

27 April 2012

Ms Toni Pirani
Assistant Secretary
Business Law Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

By email: copyright@ag.gov.au

Dear Ms Pirani

DRAFT ALRC TERMS OF REFERENCE – COPYRIGHT AND THE DIGITAL ECONOMY

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the draft Terms of Reference for the upcoming Australian Law Reform Commission (ALRC) Inquiry into Copyright and the Digital Economy.

About ASTRA

ASTRA is the peak industry body for subscription TV (STV) in Australia. The STV industry is the undisputed leader of digital broadcasting with 200 channels (including HD and Plus2) broadcast on the FOXTEL and AUSTAR platforms, and channel packages offered through Telstra T-Box and Xbox360. STV platforms and channels directly employ over 7,400 people and in 2010 invested \$578.4 million into Australian content. The direct economic contribution of STV to the Australian economy is estimated to be over \$5 billion since its inception. Received by 34% of Australians through their homes and over a million more through hotels, clubs and other entertainment and business venues, STV provides 24 hour news, sport and entertainment.

General comments on the draft Terms of Reference

ASTRA supports the Government's referral of copyright matters to the ALRC and, in particular, is supportive of the matters to which the ALRC must have regard:

- the objective of copyright law to promote the production of original copyright materials;
- the need for copyright law to provide an appropriate balance between the rights of creators and the rights, interests and expectations of users and the public so as to foster creativity and innovation and promote cultural development;
- the importance of the digital economy and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies; and
- Australia's international obligations, including any existing or proposed international obligations.

However, ASTRA is concerned that the scope of the draft Terms of Reference is too narrow to address existing serious limitations in copyright regulation that need urgent attention and that may not necessarily be adequately dealt with by other reviews and processes being undertaken in relation to copyright.

Copyright legislation in Australia and internationally is struggling to keep pace with rapid technological changes. It is over 10 years since the last significant review of the *Copyright Act 1968* (Cth) (the **Act**) and ASTRA submits that a much broader ALRC inquiry is essential if the Act is to remain relevant.

The ability for content producers and distributors to extract fair monetary returns for their investment in developing or acquiring content is essential for the ongoing sustainability of media and communications enterprises and for the continued investment in Australian content production. Technological advances in the digital era have enabled significant increases in copyright infringement, posing a significant threat to the viability of content production and distribution. Protection against illegal use and distribution of digital content is already a very significant issue for the subscription television industry and content providers generally, and will only intensify in a converged media environment.

Effective regulatory and enforcement measures for the protection of intellectual property rights are essential to encourage the investment in new content and services that will drive growth in the digital economy. As an important part of the regulatory framework, ASTRA strongly supports a comprehensive review of the Act to ensure that it meets the challenges of a converged digital environment.

Comments on specific aspects of the draft terms of reference

Exemptions – products and services of public benefit and use of copyright material on social networking sites

The existing defences to copyright infringement are well established and ASTRA is cautious about the introduction of any new exceptions to copyright owners and distributors' exclusive rights.

In relation to a possible new defence related to products and services of public benefit, we question the need for examination of a further exemption given the Crown use provisions in the Act, which allow the Commonwealth and States, and persons authorised by them, to make legitimate use of copyright materials for the services of the Commonwealth or States.

In relation to a social networking defence, we note that social networking services, while in many cases support users' non-commercial activities, also attract a significant amount of advertising. The ALRC should be cautious about recommending exemptions in relation to use of copyright material on social networking sites when these are business enterprises which benefit financially from the re-use of attractive copyright material.

Scope – “take into account recommendations from related reviews, in particular the Government’s Convergence Review”

At the commencement of the Convergence Review, the Government acknowledged that “any discussion of the production and distribution of Australian content raises issues of copyright in the digital age”, and left open the opportunity for the Convergence Review Committee (CRC) to offer views on copyright and the ongoing protection of content in a converged environment, while noting that “the Attorney-General will ultimately determine these matters.”¹

ASTRA's submission to the Convergence Review Framing Paper argued that it was vital that the CRC examined the ongoing effectiveness of copyright legislation in the context of convergence, to provide guidance to the ALRC. Convergence has the potential to create synergies across once separate industries to drive innovation in the communications environment, however this potential cannot be realised if content producers and distributors are not able to effectively monetise the content they produce or acquire.

¹ http://www.dbcde.gov.au/digital_economy/convergence_review/questions_and_answers

While the Convergence Review Committee made little reference to copyright issues in its Interim Report released in December 2011, ASTRA remains hopeful that, in its Final Report, the CRC takes note of the numerous submissions it received throughout the Convergence Review stressing the importance of ensuring adequate protection of copyright for the benefits of convergence to be realised, and that it identifies critical copyright reform issues that should be examined by the ALRC as part of its review.

Scope – “not duplicate work being undertaken on: unauthorised distribution of copyright materials using peer to peer networks; the scope of the safe harbour scheme for ISPs; a review of exceptions in relation to technological protection measures; and increased access to copyright works for blind and visually impaired people.”

ASTRA acknowledges ongoing discussions between the Government and industry stakeholders to develop workable solutions to prevent the unauthorised digital distribution of copyright material. The recent decision of the High Court² in relation to this issue provides the opportunity to progress these discussions towards a solution that appropriately balances the interests of all stakeholders including rights holders, ISPs and consumers.

Notwithstanding these discussions ASTRA submits that, given the importance of an enforceable copyright regime for continued investment in the production of content in a converging environment, the scope of the review should be expanded to include examination of these issues.

Please feel free to contact myself or Simon Curtis, Policy and Regulatory Affairs Manager, on (02) 9776 2684, if you wish to discuss further anything in the above.

Yours sincerely



Petra Buchanan
CEO

² *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 (20 April 2012)