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Your Ref:

Our Ref: TIPS Committee: 21000332/48

9 May 2012

Assistant Secretary
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By email: copyright@ag.gov.au

Dear Attorney-General

DRAFT TERMS OF REFERENCE FOR THE ALRC REFERENCE ON COPYRIGHT

Thank you for the opportunity to provide comments on the draft terms of reference for the Australian Law Reform Commission (ALRC) Reference on Copyright.

This letter was written with the assistance of the Technology and Intellectual Property Committee of the Queensland Law Society.

The Society notes that the ALRC is to consider whether the exceptions in the *Copyright Act* 1968 are adequate and appropriate in the digital environment.

The Society also notes that, amongst other things, the ALRC is to consider "whether further exceptions should be provided to:

- facilitate legitimate use of copyright works to create and deliver new products and services of public benefit; and
- allow legitimate non-commercial use of copyright works for uses on the internet such as social networking."[1]

The Society submits that the terms of reference should state the following issues as part of the review.

1. ***Whether the defences in respect of "computer programs" under Part III Division 4A of the Act are adequate and appropriate given Court judgments regarding the meaning of that term.***

[1] http://www.ag.gov.au/Consultationsreformsandreviews/Documents/Final%20-%20Revised%20draft%20terms%20of%20reference%20ALRC%20review.pdf

There is Federal Court of Australia authority that the concept of "computer program" under the *Copyright Act* need not reflect the concept which industry accepts as being covered by that term. In *CA, Inc. v ISI Pty Limited* [2012] FCA 35 (at para 120) the Court stated:

> The experts agree that the CA URT Macros are not a "computer program" as the term is understood in the industry. However, this is irrelevant to the construction of "computer program" as defined in the Act (*Owners of Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419-421).

The Court held the relevant macros to be "computer programs".

This calls into question the width of the term "computer program" under the Act and correspondingly whether the defences in respect of "computer programs" under the Act are appropriate or adequate for the judicially-recognised concept of the term.

2. ***Whether the defences under Part III Division 4A should be expressed to apply in all cases of subject matter falling within the concept of "computer program" regardless of whether that subject matter also falls within the concept of "literary work".***

In *CA, Inc. v ISI Pty Limited* [2012] FCA 35, the Court was prepared to entertain the prospect of the relevant subject matter being both "computer programs" as defined and also literary works, (regardless of the definition of "computer programs"). This raises the question of whether and how the defences under Part III Division 4A might apply in cases of the dual classification.

3. ***Whether the Part III Division 4A defences require change having regard to judicial considerations of those defences since they were enacted.***

For example, the interoperability defence has been held to be very narrow. In *CA, Inc. v ISI Pty Limited* [2012] FCA 35 (para 351) the Court stated:

> The emphasis of s 47D(1), as can be seen by:
>
> - the words 'for the purpose of obtaining information' in (b);
> - the words 'only to the extent reasonably necessary to obtain the information' in (c);
> - the repeated emphasis of the words 'in the course of finding out how' in the EM; and
> - the statement 'to the extent reasonably necessary to find out how' in the EM,
>
> is on the acquisition of information from the reproduction in the quest to find out how the original program interoperates with other programs. In light of the EM and the words of s 47D(1), the purpose of s 47D(1) appears to be to allow a person to make a reproduction or adaptation of a computer program in order to obtain information necessary to make independently a new program or article that is to be used to interoperate with that program or another program. That is, certain copying is permitted in circumstances where it is necessary to obtain information to create interoperability. ***This is a very limited exception***. [italics added]

By way of further example, the Court's judgment raises the issue of whether the Part III Division 4A defences can be effectively overridden by confidentiality commitments precluding the acts which the defences would otherwise permit, notwithstanding s 47H :

An agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of sub section 47B(3), or section 47C, 47D, 47E or 47F has no effect.

In this regard, reference is made to paragraphs 633 – 636 of the judgment.

4. ***Whether a further exception should be provided to permit the reproduction and use of "orphan works" in a digital environment.***

   In its response of May 2010 to the Report of the Government 2.0 Taskforce: Getting on with Government, the Government agreed to a recommendation that it examine the current state of copyright law with regard to orphan works.

Thank you for the opportunity to make comments on the draft Terms of Reference. The Society would be pleased to be involved in further consultations regarding this area of law.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Louise Pennisi on (07) 3842 5872 or l.pennisi@qls.com.au

Yours faithfully

Dr John de Groot
President