

23 November 2011

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](mailto:copyright@ag.gov.au)*

Dear Ms Pirani

**SUBMISSION ON CONSULTATION PAPER:  
REVISING THE SCOPE OF THE COPYRIGHT 'SAFE HARBOUR SCHEME'**

The National Film and Sound Archive of Australia (**NFSA**), a statutory authority established by the *National Film and Sound Archive of Australia Act 2008* (Cth), is Australia's national audiovisual archive, responsible for collecting, preserving and providing access to the nation's moving image and recorded sound heritage (the **national audiovisual collection**).

The NFSA has considered the Consultation Paper on Revising the Scope of the Copyright 'Safe Harbour Scheme' prepared by the Attorney-General's Department.<sup>1</sup> It is noted that the Consultation Paper proposes to broaden the definition in the *Copyright Act 1968* (Cth) (the **Act**) of "carriage service provider"<sup>2</sup> to whom the existing Safe Harbour Scheme<sup>3</sup> applies, so that an extended Scheme would apply to a "service provider" as:

*A person who provides services relating to, or provides connections for, the transmission or routing of data; or operates facilities for, online services or network access, but does not include such person or class of persons as the Minister may prescribe in the Regulations.*

The NFSA generally supports the extension of the Scheme if it would offer a 'safe harbour' to the NFSA in the course of providing its services via the internet or similar communications technologies. The NFSA welcomes the opportunity to comment as a **copyright user** and a **copyright owner**.

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<sup>1</sup>[http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews\\_RevisingtheScopeoftheCopyrightSafeHarbourSchemetheProcessofSeekingISPSubscriberDetailsinCopyrightInfringementMatters](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_RevisingtheScopeoftheCopyrightSafeHarbourSchemetheProcessofSeekingISPSubscriberDetailsinCopyrightInfringementMatters)

<sup>2</sup> section 10.

<sup>3</sup> Part V, Division 2AA.

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## **NFSA AS A COPYRIGHT USER (WHO PROVIDES SERVICES)**

The proposal to extend the existing Safe Harbour Scheme is relevant to the NFSA as a **copyright user** because most of the 1.6 million items in the national audiovisual collection are subject to the copyright interests of third parties, many of whom are unknown, cannot be located, or are subject to change at any time. This presents legal difficulties for the NFSA when pursuing its access mandate. The NFSA is also faced with potentially difficult copyright management issues when using content contributed directly by public users of NFSA websites<sup>4</sup> and related internet services, and over which the NFSA may have limited control.

Although the NFSA commits substantial resources to discharge its responsibilities in relation to content regulation, including copyright, the sheer volume of third party content involved and the lack of ability to prevent access to infringing copyright content on the internet makes it difficult to ensure compliance in every instance. The NFSA is currently in the process of implementing a voluntary take-down policy as a means of addressing the concerns which rights holders may have about illegitimate uses of their content on NFSA websites.

Potentially more complex issues arise when the NFSA acts as an intermediary, offering public internet access via a WIFI network on which infringing copyright content could be communicated without the NFSA's direct knowledge or authorisation.

The NFSA is constantly reviewing the ways it uses technology to perform its statutory mandate of maximising public access to audiovisual heritage and promoting the development of Australia's moving image and recorded sound culture.

## **NFSA AS A COPYRIGHT OWNER**

The proposal is also relevant to the NFSA as a **copyright owner** with an interest in enforcing its rights in certain material. The NFSA also supports copyright creators and producers of Australian film and sound culture, with many having financial and cultural imperatives to enforce their rights.

## **EXTENDED "SAFE HARBOUR SCHEME"**

The NFSA supports the expansion of a Safe Harbour Scheme which offers the following.

1. A definition of "service provider" which includes persons like the NFSA and other cultural institutions.
2. A definition of "services" which includes all the services outlined above and services which a "service provider" could devise in the future.
3. Clear grounds on which the Minister may prescribe persons to prevent them from relying on the Scheme, if this public consultation by the Department determines that the Minister actually requires such powers.
4. Efficient and streamlined notice and take-down procedures to maximise consistency and minimise the administrative burden of complying with the conditions for the relevant activities.<sup>5</sup>
5. Deterrents to minimise the incidence of bad faith notifications and administrative disputes, in the same spirit that groundless threats of copyright infringement are dealt with under the Act.<sup>6</sup>

The NFSA would also support discussion around the extension of the Scheme to limit the remedies available against "service providers" alleged of contravening other forms of content regulation.

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<sup>4</sup> <http://www.nfsa.gov.au>, <http://www.aso.gov.au>

<sup>5</sup> sections 116AC-116AF, 116AH-116AI.

<sup>6</sup> section 202.

Lastly, the NFSA notes that the Convergence Review<sup>7</sup> attracted submissions by parties concerned about the copyright implications of a convergent media environment. The NFSA encourages the Department to consider any comments made by the Review Committee about those submissions in the report scheduled for release in March 2012.

We appreciate the Department's consideration of the NFSA submission and would welcome further opportunities to comment on the development of the proposal.

If you have any questions, please contact Adam Flynn, Acting Principal Legal Officer, by phone on 02 6248 2056 or by email at adam.flynn@nfsa.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Michael Loebenstein', is written over a light blue rectangular background.

Michael Loebenstein  
Chief Executive Officer

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<sup>7</sup>[http://www.dbcde.gov.au/digital\\_economy/convergence\\_review](http://www.dbcde.gov.au/digital_economy/convergence_review)