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## **Draft Terms of Reference for ALRC inquiry on Copyright and the Digital Economy**

Thank you for the opportunity to comment on the draft terms of reference for the ALRC inquiry on Copyright and the Digital Economy. I have two main comments about the draft terms of reference.

1. The terms of reference should clearly reflect that the objective of copyright law is to promote both the production and the dissemination of expressive material.

The current draft terms of reference require the ALRC to have regard to "the objective of copyright law to promote the production of original copyright materials". This objective, on its own, misrepresents the economic justification for copyright. In economic terms, copyright provides a mechanism to encourage authors and producers to invest in creative cultural production. However, this is not the goal of copyright, but its instrumental function. The reason copyright policy should encourage cultural production is to further the dissemination of new material throughout society. This is important for two main reasons. First, access to cultural expression is the means by which we learn and grow. The dissemination of copyright material and the knowledge it represents is a fundamental component of progress and is important on economic, educational, and cultural grounds. Second, rich access to expression is important because it is a predicate for new creativity and innovation, which should be encouraged for its own sake as well as for its contribution to society. In these terms, the end goal of copyright is necessarily not only to promote production of expressive material, but to also promote dissemination and access to that material. The ALRC's inquiry should accordingly explicitly have regard to this fundamental balance that is at the heart of copyright law.

2. The inquiry should specifically consider the desirability of introducing an open-ended 'fair use' exception.

Over the last decade, the question of whether Australia should introduce an open-ended 'fair use' provision has generated significant public interest. In 2005, the Attorney-General's Department conducted a review which canvassed the desirability of introducing an open-ended 'fair use' style exception in Australian copyright law. Despite receiving a large number of submissions, no final report was ever released by the departmental review. Given the high level of public interest in a potential 'fair use' exception, it is extremely important that an independent, open, and transparent consultative process be conducted. The ALRC should accordingly explicitly be asked to examine the desirability of introducing an open-ended 'fair use' style exception in Australian copyright law.

Yours sincerely

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<sup>1</sup> See Kimberlee Weatherall, 'Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms' (2007) 31(2) *Melbourne University Law Review* 967.

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