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Assistant Secretary
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AFACT/AHEDA/NACO'S INITIAL SUBMISSION TO THE DRAFT ALRC TERMS OF REFERENCE: COPYRIGHT AND THE DIGITAL ECONOMY

The Australian Federation Against Copyright Theft (AFACT), the Australian Home Entertainment Distributors Association (AHEDA) and the National Association of Cinema Operators (NACO), are grateful for the opportunity to provide this submission in response to the Draft ALRC Terms of Reference: Copyright and the Digital Economy.

Australian Federation against Copyright Theft

AFACT was established in 2004 to protect the film and television industry, retailers and movie fans from the adverse impact of copyright theft in Australia. AFACT works closely with industry, government and law enforcement authorities to achieve its aims. AFACT acts on behalf of the 50,000 Australians directly impacted by copyright theft including independent cinemas, video rental stores and film and television producers across the country.

AFACT members include: Village Roadshow Limited, Motion Picture Association, Walt Disney Studios Motion Pictures Australia, Paramount Pictures Australia, Sony Pictures Releasing International Corporation, Twentieth Century Fox International, Universal International Films, Inc., and Warner Brothers Pictures International, a division of Warner Bros. Pictures Inc.

Australian Home Entertainment Distributors Association

The AHEDA represents the $1.3 billion Australian film and TV home entertainment industry covering both packaged goods (DVD and Blu-ray Discs) and digital content. AHEDA speaks and acts on behalf of its members on issues that affect the industry as a whole such as: intellectual property theft and enforcement; classification; media access; technology challenges; copyright; and media convergence. AHEDA currently has 12 members including all the major Hollywood film distribution companies through to wholly-owned Australian

companies such as Roadshow Entertainment, Madman Entertainment, Hopscotch Entertainment, Fremantle Media Australia and Anchor Bay Home Entertainment.

National Association of Cinema Operators

NACO is a national organisation established to act in the interests of all cinema operators. It hosts the Australian International Movie Convention on the Gold Coast, this year in its 66th year.

NACO members include the major cinema exhibitors Amalgamated Holdings Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, Reading Cinemas Pty Ltd as well as the prominent independent exhibitors Dendy Cinemas, Grand Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and other independent cinema owners representing over 100 cinema screens.

Executive summary

1. The Australian Federation Against Copyright Theft (**AFACT**), the Australian Home Entertainment Distributors Association (**AHEDA**), and the National Association of Cinema Operators (**NACO**) provide this submission in response to the Attorney General's draft Terms of Reference titled "Copyright and the Digital Economy" (the **TOR**).

2. We are concerned to ensure that the TOR appropriately frame the scope of the enquiry to be undertaken by the ALRC and do not have the appearance of limiting the ALRC's ability to undertake a balanced and fair review of the copyright issues or directing it to outcomes the government favours.

3. The subject matter covered by the draft TORs is surprising. There is ample evidence of business models developing within the ambit of current copyright laws. We are unaware of any controversies that have emerged in Courts in Australia concerning the use of copyright works on social networking sites. It would therefore appear that the existing copyright framework provides an appropriate balance to allow both content producers, social networks, and indeed other internet businesses, to grow and flourish.

4. The current copyright laws have been crafted to reflect Australia's obligations under international treaties, such as the WIPO Copyright Treaty, TRIPS and the Berne Convention. In none of those treaties is there any reference to the need for provision to be made to provide widespread exceptions to benefit certain businesses over others or users of social networking sites with additional rights to engage in activities which will involve infringements of copyright. Australia is under no obligation to amend its laws in relation to such uses of copyright works and would run a serious risk of conflicting with its existing international obligations if it did so.

5. There are also provisions in the Copyright Act outside the scope of the TOR which require urgent review. The recent High Court decision in *Roadshow Films Pty Ltd v iiNet Ltd*[1] unanimously confirmed that legislative amendment is required in order to regulate the responsibilities of ISPs for the

[1] *Roadshow Films Pty Ltd v iiNet Limited* [2012] HCA 16.

infringements of their users. That need is not being met by the draft TOR. These matters should be dealt with separately and with priority over the issues identified in the TOR.

Balance between the rights of copyright owners and users

6. There are a number of elements of the draft TOR which suggest that the ALRC is being directed to undertake an unbalanced investigation of the scope of copyright protection in the digital environment.

7. The TOR task the ALRC with conducting an inquiry and report into the matter of "whether the *exceptions* in the Copyright Act 1968, are adequate and appropriate in the digital environment". The emphasis on exceptions to copyright is carried through to the two circumstances that the ALRC is required to consider in relation to "whether further exceptions should be provided for." The absence of balance in the TOR is particularly evident in the lopsided way in which the draft TOR refer to the "balance between the rights of creators" on the one hand and "the rights, interests and expectations of users and the public" on the other.

8. Drafted in this way the TOR appear to reflect an unstated assumption that further exceptions are necessary and should be formulated by the ALRC, rather than leaving the ALRC to undertake an objective and balanced review of the scope of copyright protection online and the existing exceptions. By definition, further exceptions involve the reduction in copyright protection in the digital environment. This is even more obvious from the use of language of "interests and expectations of users and the public" which is contrary to the long history of copyright law in Australia and speaks of a different agenda. As the Full Court decision in the *OptusNow* case illustrates,[2] great care needs to be taken in relation to the exceptions in order to avoid commercial exploitation of the exceptions by other businesses. This is not the time for an open-ended revisiting of the exceptions as may be suggested by the draft TOR.

9. Through ubiquitous access to services offering users the ability to stream, download or otherwise copy content without authorisation or payment to creators and owners, it is an unfortunate fact that the expectations of such users have been heavily influenced to expect more for less, despite the broad and diverse range of choices available for legitimate content on the internet. A number of interest groups promote an unprincipled rejection of all copyright law by consumers. Copyright policy development should instead proceed on the basis of more balanced interests.

10. This approach can be contrasted with the balanced reference is that given to the Copyright Law Committee in 1974 (the "Franki Committee"):[3]

> *To examine the question of the reprographic reproduction of works protected by copyright in Australia and to recommend any alterations to the Australian copyright law and any other measures the Committee may consider necessary to effect a proper balance of interest*

[2] *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCAFC 59.

[3] *Report of the Copyright Law Committee on Reprographic Reproduction* (1974), para 101.

between owners of copyright and the users of copyright material in respect of reprographic reproduction. The term 'reprographic reproduction' includes any system or technique by which facsimile reproductions are made in any size or form.

11. If the government's policy is to wind back copyright protections online, then this ought to be made clear in an open and transparent way before the ALRC reference and in the TOR, so that all parties affected are afforded the opportunity to address such policy. Alternatively if the government has an open mind on the scope of copyright protections online, it should make this clear by revising the TOR to expressly allow the ALRC to also investigate whether the existing scheme is adequate for the protection of copyright owners and recommend any alterations to the scheme it considers necessary. Furthermore, there appears to be no reference to the need for an evidence-based approach to the question of how the protection of copyright interacts with the growth and development of particular services. The TOR seems to have skipped this step and operates on the presumption that an adverse relationship exists.

12. This is a very important time for copyright law. There have been many important developments in copyright law in the last 5 years, and very little policy development or legislative action during the same period. Developments in copyright law have largely been the product of judicial decisions. Where legislation has been enacted it has typically been ad hoc, designed to remedy very narrow issues[4] and has left many important, and urgent, issues unaddressed.[5]

13. Business models have been developed and implemented against the background of the existing legal framework and existing protections of copyright material online. They were encouraged to do so by successive governments. Changes to the existing legal framework would need to be very carefully weighed against the potential harm they may cause. This finds no expression or recognition in the TOR which appear designed, in part, to address the interests of a class of copyright users using social media services.

"The objective" of copyright law

14. The opening words of the TOR refer to a singular objective of copyright law as being to "promote the production of original copyright materials". This is highly concerning because it is an inaccurate statement of the purpose of copyright law, is inconsistent with the long history of copyright law and would be the wrong starting point from which the ALRC would undertake its reference.

15. As far back as the Statue of Anne 1710, the purpose of copyright law has been clearly stated to be to reward creators and owners of certain types of property.[6] The right to rewards flowed from the

[4] For example, the resale royalty right.

[5] For example, the urgent need to remedy the gap in protection for original computer-generated works, including software, that have been left unprotected by reason of recent decisions such as *IceTV Pty Ltd v Nine Network Pty Ltd* (2009) 239 CLR 458, *Achohs Pty Ltd v Ucorp Pty Ltd* [2012] FCAFC 16 and *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 264 ALR 617.

[6] The preamble to the Statute of Anne begins *"Whereas printers, booksellers and other persons have of late frequently taken the liberty of printing, reproducing and publishing or causing to be printed, reprinted and published books and other writings without the consent of the authors of proprietors of such books and wirings, to their great detriment and*

creations being a form of property resulting from the "labour and invention" of an author.[7] The reward for creation of such property has been the consistent overriding rationale for copyright law ever since, as recognised by modern leading authorities in copyright.[8]

16. In 1959 the Spicer Committee described the "primary end" of copyright as being:[9]

> *to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. On the other hand, as copyright is in the nature of a monopoly, the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered.* (Emphasis added)

17. The Franki Committee agreed with this statement of the "purpose of copyright" in 1974.[10]

18. More recently, in their 2009 decision in the *IceTV* case, three members of the High Court observed the "longstanding theoretical underpinnings of copyright legislation" as being:[11]

> *"concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public."*

19. Ensuring creators their just reward through exclusive right encourages them to make their works available, thereby enhancing further creativity, culture, knowledge and freedom of expression.

20. In the circumstances, the TOR require amendment to accurately reflect the underlying rationale of copyright, consistently with the above.

Copyright subject matter

21. The statement of objective of copyright law in the draft TOR also refers to "original copyright materials" and no other form of copyright subject matter. It is not clear whether this is intended and that the scope of the ALRC's reference would be limited to "Works" within the meaning of s10 of the Act. The reference

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too often to the ruin of them and their families; for preventing such practices for the future and for the encouragement of learned men to compile and write useful books ..."

[7] Copinger, *The Law of Copyright in Works of Literature and Art: Including that of the Drama, Music, Engraving, Sculpture, painting, Photography and Ornamental and Useful designs*. 1st Edn, 1870, Chapter 1.

[8] See, for example, Garnett, Davies and Harbottle, *Copinger and Skone James on Copyright*, 17th ed (2011), Vol 1 at 3-5, 27-29.

[9] Report of the Copyright Law Review Committee, 1959 to "Consider what alterations are desirable in the Law of the Commonwealth" (known as the "Spicer Committee"), para 13.

[10] Franki Committee Report, para 1.05.

[11] *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14, per French CJ, Crennan and Kiefel JJ at [24]-[25].

to Works suggests that the ALRC may, as the Franki Committee did in 1974, limit its analysis to Works as defined in s 10.[12]

22. If it is intended that the reference would extend to other copyright subject matter, then the emphasis on "original works" is inappropriate. Since the Berne Convention, copyright law has recognised and protected copyrights in subject matters other than works, such as sound recordings, films and broadcasts. With the exception of computer software, which is anomalously protected as a literary work,[13] more modern copyright subject matter, such as films and sound recordings, is protected sui generically under Part IV of the Act.

23. The distinction between copyright "works" and other subject matter protected by copyright is crucial to an understanding of the scope and exceptions to copyright under the Act. None of the other subject matters have a requirement of originality. Copyright subsists if they are made by a qualified person and the owner of copyright is the maker. Generally, these other subject matters are protected based on the investment in their creation.

24. The draft TOR should specify whether they are intended to cover other subject matters and, if so, in what respects given the different natures of the property in question and the investment in their creation the ALRC ought to undertake its review.

The digital economy, innovation and new digital technologies

25. We support and endorse government's comments in the 2009 report "A*ustralia's Digital Economy: Future Directions* in which this government recognised that "…content is the key driver of digital economy growth" and in turn "the digital economy is essential to Australia's productivity, global competitiveness and improves social wellbeing".[14] The internet and digital economy offers opportunities for existing and new business models which in turn bring innovation in digital content and services to Australian consumers.

26. The specific direction in the draft TOR to the ALRC to consider a possible copyright exception to "facilitate legitimate use of copyright works to create and deliver new products and services of public benefit" is problematic.

27. Copyright protection on the internet in Australia revolves around the scheme introduced by the Digital Agenda Act. The scheme was introduced following extensive public consultations and the report of the

[12] The Franki Committee report noted at I. 15 that "The Committee was of the view that any copyright material which did not fall within the definition of 'work' in section 10 of the *Copyright Act* 1968–19732 should not be treated as within its terms of reference."

[13] As the Copyright Law Reform Committee noted in its report on Computer Software Protection (1995), this treatment of computer software was imposed by Australia's treaty obligations under the Berne Convention.

[14] http://www.dbcde.gov.au/digital_economy/what_is_the_digital_economy/australias_digital_economy_future_directions.

Copyright Convergence Group in 1994.[15] The recommendations of that Committee that have already been acted on; it is not clear what remains for the ALRC to "take into account" as it appears to be directed to do under the draft TOR.

28. The Digital Agenda scheme consists of a technology neutral right of communication to the public and a range of specific provisions covering the liability of persons facilitating potential infringements of copyright, in the form of s101(1A) and s112E. Over time amendments have been made to that scheme, including the introduction of the ISP safe harbours in Div 2AA to give effect to Australia's obligations under the US/Australia Free Trade Agreement.

29. None of the elements of the Digital Agenda scheme are referred to in the draft TOR; they are effectively ignored. This is unfortunate because if they were they would reveal the serious problems inherent in the language used in the draft TOR. These problems include:

(a) The concept of "facilitation" of the use of copyright works runs headlong into provisions such as s101(1A) and s112E, which alternatively provide a potential basis for liability for facilitation or a defence to liability for conduct that would amount to facilitation.

(b) The concept of "legitimate use" which is also inherently ambiguous and inconsistent with the DA scheme, since all uses of a substantial part of a work online which involve the exercise of the right of communication to the public could constitute infringement, unless they had a licence from the copyright owner.

(c) The notion that this new type of exception would cover unlicensed commercial uses of copyright works, because they involve the provision of "new products and services", is a fundamental departure from the core principles underpinning copyright law in Australia and in the countries of its trading partners. The existing fair dealing provisions are predicated on very limited incursions into the rights of copyright owners - none of them allow wholesale unlicensed use in the name of commerce.

30. The existing suite of provisions, such as the right of communication to the public and s112E were enacted to give effect to Australia's obligations under Berne, TRIPS and the US/Australia Free Trade Agreement.

Use of copyright works on the internet

31. The specific direction in the draft TOR to the ALRC to consider a possible copyright exception to "allow legitimate non-commercial use of copyright works for uses on the internet such as social networking" is highly problematic and concerning.

[15] See the Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* at pp 3-4.

32. The DA scheme does not recognise a concept of "legitimate non-commercial use of copyright" on the internet. The concept of "non-commercial use" is not found anywhere in the Act; a concept of private and domestic use is used to denote activities that are permitted without infringing copyright. These are very limited and, with the exception of the highly controversial decision in *OptusNow* concerning s111, they have not conflicted with the internet domain.

33. In any event, the concept of "non-commercial use" is inherently ambiguous as a user might perceive use to be non-commercial because they are not receiving revenue, but it is nevertheless commercial because of its adverse revenue impact on copyright owners. Such a concept is vulnerable to exploitation by internet users and operators.

34. The right of communication to the public is not exercised only when it occurs commercially. Decisions of Australian Courts, particularly the Full Federal Court, in cases such as *Cooper*[16] and *iiNet*,[17] recognise that it is an infringement of copyright in a sound recording or film for it to be made available online. It was no less an infringement that the persons involved were distributing files without payment. Similarly the requirement that the communication take place "to the public", within the definition of s10, has been held to occur when copyright subject matter is available to certain online communities such as file sharers.

35. The implementation of the DA scheme and the subsequent jurisprudence concerning the right of communication to the public has created a reasonable degree of certainty and guidance for all participants in the online world. The introduction of a right of "non-commercial use" would throw these decisions, and many years of jurisprudence, into uncertainty.

36. It is not clear how language as loaded as "legitimate non-commercial use" could even be applied to the activities of social networking sites. These account for some of the largest businesses in the world today. To describe them, or their activities, as "non-commercial" is to accept the unreal and to fall into a trap of favouring businesses within one industry over businesses in another, allowing such sites to benefit from the investments of others without their consent and without remuneration.

37. Further, much of the copyright material commercially distributed today, such as films, is protected by technological protection measures (**TPMs**), which prevent unauthorised or illegal access to, or copying or reproduction of, copyright materials. In order to communicate copyright materials on the internet, it is likely that many users are circumventing the TPMs in breach of existing provisions of the Copyright Act (see Part V Div 2AA of the Act). It is problematic to task the ALRC with an enquiry into certain exceptions and ignore the issue of TPMs when the two policy positions would inevitably run into conflict.

38. The draft TOR should be amended to permit the ALRC to undertake a review of the effectiveness of the current DA scheme and to make recommendations about how it could be improved, if the ALRC forms the view that it could be.

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[16] *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380.

[17] *Roadshow Films Pty Ltd v* iiNet *Ltd* (2011) 194 FCR 285.

Conclusion

39. For the above reasons, the ALRC reference should not proceed on the basis of the draft TOR.

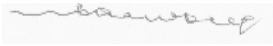
40. There are matters which need to be dealt with separately as a matter of urgency before the government proceeds with the ALRC reference, including the matters arising out of the High Court's recent judgment in *Roadshow Films Pty Ltd v iiNet Ltd*.

41. If the government does proceed with the ALRC reference, the draft TOR should be amended to:

    (a) enable the ALRC to undertake a balanced investigation into the scope of copyright protection in the digital environment, consistent with the underlying rationale of copyright, namely that the purpose of copyright is to reward creators and owners of certain types of intellectual property; and

    (b) clarify the scope of the reference, namely whether it encompasses both copyright works and copyright subject matter other than works.

Yours Faithfully,

Neil Gane	**Michael Hawkins**	**Simon Bush**
		
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