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Australian Law Reform Commission.

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**Re: ALRC: The Case for Fair Use in Australia.** **Australian Copyright Act.**

Submission from John Bryson LLb (Melb. 1960).

Please see <http://www.austlit.edu.au/austlit/page/A27720> or

<http://www.austlit.com/a-list-a-e.html#x-bryson> .

4. The Case for Fair Use in Australia.

The Nature of Fair Use:

(i) The ALRC proposing a recommendation for Fair Use, a social construct, because it cannot be defined, is astonishing. Because this is a social construct, its question ‘Is this fair’ will be determined differently in Australia than in, say, the USA, and allows interstate differences. The deciding tribunal may well resort to online polling to best judge the social value of the answer. This may result in a social good, but best we know what we are doing.

(ii) The term ‘Digital Economy’ is too indistinct for economic usefulness, but we come closer to relevance if we focus on the opposing pressures. We have an Appropriator whose need to use a protected item is to be recognised, and we have its Rights Holder who is often its creator and needs to earn from the work.

Facilitation of Purchase:

(iii) The Appropriators’ argument to the ALRC assumes that purchase of the Right, or License, is out of the question. Why does the ALRC accept this? The Commission should be considering facilitation of digital commerce in Rights/Licenses as part of the ‘Digital Economy.’ Where the Appropriator’s goal is commercial gain, including advertising and branding, the usual market forces which regulate supply and demand should not be interfered with. Statutory enforcement of gratis use should happen only in cases where normal commercial purchase and sale is not possible.

(iv) Appropriation of parts of ‘Orphan Works’ should be managed by the Copyright Council, just as it has custodial power over some images consigned to it, with earnings to Consolidated Revenue or the Australia Council or to the consignor.

Estrangement of Original Producers:

(v) Estrangement of profitability from the original producers is a phenomenon we have watched increase over recent decades. Primary producers attest to it, as do processors, and the smaller manufacturers. This is a systemic failure in western economies and should not be encouraged in digital commerce.

John Bryson.