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Professor Jill McKeough
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Submitted by email: jill.mckeough@alrc.gov.au

Dear Professor McKeough,

**Australian Law Reform Commission: Copyright and the Digital Economy
Discussion Paper June 2013**

The University of Sydney welcomes the opportunity to comment on the ALRC's *Copyright and the Digital Economy* Discussion Paper released on 5 June 2013. In providing the attached submission we seek to endorse and complement the response made by Universities Australia on behalf of its 39 members.

The University has a keen interest in the outcomes of this review. Access to copyright protected works on reasonable financial and administrative terms is simply fundamental to the core education, research and knowledge dissemination functions that universities provide for the benefit of their societies and economies. Globalisation and rapid advances in information technology pose both challenges and opportunities for nations in the protection and efficient regulation of such works. We are keen to see the review result in a modernisation of Australia's copyright laws to bring them into line with international standards by providing legal certainty and striking an appropriate balance between the legitimate rights of owners and non-commercial users of original works.

Fair Use

The University strongly supports the ALRC's proposal to introduce fair use and repeal the education statutory licences of the Copyright Act 1968 (Cth) (the **Act**). If enacted, we believe these amendments will provide a flexible and "fair" copyright framework that promotes innovation in the higher education sector. The Discussion Paper outlines how these

amendments will operate including the proposed deletion of several free use exceptions for educational institutions. Many of these exceptions are likely to be permitted uses under fair use and some may not.

The University is concerned that fair use (or fair dealing as discussed below) may not provide adequate protection for two important educational activities allowable under the existing exceptions that provide for copying and communicating of copyright protected materials in the classroom (s28 of the Act) and during examination (s200(1)(b) of the Act). As stated above, some copying for classroom and examination use may be considered fair use or fair dealing, but where such uses are not wholly permitted under either of these exceptions then ss28 and s200(1)(b) may provide an important safeguard for these fundamental educational activities. We therefore propose that the ALRC consider retaining these specific exceptions.

Third Parties

The University welcomes the ALRC's discussion on the issue of third party uses of copyright material. In the higher education context "education" is by nature an exchange of sorts (ie. an exchange of knowledge, information and ideas) between academic staff, students, librarians and the general public. This interface is becoming increasingly diverse with new emerging platforms for learning and teaching. For example, if fair use is enacted, the University will rely on it to make and communicate allowable quantities of copyright protected material for its own use (i.e. preparation of course materials) and to make copies and communicate these course materials to persons for educational purposes. In so doing, the University may also solicit the services of a third party service provider (such as a cloud server or document digitisation service) to make or store copies in a format that is accessible across a range of technological platforms (tablets, intranet, other). We therefore strongly support the ALRC's shift away from the current position under the Act that considers "who is doing the copying" to the fundamental question of whether or not the copying is "fair". As a result we will ensure that such "technical" or "non-consumptive" copying is within the scope of "fair use" or "fair dealing".

Fair Dealing

In the event that fair use is not enacted the ALRC proposes to expand the existing fair dealing exceptions to include "education", "quotation" and "non-consumptive use". We support this as a fall-back approach only on the basis that the limitations of fair dealing are well known. It is a close-ended exception that does not provide the flexibility required in the digital age. However, in the event that fair dealing remains we urge the ALRC to protect new and existing fair dealing exceptions by a) ensuring that third party use is permitted (provided that this facilitates a "fair dealing" use of the work); and, b) protecting these exceptions from contracts that exclude or seek to limit these exceptions (see discussion below under 'Contracting-out'). With these two

safeguards in place the Act will overcome the existing limitations placed on institutional copying that currently restricts universities from undertaking copying or communicating on behalf of their students or researchers. This will ensure that universities are able to derive full benefit from the fair dealing exceptions and place them on an equal footing to many of its competitors internationally.

Orphan Works

The University is encouraged by the analysis undertaken by the ALRC on the issues associated with orphan works. Consistently with our submission to the Issues Paper we support a simple solution to the problem and limiting liability for use of orphan works is a welcome step. In particular, we fully support excluding the use of a voluntary licence (Extended Collective Licensing (ECL) or other) in respect to orphan works.

It is our view, however, that a limited liability system alone may not provide the necessary incentives required to encourage public repositories to make orphan works publicly available. As a consequence, the overall effect of proposal 12-1 - 12-3 may not provide Australian universities with the degree of certainty they need to make orphan works accessible to the general public. In the context of mass digitisation of publications and the shift to large open access data repositories there are quantities of orphan works held in universities' collections that they may wish to make accessible to the public for non-commercial use (within the scope of fair use/fair dealing). We believe that a statutory licence will be the best mechanism by which to achieve this. However, given the issues associated with such a broad exception we suggest a revised approach whereby a statutory licence and limited liability is made available for 'unpublished' orphan works, with the use of 'published' orphan works protected by a limited liability system.

The rationale for making a distinction between 'published' and 'unpublished' material vests in the extended operation of copyright in respect to unpublished materials. Under sections (ss33 (3) and 94(1) of the Act) unpublished materials such as literary, dramatic, musical works and cinematographs remain protected by copyright indefinitely. The University has considered the recommendations of Professor David Brennan and Professor Michael Fraser¹ to establish a general exception for the non-commercial use of unpublished orphan works by natural persons after a reasonably diligent search has been made for the owner. In our view this proposal suggests a workable approach but only if it is modified to remove reference to "natural persons". With this modification the exception may be broad enough to permit institutional and

¹ Brennan D and Fraser M, "The Use of Subject Matter with Missing Owners – Australian Copyright Policy Options" April 2012, <http://www.screenrights.org/news/industry-news/2011/10/orphan-works-discussion-paper-released>

third party technical or non-consumptive use of unpublished orphan works for non-commercial purposes.

We support the ALRC's proposal to leave open the meaning of "reasonably diligent search" as a practical solution that provides for the nature and known facts of the orphan work to determine what is "reasonable" in the circumstances. In practice, while copyright subsists in the work, the University may nevertheless face the prospect of the owner becoming known and requiring the work to be restricted from access, or seeking to control all use of the work in the future. In such circumstances it is important that any remedies available to the owner do not include extensive remedial action to be taken or compensatory payments made for making the orphan work available for non-commercial purposes. Remedies that require other steps to be taken such as notification of all persons accessing the material, recall of material, or the payment of compensation for non-commercial use of the material should be excluded.

Based on the above discussion the University recommends the following:

- a) If, after diligent searches have been undertaken, an unpublished orphan work is used for non-commercial purposes the rights owner should be restricted from seeking damages or an account of profit or limiting use of the orphan work that is otherwise "fair" provided that attribution of the work occurs in a reasonable time frame from the date of notification by the rights owner.
- b) If, after diligent searches have been undertaken, a published orphan work is used for non-commercial purposes the rights owner should be restricted from seeking damages or an account of profit or limiting use of the orphan work that is "fair".
- c) If, after diligent searches have been undertaken, a published orphan work is used for commercial purposes the rights owner should be restricted from seeking damages. The copyright owner may however, seek an account of profit but any account of profit must discount any "fair use" made of the orphan work and, in circumstances where the use of the orphan work is not part of a derivative work, undertake sole control of the use of the work in the future. For clarity, the meaning of "commercial purposes" should exclude fees paid to access an orphan work that covers the reasonable cost of making the work available.

Note: in the event that "fair use" is not enacted the above references to "fair" are intended to read as references to the "fair dealing" exceptions.

Mass Digitisation

As outlined above the University does not view Extended Collective Licensing (ECL) as an appropriate mechanism for orphan works. Nor do we consider it appropriate for mass digitization projects. In our view, the administrative burden of negotiating and implementing an ECL will in most circumstances outweigh the modest royalties that may be paid for most of the non-commercial uses that public collections (such as the University of Sydney), the academic community and the general public are likely to make of the digitised works.

The University foresees several digitisation projects where we expect a range of copyrights will exist in the collection (including image, sound, text and broadcast material). If ECL's were enacted each of these projects would require multiple licenses from a range of collecting societies. Negotiating with each society separately may result in a patchwork of rights and require the establishment of a complex rights management system. Furthermore, where no collecting society is eligible to undertake an ECL (due to lack of sufficient representation of rights holders) the project may be stopped altogether. We are also concerned that the funds paid under an ECL may never reach the copyright owner as the owner may never be found.

Contracting Out

The University is particularly concerned about proposal 17-1. In our submission to the ALRC's Issues Paper we proposed that any amendment made to the Act for the purpose of promoting educational use of copyright material should not be muted by the existence of a statutory licence or overridden by private/voluntary copyright licences that seek to exclude these exceptions. To ensure that "fair use" and/or "fair dealing" operates in the manner in which it is intended the University recommends that all voluntary licences are negotiated or entered into in the context of what is "fair" (ie: no restrictions placed on fair use/fair dealing).

We therefore request the ALRC to amend proposal 17-1 to either:

- a) remove the exceptions specified in 17-1 (being "research or study, criticism or review, parody or satire, reporting news, or quotation"), or
- b) include all illustrated fair use / fair dealing purposes by including "education", "public administration", "non-transformative use" to the list of illustrated purposes.

In this way, statute will ensure that these fair use / fair dealing purposes cannot be over-ridden by contract.



Failure to enact either of these solutions may have significant implications for Australian universities as it could result in them having to pay for uses that are intended to be free under the Act.

We would be pleased to assist the Commission by providing any further information it may require to better understand the University's perspectives on these issues. In the first instance, please contact the University Librarian, Ms Anne Bell, anne.bell@sydney.edu.au, (02) 9351 – 2990.

Yours sincerely

Michael Spence