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30 July 2013

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

Dear Professor McKeough,

Response to Copyright and the Digital Economy Discussion Paper (DP 79)

I am writing this letter to make two short comments regarding two issues discussed in the Copyright and the Digital Economy Discussion Paper (DP 79).

I am an Associate Professor at the Faculty of Law, University of Toronto, where I hold the Innovation Chair, Electronic Commerce. I am also the former Director of the Centre for Innovation Law and Policy, and my main areas of research and teaching involve intellectual property and competition law.

Specifically, I have recently written two papers relating directly to the questions of fair use/fair dealing and orphan works, which you discuss in the Discussion Paper. I hope that you will find my comments and papers useful in formulating the proposed reforms under your consideration.

Fair Use / Fair Dealing

As a signatory to a separate letter written by Robert Burrell, Michael Handler, and Emily Hudson, I have already expressed my support of Proposal 4–1 of the Discussion Paper: “The *Copyright Act 1968* (Cth) should provide a broad, flexible exception for fair use.” Therefore, in this letter I wish to add another point regarding what I believe is a common misconception about the scope of fair dealing as compared to fair use.

There is a widely shared belief (and para. 7.4 of the Discussion Paper expresses such belief) that the statutory introduction of ‘fair dealing’ in the *Copyright Act 1911 (Imp)* resulted in a closed list of specifically enumerated purposes that could qualify as fair dealing. This view is often contrasted with ‘fair use’ in the United States, which is clearly open-ended with respect to the purposes to which it could apply. Yet, as I show in a recent book chapter entitled “[Fair Use 2.0: The Rebirth of Fair Dealing in Canada](#)”,¹ the historical record shows that the distinction between US-style open-ended fair use and fair dealing is an unsupported myth.

¹ A Katz, 'Fair Use 2.0: The Rebirth of Fair Dealing in Canada' in M Geist, ed., *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundation of Canadian Copyright Law* (Ottawa, ON: Ottawa University Press, 2013) 93. Online: <http://papers.ssrn.com/abstract=2206029>

In fact, the codification of fair dealing in 1911 was not designed to limit its application to the enumerated purposes included in the statute, nor was it intended to foreclose the option of applying the common law concept of fair use to other activities.

Therefore, Proposal 4-1 should not be regarded as a radical departure from the copyright tradition of Commonwealth jurisdiction, or an attempt to implant a foreign concept. Fair use has always been an integral part of copyright law in the common-law world, and it is the notion of an exhaustive list of statutory exceptions that is foreign. Thus, Proposal 4-1 should be properly regarded as a clarification needed to correct a common and unfortunate misconception and realign modern copyright law with its deeper historical roots.

Orphan Works

I also wish to bring your attention to another recent paper in which I various proposed solutions to the orphan works problem and propose a simple and better common-law approach. In this paper, entitled "[The Orphans, The Market, and the Copyright Dogma: A Modest Solution to a Grand Problem](#)",² I note that most of the discussions on the orphan works problem focus on the demand side: on users' inability to locate owners. However, looking also at the supply side reveals that the problem of orphan works arises not only because users find it prohibitively costly to locate owners, but also because under a strict permission-first rule copyright owners, who do not internalize the full social cost of forgone uses, face suboptimal incentives to maintain themselves locatable.

Acknowledging the supply side of the problem is important because in many cases copyright owners are the least-cost avoiders of the orphan works problem. Therefore, like in many other areas of law, they should be encouraged to take steps to reduce the extent of the problem. Building on this insight, the paper shows how considering the locatability of the owner of an infringed work at the remedy stage and tweaking the appropriate remedy will encourage owners to remain locatable, and why this solution is preferable to other proposed solutions.

The paper also discusses the tendency to treat the requirement to seek permission before using as a dogma, and why this dogmatic view of copyright impedes simple and efficient solutions and leads to adoption of grand solutions, such as "extended collective licensing" that are ineffective at best and harmful at worst.

I hope you find these two comments useful and I wish you good luck in completing this important reform project.

Sincerely,

Ariel Katz

² A Katz, 'The Orphans, The Market, and the Copyright Dogma: A Modest Solution to a Grand Problem' (2012) 27:3 *Berkeley Technology Law Journal* 1285, online: <http://ssrn.com/abstract=2118886>.