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Copyright Law Review Committee

**Copyright and Contract**



**COPYRIGHT LAW REVIEW COMMITTEE**

# **Copyright and Contract**

**June 2001**

Prepared by the Copyright Law Review Committee  
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## Overview

The Copyright Law Review Committee was established in 1983 by the Attorney-General as a specialist advisory body to report to Government on specific copyright law issues referred to it for consideration. Since then, the Committee has reported on nine separate references. This tenth reference was referred to the Committee on 23 April 2001.

The purpose of this paper is to invite submissions on the matters raised in the Committee's terms of reference. In particular, information is sought regarding the prevalence, effects and desirability of contracts that purport to override copyright exceptions granted under the *Copyright Act 1968* (Cth). No particular view or course of action is endorsed. Rather, the Committee seeks the views of interested parties on the issues raised.

Submissions should be made by 10 August 2001, and should be addressed to:

The Director  
Copyright Law Review Committee Secretariat  
Attorney-General's Department  
Robert Garran Offices  
National Circuit  
Barton ACT 2600

Submissions that are received by the Committee in electronic form will be placed on the Committee's website. All submissions will be made public unless marked confidential. Guidelines for the format of submissions can be found on the Committee's website at <http://www.law.gov.au/clrc>. Submitters not having access to Internet facilities may contact the Committee's Secretariat on (02) 6250 6076 for a copy of the Guidelines and any additional information they require.

## Introduction: The copyright balance

1. Copyright is all about striking an appropriate balance between the need to provide incentives for innovation and creativity and the need to encourage the dissemination of information and ideas. One way this is achieved is by granting copyright for a limited term only. Once that term has expired material previously protected by copyright will enter the public domain.<sup>1</sup> Another way the balance is struck is through the idea/expression dichotomy. That is, the notion that copyright does not protect ideas, but the expression of those ideas.<sup>2</sup> In addition to these limitations, the *Copyright Act 1968* (the Act) seeks to balance the interests of copyright owners and users through a range of exceptions that modify the exclusive rights of copyright owners.
  
2. There are many policy considerations to be taken into account in determining the exact nature and scope of these exceptions, including Australia's international obligations. Article 13 of the *Agreement on Trade Related Aspects of Intellectual Property* (the TRIPS Agreement) contains a 'three step test' which sets the parameters for such exceptions. This test has its origins in Article 9(2) of the *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention). Article 13 provides that exceptions to exclusive rights must:
  - (1) be confined to certain special cases;
  - (2) which do not conflict with a normal exploitation of the work; and
  - (3) do not unreasonably prejudice the legitimate interests of the right holder.

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<sup>1</sup> See ss. 33 and 34 of the *Copyright Act 1968* in relation to works and ss. 93-96 in relation to subject matter other than works. While the term of protection is generally longer than in relation to registered forms of intellectual property, the term is finite and may not be renewed.

<sup>2</sup> It should be noted that reproduction of less than a substantial part of the expression of ideas comprising a copyright work, judged in a qualitative sense, is permissible. Section 32 and ss. 89, 90, 91 and 92 deal respectively with the subsistence of copyright in original works and in subject matter other than works.

The condition that a use be 'special' has been interpreted to mean that the use is 'justified by some clear reason of public policy or exceptional circumstance'.<sup>3</sup>

3. Licences to use copyright works, especially those regarding digital subject matter such as computer programs or Internet based works, may contain clauses that purport to exclude or modify the statutory exceptions to copyright infringement. This reference is primarily concerned with the extent to which this occurs and whether it should be permissible. The reference is also concerned with any other types of agreement that purport to exclude or modify the copyright exceptions, and the effect such agreements might have on the copyright balance. The *Circuit Layouts Act* 1989 contains similar exceptions to the rights of owners as the Copyright Act.<sup>4</sup> The Committee takes the view that the issues concerning copyright and contract are likely to also apply to circuit layouts. For this reason the Committee does not propose to examine the Circuit Layouts Act in its own right in this Issues Paper. If, however, there are particular views in relation the Circuit Layouts Act that people would like to raise, the Committee encourages them to do so.

## Exceptions under the Act

4. A number of exceptions in the Act seek to ensure that the copyright balance is maintained<sup>5</sup>. These exceptions are based on such principles as the right to information, freedom of expression and the need to promote culture and education. There are also certain public interest considerations, such as the facilitation of justice through special exemptions for judicial proceedings and the provision of legal advice. In some circumstances there is also a need to address market failure. An

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<sup>3</sup> See *United States - Section 110(5) of the Copyright Act, Report of the WTO Panel* (the "Homestyle Case") WT/DS160/R, 15 June 2000.

<sup>4</sup> See Appendix C.

<sup>5</sup> See Appendix B for text of these exceptions.

example is the situation in which the cost of negotiating individual licensing agreements is prohibitively high, blocking access to the material.<sup>6</sup>

### **Fair Dealing**

5. The first category of exceptions is known as 'fair dealing'. Sections 40 to 43 apply fair dealing to literary, dramatic, musical and artistic works and adaptations.<sup>7</sup> Sections 103A to 103C apply fair dealing to an 'audio-visual item', which is defined in s. 100A as a 'sound recording, a cinematograph film, a sound broadcast or a television broadcast'.

### **Research or study**

6. There is a number of exceptions within this category, the first of which is fair dealing for the purpose of research or study (ss. 40). The factors to be considered in determining whether a dealing is fair for works (s. 40(2)) or for an audio-visual item (s. 103C(2)) include:

- the purpose and character of the dealing;
- the nature of the work;
- the possibility of obtaining it within a reasonable time at an ordinary commercial price;
- the effect of the dealing upon the owner's potential market; and
- the amount and substantiality of the part copied in relation to the whole.

7. Sub-section 40(3) specifies that for literary, dramatic or musical works and their adaptations, one article from a periodical publication, or a reasonable portion in any other case, may be copied for research or study. The Act specifies that for hardcopy material other than computer programs and artistic works, 10% of the pages of a published edition of the work, or one chapter, will be deemed to be a 'reasonable portion'. The 'reasonable portion' test also applies to online published literary and dramatic works (10% of the words may be copied), other than computer programs or electronic compilations such as databases and online artistic and musical

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<sup>6</sup> Guibault, L, *Pre-emption issues in the Digital Environment: Can Copyright limitations be overridden by contractual agreements under European Law?* (Molengrafica Series: 1998) pp. 3-10.

<sup>7</sup> with the exception of adaptations of artistic works.

works. The reasonable portion test does not apply to a fair dealing with an audio-visual item, either online or in hardcopy.

8. It should be noted that the 'reasonable portion' test only applies to the *reproduction* of a work. It may not be used to justify any further communication of that reproduction. Emailing material to a friend, for example, would fall outside the scope of the test, even if that material had been downloaded in accordance with the 'reasonable portion' test. However, material may be communicated if it is determined to be a fair dealing for the purposes of research or study in accordance with the criteria in s. 40(2).

### **Criticism or review**

9. The second fair dealing exception allows a fair dealing with a work or adaptation for the purpose of criticism or review provided that sufficient acknowledgment of the work is made (s. 41). Section 103A applies this exception to an audio-visual item and the underlying copyright material in it, providing that sufficient acknowledgment is made.
10. There are no legislative guidelines on the meaning of 'criticism or review'. It is therefore to be determined by the common law. In one decision, it was held that the work must be used for genuine criticism or review and cannot be published under the pretence of quotation.<sup>8</sup> In another, it was found that so long as there is a substantial measure of criticism or review, this need not be the sole purpose of the dealing.<sup>9</sup> In *De Garis v Neville Jeffress Pidler Pty Ltd*,<sup>10</sup> Beaumont J considered the meanings of the terms. He held that the *Macquarie Dictionary* definitions applied, noting that cognitive evaluation was essential to criticism and review. In *TCN Channel Nine & Ors v Network Ten*, Conti J upheld the *De Garis* definitions, stressing that the terms are of broad meaning.<sup>11</sup> He also noted that comments need not be balanced to be classified as 'criticism or

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<sup>8</sup> *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 56.

<sup>9</sup> *Sillitoe v McGraw-Hill Book Co (UK) Ltd* (1983) FSR 545.

<sup>10</sup> (1992) 37 FCR 99 at 105.

<sup>11</sup> (2001) FCA 108 at para. 48.

review’, and a ‘hidden motive’ may lead to a presumption that the dealing was not fair.<sup>12</sup>

11. The underlying question will always be whether the use was fair for the relevant purpose. Conti J noted that the substantiality of the material used, and the motives for use, will influence the determination of ‘fairness’.<sup>13</sup> The factors prescribed in s. 40(2) pertaining to fairness (described above) are relevant to this question as they are to a large part a summary of the principles developed in the relevant cases.<sup>14</sup>

### **Reporting news**

12. The third fair dealing exception permits fair dealing in the course of reporting news (s. 42). Reporting can occur via:

- a newspaper, magazine or similar periodical, where sufficient acknowledgment of the work is made;
- a communication,<sup>15</sup> or
- a cinematograph film.

Playing a musical work by means of a communication or in a cinematograph film will not constitute a s. 42 fair dealing if it does not form part of the news being reported (s. 42(2)).

13. Section 103B correspondingly applies the exception to an audio-visual item. Sufficient acknowledgment of the work must be made if the reporting occurs via a newspaper, magazine or similar periodical.

14. The courts have found that the term ‘news’ is not restricted to current events. It can relate to long-term reviews or commentary.<sup>16</sup> In the *De*

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<sup>12</sup> op.cit. at para. 51.

<sup>13</sup> op.cit. at paras. 49-53 and para. 66.

<sup>14</sup> See *TCN Channel Nine v Network Ten* (2001) FCA 108 (Fed C of A) para 49; *De Garis v Neville Jeffress Pidler Pty Ltd* (1992) 37 FCR 99 at 108; *Hubbard v Vosper* (1972) 2 QB 84 at 94 per Lord Denning.

<sup>15</sup> ‘Communicate’ is defined in s. 10(1) as ‘make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter’.

<sup>16</sup> *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

*Garis* case, Beaumont J again accepted the Macquarie Dictionary definition of news.<sup>17</sup> In the *TCN Channel Nine* case Conti J found that it can be difficult to distinguish between news and entertainment, as news may involve entertainment and the use of humour.<sup>18</sup>

### **Judicial proceedings and professional advice**

15. The final fair dealing exception relates to the provision of professional advice (s. 43). A fair dealing for the purpose of the giving of professional advice by a legal practitioner, patent attorney or trade marks attorney is also permitted. In addition, anything done for the purposes of a judicial proceeding or report of a judicial proceeding will not infringe the copyright of a work. This is not really a fair dealing defence as no question of fairness is involved.

16. Section 104 further provides that copyright in subject-matter other than works is not infringed by anything done for the purpose:

- of a judicial proceeding or a report of a judicial proceeding; or
- for the giving of professional advice by a legal practitioner, patent attorney or trade marks attorney.

### **Library and archives exceptions**

#### **Works in hardcopy**

17. Special exceptions allow copying and communication by libraries and archives of literary, dramatic, musical and artistic works (ss. 48-53). Different rules apply, depending upon whether the work is in hardcopy or electronic format. Under s. 49 libraries and archives can reproduce a 'reasonable portion' of a work in their collection, when a person requests the material for research or study purposes. A larger portion may be copied if the work is not available within a reasonable time at an ordinary commercial price. Under s. 50, a 'reasonable portion' of a work may also be supplied between libraries if the reproduction is to be included in the recipient library's collection, or in order to fulfil a s. 49 user request. More

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<sup>17</sup> *De Garis v Neville Jeffress Pidler Pty Ltd* (1992) 37 FCR 99 at 109.

than a reasonable portion of a work may be supplied if the work is not available within a reasonable time at an ordinary commercial price.

### **Works in electronic form**

18. Libraries may also copy and communicate material in electronic form.

Rules apply in a similar way to material in hardcopy format. However, special provisions apply to the s. 50 inter-library supply of copyright material in electronic form. These additional requirements are intended to provide safeguards for copyright markets.

19. A library or archives may supply a work, an article, or a portion of a work in electronic form to another library or archives only if that work, articles or portion is not available within a reasonable time at an ordinary commercial price. Further, any electronic copy of a work made by a library under s. 49 or s. 50 must be destroyed after the copy is communicated to the person requesting it.

20. An additional library exception, however, has been introduced for digital material. Material that has been acquired in electronic form as part of the library's or archives' collection may be made available online within the premises of the library, provided that users are not able to copy or communicate that material (s. 49(5A)).<sup>19</sup>

### **Sound recordings and films**

21. Section 110A permits the copying or communication of unpublished sound recordings and films that are kept in the collection and are publicly accessible. In such a situation, a person, or a library officer on his or her behalf, may copy or communicate the material for the purpose of research or study or with a view to publication.

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<sup>18</sup> *TCN Channel Nine & Ors v Network Ten* (2001) FCA 108 (Fed C of A) at paras. 58 and 66.

<sup>19</sup> It should be noted that the library exceptions and their adaptations to digital technologies in Australia may be considered broad in comparison with other countries. See McDonald, I. *A comparative study of library provisions from photocopying to digital communication* (Centre for Copyright Studies Ltd: Sydney, 2001) pp. 1-2.

22. Section 110B allows libraries and archives to copy sound recordings and films that form a part of their collection. This may be done for the preservation of first copies or replacement in case of damage, deterioration, loss or theft. Such a copy may only be made if another copy cannot be obtained within a reasonable time at an ordinary commercial price. There is provision to make such copies available online to other library or archives officers.

### **Parliamentary libraries**

23. Section 48A provides that copyright is not infringed by anything Parliamentary librarians do for the sole purpose of assisting a member of Parliament in the performance of that member's duties.

### **Copying for preservation and other purposes**

24. Section 51A provides for libraries and archives to make copies for preservation and certain other purposes. Section 51AA allows the Australian Archives to make one working copy of a work and a reference copy for another archives on request.

### **Temporary Reproductions**

25. Sections 43A (works) and 111A (audio-visual items) provide that copyright is not infringed by making a temporary copy as part of the technical process of making or receiving a communication. The revised Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 2000 explained that many temporary or incidental copies are made in the course of the technical process of the making available and the electronic transmission of copyright material on communications networks, including the Internet. It went on to explain that the exception for temporary reproductions is intended to include the browsing (or simply viewing) of copyright material, including copyright material that involves the production of sound. This amendment reflects the Government's aim of ensuring that the technical processes which form the basis of the operation of new technologies such as the Internet are not jeopardised. The exception would also mean that reproductions made in the course of certain caching

would not be caught by the existing reproduction right.<sup>20</sup> Sections 43A(2) and 111A(2) provide that the maker of a communication cannot rely on this defence where the communication is itself an infringement.<sup>21</sup>

### **Computer program exceptions**

26. Part III Division 4A allows certain acts that would otherwise infringe the copyright in computer programs. These exceptions allow reproductions (and in certain circumstances adaptations) for the purposes of:

- normal use or study of the program (s. 47B);
- making a back-up copy (s. 47C);
- making interoperable products (s. 47D);
- error correction (s. 47E); and
- security testing (s. 47F).

27. The exceptions are designed to make allowances for the reproduction that occurs incidentally through normal computer program usage, (such as running software on a hard drive), to allow for legitimate activities (such as error correction), and also to promote the development of new interoperable technology. Section 47H expressly provides that a contract which excludes or limits the exceptions provided by ss. 47B(3) and 47C to 47F has no effect. Section 47H does not apply to the exception provided by s. 47B(1).

### **Statutory licences**

28. In addition, there are a number of statutory licences which enable the use of copyright material for certain purposes. While it is not necessary to seek the copyright owner's permission for such uses, the user must pay equitable remuneration for the use.

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<sup>20</sup> Revised Explanatory Memorandum, paras. 68 and 69.

<sup>21</sup> *op.cit.* para. 70

29. Statutory licences apply in relation to:

- ephemeral reproductions for the purpose of broadcasting, where the broadcast is made by a person other than the maker of the reproduction (ss.47(3), 70(3), 107(3));
- sound broadcasts by holders of a print disability radio licence (s.47A(8)). Note that there is no longer a 'print disability radio licences' under the *Broadcasting Services Act 1992*, and this drafting anomaly is to be corrected;
- recording of musical works (s.55(6));
- 'off air' copying by educational institutions and institutions assisting people with a print or intellectual disability (Part VA);
- copying of works etc by educational institutions and institutions assisting people with a print or intellectual disability (Part VB);
- retransmission of broadcasts (Part VC);
- public performance and broadcast of sound recordings (ss. 108(1)(a), 109 (1));
- use of copyright material for Crown (s.183).

### **Circumvention Devices and Circumvention Services**

30. The *Copyright Amendment (Digital Agenda) Act 2000* introduced enforcement provisions relating to circumvention devices and circumvention services. These provisions may have a significant impact upon the exceptions granted under the Act.

31. Circumvention devices and circumvention services are those devices and services that have only a limited commercially significant purpose other than the circumvention of a technological protection measure (s. 10(1)). A 'technological protection measure' is a measure designed to prevent or inhibit copyright infringement through the use of access codes, access processes or copying control mechanisms (s. 10(1)). The use of technical protection measures and circumvention devices coupled with an

increasing reliance on contract law has caused some commentators to query whether copyright is being reduced to little more than an access right.<sup>22</sup>

32. Commercial dealings with circumvention devices and services are generally prohibited under the Act, even if the purpose of circumvention is to access material for a fair dealing purpose, and even if such material is otherwise unavailable. However, dealings in circumvention devices and services are allowed for certain 'permitted purposes'. These purposes are:

- reproduction of computer programs to make interoperable products, for error correction and for security testing (ss. 47D-47F);
- copying by Parliamentary libraries for members of Parliament (s. 48A);
- reproduction and communication of works by libraries or archives for users, other libraries or archives and preservation etc. (ss. 49, 50 and 51A);
- use of copyright material for the services of the Crown (s. 183), and;
- reproduction and communication of works etc. by educational and other institutions (Part VB).

33. Section 116A (unlike some overseas legislation) does not prohibit use of a circumvention device by an individual.<sup>23</sup> Citing concerns about the use of bans on circumvention to restrict lawful activity, the Attorney-General's Department and the Department of Communications, Information Technology and the Arts have explained the Government's approach as follows:

'The government believes that the most significant threat to copyright owners' rights lies in preparatory acts for circumvention, such as manufacture, importation, making available online and sale of devices, rather than individual acts of circumvention.'<sup>24</sup>

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<sup>22</sup> See, for example, Gamertsfelder, L. "Digitising Copyright Law – an Australian Perspective" 6(2001) *Media & Arts Law Review* pp. 26-27.

<sup>23</sup> Unless the individual's use is protected by licence or a statutory defence (such as a fair dealing defence), the use may however, still give rise to an infringement of copyright.

<sup>24</sup> Report of House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999*, December 1999, paras. 4.36 – 4.43.

Moreover, individuals who need access to materials for the purposes of research or study may well be able to obtain a copy from a library as the creation and supply of a copy for the purposes of research or study pursuant to ss. 49 and 50 of the Act is a permitted purpose under s. 116A(7).

34. The Committee is not aware of the extent, if any, to which individuals or libraries are being presented with agreements attempting to contract out of their rights to acquire and use circumvention devices or services for permitted purposes.

## **Mass-market agreements**

35. The rapid and continuing growth of electronic commerce has facilitated the use of contract to set terms and conditions on access to and use of copyright material. Increasingly, mass-market agreements are being used to grant access to copyright material. There are two distinct types of mass-market agreement.

### **Shrinkwrap agreements**

36. The first is the 'shrinkwrap' agreement, generally used for tangible products. These contracts often provide that breaking the seal of the product constitutes acceptance of the conditions of the agreement. The conditions may or may not be visible prior to breaking the seal.

### **Clickwrap agreements**

37. The second is the 'clickthrough' or 'clickwrap' agreement. These are used for contracts that are completed online, the subject of which may be tangible products or services. They provide for online acceptance of the conditions; such conditions may appear on the same screen as the contract, or may be posted on another site. A typical manner of concluding a 'clickwrap' agreement would be by clicking an 'I accept' or 'I agree' icon.

38. The two concerns commonly voiced about mass-market agreements are that the public cannot or will not ordinarily negotiate their own terms, and that the standard terms may override exceptions granted in the Act or impose other undesirable restrictions.<sup>25</sup>

***Issue 1: The Committee seeks your views as to the extent that electronic trade in copyright material is subject to agreements that try to exclude or modify limitations to the exclusive rights of copyright owners provided in the Act. Can you provide the Committee with examples of any such agreements?***

***Issue 2: The Committee seeks your views as to whether the situation is any different in relation to trade in copyright material that occurs offline. Can you provide the Committee with examples of any such agreements?***

***Issue 3: The Committee seeks your views as to the nature of any such difference.***

***Issue 4: The Committee seeks your views as to whether the express prohibition on contracting out in s. 47H suggests that provisions elsewhere in the Act can be overridden by contract. Should it be possible to achieve this result by contract? In this regard, should all exceptions be treated alike?***

## **Enforceability**

39. There are many factors that will affect whether the relevant agreements are enforceable, and if so, in what manner they are enforceable. Like all other contracts, contracts which purport to exclude or modify the exceptions to the exclusive rights of copyright owners provided for in the

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<sup>25</sup> Founds, G. "Shrinkwrap and Clickwrap Agreements: 2B or Not 2B?" 52(1)(1999) *Federal Communications Law Journal* p. 100.

Act, will need to satisfy the various elements of contract formation. They may also be subject to a number of vitiating factors such as illegality (including unreasonable restraint of trade) and consumer protection based rules against:

- misrepresentation;
- duress;
- undue influence;
- unconscionability; and
- misleading or deceptive conduct.

In addition, there may be a number of jurisdictional and practical questions that affect their enforceability. Some of these issues are examined below.

## **Illegal Contracts**

### **Is modification by agreement permitted under the Act?**

40. A clear example of where a contract will be illegal is where it is prohibited by statute. Sections 47B - F of the Act provide that computer programs may be reproduced for certain purposes (see above). Section 47H specifically states that an agreement that purports to limit or exclude those provisions (except s. 47B(1)) has no effect.

41. Section 47H is unique in the Act. It was introduced by the *Copyright Amendment (Computer Programs) Act 1999* and is based on a recommendation of the CLRC in its report on *Computer Software Protection*.<sup>26</sup> The Committee noted in that report that its recommendations for exceptions in relation to interoperability, back-up copying and decompilation would have little practical effect if parties could rely on contractual provisions to prevent these acts. In making this recommendation, the Committee had particular regard to Article 9 of the *EC Directive on Computer Programs* which provides, in part:

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<sup>26</sup> Copyright Law Review Committee, *Computer Software Protection*, 1995, recommendation 2.31, para 10.106.

'Any contractual provisions contrary to Article 6 [*decompilation*] or to the exceptions provided in Article 5(2) [*back-up copying*] and (3) [*observation and study*] shall be null and void.'

42. The Second Reading Speech for the *Copyright Amendment (Computer Programs) Act 1999* also emphasised the need for Australian software copyright law to be brought into line with the USA and Europe in order for Australian industry to be able to compete on level terms.<sup>27</sup>

### **Public policy: contracts in unreasonable restraint of trade**

43. Another instance of when a contract might be illegal is where it is contrary to public policy. Contracts in unreasonable restraint of trade are one such example. While this is a common law doctrine, such contracts may also contravene the restrictive trade practices provisions in the *Trade Practices Act 1974* (see below).

44. The law against contracts in unreasonable restraint of trade is classically stated in *Esso Petroleum Co Ltd v Harpers Garage (Stourport) Limited* [1968] AC 269 in relation to a solus agreement. A more recent and celebrated example is *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] ECC 395 which involved a dispute between the singer, George Michael, and his record company. Under this doctrine, the courts will refuse to enforce provisions in contracts which unreasonably restrain trade. Broadly speaking, a contract will be in restraint of trade where it affects a person's future ability to carry on his or her trade, business or profession. Such restraints are against the public interest unless shown to be reasonable in the interests of both the parties and the public.<sup>28</sup> Inequalities in bargaining power and unfairness can play important parts in this assessment. It may be that contracts which seek to override statutory exceptions to copyright are unreasonable restraints of trade.

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<sup>27</sup> Hansard, Senate, Wednesday 21 April 1999, p. 3964.

<sup>28</sup> See also *Macaulay v Shroeder* (1974) 1 WLR 1308; *Zang Tumb Tunn Records v Johnson* (1993).EMLR 175; *Ryder v Nicholl* (UK CA 15 Dec. 1999).

## Consumer Protection

### **Agreements tainted by misrepresentation, duress, undue influence and unconscionable conduct**

45. The ordinary law of contract prevents contracts that are affected by mistake, misrepresentation, duress, undue influence and unconscionable conduct from being held valid.

46. In one instance the Act sets out what the effect of certain conduct will be on agreements made under the Act. Section 195AWB provides that moral rights consent agreements made pursuant to s. 195AW or s. 195AWA will be invalidated by duress or false or misleading statements.

47. In addition, the Trade Practices Act codifies certain consumer protection provisions. Section 51AB prohibits traders from engaging in unconscionable conduct. Section 51AB(2) sets out the following five factors to which a court may have regard in determining whether conduct was unconscionable:

- the relative bargaining positions of the parties;
- whether as a result of the conduct the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
- whether the consumer was able to understand any documents relating to the supply of goods or services;
- whether any undue influence or unfair tactics were used; and
- the amount for which and the circumstances under which the consumer could have obtained the goods or services from an alternative supplier.

Similar factors are listed in s. 9 of the *Contracts Review Act 1980 (NSW)* in relation to determining whether a contract is unjust.

### **Misleading or Deceptive Conduct**

48. Part V of the Trade Practices Act contains a general prohibition against misleading or deceptive conduct (s. 52). This provision is replicated in the various State and Territory Fair Trading Acts. The Trade Practices Act also prohibits certain specified types of misleading or deceptive conduct.

### **Competition**

49. Regulation of restrictive trade practices may also affect the enforceability of contracts that purport to modify the exceptions in the Act. The doctrine of freedom of contract is based on the notion that parties should be able to transact agreements freely. This doctrine was dominant in the nineteenth century. However, today it has been displaced by a view that regards regulation as necessary in certain instances. One such example is the area of consumer protection, discussed above. Another is the area of restrictive trade practices.

50. The regulation of restrictive trade practices is said to foster a more competitive and therefore more efficient economy. In Australia, this is achieved through Part IV of the Trade Practices Act and by the common law doctrine which prevents contracts in unreasonable restraint of trade.

51. Contracts dealing with intellectual property rights are in a unique position in relation to the regulation of restrictive trade practices. This is because s. 51(3) of the Trade Practices Act exempts licences and assignments of intellectual property from the restrictive trade practices provisions of that Act (other than those relating to monopolisation and resale price maintenance) in so far as they relate to the thing in which the rights subsist (in this case, the copyright work or other subject matter or the circuit layout in which eligible layout rights subsist).

52. This provision has been the subject of detailed consideration by the National Competition Council, and more recently, by the Intellectual Property and Competition Review Committee (the Ergas Committee).<sup>29</sup>

53. The Ergas Committee, while in favour of tightening the s. 51(3) exemption, thought it 'desirable for right owners to have the scope to enter into efficient contracts that involve intellectual property rights, and to be able to do so free of onerous and ultimately counter-productive regulatory burdens.' The Committee went on to say that it was 'broadly satisfied that the Government's approach to the issues associated with technological protection measures preserves a reasonable balance between competing interests.' The Ergas Committee did however state that it would be concerned if the use of technological locks, perhaps accompanied by greater reliance on contract, were to displace or in any way limit the effectiveness of fair dealing provisions.<sup>30</sup>

***Issue 5: The Committee seeks your views about whether:***

- (a) there are legal remedies other than those outlined above to protect against the use of agreements to override copyright exceptions granted under the Act; and***
- (b) the existing legal remedies provide adequate protection against the use of agreements to override copyright exceptions granted under the Act.***

***Issue 6: The Committee seeks your views as to whether there should be any limitations to the enforceability of mass-market agreements. For example, should mass-market agreements be treated as a special category and subject to special rules as to validity and enforceability?***

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<sup>29</sup> National Competition Council, *Review of sections 51(2) and 51(3) of the Trade Practices Act 1974*, March 1999; Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement*, September 2000 (Ergas Report).

<sup>30</sup> Ergas Report, p. 11.

## **Jurisdictional Issues**

54. Aside from the theoretical problems posed by the enforceability of contracts that purport to modify exceptions in the Act, there are some very real practical obstacles. The online economy has seen a rise in contracts being transacted across national borders. For example, an offer to contract posted on a website in one country might simultaneously take effect all over the world. This can lead to a range of difficulties in enforcement.

55. One practical difficulty is that parties to an online contract will not always know each other's geographical location. Even where this can be established, it will not always be clear where the contract was formed and which law should apply to it. While contracts regularly include a 'governing law' clause and set out the procedures for dispute resolution, these will not always be effective where the laws of the different jurisdictions are incompatible.

56. This gives rise to the following questions:

- Where should proceedings be instituted, and if necessary, could there be one consolidated proceeding?
- What law should apply?
- Would the judgment of a court in one jurisdiction be enforceable elsewhere?

57. Traditional territorial approaches are often ill suited to dealing with problems in the digital world. This is something being grappled with at an international level. The Hague Conference on Private International Law has been working on a *Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*.

58. Article 6 of the Draft Convention sets out the general rules in relation to contracts. It provides that:

'A plaintiff may bring an action in contract in the courts of a State in which -

- a) in matters relating to the supply of goods, the goods were supplied in whole or in part;
- b) in matters relating to the provision of services, the services were provided in whole or in part;
- c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.'

59. Article 3 also provides that a defendant may be sued in the courts of the country where he or she is habitually resident.

60. One of the most controversial areas of the Draft Convention is Article 7, which has a 'consumer protective jurisdiction' provision that would permit a consumer to sue in his or her country of habitual residence. In the absence of that provision, the consumer would have to make use of the general contracts jurisdiction or sue in the supplier's forum. This provision has been supported by EU countries and Australia but has met strong resistance from the United States of America on the grounds that it has the potential to chill e-commerce. At a meeting of the Hague Conference in March in Ottawa a compromise was reached whereby:

- the courts of a country may exercise protective consumer jurisdiction if the national law of that country provides for such jurisdiction (this is the law in Europe and Australia but not in the USA); and
- if a court gives a judgment in breach of a choice of court clause, there is no obligation for another Contracting State to enforce the judgment if recognition would be inconsistent with the national law of the State addressed.

It therefore seems that this issue might be closer to resolution.

61. While the Draft Convention applies to industrial property, it does not currently apply to copyright. A joint meeting between the Hague

Conference and the World Intellectual Property Organisation (WIPO) was held in January this year. Papers prepared by WIPO for this meeting canvassed the development of an instrument to establish norms for determining the law of the contract and rules to be applied in cases of online infringement of copyright<sup>31</sup>. Whether these ideas will be taken up as part of the Hague Convention or as separate instruments is as yet unclear.

***Issue 7: The Committee seeks your views on whether jurisdictional issues are likely to result in copyright exceptions being overridden and, if so, on suggested solutions.***

## **International examples**

62. The issue of the contractual modification of copyright exceptions is of concern to many countries. It is helpful to look at some international examples of copyright law systems and the approaches taken to address this issue.

### **The United States**

#### **Fair Use**

63. Rather than listing specific exceptions to exclusive rights as we have in Australia, the United States has adopted the broader doctrine of 'fair use' in order to achieve the copyright balance. Several factors are taken into account in determining whether a use is 'fair'. These include:

- the purpose, character and commerciality of the use;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used; and
- the effect of the use upon the potential value of the copyrighted work.

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<sup>31</sup> Ginsburg, J, *Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Digital Networks (2000 Update)* (WIPO forum on Private International Law and Intellectual Property: Geneva, 01/01); Lucas, A, *Private International Law Aspects of the*

64. Similar considerations help determine whether a dealing for the purpose of research or study in Australia is fair (s. 40 of the Act). The doctrine of fair use applies irrespective of the manner in which the material is distributed. This means that fair use applies in the online and offline environments equally.

### **Circumvention Devices**

65. The *Digital Millennium Copyright Act* (1998) inserted provisions dealing with circumvention devices into the *US Copyright Act* (The US Act). Section 1201(a)(1) of the US Act prohibits the circumvention of technical measures that control access to all works. Section 1201(b)(2) prohibits trafficking in technology that may be used to circumvent technological protections against unauthorised access to works. Section 1201(b) prohibits trafficking in devices that circumvent copy-control measures. It does not, however, prohibit the act of circumventing copy-control measures. This anomaly stems from a concern that prohibiting such conduct could inhibit non-infringing conduct such as fair use. Each of the prohibitions in Chapter 12 of the US Act is subject to exceptions for uses deemed fair by Congress such as reverse engineering, security testing, good faith encryption research, and certain uses by non-profit libraries, archives and educational institutions. A similar concern underpins the permitted purposes exceptions in the Australian Digital Agenda Act.

66. Chapter 12 of the US Act also requires the Library of Congress to determine in a rule-making proceeding whether to exempt any classes of work from the application of the anti-circumvention provisions applying to access control. There have been a number of cases under this procedure, such as *Universal City Studios v Reimerdes* 111 F.Supp. 2d. 294 (SDNY).<sup>32</sup> The US Copyright Office has also conducted proceedings under the rule-making procedure to determine whether any classes of

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*Protection of Works and of the Subject Matter of Related Rights Transmitted Over Digital Networks.* (WIPO forum on Private International Law and Intellectual Property: Geneva, 01/01).

<sup>32</sup> This case is currently on appeal. See Goldberg, David and Bernstein, Robert J, "The Prohibition on Circumvention Devices and the Attack on the DVD" [2001] EIPR 160 at 163.

work should be exempt from the anti-circumvention provisions for the next three years. In a determination made on 27 October 2000, the Library of Congress declared two exempt classes: compilations consisting of lists of websites blocked by filtering software applications and literary works including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.

67. There has been a great deal of debate as to whether fair use exceptions can be modified by contract. Mass-market licences have been particularly contentious.<sup>33</sup> Since the landmark *Pro-CD*<sup>34</sup> decision, courts have tended to enforce shrinkwrap agreements that are 'commercially reasonable' and valid under contract law, so long as consumers have the right to reject the terms and receive a refund on opening the product.<sup>35</sup> A recent Massachusetts decision shows that some courts are willing to review mass-market licences and the circumstances surrounding their acceptance, in light of their 'reasonableness' from the consumer's perspective.<sup>36</sup>

## **Article 2B**

68. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is a body that prepares uniform codes with a view to encouraging their enactment by individual States. The NCCUSL proposed Article 2B as an addition to the Uniform Commercial Code to ensure legal certainty as to the enforceability of such contracts. It encountered heavy criticism from consumer groups, creators' organisations, industry groups and academics, and the American Law Institute withdrew its support.<sup>37</sup>

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<sup>33</sup> Founds, G, "Shrinkwrap and Clickwrap Agreements: 2B or Not 2B?" 52(1)(1999) *Federal Communications Law Journal* p. 102.

<sup>34</sup> *ProCD Inc v Zeidenberg* 86 F.3d 1447 (7<sup>th</sup> Cir. 1996). The terms of a licence agreement were found not to place an unreasonable burden on the licensee; the shrink-wrap licence was therefore enforceable.

<sup>35</sup> Hale and Dorr Internet Law, *Are 'Click Through' Agreements Enforceable?* <[www.haledorr.com](http://www.haledorr.com): email alert 26/04/01>.

<sup>36</sup> Decision in *Williams v AOL, Inc* 962 Mass (Superior Court of Civil Action 2001); see also Hale and Dorr Internet Law, *Court Draws Line on Unreasonable 'Click and Accept' License Terms* ([www.haledorr.com](http://www.haledorr.com): email alert 10/04/01).

<sup>37</sup> Evans, G, Fitzgerald, B. "Information Transactions under UCC Article 2B: the Ascendancy of Freedom of Contract in the Digital Millennium?" 21(2)(1998) *UNSW Law Journal*.

## **UCITA**

69. The Uniform Computer Information Transactions Act (UCITA), adopted in 1999 by the NCCUSL, is a piece of uniform contract legislation almost identical to Article 2B.<sup>38</sup> At the time of writing, UCITA had been adopted or introduced into nine States.<sup>39</sup> It renders most mass-market licences enforceable, allowing parties as much freedom of contract in this area as in any other. A shrinkwrap licence will not be enforceable under UCITA if the licensee is unaware that terms are forthcoming or if there is no right to return the product and receive a full refund after viewing the terms. The licence must also make provision to restore the licensee's system if alterations were made when the licensee tried to view the terms.

70. Federal and State laws in the US sometimes conflict. This is significant for the application of UCITA (which is State-based legislation) to copyright and copyright exceptions (which are governed by federal law). It is not yet clear which law will prevail in the courts. It should also be noted that UCITA can only affect agreements governed by the law of a State that has enacted it.

71. The provisions of UCITA are default rules which apply if an agreement elects no others, although it should be noted that the rules relating to fairness of contract cannot be waived. UCITA has significant implications for mass-market licenses, however, because such licences are not individually negotiated and there is rarely the opportunity to elect a different set of rules.

72. UCITA applies to contracts in 'computer information' or digital information; this includes traditional copyright material that is online, database access and computer games. UCITA does not automatically apply to film, television or music, even if these are broadcast over the Internet.

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<sup>38</sup> For full text, see the NCCUSL website: <[www.law.upenn.edu/bll/ulc/ucita/ucita1200.htm](http://www.law.upenn.edu/bll/ulc/ucita/ucita1200.htm)>.

<sup>39</sup> From NCCUSL website, [www.nccusl.org](http://www.nccusl.org), 05/06/01.

73. UCITA only affects contract law. It cannot be used to circumvent current consumer protection laws at State or federal level.<sup>40</sup> Section 105A of UCITA expressly recognises pre-emption by federal laws and grants the court power to refuse enforcement of a provision in a licence for public policy reasons. This means that federal laws will override any contrary provisions in UCITA. Section 105 is as follows:

**SECTION 105. RELATION TO FEDERAL LAW; FUNDAMENTAL PUBLIC POLICY; TRANSACTIONS SUBJECT TO OTHER STATE LAW.**

(a) A provision of this [Act] which is pre-empted by federal law is unenforceable to the extent of the pre-emption.

(b) If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.

(c) Except as otherwise provided in subsection (d), if this [Act] or a term of a contract under this [Act] conflicts with a consumer protection statute [or administrative rule], the consumer protection statute [or rule] governs.

(d) If a law of this State in effect on the effective date of this [Act] applies to a transaction governed by this [Act], the following rules apply:

(1) A requirement that a term, waiver, notice, or disclaimer be in a writing is satisfied by a record.

(2) A requirement that a record, writing, or term be signed is satisfied by an authentication.

(3) A requirement that a term be conspicuous, or the like, is satisfied by a term that is conspicuous under this [Act].

(4) A requirement of consent or agreement to a term is satisfied by a manifestation of assent to the term in accordance with this [Act].

[(e) The following laws govern in the case of a conflict between this [Act] and the other law: [List laws establishing a digital signature and similar form of attribution procedure.]]

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<sup>40</sup> See NCCUSL website, "An overview of UCITA", <[www.nccusl.org/nccusl/uniformact\\_overview/uniformacts-ov-ucita.asp](http://www.nccusl.org/nccusl/uniformact_overview/uniformacts-ov-ucita.asp)>.

## Europe

74. Harmonisation of copyright law between member countries of the European Union has proved particularly difficult. One reason has been the conceptual differences between copyright as understood in the common law from the system of authors' rights in the civil law countries, and the different approaches to the scope of the limitations and exceptions to the rights of the author or the copyright owner that these systems embody.

75. Over the last decade, several Directives relevant to contract and copyright issues have been adopted. There are a number of others, such as the Database Directive, that are highly significant for copyright law issues in the digital age which cannot be discussed here due to limitations of space. It is also beyond the scope of this paper to detail the law as it functions in individual countries. The Committee welcomes submissions referring to relevant Directives and laws not discussed in this Paper. The following is a brief overview of the most relevant EU legislation.

### Computer Programs Directive

76. In 1991, the European Commission adopted the *Computer Programs Directive*<sup>41</sup>. The main effect of this Directive is to grant copyright protection to computer programs as 'literary works within the meaning of the Berne Convention' (Art. 1). Article 4 prescribes the exclusive rights of authors in computer programs. Article 5 provides for exceptions to these exclusive rights for acts done in order to correct errors, use the program in accordance with its intended purpose, make back-up copies, or for observation, study or testing in the course of normal use. Article 6 permits decompilation for interoperability. While Article 5(1) expressly recognises the possibility that the exceptions may be contractually modified, Article 9 provides that contractual provisions contrary to the decompilation, back-up copying or observation and study exceptions will be void. The sections in the Australian Copyright Act relating to computer program exceptions, and the effect that contract may have on these (ss. 47B(3), 47C-47F and 47H), are modelled on these articles.

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<sup>41</sup> For full text, see EU website: <[www.europa.eu.int/eur-lex/en/lif/dat/1991/en\\_391L0250.html](http://www.europa.eu.int/eur-lex/en/lif/dat/1991/en_391L0250.html)>.

### **Directive on Rental and Lending Rights and Related Rights**

77. The *Directive on Rental and Lending Rights and Related Rights*<sup>42</sup>, adopted in 1992, covers most copyright material with the exception of buildings and works of applied art. Article 4 provides for certain unwaivable rights to equitable remuneration. Of particular interest is Art. 4(2), which specifies that the right to obtain an equitable remuneration for rental cannot be waived by authors or performers.

### **Directive on Unfair Terms in Consumer Contracts**

78. The *Directive on Unfair Terms in Consumer Contracts*<sup>43</sup> was adopted in 1993. It provides that terms in consumer contracts which are deemed 'unfair' will not be binding. 'Unfair' is a broader concept than is 'unconscionable', focussing on the imbalance in parties' rights and obligations rather than bad faith. It further provides that terms are to be framed clearly and simply. This Directive expressly applies to mass-market agreements.

### **Long Distance Selling Directive**

79. The *Long Distance Selling Directive*, adopted in 1997, imposes certain consumer protection measures for online contracts. Protection measures include the requirements that consumers be provided with written confirmation of online contracts, and be given the right to return goods and gain a refund within seven days of receiving this confirmation<sup>44</sup>.

### **Directive on Electronic Signatures**

80. The *Directive on Electronic Signatures*<sup>45</sup>, adopted in 1998, imposes certain requirements to ensure that electronic signatures in online contracts will be legally recognised.

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<sup>42</sup> For full text, see EU website: <[www.europa.eu.int/eur-lex/en/lif/dat/1992/en\\_392L0100.html](http://www.europa.eu.int/eur-lex/en/lif/dat/1992/en_392L0100.html)>.

<sup>43</sup> For full text, see EU website: <[www.europa.eu.int/eur-lex/en/lif/dat/1993/en\\_393L0013.html](http://www.europa.eu.int/eur-lex/en/lif/dat/1993/en_393L0013.html)>.

<sup>44</sup> Hale and Dorr Internet Law *EU Internet Directives and their Implications for US Internet Companies* ([www.haledorr.com](http://www.haledorr.com): 14/03/00).

<sup>45</sup> For full text, see EU website: <[www.europa.eu.int/eur-lex/en/lif/dat/1999/en\\_399L0093.html](http://www.europa.eu.int/eur-lex/en/lif/dat/1999/en_399L0093.html)>.

## Electronic Commerce Directive

81. The *Electronic Commerce Directive*,<sup>46</sup> adopted by the European Commission in 1999, sets up an overall framework to regulate the different aspects of electronic commerce. It does not overrule previous directives or national legislation, but seeks to coordinate Internet-related legislation. The Directive addresses five key topics:

- the establishment of Information Society service providers;
- online commercial communications;
- the conclusion of contract online (such as format requirements for electronic signatures and the timing of contract formation);
- the liability of intermediaries (such as ISPs); and
- the implementation and enforcement of the Directive itself<sup>47</sup>.

In this way, it is similar to the Commonwealth *Electronic Transactions Act 1999*.

## Copyright Harmonisation Directive

82. The most recent European legislation is the *Copyright Harmonisation Directive*, adopted on 25 September 2000.<sup>48</sup> It aims to harmonise European copyright and related laws, to bring them in line with the WIPO 'Internet Treaties', and to provide legal certainty.<sup>49</sup> The Directive grants owners exclusive rights to reproduce, communicate to the public and distribute their material.<sup>50</sup> Article 5 then exhaustively lists the possible copyright exceptions; adoption of each is optional, with the exception of the mandatory provision relating to temporary copies made in certain circumstances as part of a technical process (for example, browsing on the

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<sup>46</sup> For full text, see EU website: <[www.europa.eu.int/eur-lex/en/lif/dat/2000/en\\_300L0031.html](http://www.europa.eu.int/eur-lex/en/lif/dat/2000/en_300L0031.html)>.

<sup>47</sup> European Commission *Commission welcome adoption of the Directive on copyright in the information society by the Council* (Commission online, [www.europa.eu.int](http://www.europa.eu.int): 23/04/01); e-Revolution Reports and Studies, *Electronic Commerce: a Challenge for Europe* (linked to [www.europa.eu.int](http://www.europa.eu.int) : 17/05/01); European Commission *Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market* ([www.europa.eu.int](http://www.europa.eu.int): 17/05/01).

<sup>48</sup> For full text of amended proposal (document delivered on 19/02/01), see EU website: <[www.europa.eu.int/eur-lex/en/com/dat/1999/en\\_599PC0250.html](http://www.europa.eu.int/eur-lex/en/com/dat/1999/en_599PC0250.html)>.

<sup>49</sup> Hugenholtz, P *Why the Copyright Directive is Unimportant, and Possibly Invalid* (European Intellectual Property Report issue 11: 2000) pp. 1-3.

<sup>50</sup> European Commission, *Commission welcome adoption of the Directive on copyright in the information society by the Council* (Commission online, [www.europa.eu.int](http://www.europa.eu.int): 23/04/01).

Internet).<sup>51</sup> Private copying is allowed for the non-commercial use of audio, visual or audio-visual material (Art. 5(2)(b)). Limited copying in establishments accessible to the public is also permissible (Art.5(2)(c)). Further exceptions are made for the (non-commercial) purposes of teaching or scientific research and for the benefit of the disabled; for the reporting of news; for quotation for the purposes of criticism and review; and for public security, administrative or judicial purposes.

83. In addition to listing all possible copyright exceptions, the Directive provides for fair compensation for copyright owners in relation to photocopying, private copying and some broadcast reproductions. It also addresses the circumvention of technological protection measures (Art. 6). Copyright owners are given control over the production and distribution of circumvention devices, but must make such devices available to certain parties entitled to use copyright material under a copyright exception (such as libraries). There is limited provision for private copying of material that has been technologically locked.<sup>52</sup>

84. The Directive does not touch upon the contractual modification of copyright exceptions.<sup>53</sup>

***Issue 8: The Committee seeks your views as to whether any, and if so what, lessons can be learned from the overseas experience?***

***Issue 9: The Committee seeks your recommendations as to any specific action, legislative or otherwise, in relation to the issues raised in your submission.***

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<sup>51</sup> *ibid.*

<sup>52</sup> *ibid.*

<sup>53</sup> Hugenholtz, P “Why the Copyright Directive is Unimportant, and Possibly Invalid” 2000 [EIPR] 11.

## Appendix A - Terms of Reference

The rapid and continuing growth of electronic commerce has facilitated the use of contract to set terms and conditions on access to and use of copyright material. The *Copyright Act 1968* (the Copyright Act) confers a number of rights on copyright owners to encourage the creation of copyright material, and provides exceptions to those rights to maintain the public benefit in access to that material. The Act is silent as to whether private agreements can displace provisions of the Copyright Act which provide for reasonable access to copyright material (with the exception of s. 47H which provides that an agreement which excludes or limits, or has the effect of excluding or limiting, the operation of sections providing for the reproduction of computer programs for decompilation, security testing and error correction has no effect).

1. The Government regards it as important that Australian copyright law maintain an appropriate balance between the rights of copyright owners and the rights of copyright users. Against that background, the Copyright Law Review Committee is to inquire into and report on:
  - (a) as far as is reasonably ascertainable, the extent to which electronic trade in copyright works and other subject matter is subject to agreements which exclude or modify exceptions to the exclusive rights of copyright owners provided under the Copyright Act;
  - (b) as far as is reasonably ascertainable, the extent to which trade in copyright works and other subject matter, otherwise than on-line, is subject to agreements which exclude or modify exceptions to the exclusive rights of copyright owners provided under the Copyright Act, and the nature of the difference, if any, with (a);
  - (c) the ability of owners or users of copyright to enforce agreements which exclude or modify exceptions to the exclusive rights of copyright owners;
  - (d) whether agreements which exclude or modify exceptions provided under the Copyright Act should be enforceable under the Act;
  - (e) the views of the owners and users of copyright material on (c) and (d);
  - (f) the possible relevance of the Committee's findings in response to (c) or (d) for exceptions provided under the *Circuit Layouts Act 1989*.
  - (g) a strategy to implement and review the preferred option(s), including whether the preferred options can be implemented by non-legislative change;
  - (h) incidental matters arising out of points (a) - (g) which are able to be addressed within the time frame for the reference.
2. In undertaking the inquiry, the CLRC will have regard to:
  - (a) any amendments to the Copyright Act that are introduced into Parliament, or which the Government announces are proposed to be introduced or are being considered;

- (b) the recommendations and findings of relevant Government reviews or inquiries and any reports by or views of relevant expert or advisory bodies and other interests;
  - (c) Australia's relevant international obligations, including those in treaties to which Australia is considering becoming a party;
  - (d) the principle that legislation which restricts competition should be retained or new legislation should be made only if the benefits to the community as a whole outweigh the costs; and if the objectives of the legislation can be achieved only by restricting competition;
  - (e) the possible effect on the operation and complexity of any future copyright legislation as a result of the need to introduce transitional provisions and the desirability of introducing such provisions in relation to private agreements;
  - (f) the Government's policy that the compliance cost and paperwork burden on small business should be reduced where feasible.
3. In undertaking the review, the Committee is to advertise widely and consult with key interest groups and affected parties.
  4. In undertaking the review and preparing its report and associated recommendations, the Committee is to report to the Attorney-General by 30 April 2002.

## Appendix B - Extracts from the *Copyright Act 1968* (Cth) as in force 4 March 2001

### Division 3—Acts not constituting infringements of copyright in works

#### 40 Fair dealing for purpose of research or study

(1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of research or study does not constitute an infringement of the copyright in the work.

(1A) A fair dealing with a literary work (other than lecture notes) does not constitute an infringement of the copyright in the work if it is for the purpose of, or associated with, an approved course of study or research by an enrolled external student of an educational institution.

(1B) In subsection (1A) the expression *lecture notes* means any literary work produced for the purpose of the course of study or research by a person lecturing or teaching in or in connection with the course of study or research.

(2) For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of reproducing the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for the purpose of research or study include:

- (a) the purpose and character of the dealing;
- (b) the nature of the work or adaptation;
- (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (e) in a case where part only of the work or adaptation is reproduced—the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

(3) Notwithstanding subsection (2), a dealing with a literary, dramatic or musical work, or with an adaptation of such a work, being a dealing by way of the reproducing, for the purposes of research or study:

- (a) if the work or adaptation comprises an article in a periodical publication—of the whole or a part of that work or adaptation; or
- (b) in any other case—of not more than a reasonable portion of the work or adaptation;

shall be taken to be a fair dealing with that work or adaptation for the purpose of research or study.

(4) Subsection (3) does not apply to a dealing by way of reproducing the whole or a part of an article in a periodical publication if another article in that publication, being an article dealing with a different subject matter, is also reproduced.

#### **41 Fair dealing for purpose of criticism or review**

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and a sufficient acknowledgement of the work is made.

#### **42 Fair dealing for purpose of reporting news**

- (1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if:
  - (a) it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the work is made; or
  - (b) it is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.
- (2) The playing of a musical work in the course of reporting news by means of a communication or in a cinematograph film is not a fair dealing with the work for the purposes of this section if the playing of the work does not form part of the news being reported.

#### **43 Reproduction for purpose of judicial proceedings or professional advice**

- (1) The copyright in a literary, dramatic, musical or artistic work is not infringed by anything done for the purposes of a judicial proceeding or of a report of a judicial proceeding.
- (2) A fair dealing with a literary, dramatic, musical or artistic work does not constitute an infringement of the copyright in the work if it is for the purpose of the giving of professional advice by:
  - (a) a legal practitioner; or
  - (b) a person registered as a patent attorney under the *Patents Act 1990*; or
  - (c) a person registered as a trade marks attorney under the *Trade Marks Act 1995*.

#### **43A Temporary reproductions made in the course of communication**

- (1) The copyright in a work, or an adaptation of a work, is not infringed by making a temporary reproduction of the work or adaptation as part of the technical process of making or receiving a communication.
- (2) Subsection (1) does not apply in relation to the making of a temporary reproduction of a work, or an adaptation of a work, as part of the technical process of making a communication if the making of the communication is an infringement of copyright.

## Part III Division 4A—Acts not constituting infringements of copyright in computer programs

### 47AB Meaning of *computer program*

In this Division:

*computer program* includes any literary work that is:

- (a) incorporated in, or associated with, a computer program; and
- (b) essential to the effective operation of a function of that computer program.

### 47B Reproduction for normal use or study of computer programs

- (1) Subject to subsection (2), the copyright in a literary work that is a computer program is not infringed by the making of a reproduction of the work if:
  - (a) the reproduction is incidentally and automatically made as part of the technical process of running a copy of the program for the purposes for which the program was designed; and
  - (b) the running of the copy is done by, or on behalf of, the owner or licensee of the copy.
- (2) Subsection (1) does not apply to the making of a reproduction of a computer program:
  - (a) from an infringing copy of the computer program; or
  - (b) contrary to an express direction or licence given by, or on behalf of, the owner of the copyright in the computer program to the owner or licensee of the copy from which the reproduction is made when the owner or licensee of that copy acquired it.
- (3) Subject to subsection (4), the copyright in a literary work that is a computer program is not infringed by the making of a reproduction of the work if:
  - (a) the reproduction is incidentally and automatically made as part of the technical process of running a copy of the program for the purpose of studying the ideas behind the program and the way in which it functions; and
  - (b) the running of the copy is done by, or on behalf of, the owner or licensee of the copy.
- (4) Subsection (3) does not apply to the making of a reproduction of a computer program from an infringing copy of the computer program.
- (5) In this section:

*reproduction*, in relation to a computer program, does not include a version of the program of the kind referred to in paragraph 21(5)(b).

### 47C Back-up copy of computer programs

- (1) Subject to subsection (4), the copyright in a literary work that is a computer program is not infringed by the making of a reproduction of the work if:
  - (a) the reproduction is made by, or on behalf of, the owner or licensee of the copy (the *original copy*) from which the reproduction is made; and
  - (b) the reproduction is made for use only by, or on behalf of, the owner or licensee of the original copy; and

- (c) the reproduction is made for any of the following purposes:
  - (i) to enable the owner or licensee of the original copy to use the reproduction in lieu of the original copy and to store the original copy;
  - (ii) to enable the owner or licensee of the original copy to store the reproduction for use in lieu of the original copy if the original copy is lost, destroyed or rendered unusable;
  - (iii) to enable the owner or licensee of the original copy to use the reproduction in lieu of the original copy, or of another reproduction made under this subsection, if the original copy, or the other reproduction, is lost, destroyed or rendered unusable.
- (2) Subject to subsection (4), the copyright in a literary work that is a computer program, and in any work or other subject-matter held together with the program on the same computer system, is not infringed by the making of a reproduction of the program, or of such a work or other subject-matter if:
  - (a) the reproduction is made by, or on behalf of, the owner or licensee of the copy (the *original copy*) from which the reproduction is made; and
  - (b) the making of the reproduction is part of the normal back-up copying of data for security purposes.
- (3) Subsection (1) applies in relation to a reproduction of a work made for a purpose referred to in subparagraph (1)(c)(iii) whether or not other reproductions of the work have previously been made for the same purpose from the same copy.
- (4) Subsections (1) and (2) do not apply to the making of a reproduction of a computer program:
  - (a) from an infringing copy of the computer program; or
  - (b) if the owner of the copyright in the computer program has so designed the program that copies of it cannot be made without modifying the program; or
  - (c) if a licence to use the original copy, given by, or on behalf of, the owner of the copyright in the computer program to the owner of the original copy when the owner of that copy acquired it, has expired or been terminated.
- (5) For the purposes of this section, a reference to a copy of a computer program is a reference to any article in which the computer program is reproduced in a material form.
- (6) In this section:

*reproduction*, in relation to a computer program, does not include a version of the program of the kind referred to in paragraph 21(5)(b).

#### **47D Reproducing computer programs to make interoperable products**

- (1) Subject to this Division, the copyright in a literary work that is a computer program is not infringed by the making of a reproduction or adaptation of the work if:
  - (a) the reproduction or adaptation is made by, or on behalf of, the owner or licensee of the copy of the program (the *original program*) used for making the reproduction or adaptation; and
  - (b) the reproduction or adaptation is made for the purpose of obtaining information necessary to enable the owner or licensee, or a person acting on behalf of the owner or licensee, to make independently another program

(the *new program*), or an article, to connect to and be used together with, or otherwise to interoperate with, the original program or any other program; and

- (c) the reproduction or adaptation is made only to the extent reasonably necessary to obtain the information referred to in paragraph (b); and
- (d) to the extent that the new program reproduces or adapts the original program, it does so only to the extent necessary to enable the new program to connect to and be used together with, or otherwise to interoperate with, the original program or the other program; and
- (e) the information referred to in paragraph (b) is not readily available to the owner or licensee from another source when the reproduction or adaptation is made.

- (2) Subsection (1) does not apply to the making of a reproduction or adaptation of a computer program from an infringing copy of the computer program.

#### **47E Reproducing computer programs to correct errors**

- (1) Subject to this Division, the copyright in a literary work that is a computer program is not infringed by the making, on or after 23 February 1999, of a reproduction or adaptation of the work if:

- (a) the reproduction or adaptation is made by, or on behalf of, the owner or licensee of the copy of the program (the *original copy*) used for making the reproduction or adaptation; and
- (b) the reproduction or adaptation is made for the purpose of correcting an error in the original copy that prevents it from operating (including in conjunction with other programs or with hardware):
  - (i) as intended by its author; or
  - (ii) in accordance with any specifications or other documentation supplied with the original copy; and
- (c) the reproduction or adaptation is made only to the extent reasonably necessary to correct the error referred to in paragraph (b); and
- (d) when the reproduction or adaptation is made, another copy of the program that does operate as mentioned in paragraph (b) is not available to the owner or licensee within a reasonable time at an ordinary commercial price.

- (2) Subsection (1) does not apply to the making of a reproduction or adaptation of a computer program from an infringing copy of the computer program.

#### **47F Reproducing computer programs for security testing**

- (1) Subject to this Division, the copyright in a literary work that is a computer program is not infringed by the making of a reproduction or adaptation of the work if:

- (a) the reproduction or adaptation is made by, or on behalf of, the owner or licensee of the copy of the program (the *original copy*) used for making the reproduction or adaptation; and
- (b) the reproduction or adaptation is made for the purpose of:
  - (i) testing in good faith the security of the original copy, or of a computer system or network of which the original copy is a part; or

- (ii) investigating, or correcting, in good faith a security flaw in, or the vulnerability to unauthorised access of, the original copy, or of a computer system or network of which the original copy is a part; and
  - (c) the reproduction or adaptation is made only to the extent reasonably necessary to achieve a purpose referred to in paragraph (b); and
  - (d) the information resulting from the making of the reproduction or adaptation is not readily available to the owner or licensee from another source when the reproduction or adaptation is made.
- (2) Subsection (1) does not apply to the making of a reproduction or adaptation of a computer program from an infringing copy of the computer program.

#### **47G Unauthorised use of copies or information**

- (1) If:
- (a) a reproduction or adaptation of a literary work that is a computer program is made under a prescribed provision; and
  - (b) the reproduction or adaptation, or any information derived from it, is, without the consent of the owner of the copyright in the computer program, used, or sold or otherwise supplied to a person, for a purpose other than a purpose specified in the prescribed provision;
- the prescribed provision does not apply, and is taken never to have applied, to the making of the reproduction or adaptation.
- (2) For the purposes of this section, sections 47B, 47C, 47D, 47E and 47F are prescribed provisions.

#### **47H Agreements excluding operation of certain provisions**

An agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of subsection 47B(3), or section 47C, 47D, 47E or 47F, has no effect.

### **Division 5—Copying of works in libraries or archives**

#### **48 Interpretation**

In this Division, a reference to an article contained in a periodical publication shall be read as a reference to anything (other than an artistic work) appearing in such a publication.

#### **48A Copying by Parliamentary libraries for members of Parliament**

The copyright in a work is not infringed by anything done, for the sole purpose of assisting a person who is a member of a Parliament in the performance of the person's duties as such a member, by an authorized officer of a library, being a library the principal purpose of which is to provide library services for members of that Parliament.

#### **49 Reproducing and communicating works by libraries and archives for users**

- (1) A person may furnish to the officer in charge of a library or archives:

- (a) a request in writing to be supplied with a reproduction of an article, or a part of an article, contained in a periodical publication or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library or archives; and
  - (b) a declaration signed by him or her stating:
    - (i) that he or she requires the reproduction for the purpose of research or study and will not use it for any other purpose; and
    - (ii) that he or she has not previously been supplied with a reproduction of the same article or other work, or the same part of the article or other work, as the case may be, by an authorized officer of the library or archives.
- (2) Subject to this section, where a request and declaration referred to in subsection (1) are furnished to the officer in charge of a library or archives, an authorized officer of the library or archives may, unless the declaration contains a statement that to his or her knowledge is untrue in a material particular, make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the person who made the request.
- (2A) A person may make to an authorized officer of a library or archives:
- (a) a request to be supplied with a reproduction of an article, or part of an article, contained in a periodical publication, or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library or archives; and
  - (b) a declaration to the effect that:
    - (i) the person requires the reproduction for the purpose of research or study and will not use it for any other purpose;
    - (ii) the person has not previously been supplied with a reproduction of the same article or other work, or the same part of the article or other work, as the case may be, by an authorized officer of the library or archives; and
    - (iii) by reason of the remoteness of the person's location, the person cannot conveniently furnish to the officer in charge of the library or archives a request and declaration referred to in subsection (1) in relation to the reproduction soon enough to enable the reproduction to be supplied to the person before the time by which the person requires it.
- (2B) A request or declaration referred to in subsection (2A) is not required to be made in writing.
- (2C) Subject to this section, where:
- (a) a request and declaration referred to in subsection (2A) are made by a person to an authorized officer of a library or archives; and
  - (b) the authorized officer makes a declaration setting out particulars of the request and declaration made by the person and stating that:
    - (i) the declaration made by the person, so far as it relates to the matters specified in subparagraphs (2A)(b)(i) and (ii), does not contain a statement that, to the knowledge of the authorized officer, is untrue in a material particular; and

- (ii) the authorized officer is satisfied that the declaration made by the person is true so far as it relates to the matter specified in subparagraph (2A)(b)(iii);

an authorized officer of the library or archives may make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the person.

- (3) Where a charge is made for making and supplying a reproduction to which a request under subsection (1) or (2A) relates, subsection (2) or (2C), as the case may be, does not apply in relation to the request if the amount of the charge exceeds the cost of making and supplying the reproduction.
- (4) Subsection (2) or (2C) does not apply in relation to a request for a reproduction of, or parts of, 2 or more articles contained in the same periodical publication unless the articles relate to the same subject matter.
- (5) Subsection (2) or (2C) does not apply to a request for a reproduction of the whole of a work (other than an article contained in a periodical publication), or to a reproduction of a part of such a work that contains more than a reasonable portion of the work unless:
  - (a) the work forms part of the library or archives collection; and
  - (b) before the reproduction is made, an authorized officer has, after reasonable investigation, made a declaration stating that he or she is satisfied that a reproduction (not being a second-hand reproduction) of the work cannot be obtained within a reasonable time at an ordinary commercial price.
- (5A) If an article contained in a periodical publication, or a published work (other than an article contained in a periodical publication) is acquired, in electronic form, as part of a library or archives collection, the officer in charge of the library or archives may make it available online within the premises of the library or archives in such a manner that users cannot, by using any equipment supplied by the library or archives:
  - (a) make an electronic reproduction of the article or work; or
  - (b) communicate the article or work.
- (6) The copyright in an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1) or (2A), of a reproduction of the article, or of a part of the article, in accordance with subsection (2) or (2C), as the case may be, unless the reproduction is supplied to a person other than the person who made the request.
- (7) The copyright in a published work other than an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1) or (2A), of a reproduction of the work, or of a part of the work, in accordance with subsection (2) or (2C), as the case may be, unless the reproduction is supplied to a person other than the person who made the request.
- (7A) Subsections (6) and (7) do not apply to the making under subsection (2) or (2C) of an electronic reproduction of:
  - (a) an article, or a part of an article, contained in a periodical publication; or
  - (b) the whole or part of a published work, other than such an article;in relation to a request under this section for communication to the person who made the request unless:

- (c) before or when the reproduction is communicated to the person, the person is notified in accordance with the regulations:
    - (i) that the reproduction has been made under this section and that the article or work might be subject to copyright protection under this Act; and
    - (ii) about such other matters (if any) as are prescribed; and
  - (d) as soon as practicable after the reproduction is communicated to the person, the reproduction made under subsection (2) or (2C) and held by the library or archives is destroyed.
- (7B) It is not an infringement of copyright in an article contained in a periodical publication, or of copyright in a published work, to communicate it in accordance with subsection (2), (2C) or (5A).
- (8) The regulations may exclude the application of subsection (6) or (7) in such cases as are specified in the regulations.
- (9) In this section:

*library* does not include a library that is conducted for the profit, direct or indirect, of an individual or individuals.

*supply* includes supply by way of a communication.

## **50 Reproducing and communicating works by libraries or archives for other libraries or archives**

- (1) The officer in charge of a library may request, or cause another person to request, the officer in charge of another library to supply the officer in charge of the first-mentioned library with a reproduction of an article, or a part of an article, contained in a periodical publication, or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library:
  - (a) for the purpose of including the reproduction in the collection of the first-mentioned library;
  - (aa) in a case where the principal purpose of the first-mentioned library is to provide library services for members of a Parliament—for the purpose of assisting a person who is a member of that Parliament in the performance of the person’s duties as such a member; or
  - (b) for the purpose of supplying the reproduction to a person who has made a request for the reproduction under section 49.
- (2) Subject to this section, where a request is made by or on behalf of the officer in charge of a library to the officer in charge of another library under subsection (1), an authorized officer of the last-mentioned library may make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the officer in charge of the first-mentioned library.
- (3) Where, under subsection (2), an authorized officer of a library makes, or causes to be made, a reproduction of the whole or part of a work (including an article contained in a periodical publication) and supplies it to the officer in charge of another library in accordance with a request made under subsection (1):

- (a) the reproduction shall, for all purposes of this Act, be deemed to have been made on behalf of an authorized officer of the other library for the purpose for which the reproduction was requested; and
  - (b) an action shall not be brought against the body administering that first-mentioned library, or against any officer or employee of that library, for infringement of copyright by reason of the making or supplying of that reproduction.
- (4) Subject to this section, if a reproduction of the whole or a part of an article contained in a periodical publication, or of any other published work, is, by virtue of subsection (3), taken to have been made on behalf of an authorised officer of a library, the copyright in the article or other work is not infringed:
- (a) by the making of the reproduction; or
  - (b) if the work is supplied under subsection (2) by way of a communication—by the making of the communication.
- (5) The regulations may exclude the application of subsection (4) in such cases as are specified in the regulations.
- (6) Where a charge is made for making and supplying a reproduction to which a request under subsection (1) relates, subsection (4) does not apply in relation to the request if the amount of the charge exceeds the cost of making and supplying the reproduction.
- (7) Where:
- (a) a reproduction (in this subsection referred to as the *relevant reproduction*) of, or of a part of, an article, or of the whole or a part of another work, is supplied under subsection (2) to the officer in charge of a library; and
  - (b) a reproduction of the same article or other work, or of the same part of the article or other work, as the case may be, has previously been supplied under subsection (2) for the purpose of inclusion in the collection of the library;
- subsection (4) does not apply to or in relation to the relevant reproduction unless, as soon as practicable after the request under subsection (1) relating to the relevant reproduction is made, an authorized officer of the library makes a declaration:
- (c) setting out particulars of the request (including the purpose for which the relevant reproduction was requested); and
  - (d) stating that the reproduction referred to in paragraph (b) has been lost, destroyed or damaged, as the case requires.

(7A) If:

- (a) a reproduction is made of the whole of a work (other than an article contained in a periodical publication) or of a part of such a work, being a part that contains more than a reasonable portion of the work; and
- (b) the work from which the reproduction is made is in hardcopy form; and
- (c) the reproduction is supplied under subsection (2) to the officer in charge of a library;

subsection (4) does not apply in relation to the reproduction unless:

- (d) in a case where the principal purpose of the library is to provide library services for members of a Parliament—the reproduction is so supplied for the purpose of assisting a person who is a member of that Parliament in the performance of the person's duties as such a member; or

- (e) as soon as practicable after the request under subsection (1) relating to the reproduction is made, an authorized officer of the library makes a declaration:
  - (i) setting out particulars of the request (including the purpose for which the reproduction was requested); and
  - (ii) stating that, after reasonable investigation, the authorized officer is satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(7B) If:

- (a) a reproduction is made of the whole of a work (including an article contained in a periodical publication) or of a part of such a work, whether or not the part contains more than a reasonable portion of the work; and
- (b) the work from which the reproduction is made is in electronic form; and
- (c) the reproduction is supplied under subsection (2) to the officer in charge of a library;

subsection (4) does not apply in relation to the reproduction unless:

- (d) in a case where the principal purpose of the library is to provide library services for members of a Parliament—the reproduction is so supplied for the purpose of assisting a person who is a member of that Parliament in the performance of the person's duties as such a member; or
- (e) as soon as practicable after the request under subsection (1) relating to the reproduction is made, an authorized officer of the library makes a declaration:
  - (i) setting out particulars of the request (including the purpose for which the reproduction was requested); and
  - (ii) if the reproduction is of the whole, or of more than a reasonable portion, of a work other than an article—stating that, after reasonable investigation, the authorised officer is satisfied that the work cannot be obtained in electronic form within a reasonable time at an ordinary commercial price; and
  - (iii) if the reproduction is of a reasonable portion, or less than a reasonable portion, of a work other than an article—stating that, after reasonable investigation, the authorised officer is satisfied that the portion cannot be obtained in electronic form, either separately or together with a reasonable amount of other material, within a reasonable time at an ordinary commercial price; and
  - (iv) if the reproduction is of the whole or of a part of an article—stating that, after reasonable investigation, the authorised officer is satisfied that the article cannot be obtained on its own in electronic form within a reasonable time at an ordinary commercial price.

(7C) If:

- (a) a reproduction is made in electronic form by or on behalf of an authorised officer of a library of the whole of a work (including an article contained in a periodical publication) or of a part of such a work; and
- (b) the reproduction is supplied under subsection (2) to the officer in charge of another library;

subsection (4) does not apply in relation to the reproduction unless, as soon as practicable after the reproduction is supplied to the other library the reproduction

made for the purpose of the supply and held by the first-mentioned library is destroyed.

- (8) Subsection (4) does not apply to a reproduction or communication of, or of parts of, 2 or more articles that are contained in the same periodical publication and that have been requested for the same purpose unless the articles relate to the same subject matter.
- (9) In this section, a reference to a library shall be read as a reference to a library other than a library that is conducted for the profit, direct or indirect of an individual or individuals, and as including a reference to archives.
- (10) In this section:  
*supply* includes supply by way of a communication.

## **51 Reproducing and communicating unpublished works in libraries or archives**

- (1) Where, at a time more than 50 years after the expiration of the calendar year in which the author of a literary, dramatic or musical work, or of an artistic work being a photograph or engraving, died, copyright subsists in the work but:
  - (a) the work has not been published; and
  - (b) a reproduction of the work, or, in the case of a literary, dramatic or musical work, the manuscript of the work, is kept in the collection of a library or archives where it is, subject to any regulations governing that collection, open to public inspection;  
the copyright in the work is not infringed:
    - (c) by the making or communication of a reproduction of the work by a person for the purposes of research or study or with a view to publication; or
    - (d) by the making or communication of a reproduction of the work by, or on behalf of, the officer in charge of the library or archives if the reproduction is supplied (whether by way of communication or otherwise) to a person who satisfies the officer in charge of the library or archives that the person requires the reproduction for the purposes of research or study, or with a view to publication, and that the person will not use it for any other purpose.
- (2) If the manuscript, or a reproduction, of an unpublished thesis or other similar literary work is kept in a library of a university or other similar institution, or in an archives, the copyright in the thesis or other work is not infringed by the making or communication of a reproduction of the thesis or other work by or on behalf of the officer in charge of the library or archives if the reproduction is supplied (whether by communication or otherwise) to a person who satisfies an authorized officer of the library or archives that he or she requires the reproduction for the purposes of research or study.

## **51AA Reproducing and communicating works in Australian Archives**

- (1) The copyright in a work that is kept in the collection of the Australian Archives, where it is open to public inspection, is not infringed by the making or communication by, or on behalf of, the officer in charge of the Archives:
  - (a) of a single working copy of the work;
  - (b) of a single reference copy of the work for supply to the central office of the Archives;

- (c) on the written request for a reference copy of the work by an officer of the Archives in a regional office of the Archives, where the officer in charge is satisfied that a reference copy of the work has not been previously supplied to that regional office—of a single reference copy of the work for supply to that regional office;
- (d) where the officer in charge is satisfied that a reference copy of the work supplied to a regional office of the Archives is lost, damaged or destroyed and an officer of the Archives in that regional office makes a written request for a replacement copy of the work—of a single replacement copy of the work for supply to that regional office; or
- (e) where the officer in charge is satisfied that a reference copy of the work supplied to the central office of the Archives is lost, damaged or destroyed—of a single replacement copy of the work for supply to that central office.

(2) In this section:

*reference copy*, in relation to a work, means a reproduction of the work made from a working copy for supply to the central office, or to a regional office, of the Australian Archives for use by that office in providing access to the work to members of the public.

*replacement copy*, in relation to a work, means a reproduction of the work made from a working copy for the purpose of replacing a reference copy of the work that is lost, damaged or destroyed.

*working copy*, in relation to a work, means a reproduction of the work made for the purpose of enabling the Australian Archives to retain the copy and use it for making reference copies and replacement copies of the work.

## **51A Reproducing and communicating works for preservation and other purposes**

- (1) Subject to subsection (4), the copyright in a work that forms, or formed, part of the collection of a library or archives is not infringed by the making or communicating, by or on behalf of the officer in charge of the library or archives, of a reproduction of the work:
  - (a) if the work is held in manuscript form or is an original artistic work—for the purpose of preserving the manuscript or original artistic work, as the case may be, against loss or deterioration or for the purpose of research that is being, or is to be, carried out at the library or archives in which the work is held or at another library or other archives;
  - (b) if the work is held in the collection in a published form but has been damaged or has deteriorated—for the purpose of replacing the work; or
  - (c) if the work has been held in the collection in a published form but has been lost or stolen—for the purpose of replacing the work.
- (2) The copyright in a work that is held in the collection of a library or archives is not infringed by the making, by or on behalf of the officer in charge of the library or archives, of a reproduction of the work for administrative purposes.
- (3) The copyright in a work that is held in the collection of a library or archives is not infringed by the communication, by or on behalf of the officer in charge of the library or archives, of a reproduction of the work made under subsection (2)

to officers of the library or archives by making it available online to be accessed through the use of a computer terminal installed within the premises of the library or archives with the approval of the body administering the library or archives.

- (3A) The copyright in an original artistic work that is held in the collection of a library or archives is not infringed in the circumstances described in subsection (3B) by the communication, by or on behalf of the officer in charge of the library or archives, of a preservation reproduction of the work by making it available online to be accessed through the use of a computer terminal:
- (a) that is installed within the premises of the library or archives; and
  - (b) that cannot be used by a person accessing the work to make an electronic copy or a hardcopy of the reproduction, or to communicate the reproduction.
- (3B) The circumstances in which the copyright in the original artistic work is not infringed because of subsection (3A) are that either:
- (a) the work has been lost, or has deteriorated, since the preservation reproduction of the work was made; or
  - (b) the work has become so unstable that it cannot be displayed without risk of significant deterioration.
- (4) Subsection (1) does not apply in relation to a work held in published form in the collection of a library or archives unless an authorized officer of the library or archives has, after reasonable investigation, made a declaration stating that he or she is satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.
- (5) Where a reproduction of an unpublished work is made under subsection (1) by or on behalf of the officer in charge of a library or archives for the purpose of research that is being, or is to be, carried out at another library or archives, the supply or communication of the reproduction by or on behalf of the officer to the other library or archives does not, for any purpose of this Act, constitute the publication of the work.
- (6) In this section:

*preservation reproduction*, in relation to an artistic work, means a reproduction of the work made under subsection (1) for the purpose of preserving the work against loss or deterioration.

## **52 Publication of unpublished works kept in libraries or archives**

- (1) Where:
- (a) a published literary, dramatic or musical work (in this section referred to as *the new work*) incorporates the whole or a part of a work (in this section referred to as *the old work*) to which subsection 51(1) applied immediately before the new work was published;
  - (b) before the new work was published, the prescribed notice of the intended publication of the work had been given; and

- (c) immediately before the new work was published, the identity of the owner of the copyright in the old work was not known to the publishers of the new work;

then, for the purposes of this Act, the first publication of the new work, and any subsequent publication of the new work whether in the same or in an altered form, shall, in so far as it constitutes a publication of the old work, be deemed not to be an infringement of the copyright in the old work or an unauthorized publication of the old work.

- (2) The last preceding subsection does not apply to a subsequent publication of the new work incorporating a part of the old work that was not included in the first publication of the new work unless:
  - (a) subsection 51(1) would, but for this section, have applied to that part of the old work immediately before that subsequent publication;
  - (b) before that subsequent publication, the prescribed notice of the intended publication had been given; and
  - (c) immediately before that subsequent publication, the identity of the owner of the copyright in the old work was not known to the publisher of that subsequent publication.
- (3) If a work, or part of a work, has been published and, because of this section, the publication is taken not to be an infringement of the copyright in the work, the copyright in the work is not infringed by a person who, after the publication took place:
  - (a) broadcasts the work, or that part of the work; or
  - (b) electronically transmits the work, or that part of the work (other than in a broadcast) for a fee payable to the person who made the transmission; or
  - (c) performs the work, or that part of the work, in public; or
  - (d) makes a record of the work, or that part of the work.

### **53 Application of Division to illustrations accompanying articles and other works**

Where an article, thesis or literary, dramatic or musical work is accompanied by artistic works provided for the purpose of explaining or illustrating the article, thesis or other work (in this section referred to as *the illustrations*), the preceding sections of this Division apply as if:

- (a) where any of those sections provides that the copyright in the article, thesis or work is not infringed—the reference to that copyright included a reference to any copyright in the illustrations;
- (b) a reference in section 49, section 50, section 51 or 51A to a copy of the article, thesis or work included a reference to a copy of the article, thesis or work together with a copy of the illustrations;
- (c) a reference in section 49 or section 50 to a copy of a part of the article or work included a reference to a copy of that part of the article or work together with a copy of the illustrations that were provided for the purpose of explaining or illustrating that part; and
- (d) a reference in section 51A or section 52 to the doing of any act in relation to the work included a reference to the doing of that act in relation to the work together with the illustrations.

## **100A Interpretation**

In this Division, *audio-visual item* means a sound recording, a cinematograph film, a sound broadcast or a television broadcast.

## **103A Fair dealing for purpose of criticism or review**

A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of criticism or review, whether of the first-mentioned audio-visual item, another audio-visual item or a work, and a sufficient acknowledgement of the first-mentioned audio-visual item is made.

## **103B Fair dealing for purpose of reporting news**

- (1) A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if:
  - (a) it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the first-mentioned audio-visual item is made; or
  - (b) it is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.

## **103C Fair dealing for purpose of research or study**

- (1) A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item included in the item if it is for the purpose of research or study.
- (2) For the purposes of this Act, the matters to which regard shall be had in determining whether a dealing with an audio-visual item constitutes a fair dealing for the purpose of research or study include:
  - (a) the purpose and character of the dealing;
  - (b) the nature of the audio-visual item;
  - (c) the possibility of obtaining the audio-visual item within a reasonable time at an ordinary commercial price;
  - (d) the effect of the dealing upon the potential market for, or value of, the audio-visual item; and
  - (e) in a case where part only of the audio-visual item is copied—the amount and substantiality of the part copied taken in relation to the whole item.

## **104 Acts done for purposes of judicial proceeding**

A copyright subsisting by virtue of this Part is not infringed by anything done:

- (a) for the purpose of a judicial proceeding or a report of a judicial proceeding; or
- (b) for the purpose of seeking professional advice from:
  - (i) a legal practitioner; or
  - (ii) a person registered as a patent attorney under the *Patents Act 1990*; or
  - (iii) a person registered as a trade marks attorney under the *Trade Marks Act 1995*; or

- (c) for the purpose of, or in the course of, the giving of professional advice by:
  - (i) a legal practitioner; or
  - (ii) a person registered as a patent attorney under the *Patents Act 1990*; or
  - (iii) a person registered as a trade marks attorney under the *Trade Marks Act 1995*.

#### **104A Acts done by Parliamentary libraries for members of Parliament**

A copyright subsisting by virtue of this Part is not infringed by anything done, for the sole purpose of assisting a person who is a member of a Parliament in the performance of the person's duties as such a member, by an authorized officer of a library, being a library the principal purpose of which is to provide library services for members of that Parliament.

#### **104B Infringing copies made on machines installed in libraries and archives**

If:

- (a) a person makes an infringing copy of, or of part of, an audio-visual item or a published edition of a work on a machine (including a computer), being a machine installed by or with the approval of the body administering a library or archives on the premises of the library or archives, or outside those premises for the convenience of persons using the library or archives; and
- (b) there is affixed to, or in close proximity to, the machine, in a place readily visible to persons using the machine, a notice of the prescribed dimensions and in accordance with the prescribed form;

neither the body administering the library or archives, nor the officer in charge of the library or archives, is taken to have authorised the making of the infringing copy merely because the copy was made on that machine.

#### **110A Copying and communicating unpublished sound recordings and cinematograph films in libraries or archives**

Where, at a time more than 50 years after the time at which, or the expiration of the period during which, a sound recording or cinematograph film was made, copyright subsists in the sound recording or cinematograph film but:

- (a) the sound recording or cinematograph film has not been published; and
- (b) a record embodying the sound recording, or a copy of the cinematograph film, is kept in the collection of a library or archives where it is, subject to any regulations governing that collection, accessible to the public;

the copyright in the sound recording or cinematograph film and in any work or other subject-matter included in the sound recording or cinematograph film is not infringed:

- (c) by the making of a copy or the communication of the sound recording or cinematograph film by a person for the purpose of research or study or with a view to publication; or
- (d) by the making of a copy or the communication of the sound recording or cinematograph film by, or on behalf of, the officer in charge of the library or archives if the copy is supplied or communicated to a person who satisfies the officer that he or she requires the copy for the purpose of research or study, or with a view to publication and that he or she will not use it for any other purpose.

## **110B Copying and communicating sound recordings and cinematograph films for preservation and other purposes**

- (1) Subject to subsection (3), where a copy of a sound recording, being a sound recording that forms, or formed, part of the collection of a library or archives, is made by or on behalf of the officer in charge of the library or archives:
- (a) if the sound recording is held in the collection in the form of a first record—for the purpose of preserving the record against loss or deterioration or for the purpose of research that is being, or is to be, carried out at the library or archives in which the record is held or at another library or archives;
  - (b) if the sound recording is held in the collection in a published form but has been damaged or has deteriorated—for the purpose of replacing the sound recording; or
  - (c) if the sound recording has been held in the collection in a published form but has been lost or stolen—for the purpose of replacing the sound recording;

the making of the copy does not infringe copyright in the sound recording or in any work or other subject-matter included in the sound recording.

- (2) Subject to subsection (3), where a copy of a cinematograph film, being a cinematograph film that forms, or formed, part of the collection of a library or archives, is made by or on behalf of the officer in charge of the library or archives:
- (a) if the cinematograph film is held in the collection in the form of a first copy—for the purpose of preserving the copy against loss or deterioration or for the purpose of research that is being, or is to be, carried out at the library or archives in which the copy is held or at another library or archives;
  - (b) if the cinematograph film is held in the collection in a published form but has been damaged or has deteriorated—for the purpose of replacing the cinematograph film; or
  - (c) if the cinematograph film has been held in the collection in a published form but has been lost or stolen—for the purpose of replacing the cinematograph film;

the making of the copy does not infringe copyright in the cinematograph film or in any work or other subject-matter included in the cinematograph film.

- (2A) The copyright in a sound recording or cinematograph film that forms, or formed, part of the collection of a library or archives, or in any work or other subject-matter included in such a sound recording or film, is not infringed by the communication, by or on behalf of the officer in charge of the library or archives, of a copy of the sound recording or film made under subsection (1) or (2) to officers of the library or archives by making it available online to be accessed through the use of a computer terminal installed within the premises of the library or archives with the approval of the body administering the library or archives.

- (2B) If:

- (a) a copy of a sound recording or a cinematograph film is made by or on behalf of the officer in charge of a library or archives under this section; and

(b) the copy is made for the purpose of research that is being, or is to be, carried out at another library or archives;

the copyright in the sound recording or film, or in any work or other subject-matter included in it, is not infringed by the communication, by or on behalf of the officer in charge, of the copy to the other library or archives by making it available online to be accessed through the use of a computer terminal installed within the premises of the other library or archives with the approval of the body administering the other library or archives.

- (3) Subsection (1) does not apply in relation to a sound recording, and subsection (2) does not apply in relation to a cinematograph film, held in a published form in the collection of a library or archives unless an authorised officer of the library or archives has, after reasonable investigation, made a declaration stating that he or she is satisfied that a copy (not being a second-hand copy) of the sound recording or cinematograph film, as the case may be, cannot be obtained within a reasonable time at an ordinary commercial price.
- (4) Where a copy of an unpublished sound recording or an unpublished cinematograph film is made under subsection (1) or (2) by or on behalf of the officer in charge of a library or archives for the purpose of research that is being, or is to be, carried out at another library or archives, the supply or communication of the copy by or on behalf of the officer to the other library or archives does not, for any purpose of this Act, constitute the publication of the sound recording or cinematograph film or of any work or other subject-matter included in the sound recording or cinematograph film.

#### **111A Temporary copy made in the course of communication**

- (1) A copyright subsisting under this Part is not infringed by making a temporary copy of an audio-visual item as part of the technical process of making or receiving a communication.
- (2) Subsection (1) does not apply in relation to the making of a temporary copy of an audio-visual item as part of the technical process of making a communication if the making of the communication is an infringement of copyright.

### **Division 2A—Actions in relation to circumvention devices and electronic rights management information**

#### **116A Importation, manufacture etc. of circumvention device and provision etc. of circumvention service**

- (1) Subject to subsections (2), (3) and (4), this section applies if:
- (a) a work or other subject-matter is protected by a technological protection measure; and
  - (b) a person does any of the following acts without the permission of the owner or exclusive licensee of the copyright in the work or other subject-matter:
    - (i) makes a circumvention device capable of circumventing, or facilitating the circumvention of, the technological protection measure;

- (ii) sells, lets for hire, or by way of trade offers or exposes for sale or hire or otherwise promotes, advertises or markets, such a circumvention device;
  - (iii) distributes such a circumvention device for the purpose of trade, or for any other purpose that will affect prejudicially the owner of the copyright;
  - (iv) exhibits such a circumvention device in public by way of trade;
  - (v) imports such a circumvention device into Australia for the purpose of:
    - (A) selling, letting for hire, or by way of trade offering or exposing for sale or hire or otherwise promoting, advertising or marketing, the device; or
    - (B) distributing the device for the purpose of trade, or for any other purpose that will affect prejudicially the owner of the copyright; or
    - (C) exhibiting the device in public by way of trade;
  - (vi) makes such a circumvention device available online to an extent that will affect prejudicially the owner of the copyright;
  - (vii) provides, or by way of trade promotes, advertises or markets, a circumvention service capable of circumventing, or facilitating the circumvention of, the technological protection measure; and
  - (c) the person knew, or ought reasonably to have known, that the device or service would be used to circumvent, or facilitate the circumvention of, the technological protection measure.
- (2) This section does not apply in relation to anything lawfully done for the purposes of law enforcement or national security by or on behalf of:
- (a) the Commonwealth or a State or Territory; or
  - (b) an authority of the Commonwealth or of a State or Territory.
- (3) This section does not apply in relation to the supply of a circumvention device or a circumvention service to a person for use for a permitted purpose if:
- (a) the person is a qualified person; and
  - (b) the person gives the supplier before, or at the time of, the supply a declaration signed by the person:
    - (i) stating the name and address of the person; and
    - (ii) stating the basis on which the person is a qualified person; and
    - (iii) stating the name and address of the supplier of the circumvention device or circumvention service; and
    - (iv) stating that the device or service is to be used only for a permitted purpose by a qualified person; and
    - (v) identifying the permitted purpose by reference to one or more of sections 47D, 47E, 47F, 48A, 49, 50, 51A and 183 and Part VB; and
    - (vi) stating that a work or other subject-matter in relation to which the person proposes to use the device or service for a permitted purpose is not readily available to the person in a form that is not protected by a technological protection measure.

- (4) This section does not apply in relation to the making or importing of a circumvention device:
  - (a) for use only for a permitted purpose relating to a work or other subject-matter that is not readily available in a form that is not protected by a technological protection measure; or
  - (b) for the purpose of enabling a person to supply the device, or to supply a circumvention service, for use only for a permitted purpose.
- (4A) For the purposes of paragraphs (3)(b) and (4)(a), a work or other subject-matter is taken not to be readily available if it is not available in a form that lets a person do an act relating to it that is not an infringement of copyright in it as a result of section 47D, 47E, 47F, 48A, 49, 50, 51A or 183 or Part VB.
- (5) If this section applies, the owner or exclusive licensee of the copyright may bring an action against the person.
- (6) In an action under subsection (5), it must be presumed that the defendant knew, or ought reasonably to have known, that the circumvention device or service to which the action relates would be used for a purpose referred to in paragraph (1)(c) unless the defendant proves otherwise.
- (7) For the purposes of this section, a circumvention device or a circumvention service is taken to be used for a permitted purpose only if:
  - (a) the device or service is used for the purpose of doing an act comprised in the copyright in a work or other subject-matter; and
  - (b) the doing of the act is not an infringement of the copyright in the work or other subject-matter under section 47D, 47E, 47F, 48A, 49, 50, 51A or 183 or Part VB.
- (8) In this section:
 

**qualified person** means:

  - (a) a person referred to in paragraph 47D(1)(a), 47E(1)(a) or 47F(1)(a); or
  - (b) a person who is an authorized officer for the purposes of section 48A, 49, 50 or 51A; or
  - (c) a person authorised in writing by the Commonwealth or a State for the purposes of section 183; or
  - (d) a person authorised in writing by a body administering an institution (within the meaning of Part VB) to do on behalf of the body an act that is not an infringement of copyright because of that Part.

**supply** means:

  - (a) in relation to a circumvention device—sell the device, let it for hire, distribute it or make it available online; and
  - (b) in relation to a circumvention service—provide the service.
- (9) The defendant bears the burden of establishing the matters referred to in subsections (3), (4) and (4A).

## **116B Removal or alteration of electronic rights management information**

- (1) This section applies if:

- (a) a person removes or alters any electronic rights management information attached to a copy of a work or other subject-matter in which copyright subsists; and
  - (b) the person does so without the permission of the owner or exclusive licensee of the copyright; and
  - (c) the person knew, or ought reasonably to have known, that the removal or alteration would induce, enable, facilitate or conceal an infringement of the copyright in the work or other subject-matter.
- (2) If this section applies, the owner or exclusive licensee of the copyright may bring an action against the person.
- (3) In an action under subsection (2), it must be presumed that the defendant knew, or ought reasonably to have known, that the removal or alteration to which the action relates would have the effect referred to in paragraph (1)(c) unless the defendant proves otherwise.

**116C Commercial dealings etc. with works whose electronic rights management information is removed or altered**

- (1) This section applies if:
- (a) a person does any of the following acts in relation to a work or other subject-matter in which copyright subsists without the permission of the owner or exclusive licensee of the copyright:
    - (i) distributes for the purpose of trade a copy of the work or other subject-matter;
    - (ii) imports into Australia a copy of the work or other subject-matter for the purpose of trade;
    - (iii) communicates a copy of the work or other subject-matter to the public; and
  - (b) any electronic rights management information attached to the copy has been removed or altered; and
  - (c) the person knew that the electronic rights management information had been so removed or altered without the permission of the owner or exclusive licensee of the copyright; and
  - (d) the person knew, or ought reasonably to have known, that the act referred to in paragraph (a) that was done by the person would induce, enable, facilitate or conceal an infringement of the copyright in the work or other subject-matter.
- (2) If this section applies, the owner or exclusive licensee of the copyright may bring an action against the person.
- (3) In an action under subsection (2), it must be presumed that the defendant:
- (a) had the knowledge referred to in paragraph (1)(c); and
  - (b) knew, or ought reasonably to have known, that the doing of the act to which the action relates would have the effect referred to in paragraph (1)(d);
- unless the defendant proves otherwise.

### **116D Remedies in actions under sections 116A, 116B and 116C**

- (1) The relief that a court may grant in an action under section 116A, 116B or 116C includes an injunction (subject to such terms, if any, as the court thinks fit) and either damages or an account of profits.
- (2) If, in an action under section 116A, 116B or 116C, the court is satisfied that it is proper to do so, having regard to:
  - (a) the flagrancy of the defendant's actions that are the subject of the action; and
  - (b) any benefit shown to have accrued to the defendant as a result of those acts; and
  - (c) any other relevant matters;the court may, in assessing damages, award such additional damages as it considers appropriate in the circumstances.

### **183 Use of copyright material for the services of the Crown**

- (1) The copyright in a literary, dramatic, musical or artistic work or a published edition of such a work, or in a sound recording, cinematograph film, television broadcast or sound broadcast, is not infringed by the Commonwealth or a State, or by a person authorized in writing by the Commonwealth or a State, doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State.
- (2) Where the Government of the Commonwealth has made an agreement or arrangement with the Government of some other country for the supply to that country of goods required for the defence of that country:
  - (a) the doing of any act in connexion with the supply of those goods in pursuance of the agreement or arrangement; and
  - (b) the sale to any person of such of those goods as are not required for the purposes of the agreement or arrangement;shall, for the purposes of the last preceding subsection, be each deemed to be for the services of the Commonwealth.
- (3) Authority may be given under subsection (1) before or after the acts in respect of which the authority is given have been done, and may be given to a person notwithstanding that he or she has a licence granted by, or binding on, the owner of the copyright to do the acts.
- (4) Where an act comprised in a copyright has been done under subsection (1), the Commonwealth or State shall, as soon as possible, unless it appears to the Commonwealth or State that it would be contrary to the public interest to do so, inform the owner of the copyright, as prescribed, of the doing of the act and shall furnish him or her with such information as to the doing of the act as he or she from time to time reasonably requires.
- (5) Where an act comprised in a copyright has been done under subsection (1), the terms for the doing of the act are such terms as are, whether before or after the act is done, agreed between the Commonwealth or the State and the owner of the copyright or, in default of agreement, as are fixed by the Copyright Tribunal.
- (6) An agreement or licence (whether made or granted before or after the commencement of this Act) fixing the terms upon which a person other than the

Commonwealth or a State may do acts comprised in a copyright is inoperative with respect to the doing of those acts, after the commencement of this Act, under subsection (1), unless the agreement or licence has been approved by the Attorney-General of the Commonwealth or the Attorney-General of the State.

- (7) Where an article is sold and the sale is not, by virtue of subsection (1), an infringement of a copyright, the purchaser of the article, and a person claiming through him or her, is entitled to deal with the article as if the Commonwealth or State were the owner of that copyright.
- (8) An act done under subsection (1) does not constitute publication of a work or other subject-matter and shall not be taken into account in the application of any provision of this Act relating to the duration of any copyright.
- (9) Where an exclusive licence is in force in relation to any copyright, the preceding subsections of this section have effect as if any reference in those subsections to the owner of the copyright were a reference to the exclusive licensee.
- (11) The reproduction, copying or communication of the whole or a part of a work or other subject-matter for the educational purposes of an educational institution of, or under the control of, the Commonwealth, a State or the Northern Territory shall, for the purposes of this section, be deemed not to be an act done for the services of the Commonwealth, that State or the Northern Territory.

### **183A Special arrangements for copying for services of government**

- (1) Subsections 183(4) and (5) do not apply in relation to a government copy (whenever it was made) if a company is the relevant collecting society for the purposes of this Division in relation to the copy and the company has not ceased operating as that collecting society.
- (2) If subsection 183(5) does not apply to government copies made in a particular period for the services of a government, the government must pay the relevant collecting society in relation to those copies (other than excluded copies) equitable remuneration worked out for that period using a method:
  - (a) agreed on by the collecting society and the government; or
  - (b) if there is no agreement—determined by the Tribunal under section 153K.
- (3) The method of working out equitable remuneration payable to a collecting society in respect of government copies (other than excluded copies) for a period must:
  - (a) take into account the estimated number of those copies made for the services of the government during the period, being copies in relation to which the society is the relevant collecting society; and
  - (b) specify the sampling system to be used for estimating the number of copies for the purposes of paragraph (a).
- (4) The method of working out the equitable remuneration payable may provide for different treatment of different kinds or classes of government copies.
- (5) Subsections (3) and (4) apply whether the method is agreed on by the collecting society and the government or is determined by the Tribunal.
- (6) In this section:

*excluded copies* means government copies in respect of which it appears to the government concerned that it would be contrary to the public interest to disclose information about the making of the copies.

## **Appendix C - Extracts from the *Circuit Layouts Act 1989* (Cth) reprinted as at 31 May 1991**

### **Division 3 - Acts that are not infringements of EL rights**

#### **20. Innocent commercial exploitation**

- (1) The EL rights in an eligible layout are not infringed by a person who commercially exploits, or authorises the commercial exploitation of, an unauthorised integrated circuit in Australia, being a circuit made in accordance with the layout, if, at the time when the person acquired the circuit, the person did not know, and could not reasonably be expected to have known, that the circuit was unauthorised.
- (2) Where a person referred to in subsection (1) becomes aware, or could reasonably be expected to have become aware, that the integrated circuit is unauthorised, that subsection ceases to apply to any subsequent commercial exploitation of the circuit, unless the person pays to the owner or exclusive licensee of the EL rights in the layout such equitable remuneration as is agreed, or as is determined by a method agreed, between the person and the owner or exclusive licensee or, in default of agreement, as is determined by the Federal Court of Australia on application made by either of them.
- (3) In this section:  
'unauthorised', in relation to an integrated circuit made in accordance with an eligible layout, means made without the licence of the owner of the EL rights in the layout.

#### **21. Copying for private use**

- (1) The EL rights in an eligible layout are not infringed by making:
  - (a) a copy or copies of the layout; or
  - (b) an integrated circuit in accordance with the layout or with a copy of the layout; for the private use of the person who does the making.
- (2) A copy of an eligible layout, or an integrated circuit made in accordance with an eligible layout or with a copy of such a layout, shall not be taken to have been made for the private use of a person if the copy or integrated circuit, as the case may be, is commercially exploited or distributed otherwise than by way of trade to an extent that will prejudice the interests of the owner of the EL rights in the layout.

#### **22. Copying for research or teaching purposes**

The EL rights in an eligible layout are not infringed by making a copy or copies of the layout, or by making an integrated circuit in accordance with the layout or with a copy of the layout, for research or teaching purposes.

#### **23. Evaluation or analysis**

- (1) The EL rights in an eligible layout are not infringed:
  - (a) by making a copy or copies of the layout for the purpose of evaluating or analysing the layout;
  - (b) by making an original circuit layout based on an evaluation or analysis carried out with the use of a copy or copies referred to in paragraph (a);
  - (c) by making an integrated circuit in accordance with an original circuit layout referred to in paragraph (b); or

- (d) by copying or commercially exploiting in Australia an original circuit layout referred to in paragraph (b).
- (2) The EL rights in an eligible layout are not infringed:
- (a) by making an integrated circuit in accordance with the layout, or with a copy of the layout, for the purpose of evaluating or analysing the layout; or
  - (b) by making an original circuit layout based on an evaluation or analysis carried out with the use of an integrated circuit referred to in paragraph (a); or
  - (c) by making an integrated circuit in accordance with an original circuit layout referred to in paragraph (b); or
  - (d) by copying or commercially exploiting in Australia an original circuit layout referred to in paragraph (b).

#### **24. Commercial exploitation of eligible layouts previously exploited under licence**

- (1) Where:
- (a) an eligible layout is commercially exploited, whether in Australia or elsewhere, by, or with the licence of, the owner of the EL rights in the layout; and
  - (b) a person acquires a copy of the layout, or an integrated circuit made in accordance with the layout, as a result of that commercial exploitation; it is not an infringement of the EL rights in the layout if the person commercially exploits the copy or the integrated circuit in Australia.
- (2) In spite of section 37 of the Copyright Act 1968 and section 38 of that Act to the extent that section 38 applies to imported articles, where the commercial exploitation of an integrated circuit containing a copy or adaptation of a work (being an integrated circuit made in accordance with an eligible layout) is not, under this section, an infringement of the EL rights in the layout, that commercial exploitation is not an infringement of the copyright in that work unless the making of that copy or adaptation was an infringement of that copyright.
- (3) Expressions used in subsection (2) that are used and defined in the Copyright Act 1968 have the same respective meanings in that subsection as they have in that Act.

#### **25 – Use for purposes of defence or security**

- (1) An act done by the Commonwealth, or by a person authorised in writing by the Commonwealth, in relation to an eligible layout is not an infringement of the EL rights in the layout if:
- (a) the act is for the defence or security of Australia; and
  - (b) the Commonwealth, or the authorised person, as the case may be, has unsuccessfully taken all reasonable steps to obtain the licence of the owner of the EL rights, on reasonable terms, to do the act.
- (2) An authorisation may be given before or after the acts in respect of which it is given have been done.
- (3) Where an act has been done under subsection (1) in relation to an eligible layout, the Commonwealth shall as soon as practicable inform the owner of the EL rights in the layout that the act has been done and give the owner such information about the doing of the act as the owner from time to time requires, unless informing the owner or disclosing the information would, or might reasonably be expected to, cause damage to the defence or security of Australia.

- (4) Where an act has been done under subsection (1) in relation to an eligible layout, the terms for the doing of the act are such terms as are, whether before or after the act is done, agreed, or determined by a method agreed, between the Commonwealth and the owner of the EL rights or, in default of agreement, as are determined by the Federal Court of Australia on the application of either of them.
- (5) Where an article is sold and the sale is, under subsection (1), not an infringement of EL rights, the purchaser of the article, and a person claiming through the purchaser, is entitled to deal with the article as if the Commonwealth were the owner of the EL rights.
- (6) An act done under subsection (1) in relation to an eligible layout shall not be taken into account in calculating the protection period of the layout.
- (7) Where an exclusive licence is in force in relation to any EL right, this section has effect as if references to the owner of the EL right were references to the exclusive licensee.