

Appendix E

Survey of agreements conducted by the Committee

The Committee has conducted its own ad hoc survey of online and offline licence agreements. Websites and publications were selected in an effort to provide a representative sample of licences used by the suppliers and retailers of different sorts of content.

The Committee acknowledges that the survey consists of a small sample of licences which was not systematically compiled. The Committee nonetheless considers that the findings give an indication of the types of licence terms being used by various industry sectors.

Where possible, online agreements have been checked on 19 March 2002 to ensure that information given is still current.

Online licences

Software

Microsoft Passport

<<http://www.passport.com>>

Link to **Terms of use** at bottom of each page.

Microsoft Passport Terms of Use and Notices

AGREEMENT BETWEEN YOU AND MICROSOFT CORPORATION

- ‘These Terms of Use constitute a legal agreement between you and Microsoft. You must accept without modification all of the terms, conditions, and notices contained in these Terms of Use in order to access and use the Passport Services. If

you do not accept these Terms of Use in their entirety, you may not access or use the Passport Services.’ (third paragraph)

- ‘Portions of the Passport Services may be governed by posted guidelines, rules, or other terms and conditions. All such guidelines, rules, and terms and conditions are hereby incorporated by reference into these Terms of Use.’...(fourth paragraph)

MODIFICATION OF THESE TERMS OF USE

- ‘Microsoft may wish to update or change the terms, conditions and notices for the Passport Services from time to time to reflect changes in the service, changes in the laws affecting the Services, or for other good reasons. You understand that Microsoft reserves the right to make these changes and that you are responsible for regularly reviewing these terms, conditions and notices. Continued access to or use of the Passport Services after any such change shall constitute your consent to such change. Unless explicitly stated otherwise, any new features that change or improve the Passport Services shall be subject to the Terms of Use, as modified from time to time.’

PERSONAL AND NON-COMMERCIAL USE LIMITATION

- ‘You may only use the Passport Services for your own personal and non-commercial purposes. You must enter into a different legal agreement with Microsoft if you wish to offer the Passport Services to users of your own application, web site or web service. You may not use any software or hardware that reduces the number of users directly accessing or using the Passport Services (sometimes called “multiplexing” or “pooling” software or hardware).’ (first paragraph)
- ‘You may not modify, copy, distribute, transmit, display, perform, reproduce, publish, license, create derivative works from, transfer, or sell any information, software, products or services that are part of the Passport Services except as expressly provided in these Terms of Use.’ (second paragraph)

NO UNLAWFUL OR PROHIBITED USE

- ‘As a condition of your use of the Passport Services, you agree that you will not use the Passport Services for any purpose that is unlawful or contrary to these Terms of Use.’...

SOFTWARE AND CONTENT AVAILABLE ON THE PASSPORT SERVICES

- ‘All content and software (if any) that is made available to view and/or download from the Web pages that are part of the Passport Services (“Software”) is owned by and is the copyrighted work of Microsoft and/or its suppliers. Your use of the Software is governed by the terms of the license agreement, if any, that accompanies or is included with the Software (“License Agreement”). You may not install or use any Software that is accompanied by or includes a License Agreement unless you first agree to the License Agreement terms. For any Software not accompanied by a license agreement, Microsoft hereby grants to you, the user, a personal, non-transferable license to use the Software for viewing and otherwise using the Passport Services in accordance with these Terms of Use, and for no other purpose provided that you keep intact all copyright and other proprietary notices. All Software is owned by Microsoft and/or its suppliers and is protected by copyright laws and international treaty provisions. Any reproduction or redistribution of the Software is expressly prohibited by law, and may result in severe civil and criminal penalties. Violators will be prosecuted to the maximum extent possible. WITHOUT LIMITING THE FOREGOING, COPYING OR REPRODUCTION OF THE SOFTWARE TO ANY OTHER SERVER OR LOCATION FOR FURTHER REPRODUCTION OR REDISTRIBUTION IS EXPRESSLY PROHIBITED. THE SOFTWARE IS WARRANTED, IF AT ALL, ONLY ACCORDING TO THE TERMS OF THE LICENSE AGREEMENT.’...

LIABILITY DISCLAIMER

- ‘MICROSOFT AND/OR ITS RESPECTIVE SUPPLIERS MAKE NO REPRESENTATIONS ABOUT THE SUITABILITY, RELIABILITY, AVAILABILITY, TIMELINESS, AND ACCURACY OF THE INFORMATION, SOFTWARE, PRODUCTS, SERVICES AND RELATED GRAPHICS CONTAINED ON OR OBTAINED THROUGH THE PASSPORT SERVICES FOR ANY PURPOSE.’...(first paragraph).

TERMINATION/ACCESS RESTRICTION

- ‘Microsoft reserves the right, in its sole discretion, to terminate your access to the Passport Services or any portion thereof at any time, without notice.’ (first paragraph).

GENERAL

- ‘These Terms of Use are governed by the laws of the State of Washington, U.S.A. You hereby irrevocably consent to the exclusive jurisdiction and venue of courts in King County, Washington, U.S.A. in all disputes arising out of or relating to the use of the Passport Services.’...(first paragraph).

Adobe

<<http://www.adobe.com>>

Link to **Terms of Use** at bottom of each page.

terms of use

For use of Adobe online services

ACCEPTANCE OF TERMS

- **‘By accessing or using this Site in any way, including, without limitation, use of any of the Services, downloading of any Materials, or merely browsing the Site, you agree to and are bound by the Terms of Use.’** (second paragraph)
- ‘Adobe reserves the right to change the Terms of Use and other guidelines or rules posted on the Site from time to time at its sole discretion, and will provide notice of material changes on the home page of the Site. Your continued use of the Site, or any Materials or Services accessible through it, after such notice has been posted constitutes your acceptance of the changes. Your use of the Site will be subject to the most current version of the Terms of Use, rules and guidelines posted on the Site at the time of such use. You should periodically check the “Terms of Use” link on the Site’s home page to view the then current terms. If you breach any of the Terms of Use, your authorization to use this Site automatically terminates, and any Materials downloaded or printed from the Site in violation of the Terms of Use must be immediately destroyed.’ (third paragraph)

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That’s Edutainment

(Educational software sales).

<<http://www.cia.com.au/edutain>>

On page where order is placed, request to ‘take a moment to read the **Terms and Conditions of Sale** [link] page.’ Terms do not cover copyright or possible end-user agreements.

Rising Software

(Software sales).

<<http://www.rising.com.au>>

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City Software

(Software sales).

<<http://www.citysoftware.com.au>>

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Adelaide Business Software

(Software sales and development).

<<http://www.abspos.net>>

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Borland

(Software enterprise solutions).

<<http://www.borland.com>>

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Governing Law and Forum

- [Choice of law and forum: California].

Films, DVDs, videos, CDs and books.

Disney Enterprises

<<http://www.disney.com>>

Link to **terms of use** at bottom of each page.

Terms of Use

RESTRICTIONS ON USE OF MATERIALS

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You may not redistribute, sell, de-compile, reverse engineer, disassemble, or otherwise reduce the Software to a human-readable form.’ (second paragraph)

GENERAL PROVISIONS

- [Choice of law and forum: California]...‘This is the entire agreement between us relating to the subject matter herein and shall not be modified except in writing, signed by both parties.’

Greater Union (Australia)

(Movie information, special offers etc.).

<<http://www.greaterunion.com.au>>

On registration page (to become eligible for competitions, etc.), user must fill in personal details and click in a box stating ‘I agree with the **Terms and Conditions**’ [link] before registering. Terms and Conditions pop up in a separate box and cannot be printed:

Terms & Conditions

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 - modify the material on this web site;

- resell the material on this website; or
- create derivative works from the material on this web site.’ (first paragraph)
- ‘We may withdraw this permission at any time without notice to you.’... (second paragraph)

GENERAL

Common Law Duty of Care:

- ‘We do not assume any common law duty of care towards you in providing the information on this website.’

Disputes:

- [Choice of law and forum: New South Wales].

Wired Entertainment.com

(DRM services for music and entertainment).

<<http://www.wiredrecords.com>>

Link to **terms & conditions** at bottom of each page.

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- [Choice of law: Australia, including federal and State legislation].

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Netflix

(US, and unavailable to Australians; DVD rental subscription service).

<<http://www.netflix.com>>

Link to **Terms of Use** at bottom of each page, in dark grey type on black background (particularly hard to make out); then blue on white type at bottom of last page for registration.

Netflix Standard Terms and Conditions

- ‘YOU AGREE TO BE BOUND BY THE NETFLIX.COM. TERMS AND CONDITIONS by using the Netflix.com Web Site.’ (first paragraph)
- [Choice of law: California]. (third paragraph)

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Blockbuster

(US online video rental reservation and chat-room service).

<<http://www.blockbuster.com>>

Link to **Terms and Conditions** at bottom of each page.

TERMS AND CONDITIONS

RELIANCE ON INFORMATION

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- [choice of law and forum: Texas]. (third paragraph)

Ezy Retail

(Video Ezy DVD, video, games and music vendor).

<<http://www.ezyretail.com.au>>

Link to **Terms & Conditions** at bottom of each page.

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8. APPLICABLE LAW

- [choice of law: Victoria].

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(UK; VHS and DVD services).

<<http://www.blackstar.co.uk>>

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- ‘Price and availability information is subject to change without notice.’ (third paragraph)

Governing Law :

- [Choice of law: Northern Ireland].

Ezydvd

(DVD sales)

<<http://www.ezydvd.com.au>>

No terms or conditions locatable or presented prior to page where personal details are required to be entered before the ordering. Printable order form does not contain terms or conditions or copyright notice.

CDNow

(CD music and services).

<<http://www.cdnow.com>>

Link to **Terms and Conditions** at bottom of each page.

Terms and Conditions appear approximately halfway through 'Policies'.

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5. Termination:

- ‘You or we may suspend or terminate your account or your use of this Site at any time, for any reason or for no reason at all.’...

16. Choice of Law; Venue

- [Choice of law and forum: Pennsylvania, US].

Amazon.com

<<http://www.amazon.com>>

Link to **Conditions of use** at bottom of each page.

Conditions of Use

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APPLICABLE LAW

- [Choice of law: Washington].

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SITE POLICIES, MODIFICATION, AND SEVERABILITY

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EBooks.com

(Sells e-books which are downloadable from the site).

<<http://www.ebooks.com>>

Link to **terms of use and licenses** at bottom of each page. Page headed Terms of Use and Licenses has separate links to **Terms of Use**, **Customer License**, **Purchase License** and **Affiliate Terms of Use**.

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Miscellaneous:

- [choice of law and (non-exclusive) forum: Western Australia].

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VIII APPLICABLE LAW

- [choice of law and forum: New York].

Project Gutenberg (Australia)

<<http://www.gutenberg.net.au>>

(allows free downloading of books in the public domain).

No Link to terms and conditions on individual pages.

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(US online medical/scientific journal).

<<http://www.sciencedirect.com/web-editions>>

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Lexis Nexis - Butterworths

<<http://www.lexisnexis.com.au>>

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January 1, 2002

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National Gallery of Australia

<<http://www.nga.gov.au>>

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<<http://www.guggenheim.org>>

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News/current affairs

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11. MISCELLANEOUS

- 11.1 [Choice of law and forum: New York].

Ninemsn

(Channel nine website).

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Miscellaneous

- [Choice of law and (non-exclusive) forum: New South Wales].

Sydney Morning Herald

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Yale University Library

Electronic Resource Licences

<<http://www.library.yale.edu/journals/licensing.html>>

This website sets out, in alphabetical order, the licence agreements used by the University and presents key information in table form. Below is a summarised version of some of this information for the first ninety-two agreements. The summary represents information available on the site in mid 2001. The first thirty agreements shown on the site as at 28 January 2002 indicate that the summary is likely to remain generally accurate. Information was incomplete for some licences, meaning that total licences will not always add to ninety-two for each category. Note that the categories were not defined by the site.

Copying

77 licences allowed material to be copied.

8 licences did not allow material to be copied.

7 licence allowed material to be copied with restrictions.

Downloading

73 licences allowed material to be downloaded.

6 licences did not allow material to be downloaded.

13 licences allowed material to be downloaded with restrictions.

Inter-library loans

22 licences allowed material to be used for inter-library loans.

32 licences did not allow material to be used for inter-library loans.

37 licences allowed material to be used for inter-library loans with certain restrictions (eg, material could only be sent in print format).

Limited sharing for scholarly purposes

51 licences allowed limited sharing of material for scholarly purposes.

38 licences did not allow limited sharing of material for scholarly purposes.

2 licences allowed limited sharing of material for scholarly purposes with additional restrictions.

Printing

80 licences allowed material to be printed.

3 licences did not allow material to be printed.

8 licences allowed material to be printed with restrictions.

Use by walk-ins

80 licences allowed walk-in users to access material.

6 licences did not allow walk-in users to access material.

1 licence allowed walk-in users to access material in certain situations.

These licences were formed with a US library and under that jurisdiction's laws. It is nevertheless interesting to note the types of use allowed, having particular regard to the concerns raised by Australian libraries in the submissions and concerns raised by various academics about the burgeoning access right.

Between ten percent and twenty percent of the licences examined placed limitations on copying, downloading or printing material. This would present problems for the library's ability to keep archival copies. It would also mean that in many cases, the total value of the contract (namely, access to material already paid for) would cease as soon as payment of subscription fees ceased. It would seem that libraries are beginning to enjoy an access right rather than the rights traditionally recognised by copyright.

The figures also reflect the concerns raised in the submissions by Australian libraries regarding restrictions placed on inter-library loans. This may have significant effect for Australian libraries, as much of the electronic copyright material licensed here originates in the US. It may have further effect if Australian copyright material providers model their licences on those commonly used in the US.

Although 'limited sharing for scholarly purposes' is not an exception recognised at copyright law in either Australia or the US, many licences recognise and allow it. This is a good example of the licence/mass-market agreement model being more responsive and better adapted to licensee/user wishes than the law.

Some licences prohibited use by walk-in users (ie, the general public not belonging to or associated with the institution). Australian libraries raised concerns about the effect this type of prohibition may have on the free flow of information and the growing tendency towards licensing an access right.

Other

OzNetlaw

(Australia; Communications Law Centre Internet legal practice)

<<http://www.oznetlaw.net.au>>

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Macquarie Dictionary

2nd edn. Macquarie University NSW: Macquarie University NSW, 1991.

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Times Atlas of the World

7th edn. London: Times Books Limited, 1985.

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Fowlers Modern English Usage

HW Fowler

2nd edn. Oxford: Oxford University Press, 1965.

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Equity and Trusts.

Dal Pont GE, Chalmers DRC, Maxton JK.

Sydney: LBC Information Services, 1997.

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Treaties and Alliances of the World

Rengger N.

5th edn. Essex UK: Longman Group UK Limited, 1990.

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International Law

Shaw MN.

4th edn. Cambridge: Cambridge University Press, 1997.

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Amnesty International Report 2001

London: Amnesty International Publications, 2001.

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The Political High Court

Solomon D.

St Leonards NSW: Allen and Unwin, 1999 and

The Struggle for Aboriginal Rights

Attwood B, Markus A

9 Atchison St NSW: Allen and Unwin, 1999

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Historical Foundations of the Common Law (1981)

Milsom SFC

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The Cauldron of Constitutional Change

Coper M and Williams G.

Centre for International and Public Law, Australian National University, 1997.

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Law for Social Welfare Workers

White M.

Sydney: Allen and Unwin for the Law Foundation of NSW, 1983.

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Regulating Privacy

Bennett C.

Ithaca: Cornell University Press, 1992.

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FOI: How to Use the Freedom of Information Laws

Chadwick P.

Melbourne: The Age and the MacMillan Company of Australia, 1985.

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Parliamentary Privilege in Australia

Campbell E

Carlton, Vic: Melbourne University Press, 1966.

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Journals

Journal of Contract Law (Vol. 17 No. 2 June 2001)

Chatswood NSW: Butterworths

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Human Rights Law and Practice (July 2001)

New Zealand: Brookers Ltd, 2001.

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Other

Symantec Ghost 7.0 Enterprise Trialware

(Computer program).

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Nokia 6210 CD-ROM

(Mobile phone end-user software agreement on CD-ROM accompanying phone).
(last reviewed on 31/07/01).

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- Agreement refers to copyright laws and international treaties.
- Choice of law: Finland; and arbitration clause. Acknowledges that the laws of other jurisdictions might affect the application of the disclaimer.

Sniffer Pro 4.6

(Trial CD-ROM accompanying magazine)

Written on disk:

'Installing this software constitutes your acceptance of the terms and conditions of the licence agreement. Please read the license before installation. Other rules and regulations of installing this software are:

- (a) The product can not be rented, loaned, or leased - you are the sole owner of this product.
- (b) The customer shall not disclose the results of any benchmark test to any third party without Network Associates prior written approval.
- (c) The customer will not publish reviews of this product without prior consent from Network Associates.'

In addition to the licences referred to above, the Committee has considered various other licences which were brought to its attention on a confidential basis. A number of examples of licences were also provided by submitters, as discussed in Chapter 4.