

Chapter Four

What is happening

Introduction

4.01 A major element of the Committee's terms of reference is to gather information about what is happening. That is, whether contracts purporting to exclude or modify the copyright exceptions are being used, and whether there is any difference between what is happening 'offline' compared with what is happening 'online'.³³⁶ This Chapter addresses these issues.

4.02 The Committee is aware that there has been a lot of academic writing about the impact of digital technology on the traditional copyright balance, particularly in terms of the ability of end-users to access copyright material. In Part I of this Chapter, the Committee surveys some of the literature, in order to arrive at an understanding of the theoretical debate around these issues.

4.03 In Part II of this Chapter the Committee discusses evidence of what is happening submitted to it by stakeholders. It also outlines its own research in relation to whether online and offline trade in copyright works and other subject matter is subject to contracts which purport to exclude or modify the copyright exceptions and the extent to which this is happening.

Part I: The nature of the new communications environment

4.04 It has frequently been observed that the nature and use of copyright material in the digital environment differs markedly from practices in the offline world.³³⁷ Digital material can be accessed almost instantaneously from anywhere at any time

³³⁶ The Committee notes that the term 'online' can be misleading as some digital media, such as CD-ROMs, are not 'online'.

³³⁷ Lindsay D. A comparative analysis of the law relating to technological protection measures. Paper delivered to the 10th Biennial Copyright Law and Practice Symposium, Sydney, 22 November 2001 (unpublished):1–25, 3–4.

and it is easier to create, access and disseminate copyright material.³³⁸ The quality of digital reproductions is also superior to analogue copies and it is now possible for individuals to produce and/or make an unlimited number of perfect copies of digital material at little marginal cost compared to the relatively high distribution costs experienced in the analogue environment.³³⁹

4.05 Commentators observe that digitisation provides new opportunities for holders of copyright and related rights (ie, new forms of content, new markets, and new distribution channels).³⁴⁰ However, digitisation is also seen to present challenges and risks for both copyright owners and consumers.³⁴¹ The Committee has found that commentators frequently remark that the digital environment is faced with a new challenge in providing copyright owners with the same level of protection against unauthorised use of their work as in the analogue environment, while protecting the interests of users in light of their fears that copyright owners' responses to these perceived risks could lead to a 'digital lockup'.³⁴² This new ability to access material brings about a greatly increased scope to access information. The Committee notes that the literature refers to this phenomenon as the 'digital dilemma'.³⁴³

New forms and uses of material

4.06 Literature surveyed by the Committee commonly notes that digital technology removes the physical constraints on accessing material that previously existed in the analogue environment, thereby reducing the costs of copying and distributing material in a tangible form.³⁴⁴ The Committee is aware, both from its own experience and literature it has read, that digitisation of copyright material has given rise to a potentially huge market for content, in so far as it has increased the

³³⁸ Vinje T. Copyright imperilled? *E.I.P.R.* 2001;4:192–207, 196.

³³⁹ McDonald I. Copyright in the new communications environment: balancing protection and access. Sydney: Centre for Copyright Studies, 1999:1-16, 11; Commission of the European Communities. Digital rights background, systems, assessment. Brussels: Commission of the European Communities, 2002;1–23, 7; and Lindsay, *op. cit.*, p. 3.

³⁴⁰ Commission of the European Communities, *ibid.*, p. 6; and McDonald, *ibid.*, pp. 8–12.

³⁴¹ *ibid.*

³⁴² Bygrave LA. The technologisation of copyright: implications for privacy and related interests. *E.I.P.R.* 2002;24(2):51–7, 52.

³⁴³ *ibid.*; and Lindsay, *op. cit.*, pp. 4–6.

³⁴⁴ Lindsay, *ibid.*, p. 3.

variety of forms of content and variety in the way content can be delivered to meet the specific needs of consumers.³⁴⁵ Commentators also suggest that as the new ability to access material has removed the need for intermediaries, it is common practice for copyright owners to directly transact with consumers via contracts, licences and other transactional arrangements.³⁴⁶

4.07 It is commonly argued that transaction costs and the market price for copyright works are lowered on a per unit basis as a consequence of the changes in the role of traditional intermediaries.³⁴⁷ However, the Committee notes alternative arguments indicating that digital technology has enabled greater differentiation in available uses of copyright work which has led to new ways of publishing, distributing and marketing digitised material and opportunities for economic returns.³⁴⁸ Other literature suggests that copyright owners and users can potentially benefit from this increased granularity in copyright content, particularly as specific content can be delivered in ways which meet the particular needs of individuals which were previously unavailable.³⁴⁹ For example, a licence or other transactional agreement may indicate that a particular video can be played for a maximum of 10 times in any semester for a \$10 fee, rather than require an individual to purchase the whole video which is priced to reflect the potential for the work to be used multiple times.³⁵⁰ The specific constraints on the number of times an item can be used as well as time constraints on the period of usage provide further granularity in the content of the material.³⁵¹

New markets

4.08 The Committee is alert to the fact that there is considerable debate about the desirability of allowing copyright owners to capitalise on all potential uses of

³⁴⁵ Vinje, *op. cit.*, pp. 194–5.

³⁴⁶ McDonald, 1999, *op. cit.*, pp. 8–9.

³⁴⁷ Heide suggests that intermediaries traditionally authorised access by requiring payment for copyright material: Heide T. Copyright in the E.U and United States: what “access right”? *E.I.P.R.* 2001;10:469–77, 473; and Commission of the European Communities, *op. cit.*, p. 7.

³⁴⁸ Vinje, *op. cit.*, p. 195; and McDonald, 1999, *op. cit.*, pp. 9–12.

³⁴⁹ Koelman KJ. A hard nut to crack: the protection of technological measures. *E.I.P.R.* 2000;6:272–88, 276.

³⁵⁰ Iannella R. Digital rights management (DRM) architectures, <<http://www.dlib.org/dlib/june01/iannella/06iannella.html>>, 7.

³⁵¹ *ibid.*

digital copyright material. The Committee observes that the digital environment has led to changes in what is a ‘normal exploitation’ of a work, particularly as digitisation is contributing to provide greater differentiation in material; the uses that can be made of copyright material; and opportunities for claiming remuneration.³⁵² For example, ‘pay as you go’ models of content distribution allow end-users to electronically contract with a copyright owner to use a computer program for a certain period of time rather than purchase the whole program.³⁵³ In contrast, the Committee acknowledges that there are practical constraints on reading in certain circumstances, such as restrictions on borrowing books from libraries.

4.09 There are indications in the literature the Committee has looked at that some copyright owners are developing new business models to capitalise on new markets created by new forms of digital material, such as the development of online ebook stores:³⁵⁴

‘OzAuthors is a service, provided by the Australian Society of Authors in a joint venture with IPR systems. Their goal is to provide an easy way for Society members (including Authors and Publishers) to provided content (ebooks) to the market place at low cost and with maximum royalties to content owners.’³⁵⁵

Other forms of business models consist of bundling additional services with content (eg, information, technical information/user manuals, and ‘plug-ins’ to adapt and update content).³⁵⁶

4.10 The Committee notes that at the Consultative Forum, on 4 October 2001, the Australian Digital Alliance (ADA) argued that payment for library services supports a market for e-commerce digital publishing which was previously unavailable. For example, partnership deals exist to enable libraries to use the National Library of Australia’s (NLA) articles index to create online subject-based indexes. The point was also raised by the Copyright Agency Limited (CAL) that fee-paying services such as

³⁵² McDonald 1999, op. cit., pp. 9–10; and Ginsburg JC. Copyright and control over new technologies of dissemination. *Colum. L. R.* 2001;101:1613–47, 1632.

³⁵³ Ginsburg, *ibid.*; and Koelman, 2000, op. cit., p. 276.

³⁵⁴ Ginsburg, *ibid.*

³⁵⁵ Iannella, op. cit., p. 8; and McDonald, op. cit., p. 10.

³⁵⁶ Commission of the European Communities, op. cit., p. 16.

APAIS, AGIS and the Meditext services operate as an alternative to the traditional services, and that libraries still have the option to use traditional services to assist in copying under the library exceptions.³⁵⁷

4.11 Similarly, there is currently a major debate about the future of scholarly communication. In particular, the Open Access Initiative (OAI)³⁵⁸ provides an alternative business model, which if implemented could clearly change returns in this area of publishing. This is the latest development in this area. Under this initiative, authors place pre-prints of their academic articles onto online institutional or disciplinary archives and then later archive the published work (provided that the publisher has consented in the latter case).³⁵⁹ While the OAI reduces the costs associated with traditional forms of dissemination, such as journal subscriptions, commentators note that the movement does require authors to arrange for their peer-reviewed articles being made available online as pre-prints prior to their release in published form.³⁶⁰

New means of remunerating copyright owners

4.12 The Committee notes that a considerable amount of the literature focuses on copyright owners' arguments that reading online material may well involve an exercise of the copyright owner's right of reproduction. Some literature suggests that in the online environment, reproduction (which is potentially remunerable) occurs both with gaining initial access (such as viewing a web-page) and repeated acts of access (such as copying and downloading material from the web).³⁶¹ A leading commentator has argued that 'every act of perception or of materialisation of a digital

³⁵⁷ CLRC Consultative Forum, 4 October 2001.

³⁵⁸ <<http://www.soros.org/openaccess>>.

³⁵⁹ The Committee notes that, even if a publisher denies permission for the published, postprint version of the work to be archived, the preprint can still remain in the open access archive as it is a different work from the postprint and as the author never transferred the copyright on the preprint. Similarly, the author may also post to the archive a list of corrigenda, or differences between the preprints and postprints, which provides users with the equivalent of free access to the postprint: see, <<http://www.earlham.edu/~peters/fos/boaifaq.htm>>

³⁶⁰ *ibid.*

³⁶¹ Vinje, *op. cit.*, p. 196.

copy requires a prior act of access'.³⁶² It is also suggested that the debate is complicated by the fact that, unlike with a book, the Internet user's personal computer must make a Random Access Memory (RAM) or cache copy of the HTML and URLs in order to display the material.³⁶³ Therefore, this act of accessing digital material raises the issue of whether there has been a substantial reproduction of the work for which the copyright owner should be remunerated.³⁶⁴

4.13 The issue about whether material is reproduced by accessing it online is less controversial when the exercise of this right is clear, such as when electronic material is downloaded from the Internet. However, in Australia it is unclear whether the act of viewing or accessing digital material online involves a substantial reproduction of the material.³⁶⁵ It may be argued that an implied licence ought to exist to browse or access websites, particularly as they cannot be viewed until they are accessed.

4.14 Section 31(1)(a)(i) of the Act allows the copyright owner to reproduce a work in material form and this right is infringed when a substantial part of a work is reproduced. In 1984, amendments to the definition of 'material form' in s. 10(1) of the Act ensured that the new definition accommodated various forms of digital storage. 'Material form' was stated to include 'such methods as storage or reproduction on magnetic tape, read only or random access computer memory, magnetic or laser disks, bubble memories and other forms of storage'.³⁶⁶ Following this amendment, cases have considered whether the act of accessing material online substantially reproduces, in the computer's RAM, the material embodied in the computer program. *Microsoft v Business Boost*³⁶⁷ held that loading material into a computer's RAM was a reproduction of a substantial part of the computer program.³⁶⁸ The court found that as the reproduction had a degree of permanence, it therefore amounted to a reproduction:

³⁶² Ginsburg J. From having copies to experiencing works: the development of an access right in U.S. copyright law. Columbia Law School Public Law & Legal Theory Working Paper Group, paper number 8, 2000;1–17, 2, <http://papers.ssrn.com/paper.taf?abstract_id=222493>.

³⁶³ Litman J. Digital copyright. New York: Prometheus Books, 2001, 26–8.

³⁶⁴ *ibid.*, pp. 26–8, 91–2; and McDonald, *op. cit.*, p. 10.

³⁶⁵ *Microsoft v Business Boost* (2000) 49 IPR 573 and *Australian Video Retailers Association Ltd v Warner Home Video Ltd* (2001) 53 IPR 242. These cases are discussed at paras 4.14–15, below.

³⁶⁶ Explanatory Memorandum, *Copyright Amendment Bill 1984*, para. 28.

³⁶⁷ (2000) 49 IPR 573 per Tamberlin J.

³⁶⁸ *ibid.*, at 574.

‘In relation to RAM, it is possible for a computer program to remain stored in RAM indefinitely until the computer system is shut down or otherwise powered down. Accordingly, in my opinion, it follows from this evidence that the period of time during which the instructions or data are stored in RAM can be substantial. For example, it is not infrequently the case that computers are left on for a considerable period of time with one or more programs running. The RAM storage continues over this period. The fact that memory is vacated when power is extinguished does not necessarily mean that there has not been a substantial period of storage of the instructions and data comprised in the RAM memory.’³⁶⁹

4.15 In contrast, Emmett J in the recent Federal Court decision of *Australian Video Retailers Association Ltd v Warner Home Video Ltd*,³⁷⁰ held that the playing of a Digital Video Disc/Digital Versatile Disc (DVD) in a DVD player or personal computer does not involve the making of a copy of the whole or a substantial part of the film embodied in the DVD in breach of copyright in the film.³⁷¹ Emmett J held that as the content of the disc was temporarily stored for the purpose of displaying the motion picture only and involved the storage at any given moment of only a tiny fraction of the visual images and sounds that comprised the cinematograph film, this did not amount to the copying of the whole or a substantial part of the motion picture or film embodied in the disc.³⁷² Although the decision is limited to the particular technology of DVDs, Emmett J alluded to the theoretical difficulty in providing a conclusive guide to determine the issue of accessing and reproducing material online:

‘The definition inserted in 1984 makes clear that “*material form*” includes a form of storage that is not visible, such as ROM or RAM. Whether or not there will be a reproduction of a computer program in material form, as that concept is extended by the definition, will depend on the particular circumstances. That will entail an examination of the particular device whose RAM is under consideration.’³⁷³

4.16 In contrast to the legal uncertainty surrounding the copyright implications of accessing online material, the Committee notes the argument raised by copyright owners that online viewing should be remunerable if it becomes a primary use of

³⁶⁹ *ibid.*, at 576.

³⁷⁰ (2001) 53 IPR 242.

³⁷¹ *ibid.*, at 255.

³⁷² *ibid.*, at 250. However, Emmett J highlighted that as a DVD is capable of being modified to study or use the RAM for the purpose of reproducing its contents, in cases such as this, there would be a substantial reproduction of the computer program in breach of copyright (at 262).

³⁷³ *ibid.*

copyright material.³⁷⁴ The Committee observes that overseas courts have also been inclined to find that markets created by new forms of copying form part of the copyright owner's right to control, even when the copyright owner's own exploitation of those markets may not be fully developed and even when the defendant's encroachment may seem modest.³⁷⁵ However, re-reading and referring to print copyright material once acquired has not traditionally been remunerable.³⁷⁶ The Committee notes that user interests commonly argue that the fact that such activity has become electronically mediated should not be over-emphasised as a reason to invent a further economic right for copyright owners.³⁷⁷

New practices in the digital environment

New ways of controlling infringement

4.17 The Committee is also aware that commentators suggest that the digital environment detracts from the ability both to access and to protect copyright material.³⁷⁸ The Committee's deliberations during the course of this reference would certainly confirm this view. As discussed in Chapter 3, amendments have been made to update copyright law to accommodate the new digital environment, including the introduction of a new right to communicate to the public. However, the Committee is aware that commentators have observed that copyright owners are also resorting to alternative measures to control access to and use of their material, particularly as the use of such technology has increased the ability to trace, monitor and control the

³⁷⁴ Litman notes that the Lehman Working Group in the United States argues that 'copyright does, and should, assure the right to control each of those reproductions to the copyright owner' (Litman, 2001, op. cit., p. 92). See also, McDonald, 1999, op. cit., p. 11.

³⁷⁵ In *Los Angeles Times v. Free Republic* 54 U.S.P.Q.2d (BNA) 1453 (C.D. Cal. 2000) the District Court for the Central District of California awarded a preliminary injunction against the unauthorised systematic copying and posting of articles from the Los Angeles Times and other newspapers to the free-access website of the Free Republic. In considering the defendant's claim to fair use of the material, the court raised the point that the defendant's activities affected a market which the plaintiffs sought to exploit: see, Ginsburg, 2001, op. cit., 1637.

³⁷⁶ Commission of the European Communities, op. cit., p. 13; and McDonald, 1999, op. cit., p. 10.

³⁷⁷ McDonald, *ibid.*, pp. 10–11. See discussion in para. 4.48, below, regarding an 'access right'.

³⁷⁸ Lindsay, op. cit., pp. 3–4; and Commission of the European Communities, op. cit., p. 7.

dissemination and use of material.³⁷⁹ These measures include the use of access control technologies, including technological protection measures (TPMs) and copy control measures, such as Digital Rights Management Systems (DRMS). These are discussed in detail below (paras 4.22–35).

Use of technological protection measures

4.18 The WCT established several benchmarks for copyright law in the digital environment, including a direction that signatories provide legal protection and effective legal remedies against the circumvention of technological measures used by copyright owners to protect their material.³⁸⁰ Article 11 of the WCT states:

‘Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law.’

4.19 Although it has yet to accede to the WCT, Australia introduced anti-circumvention provisions under s. 116A of the Copyright Act.³⁸¹ The Committee notes that at the time of introducing these provisions, the Australian Government indicated that these measures were designed to overcome the difficulty in effectively policing the use of information in the digital environment.³⁸² Commentary also suggests that many copyright owners believe that the key to controlling copying in the digital environment lies in ‘technical systems of protection’.³⁸³

4.20 The Committee notes that TPMs are often referred to as ‘self-help’ mechanisms, which include a variety of software and hardware-based mechanisms that ensure access to the subject matter they protect is authorised by the rights owner.³⁸⁴

³⁷⁹ Vinje, *op. cit.*, p. 198; and Heide T. The approach to innovation under the proposed Copyright Directive: time for mandatory exceptions? *I.P.Q.* 2000;3:215–32, 221.

³⁸⁰ Coco M. Anti-circumvention: the new song and dance routine. *AIPJ* 2001;12:199–210, 200.

³⁸¹ The anti-circumvention measures are discussed in paras 3.127–9. Implementation in Europe and the US is discussed in Chapter 6.

³⁸² Coco, *op. cit.*, p. 204.

³⁸³ Vinje, *op. cit.*, p. 196.

³⁸⁴ Coco, *op. cit.*, p. 200.

Under the Copyright Act, a TPM consists of a device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject-matter (s. 10(1)). These measures are able to restrict access to and use of a work to authorised users only, through the provision of:

- access codes or processes (including decryption, unscrambling or other transformation of the work material); and
- copy control measures.³⁸⁵

The Committee observes that some technical protection systems are not new (such as the use of hardware dongles to limit the use of a computer program to a single computer),³⁸⁶ while other powerful encryption-based systems are being rapidly deployed.³⁸⁷

4.21 Commentators make the point that DRMS include the use of technology to describe and identify digital content protected by intellectual property rights, and to control the use of copyright material.³⁸⁸ Other commentary discusses the use of alternative contract-based transactional arrangements, such as online licences either separately or in combination with technological measures.³⁸⁹ It is with such transactional arrangements that this reference is concerned.

Control of initial access

4.22 The Committee notes that initial access to material in the digital environment is being increasingly controlled.³⁹⁰ Commentators observe that this control includes either control over access to a service or control over access to a work itself.³⁹¹ Access

³⁸⁵ Coco, *ibid.*; and Vinje, *op. cit.*, p. 197.

³⁸⁶ See, *Autodesk Inc v Dyason* (1992) 173 CLR 330.

³⁸⁷ Vinje, *op. cit.*, p. 196.

³⁸⁸ Commission of the European Communities, *op. cit.*, p. 6.

³⁸⁹ Heide, 2001, *op. cit.*, p. 473; and Vinje, *op. cit.*, p. 194. The CLRC's experience also indicates the prominence of alternative contract-based transactional arrangements to manage use of copyright material.

³⁹⁰ Koelman, 2000, *op. cit.*, p. 276.

³⁹¹ Vinje, *op. cit.*, pp. 196–7.

control measures protect a service and control who may use that service.³⁹² The Committee notes that some commentators argue that measures controlling initial access are necessary to overcome large scale infringement of copyright.³⁹³ Other commentators make the point that there is now a far greater ability to control access than in the analogue world.³⁹⁴ However, other commentators suggest that in the analogue world access control was effected by either market failure (such as, out-of-print books) or by property law, such as in the case of theatres restricting access to fee-paying patrons only.³⁹⁵

4.23 In relation to a service, access can be controlled as follows:

- control at the online outlet, such as, at the website of an information provider. Password protection may control access to the site and payment may be required to enter the site.
- control at the receiver-end, such as, through the use of a decoder or set-top box operating in the user's private sphere. It is noted that such measures can be regarded as protecting a service (eg, pay TV) as well as the content provided by the service.³⁹⁶

Control of copying

4.24 Commentators note that copy control measures prevent users from making copies of digital material, thereby protecting the content of a service or the material.³⁹⁷ As the copyright owner is able to control not only initial access but also each act of access or consultation, even of a purchased or downloaded copy, it has been observed that digital material is often consumed on a pay-per-use basis rather than a pay-per-

³⁹² *ibid.*

³⁹³ Coco, *op. cit.*, p. 200; and Lindsay *op. cit.*, p. 4, pp. 5–6. Koelman outlines Smith and Olswang's arguments regarding the necessity of controlling access in the digital environment: Koelman, 2000, *op. cit.*, p. 276.

³⁹⁴ Litman, 2001, *op. cit.*, pp. 12–14. Lindsay notes that this argument is a common theme amongst American academics such as Lawrence Lessig, Pamela Samuelson and James Boyle: Lindsay, *op. cit.*, pp. 4–5.

³⁹⁵ Koelman J. The protection of technological measures vs. the copyright limitations. Paper presented at the ALAI Congress, Adjuncts and Alternatives for Copyright, New York, 15 June 2001, 1–9, 6, <<http://www.ivir.nl/publications/koelman/alaiNY.html>>.

³⁹⁶ Vinje, *op. cit.*, p. 196.

³⁹⁷ Vinje, *op. cit.*, p. 197.

copy basis.³⁹⁸ As discussed earlier, copyright users are able to benefit from the new means of delivering material by only paying for the value of the work used at the time, rather than being required to purchase a whole item whose sale is predicated on unlimited access.

4.25 As mentioned earlier, technological controls on copying form part of DRMS. Commentators note that these systems often consist of the following technologies used to describe and identify digital content and to control the use of copyright material so that exploitation can be licensed, reported and paid for in the networked environment:³⁹⁹

- serial copyright management systems (SCMS) are used on CDs and primarily protect music by only allowing the making of digital ‘master’ copies of CDs;⁴⁰⁰
- encryption is an identification technique, which guarantees the integrity and authenticity of digital content.⁴⁰¹ It involves scrambling the content of material in a ‘digital envelope’ to restrict access to only technology which contains the authorised decryption algorithm;
- digital watermarking and other monitoring devices;⁴⁰² and
- creation of ‘rights management databases’ which identify the content to which rights are attached through standard identifiers, including ISBN (international standard book numbering) for physical books, ISWC (international standard musical work code) for music compositions, and ISRC (international standard recording code) for sound recordings.⁴⁰³

³⁹⁸ Koelman, 2000, op. cit., p. 276.

³⁹⁹ Commission of the European Communities, op. cit., p. 8.

⁴⁰⁰ *ibid.*, p. 18.

⁴⁰¹ *ibid.*, p. 19.

⁴⁰² Godwin, M (IP Worldwide) ‘A cop in every computer’, list server, 14 January 2002, law.com, <<http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZGFPVOGWC>>;1-7, 4.

⁴⁰³ Commission of the European Communities, op. cit., p. 10. For an overview of electronic rights management systems see, Gervais D. Electronic rights management and digital identifier systems. *Journal of Electronic Publishing* 2002, 1-20, <<http://www.press.umich.edu/jep/04-03/gervais.html>>.

Serial copyright management system (SCMS)

4.26 The serial copyright management system (SCMS) restricts the types of copies that can be made of works and principally performs an identification function. It uses copy control ‘flags’ embedded in the CD to allow digital copies to be made from the ‘master’ CD (ie, the CD bought by the consumer), but not from a copy of that master.⁴⁰⁴

Encryption

4.27 Encryption is a common process used in technological systems whereby information is scrambled to make it unusable to non-authorised users.⁴⁰⁵ Commentators argue that encryption processes are required to provide consumers with certainty as to the integrity and authenticity of content.⁴⁰⁶ For example, the copy generation management system (CGMS) is an agreed standard which controls the copying of DVD videos and which may be calibrated to completely prevent copying.⁴⁰⁷ DVD decryption codes have also been applied to DVDs to prevent would-be-infringers from taking advantage of the increased capacity for these discs to carry movies and other content and to copy material perfectly.⁴⁰⁸

4.28 The content scrambling system (CSS) is another encryption system which only allows DVD players and drives containing the authorised decryption algorithm to effectively decrypt DVD files.⁴⁰⁹ The Committee also notes that a leading US case has indirectly approved the use of such technology. In *Universal City Studios Inc v Reimerdes*⁴¹⁰ the Federal District Court for the Southern District of New York found the anti-circumvention provisions of the *US Digital Millennium Copyright Act* (1998) (DMCA) were infringed by defendants posting a computer program (known as DeCSS) on a website that decrypts the encryption code which limits access to DVD movies, and linking to other websites containing the decryption program. This first instance decision

⁴⁰⁴ Commission of the European Communities, *ibid.*, p. 10.

⁴⁰⁵ *ibid.*

⁴⁰⁶ *ibid.*, p. 11.

⁴⁰⁷ Vinje, *op. cit.*, p. 197.

⁴⁰⁸ Coco, *op. cit.*, p. 207.

⁴⁰⁹ *ibid.*

⁴¹⁰ 111 F.Supp. 2d 294 (S.D.N.Y. 2000). See footnote 410, below, in relation to the appeal of this case. Note also Coco, *op. cit.*, p. 208.

of Kaplan J has been recently upheld by the United States Court of Appeals for the Second Circuit.⁴¹¹ The Appeal Court's decision is discussed further in Chapter 6.

4.29 It is argued by some commentators that new technologies can also control each act of accessing or consulting copyright material, even after a copy of the material has been downloaded.⁴¹² Literature to which the Committee has had regard also points to the increasing use of technological measures to control the ongoing use of material, with copies disintegrating after a certain period or when an item has been played a fixed number of times.⁴¹³ Identification measures can also restrict usage to a particular user or user device, so that even if material is e-mailed a new recipient will be required to pay before viewing any part of the content.⁴¹⁴ Despite the benefits which copy control measures provide for protecting and authenticating copyright material which has been legally obtained by end-users, commentators raise concerns that copy control may require users to pay for material which they would be able to access freely in the analogue environment, such as under the fair dealing exceptions:

'While DRMS are mainly concerned with preventing the illegal use of digital material, it is less clear how DRM solutions protect the lawful consumer. A concern that DRM solutions need to address is to ensure that the intended user of the content is not subject to any constraint on their lawful use of this content.'⁴¹⁵

4.30 It is also observed that access can be restricted by combining technological measures and contractual arrangements. In the United States, the Digital Video Express (DIVX) standard allowed a purchaser to view a DVD disk for only 2 days after first access. The system also included a modem that would send billing information over the phone every time the copy was viewed after the first two days.⁴¹⁶ Although the DIVX project has been terminated for various reasons, the Committee notes

⁴¹¹ *Universal City Studios, Inc v. Eric Corley* 273 F.3d 429 C.A.2 (N.Y.), 2001 (the decision is often referred to as the *Reimerdes* case). This decision is also significant in relation to free-speech rights as the Court found that the anti-circumvention provisions of the DMCA do not unconstitutionally restrict the ability to take advantage of the US fair use exceptions, with the material involved only having an 'incidental affect' on restricting expression.

⁴¹² Koelman, 2000, op. cit., p. 276.

⁴¹³ *ibid.*

⁴¹⁴ *ibid.*

⁴¹⁵ Commission of the European Communities, op. cit., p. 13. See also, Heide, 2001, op. cit., p. 472 for a discussion of moves by the US and European legislature to restrict the scope of the reproduction right where certain acts of lawful users or acquirers are concerned.

⁴¹⁶ Koelman, 2000, op. cit., p. 276.

commentators' concerns about the implications of these measures for the privacy of end-users:

'In this context, the question may be asked whether such electronic surveillance that reveals what information is accessed by whom is desirable in a democratic society, even if it is not performed by governmental bodies but by private entities.'⁴¹⁷

4.31 The Committee notes that, in relation to Australia's privacy regime, the National Privacy Principles⁴¹⁸ would potentially allow the collection of similar information provided that the copyright owner had disclosed to the user details about the manner in which the information was to be collected, the purposes for which it was collected and any subsequent use made of the information. However, there is a possibility that some forms of electronic surveillance could be considered to be in breach of the requirement that organisations collect personal information only by lawful and fair means and not in an unreasonably intrusive way (Principle 1.2). The Committee notes that in the United States the maker of a Charley Pride CD recently agreed (as part of an out-of-court settlement relating to CDs rendered unusable by copy protection measures) to remove the requirement for consumers to enter their names and e-mail addresses as a condition of downloading the music from a website.⁴¹⁹

4.32 The Committee is aware of commentary highlighting moves by copyright owners, particularly in the entertainment and music industry, to build copy protection into the technology itself.⁴²⁰ This would mean that technology such as computers and digital devices like Palm Pilots and MP3 players, software operating systems, and web browsers would control access to material.⁴²¹ These commentators observe that industry support exists to further develop technology to restrict unauthorised access:

'A group called 4C Entity is promoting a standard for building digital rights management into digital storage devices, such as hard drives and possibly writable CD-ROM drives (the devices that copy CD-ROMS). The 5C Consortium is developing a copy protection standard for

⁴¹⁷ *ibid.*, p. 277.

⁴¹⁸ Schedule 3, *Privacy Act 1988* (Cth).

⁴¹⁹ Wong, M (the Associated Press), 'Copy-protected music CD suit settled', list server, 27 February 2002, law.com, <<http://www.wjhl.com/news/technology/MGBAMADR5YC.html>>.

⁴²⁰ Godwin, *op. cit.*, p. 1.

⁴²¹ *ibid.*

digital television, and inter industry forums like the Content Protection Technology Working Group are also working on digital TV.⁴²²

4.33 Furthermore, a bill for the *Consumer Broadband and Digital Television Promotion Act 2002* (CBDTPA) has been introduced into the United States Senate. This bill requires that manufacturers and software developers insert built-in systems ('certified security technologies') into digital technologies which prevent unauthorised copying and the ability to make unlimited copies of digital content.⁴²³ Although industries such as the entertainment industry have been aggressively pushing for legal and technological solutions to unauthorised copying a compromise has yet to be reached with technology companies and consumer groups. This new bill provides manufacturers and content owners with a year to agree on anti-copying technology or a standard in relation to blocking unauthorised copying of copyright works; after which the bill requires regulators to step in and mandate technology.⁴²⁴ Supporters of this bill argue that protecting content in this way will provide an incentive to further develop content designed for broadband, high speed Internet services and digital television.⁴²⁵ User interests have expressed dissatisfaction with the notion of the government mandating technological solutions to the problem of unauthorised copying⁴²⁶ and are concerned that digital copy management systems could well create complexity, cost and confusion such as to discourage adoption of such innovations.⁴²⁷

Digital Watermarking and other monitoring devices

4.34 Digital watermarks and digital signatures comprise persistent marking and identification technologies which mark digital works in a way that persistently identifies

⁴²² *ibid.*, p. 3.

⁴²³ This bill was introduced in March by Senator Ernest F. Hollings. See, Musgrove, M (Washington Post Staff Writer) 'Hollings proposes copyright defense', list server, 22 March 2002, Washtech.com, <<http://washingtonpost.com/wp-dyn/articles/A92-2002Mar21.html>>; and further discussion in paras 6.93–6.

⁴²⁴ Olsen, S 'Piracy-prevention bill sparks hot debate', list server, 25 March 2002, zdnet.com, <<http://zdnet.com.com/2100-1103-867950.html>>.

⁴²⁵ Musgrove., *op. cit.*

⁴²⁶ Olsen, *op. cit.*

⁴²⁷ User groups in the US also argue that by making it impossible for consumers to make personal copies of digital content, such as for backing up or for playback on other devices, the bill would violate the 'fair use' provisions of s. 106 of the *Copyright Act 1976* (US): see, Mercury News 'Consumers could lose out with proposed copy protection law', list server, 8 March 2002, SiliconValley.com, <<http://www.siliconvalley.com/mld/siliconvalley/2820764.htm>>.

them, but does not affect the utility of the product.⁴²⁸ Copy control measures can also consist of monitoring devices, such as search-engines, which can automatically trace infringing material. Literature notes that technology such as streamlined notice and take down procedures are able to put a stop to infringing activities more quickly and cheaply than is possible in the offline world.⁴²⁹ Steganography is another method of controlling use by inserting hidden material into digital content and designing consumer products so that they allow the content to be played or copied only if the inserted material is detected.⁴³⁰

Rights management databases

4.35 Copyright management systems are basically databases that contain information about copyright content and, in most cases, the author and other current rights holders. The information includes standards recognised by the International Organization for Standardization (ISO) and other standards created to assist in identifying content and authorising the use of works.⁴³¹ Apart from content and rights identification, copyright management systems are also often used as a licensing tool.⁴³²

Transactional Agreements and contract-based control of access

4.36 The technologies described above may obviate the need to rely on contract as a means of controlling access to and use of copyright work. For example, a contract which requires a user to destroy a CD after a licence expires may not be necessary if the CD can lock itself up at this point. Nevertheless, technological developments have also provided owners with the means for concluding cost-effective online contracts with end-users of copyright materials.⁴³³ Online contracts may be used separately or to add a further layer of protection to that provided by the technologies discussed above (which may be imperfect). Whether some of the new types of agreements

⁴²⁸ Forsyth M. The Digital Agenda anti-circumvention provisions: a threat to fair use in cyberspace. AIPR 2001;12:82–103, 86.

⁴²⁹ Koelman, 2001, op. cit., p. 5.

⁴³⁰ Lindsay, op. cit., p. 4.

⁴³¹ See para. 4.25 in relation to commonly used standards.

⁴³² Gervais, op. cit., p.1.

⁴³³ Vinje, op. cit., p. 194.

which have arisen in the online environment conform to the general rules of contract formation is discussed in Chapter 5.

4.37 The argument that mass-market agreements are unfair and/or invalid because the drafting party imposes the terms is not new. However, it has been raised anew in connection with online mass-market agreements.⁴³⁴ In particular, it is argued that there is no true consent to these agreements, as traditionally required by contract law. The Committee notes the counter argument that mass-market agreements reduce transaction costs and are a convenient means of doing business for both parties. The Committee also notes the argument that market forces provide a disincentive to the imposition of one-sided terms.

4.38 While some commentators have highlighted the ways in which mass-market agreements fail to conform to traditional contract rules, others have argued that the rules of offer, acceptance and agreement are ‘irrelevant’ and that mass-market contracts are effectively part of the product to which they refer.⁴³⁵ It has therefore been argued that a ‘contract-as-product’ model may be more apt for mass-market agreements than the traditional model of ‘contract-as-consent’⁴³⁶ and that, rather than focusing on traditional notions of consent, legislatures should consider which sorts of terms should and should not be brought to a parties attention or permitted at all.⁴³⁷

4.39 The Committee notes that the issue of the validity of consent to terms in mass-market contracts is beyond the scope of this reference. However, the Committee acknowledges that the manner in which terms which exclude or modify the exceptions are arrived at may be relevant to their enforceability and to whether or not they should otherwise be permitted.

⁴³⁴ See discussion of common features of standard form contracts in Guibault, 2002, *op. cit.*, pp. 118–20.

⁴³⁵ Burke J. Contract as commodity: a non-fiction statutory approach. *Stat. L. R.* 2000; 21(1):12–42.

⁴³⁶ Radin M. Humans, computers and binding commitment. *Ind. L.J.* 2000;75:1125–62.

⁴³⁷ Radin, *ibid.* A similar point is made by Burke, *op. cit.*

Implications of the new practices in the digital environment

4.40 Alongside the concerns about the risk of unauthorised copying and unauthorised use of copyright work, the Committee notes that a vigorous debate has also arisen over the extent to which copyright is able to provide an appropriate regime for the exploitation of copyright works in the digital environment while maintaining reasonable access for end-users. The Committee observes that some literature suggests that the use of digital technology and transactional arrangements as alternatives to copyright has increased control over initial access to material;⁴³⁸ while other literature canvasses users' concerns that DRMS will prevent them from enjoying the use of digital content in the same way as they have analogue material in the past.⁴³⁹ However, at this stage the Committee observes that the literature is divided over the extent to which digital lock-out is occurring, particularly as there is a common emphasis on the evolving nature of the digital environment.⁴⁴⁰

4.41 Predictions as to how the digital marketplace will evolve vary. The Committee notes that there is a prominent school of thought that warns of the increasing levels of control over digital material and the potential to expand the scope of copyright protection to the detriment of end-users and their ability to make fair use of works.⁴⁴¹ Proponents of this view argue that technological measures potentially enable unlimited and exclusive control of digital material, while contracts can increase control over the exploitation and transfer of copyright material.⁴⁴²

4.42 The Committee is also aware of arguments that these new digital practices are broadening the scope of copyright.⁴⁴³ In particular, it has been argued that due to the absence of limitations on the extent to which control can be effected by TPMs and contractual arrangements, the scope of copyright has been expanded.⁴⁴⁴ There is

⁴³⁸ Litman, 2001, *op. cit.*, pp. 13–14.

⁴³⁹ Commission of the European Communities, *op. cit.*, p. 13; Vinje, *op. cit.*, p. 197; and Radin, *ibid.*

⁴⁴⁰ Bygrave, *op. cit.*, p. 53; Koelman, 2000, *op. cit.*, p. 279; and Lindsay, *op. cit.*, p. 1.

⁴⁴¹ This point is repeatedly made by prominent American academics, including Lawrence Lessig, Pamela Samuelson, Jessica Litman and James Boyle (Lindsay, *op. cit.*, pp. 4–5).

⁴⁴² Heide, 2000, *op. cit.*, pp. 221–2, 232–3.

⁴⁴³ Vinje, *op. cit.*, p. 206.

⁴⁴⁴ Heide, 2001, *op. cit.*, p. 475.

other literature suggesting that the role of copyright has changed from a focus on enforcement in the analogue environment to a focus on controlling the exploitation and use of digital material.⁴⁴⁵ However, there are suggestions in the literature that much of the technology is in its initial stages and that some commentators suggest that it is too crude to be able to discern between infringing and non-infringing uses of copyright (such as the exceptions).⁴⁴⁶ The Committee also acknowledges that the power of digital technology at this stage is unknown, and that concerns about preventing the complete ‘digital lock-up’ of material is a common theme amongst some academics and consumer groups:

‘...it may very well be that future encryption based means of controlling access to and use of copyright works will be so powerful that they are virtually circumvention-proof.’⁴⁴⁷

4.43 However, the Committee notes that there are also suggestions that the fear of ‘digital lock-up’ may be overstated.⁴⁴⁸ It has been suggested that competition among copyright owners combined with consumer resistance may limit the extent to which controls are imposed on copyright material.⁴⁴⁹ In this regard, the Committee notes that consumers have taken action to demonstrate their dissatisfaction with anti-copying technologies, particularly technologies used to prevent CDs from being played on computers which are then unable to be played on normal CD players. For example, consumers in Britain and Europe dissatisfied with their inability to play Natalie Imbruglia’s ‘White Lilies’ CD demanded refunds.⁴⁵⁰ The Committee also observe that there are a number of websites run by lobby groups opposed to the copy-protected music CDs on the grounds that they affect sound quality, damage CDs and cause inconvenience. One example is the US-based site called *Fat Chuck’s* which provides a list of reportedly ‘corrupt’ CDs and advice on what consumers can do to avoid

⁴⁴⁵ Heide, 2000, op. cit., pp. 221–23.

⁴⁴⁶ Lindsay, op. cit., p. 7.

⁴⁴⁷ Vinje, op. cit., p. 201.

⁴⁴⁸ Lindsay, op. cit., p. 5.

⁴⁴⁹ *ibid.*, p. 6.

⁴⁵⁰ ‘Copy bug won’t affect local Imbruglia CDs’ *The Age*, 22 November 2001, <<http://216.239.51.100/search?q=cache:IDNjhmA7wC:www.theage.com.au/entertainment/2001/11/22/FFXKE32Z9UC.html+&hl=en>>.

purchasing the copy-protected products.⁴⁵¹ Another example is the UK-based *Campaign for Digital Rights* site.⁴⁵²

4.44 Nevertheless, the Committee notes that consumer resistance does not always suffice to govern the market and that there exists the potential for right holders to use the anti-circumvention provisions to extend their control over the access to and use of their intellectual property, irrespective of the protest of consumers. In particular, the Committee is aware of the current action in the Federal Court of Australia by Sony Australia and related companies against Eddy Stevens in relation to his sale of ‘mod-chips’.⁴⁵³ Mod-chips allow regional playback coding (RPC) on Sony Playstation consoles to be bypassed, which enables consumers to play cheaper games obtained from overseas, as well as copied games, on Australian PlayStations.⁴⁵⁴ Although the anti-circumvention provisions under s. 116 of the Act do not prohibit individual acts of circumvention, the Committee understands that Sony has claimed that RPC is a technological protection measure designed to protect against copyright infringement and that mod-chips are designed to circumvent RPC. Accordingly, the Committee understands that Sony has argued that commercial dealings in mod-chips are prohibited under s. 116A of the Copyright Act.⁴⁵⁵ In this regard, the Committee notes that government authorities may have a role to play in representing consumer interests. For example, the ACCC has been granted leave to intervene in the Sony

⁴⁵¹ <<http://www.fatchucks.com/>>. The reported worldwide corrupt CDs listed on the site include:

- all Osmose Productions music since February 2001;
- all Universal Music label albums starting in October, 2001;
- all Warlock Records and Strictly Rhythm music since January 2000;
- Michael Jackson promotional single: *You Rock My World* (Sony);
- More Music from the Fast and the Furious: *Soundtrack* (Universal); and
- Charley Pride: *A Tribute to Jim Reeves* (Fahrenheit Entertainment).

The reported corrupt Australian CDs listed on the site include:

- Red Hot Chili Peppers: *Californication* (Australia, WEA/Warner Bros).

⁴⁵² <<http://uk.eurorights.org/issues/cd/>>.

⁴⁵³ *Sony Entertainment Pty. Ltd. v Eddy Stevens* (FCA NSW Registry N738/2001).

⁴⁵⁴ RPC technology is most commonly used in relation to DVD players. The technology is used effectively to divide the world into six regions for the purposes of DVD distribution, preventing inter-region substitution of discs and hardware inserted into DVDs. RPC is also present in PlayStations, with the various multinational Sony computer entertainment companies distributing PlayStations according to three regional zones: North America, Japan (covering Asia) and Europe (which includes Australia). The practical effect of this technology is that a consumer who has bought a PlayStation console in Australia may be prevented from playing imported games: Australian Competition and Consumer Commission (ACCC) *ACC defends the rights of PlayStation owners*, ACCC, Canberra, 12 Feb 2002, viewed at: <http://203.6.251.7/acc.internet/digestview_media.cfm?RecordID=595>.

⁴⁵⁵ *ibid.*

action as a friend of the court. The ACCC has indicated that it will submit to the Court that as playing imported or copied games is not prohibited under s. 116A,⁴⁵⁶ Sony cannot maintain an argument that RPC, by preventing the playback of these games, is designed to prevent or inhibit copyright infringement.⁴⁵⁷

Is there an access right?

4.45 Concerns about the broadening scope of copyright has led to a rigorous debate about whether there is an access right additional to the normal copyright reproduction right and its derivative rights.⁴⁵⁸ A leading commentator defines an access right as ‘the right to control the manner in which members of the public apprehend the work’.⁴⁵⁹ The term is used with reference to the copyright owner’s ability to control initial access and repeated acts of access, rather than an end-user’s right to gain access.⁴⁶⁰

4.46 Under its terms of reference, the Committee is not required to explore in detail the debate about an access right. However, the issue of access is central to assessing what is happening in the digital environment (including the use of technological measures and transactional arrangements) and its effect on the copyright balance (particularly, the exceptions in the Copyright Act).

4.47 The Committee notes that the claim to an access right is considered controversial as although copyright limits the type and amount of material that can be copied under the fair dealing and other exceptions, the copyright holder could not

⁴⁵⁶ Although it is illegal to import games for commercial resale or distribution or to make unauthorised copies of games except for backup purposes.

⁴⁵⁷ *ibid.*

⁴⁵⁸ Ginsburg was the first to articulate the existence of an ‘access right’, defined as ‘the right to control the manner in which members of the public apprehend the work’: Ginsburg, 2000, *op. cit.*, 7. See also, Koelman, 2000, *op. cit.*, p. 276 for an outline of Smith and Olswang’s justifications for the granting of an exclusive right of access.

⁴⁵⁹ Ginsburg, *ibid.*, p. 7.

⁴⁶⁰ The Committee notes that a session of the Association Littéraire et Artistique Internationale (ALAI) Congress on *Adjuncts and Alternatives to Copyright*, New York, June 13–17, 2001 (Columbia University School of Law) was devoted to the issue of the new or evolving ‘access right’. The session focused on discussing whether circumvention measures adopted in Australia, Japan, the U.S. and the European Union create a new access right under (or over) copyright.

prohibit access to a work, in the sense of browsing a book in a bookstore.⁴⁶¹ However, as the Arts Law Centre pointed out to the Committee, the access provided by fair dealing does not extend to ‘taking’, as the exceptions have never allowed a user to steal a book from a bookstore for a fair dealing purpose.⁴⁶²

4.48 The Committee notes that references to an access right have primarily arisen alongside the introduction of the anti-circumvention provisions and that the term is commonly used with reference to access control tools rather than exclusive rights.⁴⁶³ As international conventions do not explicitly provide for an access right, a leading commentator argues that any ‘right against the gaining of unauthorised access’ under copyright only exists ‘for the purpose of engaging in uses reserved to the author’.⁴⁶⁴ It is also argued that as every act of access in the digital environment involves a reproduction, access therefore remains a separate and distinct act not equating with a reserved use of the copyright owner.⁴⁶⁵

4.49 The Committee notes, however, that despite the above arguments, there is still considerable academic support for an access right. One commentator argues that recognising an access right would reinforce contractual structures by providing a proprietary right to beat unauthorised copying.⁴⁶⁶ It is also argued that an access right is consistent with the legal determination that the right of reproduction is exercised through the RAM of a computer:

‘Every act of perception or of materialization of a digital copy requires a prior act of access...And if the copyright owner can control access, she can condition how a user apprehends the work, and whether a user may make a further copy. Access control can at the same time thus vastly increase the availability of copyrighted works in de-materialized form, yet constrain their susceptibility to conversion to physical copies.’⁴⁶⁷

⁴⁶¹ Koleman, op. cit., p. 6. See also, McDonald, op. cit., p. 10, for an overview of arguments in relation to browsing material in both electronic and digital form.

⁴⁶² Delia Browne (Arts Law Centre) at the consultative forum.

⁴⁶³ Hoeren T. Access right as a postmodern symbol of copyright deconstruction? - some fragmentary considerations for the 2001 ALAI Congress in New York, 3, <http://www.law.columbia.edu/conferences/2001/pres_hoeren.doc>.

⁴⁶⁴ Heide 2001, op. cit., p. 471.

⁴⁶⁵ *ibid.*, p. 472.

⁴⁶⁶ Olswang as quoted in Koleman 2000, op. cit., p. 276.

⁴⁶⁷ Ginsburg, 2000, op. cit., p. 2. See paragraphs 4.13–15 in relation to the implications under Australian copyright law of viewing or accessing digital material online.

4.50 While the above discussion indicates that the traditional copyright balance is being challenged by the digital environment, the Committee is of the view that the literature is divided over the extent to which the use of technology and transactional arrangements is detrimentally impacting on the copyright balance. The Committee now turns to look at practical indicators of what is happening and whether these new arrangements are affecting the copyright balance.

Part II: Extent to which electronic trade in copyright material is subject to agreements which exclude or modify the copyright exceptions

4.51 Part II of this Chapter examines the extent to which electronic and other trade, in copyright works and other subject-matter, is subject to agreements which exclude or modify the copyright exceptions. It also explores the nature of any differences between online and offline trade, based on material presented to the Committee and its own collection of data.⁴⁶⁸

4.52 As well as seeking submissions on these and other issues, the Committee held a consultative forum with key interests on 4 October 2001 at which discussion of the issues dealt with in this Chapter took place.⁴⁶⁹ For the most part, views put to the Committee through submissions and at the forum were polarised along the lines of copyright owner and user perspectives.

4.53 The headings used in the following discussion correspond with the questions raised in the Committee's Issues Paper.

4.54 Submissions from copyright owner interests generally argued that there was no conflict between the operation of agreements used in connection with copyright materials and the copyright exceptions. The Australian Record Industry Association (ARIA) stated that '[t]he record industry is not at all characterised by conduct which

⁴⁶⁸ As per paras 1(a) and (b) of the Committee's terms of reference.

⁴⁶⁹ A list of submitters is provided in Appendix A. A list of attendees is provided in Appendix B.

seeks to modify copyright exceptions'.⁴⁷⁰ Similarly, the Australian Publishers' Association (APA), which is said to represent ninety-one percent of the book publishing industry, stated that:

'We are not able to provide any comprehensive analysis. The APA approached all of its members seeking information on whether any of them adopted such contractual terms and there were no positive responses. We then looked at the Internet sites of a number of on-line e-book sellers and did not find any express terms seeking to exclude or modify exceptions to infringement.

From our enquiries, there does not seem to be reliance on such contracts in the book publishing industry. There does not appear to be any evil to be overcome by legislation at present.⁴⁷¹

4.55 CAL stated that it was not aware of any Australian agreements relating to digital works that exclude or modify the limitations to the exclusive rights of copyright owners.⁴⁷² However, at the consultative forum, CAL acknowledged that the terms of some agreements may initially exclude or modify the copyright exceptions, but that these terms can be negotiated.⁴⁷³ The Australian Information Industry Association (AIIA) stated that it was not aware of widespread use of such agreements in its industry.⁴⁷⁴ The Australasian Performing Right Association Limited (APRA) and the Australasian Mechanical Copyright Owners' Society Limited (AMCOS) stated that, while they grant licences for the use of material 'in an electronic or digital context', they do so without seeking to impose conditions that attempt to exclude or modify any limitations to the rights of copyright owners contained in the Copyright Act.⁴⁷⁵

4.56 While the Ministerial Council on Education, Employment Training and Youth Affairs Taskforce on Copyright (MCEETYA) did not believe that contracts purporting to exclude or modify copyright exceptions are used extensively at this time, it stated that it was aware of certain examples of online contracts that attempt to limit the technological format of copies made by users (for example, by allowing users to reproduce materials by means of a photocopier or printer only). MCEETYA

⁴⁷⁰ ARIA submission, p. 1.

⁴⁷¹ APA submission, p. 2.

⁴⁷² CAL submission, p. 9.

⁴⁷³ Michael Fraser, Chief Executive Officer, CAL at the consultative forum.

⁴⁷⁴ AIIA submission, p. 3.

⁴⁷⁵ APRA/AMCOS submission, p. 1.

also expressed concern about the implications for schools and the TAFE sector if such contracts become more prevalent.⁴⁷⁶

4.57 On the other hand, submissions from the Australian Consumers' Association (ACA), the ADA, the Australian Libraries' Copyright Committee (ALCC), the Australian Library and Information Association (ALIA), the Australian Vice-Chancellors' Committee (AVCC), the Council of Australian State Librarians (CASL), the Council of Australian University Librarians (CAUL), the Department of Communications, Information Technology and the Arts (DCITA), the Federal Libraries' Information Network (FLIN), the NLA, Deakin University, Monash University and the Law Council of Australia (Law Council) claimed – to varying degrees – that online trade in copyright material is subject to agreements which exclude or modify the copyright exceptions or which otherwise undermine the copyright balance.

4.58 DCITA cited figures from the National Office for the Information Economy (NOIE) indicating that there is a growing electronic trade in copyright material,⁴⁷⁷ while submissions from the library sector stated that copyright materials increasingly come in electronic form. The AVCC stated that the importance of electronic publications and subscriptions has increased in recent times and that many academic journals and works are now available only in electronic form.⁴⁷⁸

4.59 With the exception of Monash University, library interests submitted that electronic trade in copyright material was subject to agreements which exclude or modify the copyright exceptions. Monash stated that a 'quick' review it conducted of its licences for electronic resources entered into from 1997 revealed no examples of licences specifically overriding the copyright exceptions,⁴⁷⁹ noting that its practice was to review and negotiate agreements through its library before referring licences to its lawyers.⁴⁸⁰ Monash stated that it was 'reasonably satisfied' with licences for electronic

⁴⁷⁶ MCEETYA submission, p. 7.

⁴⁷⁷ A large proportion of which is overseas based: DCITA submission, pp. 2–3.

⁴⁷⁸ AVCC submission, p. 7. Monash identified three main categories of electronic materials used by libraries: indexing and abstracting services; electronic versions of the full texts of serial titles (which are generally scholarly in orientation and are frequently offered as parts of aggregated collections); and electronic versions of the full texts of monographs (which until recently were largely reference works but increasingly include textbooks and recreational titles): Monash submission, p. 2.

⁴⁷⁹ Monash submission, p. 2.

⁴⁸⁰ Hans Groenewegen, Deputy University Librarian, Monash University at the consultative forum.

resources negotiated on behalf of its library⁴⁸¹ and that ‘most licenses have steadily become more liberal and appropriate to our requirements’⁴⁸² (although it raised a number of ‘points of contention’ with respect to certain licence provisions).⁴⁸³ However, at the consultative forum, other library interests expressed surprise at this finding and noted that it was at odds with their own experience of licence conditions.

4.60 The ADA stated that:

‘A very substantial number of licence agreements contain terms or conditions which purport to override or modify copyright exceptions. These include:

- restrictions on users printing or downloading or emailing copies of (parts of) the resource – overriding s. 40 (fair dealing for research or study);
- restrictions on libraries performing Inter-Library Loan/ Document Supply – overriding ss. 49 and 50 (reproducing and communicating works by libraries and archives for users & reproducing and communicating works by libraries or archives for other libraries or archives);
- restrictions on libraries copying the work for preservation purposes under section 51A.
- restrictions on libraries networking the resource across the premises of the library subject to certain conditions – overriding s. 49(5A).⁴⁸⁴

4.61 These provisions tended to be the focus of submissions from other library interests although fair dealing in general was also described as being under threat from licence agreements. In addition, Deakin University and the AVCC argued that agreements were being used to modify their statutory licences as ‘educational institutions’ under Part VB of the Copyright Act.

4.62 Submitters from the library sector provided a number of examples of licences/ licence clauses for the use of electronic materials.⁴⁸⁵ While many of these involved overseas publishers, many were also local. Most were offered by way of general support for the submissions they accompanied although some were offered as examples of clauses which, it was argued, excluded or modified particular exceptions.

⁴⁸¹ Monash submission, p. 3.

⁴⁸² *ibid.*, p. 2.

⁴⁸³ *ibid.*, pp. 3–4.

⁴⁸⁴ ADA submission, p. 4.

⁴⁸⁵ Deakin submission, Annexures 1 and 2; ALIA submission, pp. 9–10, 13; CAUL submission, Attachments 1–4; AVCC submission, Annexure A; ADA submission, p. 5 and Attachments B and C; DCITA submission, Attachments 13–17; and CASL submission, p. 2. Further details of licences were also submitted to the Committee in confidence.

4.63 The ADA submitted an example of a licence for an online encyclopedia which provides, in part, that:

[this service] is protected by copyright laws, and EXCEPTING A SINGLE COPY FOR PERSONAL USE, NO EXTRACT MAY BE COPIED, REPRODUCED OR DISTRIBUTED, nor is any other act with respect to [this service] allowed that would violate copyright laws. The Licensee may not modify, reverse engineer, decompile or disassemble [this service] and may not deliver copies to, or sell, rent, lease or sub-licence [this service] to anyone else.⁴⁸⁶

4.64 Deakin University submitted a clause from an agreement with a US based information provider, which provides, in part, that:

The Databases are copyrighted either by [information provider] or its Data Suppliers, and all rights are reserved. Customer shall not duplicate, distribute, sell, commercially exploit, create derivative works from, or otherwise make available the Databases or information contained therein, in any form or medium (electronic, paper, photographic film or otherwise), to any third party.⁴⁸⁷

4.65 ALIA submitted a clause from an agreement used by a scholarly publishing company which provides, in part, that:

No material from [company] or any website owned, operated, licensed, or controlled by [company] may be copied, reproduced, republished, uploaded, posted, transmitted, or distributed in any way, except that you may download one copy of the materials on any single computer for your personal use only, provided you keep intact all copyright and other proprietary notices. Modification of the materials or use of the materials for any other purpose is a violation of [company's] copyright and other proprietary rights. For purposes of these terms, the use of any such material on any other website or networked computer environment is prohibited...

You may not redistribute, sell, decompile, reverse engineer, disassemble, or otherwise reduce the Software to a human-perceivable form.⁴⁸⁸

4.66 With respect to the requirement that 'no material' be used, ALIA stated that 'surely, it should be possible to use insubstantial parts of a work, or even substantial parts of a work provided that they are protected by fair dealing. The exception that a user "may download one copy of the materials on any single computer for your personal use only" is much more limited than the range of dealings permitted under fair dealing.

⁴⁸⁶ ADA submission, Attachment B (Example 1).

⁴⁸⁷ Deakin submission, Annexure 2 (Example 6).

⁴⁸⁸ ALIA submission, p. 9.

Furthermore, the prohibition against reverse engineering fails to reflect the position under s 47D of the Copyright Act...’⁴⁸⁹

4.67 The Committee observes that these clauses seek to limit a user’s ability to reproduce, publish, communicate to the public or (in the case of the second and third examples) make an adaptation of (extracts of) a work forming part of the resource.

4.68 The Committee observes that these and similar clauses would prevent libraries and archives from reproducing and communicating (extracts of) works as would otherwise be permitted by the library and archives exceptions (see discussion in Chapter 3). The Committee observes that such clauses may also have the effect of excluding or modifying other exceptions, for example, fair dealing exceptions, the statutory licence scheme established by Part VB of the Act and the exception created by s. 183 for use of copyright materials for the services of the Crown, as well as a number of miscellaneous exceptions (see discussion in Chapter 3).⁴⁹⁰ The clauses set out at paras 4.63 and 4.65 also seek to prohibit reverse engineering (see above).

4.69 Library interests also brought to the Committee’s attention clauses with a more confined operation. For example, the AVCC submitted the following:

- A clause which, it submitted, purports to override s. 49 by requiring a university to refuse requests from individuals and to prevent the supply of an article in electronic form as contemplated by ss. 50(7C) and (10), viz:

‘[resource] may be used as a source for Inter Library Loan whereby articles can be printed and these print copies be delivered via postal mail or fax to fulfil ILL requests from an academic, research or other non-commercial library. Requests received from commercial, for-profit companies or directly from individuals may not be honoured.’⁴⁹¹

- A clause which, it submitted, purports to override s. 50, viz:

‘the on-line version of the Journal may not be used by institutions or their authorised users for making inter-library loans.’⁴⁹²

⁴⁸⁹ *ibid.*

⁴⁹⁰ For example as established by: s. 28 (performance of works or other subject matter in the course of educational instruction); s. 112 (reproductions of editions of works); and s. 182A (reproduction of statutory instruments and judgments).

⁴⁹¹ AVCC submission, Annexure A (Example 3).

⁴⁹² AVCC submission, Annexure A (Example 5).

- A clause which, it submitted, would prevent a University from exercising the statutory licence granted under Part VB for the purpose of creating course-packs or closed reserve sections in libraries, viz:

‘the Subscriber and Authorised Users are permitted online access to the [journals]...and may download or print text, search results, or other information from such [journals] solely for the private use or research of the Subscriber and the Authorised User.’⁴⁹³

4.70 Some submissions from users raised specific concerns about agreements which seek to impose prohibitions on the decompilation of software. In addition to the examples provided above, CAUL gave an example of an agreement that stipulates, in part, that:

‘You may not and you may not permit others to (a) disassemble, decompile, or otherwise derive source code from the software included in the DISK (the “Software”), (b) reverse engineer the Software, [or] (c) modify or prepare derivative works of the DISK.’⁴⁹⁴

4.71 The Committee notes that insofar as this clause seeks to override s. 47D, it would have no effect because of the operation of s. 47H (see discussion in Chapter 5).

4.72 While Deakin University stated that it had never seen a contract which granted users more rights than those provided under the Copyright Act,⁴⁹⁵ other submissions from users stated that some agreements provided for usage conditions that are superior to those offered by the Copyright Act. For example, Monash University stated that ‘[f]ollowing the...Digital Agenda Amendments, some of the sections [of the Copyright Act] relating to libraries are now actually more restrictive than most of the licenses with which [the University] is familiar’.⁴⁹⁶ Monash also stated that, even before Parts VA and VB of the Act were extended to the digital environment, ‘due to pressure by universities, licenses began to include clauses permitting the use of the licensed materials in course packs or for electronic reserve’.⁴⁹⁷

⁴⁹³ AVCC submission, Annexure A (Example 6).

⁴⁹⁴ CAUL submission, Attachment 1.

⁴⁹⁵ Adriana Salerno, Assistant University Solicitor, Deakin University at the consultative forum.

⁴⁹⁶ Monash submission, p. 4. See also, ADA submission, p. 1; FLIN submission, p. 2 (although both the ADA and FLIN stated that superior terms have usually only been gained if the bargaining position of the particular agency or consortium is strong); AVCC submission, p. 5.

⁴⁹⁷ Monash submission, p. 5.

4.73 ALIA submitted the following clause, from an agreement with a scholarly publisher, as ‘the most satisfactory’ of those examples it provided:

‘we grant a non-transferable, non-exclusive licence to you for the term of this agreement only to:

- a) use the Licensed Products and reproduce part (but not all) of the Licensed Products for the purposes only of supplying professional services to your clients, research or study, or supplying academic services to students; and
- b) if the Licenses Product includes precedents, copy and modify those precedents for your internal use or for the purpose of supplying those precedents to your clients or students.’⁴⁹⁸

ALIA stated that conversations with the licensor ‘have confirmed that they intend the provisions [of the licence] to be similar to those of the Copyright Act’.⁴⁹⁹

4.74 While no submitters provided examples of licence clauses which preserved the exceptions in their entirety, the Committee’s own survey of licence agreements revealed that agreements sometimes acknowledge user’s rights under copyright legislation and/or allow for uses which loosely parallel some of these rights (see discussion of survey findings at paras 4.93–106 and Appendix E).

4.75 Submissions from user interests also raised concerns regarding restrictions on the use of insubstantial portions of materials, restrictions on the use of materials in the public domain, the use of ‘site-clauses’, restrictions on ‘walk-in’ and non-affiliate use, the variety of agreements governing the use of copyright materials, difficulties in negotiating agreements and ‘bundling’ of content. Some of these issues were also addressed in submissions from owners.

4.76 The Committee observes that these concerns do not directly address the extent to which agreements purport to exclude or modify the copyright exceptions. However, the Committee notes that they may be relevant to whether the copyright balance has otherwise been altered in the digital environment. The Committee therefore discusses submissions on these issues below.

⁴⁹⁸ ALIA submission, p. 10.

⁴⁹⁹ *ibid.*

4.77 The ADA stated that some of the agreements it submitted would control material that is otherwise beyond the scope of copyright such as facts or insubstantial portions.⁵⁰⁰ It also argued that the licence extracted at para. 4.63 would restrict reference librarians from answering queries, by refusing to allow the reproduction of an ‘extract’, however small. It was noted that the amount of material used by a librarian to answer a query might be as little as a paragraph or even a sentence.⁵⁰¹

4.78 Licences which purport to restrict use of material in the public domain were also discussed. The ADA cited an example of a vendor of international treaties on CD-ROM which purports to restrict reference librarians from copying parts of these treaties to answer inquiries despite the fact that such treaties are not subject to the vendor’s copyright.⁵⁰²

4.79 Submissions from libraries also noted that licences commonly contain ‘site clauses’ which restrict use of materials to a particular geographic location. The following example was provided by the ALIA:

‘Access is for a single institution or campus... *Use by others in geographically distinct* or separately administered sites *will require further subscriptions. For example universities with separate campuses,* or administratively distinct units on the same campus with their own libraries, will need separate subscriptions for each unit where access is required.’⁵⁰³

4.80 Monash University stated that it can be difficult to arrange for Australian vendors to grant access to a library’s overseas campuses as the vendor may have granted rights to sell the product in other countries to another agent.⁵⁰⁴

4.81 Libraries were particularly concerned about the practice of limiting access to online materials to registered or authorised user groups. Monash University observed that licences, by definition, create a category of ‘authorised user’ which, it argued, is

⁵⁰⁰ ADA submission, p. 9.

⁵⁰¹ ADA submission, p. 4.

⁵⁰² ADA submission, p. 4, although the Committee notes that the publisher in this case may have had copyright in the material as a compilation or published edition under Australian law or as a database for the purposes of European Union law.

⁵⁰³ ALIA submission, p. 13.

⁵⁰⁴ Hans Groenewegen, Deputy University Librarian, Monash University at the consultative forum.

sometimes defined in unreasonably narrow terms.⁵⁰⁵ Libraries argued that this practice restricts their ability to make licensed products available for non-copyright uses (eg, reading, viewing, listening and lending) to some or all members of the public. CAUL referred to a ‘broad range of users who [it argued] previously had access in the print environment’.⁵⁰⁶ The extent to which libraries are expected to enforce such limitations and the fact that access is often dependent upon ongoing payment (through renewal of subscription) was a source of concern. The ADA submitted one example of this type of prohibition in a US licence. The licence defines authorised users as:

‘For academic institutions: Faculty members (including temporary or exchange faculty for the duration of their assignment); graduate and undergraduate students; staff members; and independent contractors acting as faculty or staff members.’

It provides that:

‘If Subscriber provides access to its collections to all or selected members of the public who walk into the library facility, it may provide access to and permit copying for scholarly, research, educational and personal use... to those members of the public who come into the library and use workstations located at the library facility. Remote access is permitted only for Authorized Users.’⁵⁰⁷

4.82 Submissions from library interests stated that licence terms are not standardised and that this made it difficult for institutions to keep track of different licence conditions and to readily explain their implications to staff. The need for individual libraries to replicate negotiations with domestic and overseas suppliers was also raised.⁵⁰⁸ The Committee notes that its terms of reference require it to have regard to the Government’s policy that the compliance cost and paperwork burden on small business should be reduced where feasible⁵⁰⁹ and that these issues are relevant in this regard.

4.83 Many submissions discussed the increasing use of mass-market agreements to regulate electronic trade in copyright material as discussed in paras 4.36–9.

⁵⁰⁵ For example, an authorised user must be a ‘registered student’, an employee, must reside on a certain campus, work in a certain building etc: Monash submission, p. 3.

⁵⁰⁶ CAUL submission, p. 2.

⁵⁰⁷ ADA submission, Attachment B (Example 6).

⁵⁰⁸ For example, Hans Groenewegen, Deputy University Librarian, Monash University at the consultative forum.

⁵⁰⁹ See, terms of reference 2(f).

4.84 Some submissions questioned whether certain new types of online mass-market agreement conform with the ordinary rules of contract formation. This issue is discussed under enforceability in paras 5.3–16.

4.85 Library submitters generally took the view that online mass-market agreements were not a major issue in their industry.⁵¹⁰ The Committee observes that, like mass-market agreements generally, online mass-market agreements may be more relevant for individual consumers and small businesses than for institutions.⁵¹¹

4.86 Most library interests did, however, argue that agreements commonly encountered in the sector are dictated by the vendor and are difficult to negotiate.⁵¹² FLIN argued that negotiation was made more difficult by what it alleged was the

⁵¹⁰ For example, Monash submission, p. 2. CAUL also stated that the issue of mass-market products was not of particular interest to it: CAUL submission, p. 8. The Committee uses mass-market licence in this context to refer to standard form agreements where the offer is not made to a particular party and the identity of the offeree is not necessarily known to the offerer. In the case of libraries, while an agreement may be based on standard terms, it is entered into by a publisher with a known licensee, ie, the library or educational institution. However the identity of those who may be licensed to exercise certain copyright rights under this licence (eg, students) will not necessarily be known to the publisher.

⁵¹¹ The Committee is aware that the Department of Treasury called for submissions on the nature and extent of e-commerce complaints in its Discussion Paper: *Dispute Resolution in Electronic Commerce*, October 2001, Consumer Affairs Division, Department of Treasury, Canberra. While most submitters provided little data on this issue, the submission from the Australian Competition and Consumer Commission (ACCC) noted that, in 2001, the ACCC received over 1,000 e-commerce complaints, being in the order of 1.6% of total complaints. The ACCC observed that, '[a]part from conduct directly related to the technology itself, most complaints pursued by the Commission concern misleading and deceptive conduct of various kinds. In an e-commerce context, this can include failure to disclose terms and conditions, failure to adhere to quoted delivery times, claiming that goods have properties they do not have, falsely representing sponsorship or approval, failing to disclose the currency used to quote prices and attempting to disclaim statutory rights such as warranties. While many of these issues are common in offline consumer transactions, there are some unique issues arising in relation to online transactions. While websites may contain a great deal of information regarding products and terms and conditions of sale, this information is not always easily accessible to consumers. For example, an experienced surfer may easily find a privacy policy or terms and conditions through links and icons. However, an inexperienced surfer may never realise that these policies were published on the site at all.' Other major areas of complaint identified by the ACCC involved technological practices (such as redirecting consumers to websites which they did not intend to access), the practices of Internet Service Providers, and domain name issues. The ACCC also observed, in general terms, that '[c]onsumers face significant challenges in seeking redress when a transaction goes wrong, as in many cases traders will be located in other jurisdictions which makes it costly and difficult to pursue remedies [see discussion in Part II of Chapter 5 of this Report]. In extreme cases, because of the relative or perceived anonymity of the Internet, consumers may have difficulties in identifying and locating traders.' The ACCC's submission is available at: http://www.accc.gov.au/ecom2/ecom_dispute_res.html. The Committee is also aware that consumer protection in the online environment was discussed at a conference sponsored by the ACCC, *Meaningful regulation and the information economy*, held in Melbourne over 19–20 November 2001. However, summaries of power-point presentations available on the ACCC's website contain little specific data on the nature and extent of consumer e-commerce complaints. In October 2001, the ACCC also released a Discussion Paper: *E-Commerce and Competition Issues Under the Trade Practices Act*, Australian Competition and Consumer Commission, Canberra, which is discussed in para. 5.127.

⁵¹² For example, FLIN submission, p. 2; ADA submission, p. 1; and submissions from library interests at the consultative forum.

concentration of electronic publishing in the hands of aggregators due to the technical requirements of delivering content online.⁵¹³

4.87 At the consultative forum, Monash observed that it found it easier to negotiate certain terms⁵¹⁴ than was previously the case and that while vendors may lack an appreciation of how libraries operate, they are often willing to amend licences once the position is explained. However, other library interests observed that Monash's experience did not represent their own, and argued that smaller libraries in particular may not have the legal knowledge or 'clout' to negotiate in the manner described by Monash. It was submitted that this was particularly so given the many and varied licences applicable to different materials. The Business Software Association of Australia (BSAA) representative countered by querying whether libraries had made real attempts to negotiate terms.⁵¹⁵

4.88 While some submissions from owners accepted that mass-market agreements are generally not designed for individual negotiation, their ability to reduce transaction costs for both parties was cited as a countervailing benefit. The IIPA stated that '[t]he inescapable fact is that standard form contracts are ubiquitous in our world today. To treat them as of dubious validity or enforceability would have widespread detrimental impacts on the economy.'⁵¹⁶ The suitability of mass-market agreements to online transactions was also raised amidst concerns that special rules would stifle the growth of e-commerce. The Government's stated commitment to encouraging business uptake of and consumer confidence in e-commerce through a light-touch legal and regulatory framework was noted in this regard.⁵¹⁷

⁵¹³ FLIN submission, p. 2.

⁵¹⁴ For example, those relating to walk-in use.

⁵¹⁵ Maurice Gonsalves, Mallesons Stephen Jaques, representing the BSAA at the consultative forum.

⁵¹⁶ IIPA submission, p. 6

⁵¹⁷ APA submission, p. 2.

4.89 Other submissions from owners stated that many standard form contracts are nonetheless open to negotiation. It was also argued that there are strong market pressures on licensors to provide reasonable terms and conditions.⁵¹⁸

4.90 The Australian Copyright Council (ACC) argued that, while individual consumers may not have the same ability to negotiate as institutional consumers, they are not devoid of negotiating power. The ADA's submission that books are not shrinkwrapped because this would be unacceptable to consumers was offered as evidence.⁵¹⁹ The possible impact of consumer resistance to the imposition of technological controls over copyright materials was discussed in paras 4.43–4.

4.91 The Committee notes that an inability for one party to negotiate satisfactory terms in a mass-market or other agreement may be amongst those factors which a court will consider in determining whether to grant any of the relief discussed in Chapter 5.

4.92 The Committee is also aware that the practice of 'bundling' – ie, requiring consumers to purchase/subscribe to a number of products/services in order to obtain access to or use a single product/service – is of concern to the library sector. The Committee notes that, if it is occurring, bundling may be relevant in the present context if it allows agreements which exclude or modify the exceptions to be simultaneously imposed over a number of products/services. It may also be relevant if it reduces competition in the relevant market/s and increases a vendor's capacity to impose one-sided agreements on consumers. However, the Committee notes that no data regarding bundling was provided by submitters. To the extent that bundling raises trade practices issues, it is discussed in Chapter 5.

⁵¹⁸ AIA submission, p. 6. On this point, the AVCC's submission stated that, while market forces may create a range of options for consumers, '[t]he position of universities is somewhat different. Access to the widest range of information and therefore copyright works is important. In a world where increasingly a single electronic subscription offered by a publishing aggregator will cover what were once 1,000 different hard copy journals, there is no substitutable product which competes in the market from the viewpoint of the university. Either it subscribes, or it does not': AVCC submission, p. 8.

⁵¹⁹ ACC supplementary submission, p. 7.

Committee's survey of online licence agreements

4.93 The Committee has conducted its own ad hoc survey of local and overseas licences over the course of its reference (see Appendix E). The following are general observations regarding online licences based on that survey.

4.94 Many of the online licences surveyed contained terms which explicitly or implicitly purported to exclude or modify the exceptions to the exclusive rights of owners set out in the Copyright Act.

4.95 General uses that are prohibited by the licences examined include reproducing, making derivative works from, or commercially exploiting the material and communicating, distributing or publishing the material. Exceptions that are explicitly excluded include the computer programs exceptions (decompiling, reverse engineering or using any other means to determine the underlying code) and (in one case) exceptions allowing copying for satire or parody under the fair dealing doctrine.

4.96 Many of the agreements examined prohibit the use of even insubstantial portions of material.

4.97 Although the licences examined commonly purport to modify or exclude copyright exceptions, there is often a provision for obtaining express written permission for uses not otherwise permitted by the agreement. The legal effect of granting users conditional permission to utilise exceptions, which they would ordinarily be entitled to unconditionally, is not clear (see Chapter 5).

4.98 A number of agreements specifically acknowledge user's rights under copyright legislation while many allow for various degrees of personal, non-commercial use. For example, a licence governing the use of a US Museum's website provides, in part, that:

'The Materials are made available for limited non-commercial, educational, and personal use only, or for fair use as defined in the United States copyright laws. Users may download these files for their own use, subject to any additional terms or restrictions which may be applicable to the individual file or program.'⁵²⁰

⁵²⁰ Metropolitan Museum of Art (see Appendix E).

A licence used by a large US scholarly publisher provides, in part, that:

'Single photocopies of single articles may be made for personal use as allowed by national copyright laws. Permission of the Publisher and payment of a fee is required for all other photocopying...Special rates are available for educational institutions that wish to make copies for non-profit educational classroom use.

Subscribers may reproduce tables of contents or prepare lists of articles including abstracts for internal circulation within their institutions.⁵²¹

Similarly, a licence used by an Australian legal website provides, in part, that:

'You may download, display, print and reproduce this material in unaltered form only (retaining this notice) for your personal, non-commercial use or use within your organisation. Apart from any use as permitted under the *Copyright Act 1968* all other rights are reserved...⁵²²

The Committee observes that, unlike the position in other jurisdictions, there is no general exception under the Act for personal, non-commercial use (see further discussion in Chapter 6).

4.99 The agreements commonly reserve the right to alter any term at any time without notice. Continued use of the site or services was generally deemed to indicate continued acceptance. A small number of agreements provided for notification of changes to terms. For example, a licence used by an Australian vendor of ebooks provides, in part, that:

'We may change the customer licence from time to time. If we do, we will post the new version on our site and we will email you...Although any change will take place immediately it is posted on our site, we welcome your comments on any such changes.⁵²³

4.100 Most of the agreements that the Committee has examined refer to the copyright laws of a particular jurisdiction, while a smaller number refer to international copyright laws and treaties. Some agreements refer implicitly to the fact that applicable copyright laws allow for certain exceptions to the exclusive rights of copyright owners. For example, the website of an Australian DVD, video and games vendor provides, in part, that:

⁵²¹ ScienceDirect Web Editions (see Appendix E).

⁵²² OzNetlaw (see Appendix E).

⁵²³ Ebooks.com (see Appendix E).

‘Other than as may be permitted by the Copyright Act, no part of this website may, in any form or by any means, be reproduced, modified, adapted or reused without the permission of the copyright owner.’⁵²⁴

4.101 However, a number of agreements, having implicitly acknowledged the existence of the copyright exceptions through references to copyright legislation, proceed to exclude or modify some or all of the exceptions. Some agreements also combine statements that material is protected by copyright law with terms that modify or exclude the copyright exceptions. It is arguable that some of these agreements imply that an infringement of their terms would be an infringement of copyright law (as discussed in paras 5.56–7).

4.102 Many agreements examined by the Committee contained choice of law and forum clauses, although some recognised that the laws of other jurisdictions would affect their operation.

4.103 Browsewrap agreements were found to be more common than clickwrap agreements (see discussion of these agreements in paras 5.04–16). Browsewrap agreements generally utilised a link to relevant terms and conditions of use on the bottom of each web-page. The terms and conditions were deemed to govern use of the site and services provided on it. Users were sometimes requested or advised to read these on the home page, before entering the site or prior to ordering products, but more commonly no reference was made to the link at all. The link was usually in small print and was rarely prominently displayed, although the Committee observes that it appeared in a fairly standard place on most websites.

4.104 The first clause or line of the terms and conditions/licence agreement generally deemed that use of the website constituted acceptance of the terms. The Committee notes that if such a claim were legally valid, a user would be bound by a licence through the acts of trying to access and read the licence.

4.105 In a small number of cases, it was not possible to print out a hard copy of terms and conditions at all. In other cases, terms and conditions did not print out

⁵²⁴ Ezy Retail (see Appendix E).

properly; however the Committee acknowledges that this may have been due to problems with its own equipment.

4.106 On the basis of evidence presented by submitters and its own investigations, the Committee is of the view that electronic trade in copyright materials is subject to agreements which purport to exclude or modify the exceptions to the exclusive rights of copyright owners provided under the Copyright Act. On the Committee's understanding of the exceptions as discussed in Chapter 3, it is of the view that this phenomenon *prima facie* alters the copyright balance established by the Copyright Act, which partly defines the rights of copyright owners in terms of the limits placed upon those rights by the exceptions.

Whether the situation is any different in relation to trade in copyright material that occurs offline

4.107 Generally, library and education interests such as FLIN, Deakin University, the AVCC, the ADA and the NLA indicated that few print materials with which they deal are subject to licence agreements which attempt to exclude or modify the exceptions.

4.108 Notwithstanding this, a number of examples of offline agreements which purport to do so were submitted to the Committee. The ADA submitted a clause printed on a videotape which provides:

RESTRICTED USE

THIS VIDEO IS PROTECTED UNDER THE COPYRIGHT ACT (1968) **IT MUST NOT BE:**

- Copied or reproduced in whole or in part in any format including digital;
- Rehired or let to another institution or organization;
- Used for commercial purposes....
- Copied, cut, marked or otherwise mutilated;
- Broadcast in any form;

UNLESS WRITTEN PERMISSION IS OBTAINED FROM [the vendor].

DUPLICATION WITHOUT PERMISSION IS ILLEGAL

OFFENDORS WILL BE PROSECUTED.⁵²⁵

⁵²⁵ ADA submission, p. 5.

4.109 CAUL noted that CD-ROMS may be packaged with books, both of which are subject to restrictive shrink-wrap licences.⁵²⁶ CAUL also stated that copyright statements in some academic print journals are becoming increasingly specific in relation to permitted uses and that some publishers seem to be attempting to converge conditions for use of their print and electronic products. It provided a number of examples of such statements.⁵²⁷ The ACA referred to ‘the copyright notice mantra at the head of virtually any book’, and stated that these notices ‘purport to oust any form of copying...[and]...make no reference to or exception for the statutory and other rights of the buyer.’⁵²⁸ The ADA gave the following example from a UK edition of a novel which, it stated, was purchased in Australia:

‘All rights reserved. No reproduction of this publication may be made without written permission. No paragraph of this publication may be reproduced, copied or transmitted save with written permission or in accordance with the provisions of the Copyright Act 1956 (as amended). Any person who does any unauthorized act in relation to this publication may be liable to criminal prosecution and civil claims for damages.’⁵²⁹

4.110 As with the clauses set out at paras 4.63, 4.64 and 4.65, this notice purports to restrict a user’s ability to:

- reproduce (extracts of) the book (eg, by photocopying it);
- publish (extracts from) the book;
- communicate (extracts from) the book to the public; and
- make an adaptation of (extracts from) the book.

4.111 The ACC noted that art galleries require visitors not to photograph artworks in the gallery, whether or not the artworks are still protected by copyright or could be reproduced pursuant to an exception.⁵³⁰

4.112 The ABC raised concerns about broadcast material obtained contractually from third parties and stated that agreements sometimes try to modify the fair dealing

⁵²⁶ CAUL submission, p. 3.

⁵²⁷ CAUL submission, pp. 4–5.

⁵²⁸ ACA submission, p. 5.

⁵²⁹ ADA submission, p. 5.

⁵³⁰ ACC submission, p. 5.

exceptions. It observed that, if bound to such agreements, the ABC would be in a worse position than other broadcasters, who could record material from an ABC broadcast and then make fair dealing uses of it.⁵³¹

4.113 The Committee is also aware that offline trade in copyright materials between parties with relatively equivalent bargaining power may sometimes involve terms which exclude or modify the copyright exceptions, but which are tolerated in the interests of business efficacy.

Committee's survey of offline licence agreements

4.114 The Committee's own survey of offline licences found that copyright notices which purport to exclude or modify the copyright exceptions commonly appear in print materials. These notices were much briefer than the terms and conditions accompanying online materials but were equally broad in their exclusion of relevant exceptions. Clauses commonly prohibited the reproduction, storage in a retrieval system or transmission in any form or by any means of materials without the prior permission of the publisher.

4.115 Notices in books and journals almost always appeared on the reverse of the title page and were easy to find. However, notices in magazines were not uniformly located and appeared in very small print.

4.116 Notices purporting to exclude or modify the copyright exceptions were not restricted to recent publications.

4.117 On the basis of evidence presented by submitters and its own investigations, the Committee is of the view that offline trade in copyright material is, like online trade in copyright material, subject to agreements and notices which purport to exclude or modify the exceptions to the exclusive rights of copyright owners. As a matter of principle, the Committee considers that these agreements are capable of altering the copyright balance established by the Copyright Act. However, the Committee observes

⁵³¹ ABC submission, pp. 2–3.

that the impact of these agreements may differ given differences between the digital and analogue environments, as discussed below.

The nature of any difference

4.118 The Committee received a range of views as to the differences between online and offline trade in copyright material. Owner interests generally argued that electronic trade in copyright material should not be subject to regulation additional to that which presently applies to non-electronic trade and materials. It was submitted that contracts provide a vital means of responding to changes brought about by the digital environment, such as the heightened risk of unauthorised copying of materials (see below). It was also argued that clauses prohibiting supply to third parties or granting access to authorised users could be a reasonable means of avoiding the risk that a supplier will exhaust the market with the first supply of material.⁵³²

4.119 The question of whether fair dealings with respect to digital materials may be different from fair dealings with respect to print materials was also raised at the consultative forum. The ACC stated that the only point of reference is the 3-step test in the Berne Convention which refers to ‘normal exploitation’ of works and that normal uses are changing in the digital environment.⁵³³

4.120 Both owners and users variously accepted that electronic trade in copyright material differs from non-electronic trade in that:

- contracts generally take the form of licences for access to copyright material;
- copyright material in electronic form is more vulnerable to unauthorised copying;
- copyright (and other) material can be protected by technological protection measures;
- mass direct contracting with end-users is possible; and
- contracts are more likely to be transacted across national borders.

The Committee discusses submissions in terms of these headings below.

⁵³² ACC supplementary submission, p. 5.

⁵³³ Libby Baulch, Executive Officer, ACC at the consultative forum.

Licensing of access

4.121 Consistent with commentary discussed in Part I of this Chapter, submitters generally agreed that copyright material in electronic form is typically accessed through a licence agreement. The Committee notes that licences may be used to restrict the subsequent transfer of products and the uses to which a product can be put. When a purchaser becomes the owner of a tangible copy of a copyright work such as a book they do not require a licence to read the book, as the act of reading does not involve the exercise of a copyright right. However, if the purchaser wishes, for example, to copy the book, perform it in public or broadcast it, a licence will be required unless one of the exceptions set out in Chapter 3 is applicable. In contrast, the mere act of accessing a work in digital form may well involve a reproduction of the work (ie, the exercise of a copyright right). This gives rise to the argument, advanced by copyright owners, that a licence is required to access a work for uses such as reading and viewing, which were not previously subject to copyright.

4.122 The International Intellectual Property Alliance (IIPA) stated that '[t]he paradigmatic form of dissemination of copyright materials through the outright sale of tangible copies is rapidly shifting to a model featuring the licensing of access of intangible copies.' It stated that this could occur 'with or (increasingly) without transfer of any tangible object' and that terms of access 'may include for how long the access endures; from where (geographically or with respect to technological platforms) the access may take place; the transferability, if any, of the right to access the materials; and the degree to which the accessing party is allowed to retain all or part of the material after the initial period of licensed access'.⁵³⁴ The IIPA characterised this shift to licensing of access as 'a marketplace reality, resulting from changes in the ways that consumers use works and technology.'⁵³⁵ The AIIA, ADA, AVCC, Deakin University and others also highlighted the shift to licensing of rights in the digital environment.

⁵³⁴ IIPA submission, pp. 3–4.

⁵³⁵ IIPA submission, p. 3.

Digital material is more vulnerable to unauthorised copying

4.123 The APA argued that ‘[t]he digital arena is a dangerous place for copyright owners. Perfect copies can be made and instantly spread around the world effortlessly without authority. If publishers are to be encouraged to release works of scholarship and creativity into the on-line environment they must feel safe’.⁵³⁶ CAL stated that ‘file trading networks [that] allow perfect copies of files to be made simply which can be distributed to an enormous number of users within an instant’ have created a situation where ‘[o]wners of copyright in musical works and sound recordings have clearly been subjected to the most flagrant infringement of their rights’.⁵³⁷ A similar point was made by ARIA⁵³⁸ and acknowledged at the consultative forum.⁵³⁹

4.124 A number of submissions from owners and users characterised the shift to licensing as a response to potential unauthorised copying. For example, the APA warned that ‘limitations on contracting have the potential to further discourage on-line publishing’⁵⁴⁰ while the BSAA stated, with respect to software, that:

‘[t]he only way in which the copyright owner can regulate the number of copies which the user is entitled to make is by means of an appropriate licence. This issue of regulating the number of copies a user can make is all the more important given the immense problem of illegal copying which the software industry has faced from the outset, due to the ease with which software can be copied’.⁵⁴¹

4.125 Consistent with submissions and with commentary discussed in Part I of this Chapter, the Committee accepts that the online environment has increased the ease with which large numbers of high quality infringing copies of digital material can be created and rapidly disseminated.

⁵³⁶ APA submission, p. 3.

⁵³⁷ CAL submission, p. 9.

⁵³⁸ ARIA submission, p. 1.

⁵³⁹ Professor Jill McKeough, Law Council at the consultative forum.

⁵⁴⁰ APA submission, p. 3.

⁵⁴¹ BSAA submission, p. 2.

Copyright (and other) material can be protected by TPMs

4.126 Consistent with commentary discussed in Part I of this Chapter, submissions from user interests argued that licences are increasingly backed by technological measures which can control copying and/or access. The Committee notes that, unlike copying, access is not directly dealt with by the Copyright Act. Many submissions from users raised the same concerns with respect to both access and copy control (the differences between these concepts is discussed in Part I of this Chapter).

4.127 MCEETYA stated that '[t]echnologies such as encryption, and other technological protection mechanisms, will mean that copyright owners will have increasing levels of control over public access to copyright materials.'⁵⁴²

4.128 According to the ACA '[t]he information products that consumers need may become hidden away behind ramparts of technology. Besides encryption, there are login procedures, software/hardware combinations, anti-copying devices, electronic 'watermarks', etc.'⁵⁴³

4.129 DCITA's submission discussed and gave examples of DRMS which 'allow systemic control of diverse content over the entire life cycle of the product'. It provided relevant articles and examples of DRMS which, it stated, 'provide[d] owners and users with a number of conditions of use, delivery, types of access, levels of use and tracking options'.⁵⁴⁴

4.130 The AVCC stated that '[t]he new exclusive right of communication to the public coupled with the prohibitions on the supply of circumvention devices (for which there is no exception for the purpose of fair dealing) significantly alters the extent to which the copyright exceptions can be exercised.'⁵⁴⁵ The permitted purposes for which a circumvention device may be used were said by some submitters to be essential to ensuring appropriate access to information in the online environment.

⁵⁴² MCEETYA submission, p. 4.

⁵⁴³ ACA submission, p. 3.

⁵⁴⁴ DCITA submission, p. 4 and Attachments 2–7.

⁵⁴⁵ AVCC submission, p. 1.

4.131 From an owner's perspective, the ACC argued that '[e]xceptions to infringement regulate the use of material which is accessible. They do not require a copyright owner to give access to material which is otherwise inaccessible, or to give unconditional access to material which is accessible subject to certain conditions (for example, in return for payment).'⁵⁴⁶ Other owner interests at the consultative forum supported this view. For example, the BSAA stated that an owner is and always had been free to deny or grant access to their work by making it public.⁵⁴⁷ As noted in Part I of this Chapter, the Arts Law Centre stated that the exceptions do not allow a user to steal a book from a bookstore for a fair dealing purpose and that fair dealing does not extend to 'taking'.⁵⁴⁸

4.132 Other participants at the forum argued that the question of use arises once initial access has been granted.⁵⁴⁹ The ADA stated that users can be required to pay an access fee given that nothing in the Act grants a right of free access, but once access is obtained it may be permissible to circumvent protections to gain the full range of uses.⁵⁵⁰ The Committee shares the view that it is the ability to do certain acts prescribed by an exception once a person has acquired lawful access to copyright material that is the crucial question. It is not the Committee's role to reopen the question of when it should be possible to circumvent a technological protection measure. By definition, the issue of allowing access where the copyright owner has denied it altogether does not involve the role of contract.

4.133 Submissions were consistent with some of the commentary set out in Part I of this Chapter in observing that licences may be backed by technology which can directly enforce terms of the agreement (eg, by disabling printing or 'locking-up' a CD-ROM after a licence period expires) and/or communicating with the vendor with respect to compliance status.⁵⁵¹ According to the ACA, '[t]here are those who fear the trend of control by technology and contract could culminate in a regime of

⁵⁴⁶ ACC submission, p. 2.

⁵⁴⁷ Maurice Gonsalves, Mallesons Stephen Jaques, representing the BSAA at the consultative forum.

⁵⁴⁸ Delia Browne, Director, Arts Law Centre at the consultative forum.

⁵⁴⁹ Professor Jill McKeough, Law Council at the consultative forum.

⁵⁵⁰ Nick Smith, Executive Officer, ADA at the consultative forum.

⁵⁵¹ For example, FLIN submission, p. 1.

lex infomatica, where judge jury and executioner would all be embodied in the functions of computer code, dispensing precise and instant automated law, with prescription, policing and enforcement rolled into one neat binary package.⁵⁵²

4.134 The Committee observes that some user concerns regarding ‘digital lock-up’ are consistent with academic commentary discussed in Part I of this Chapter. The Committee also notes that, as appears from commentary and submissions, the nature and existence of a new access right is controversial.

Direct contracting with end-users on a mass scale is possible

4.135 Submissions were also consistent with academic commentary in noting that, along with these developments, the new forms of mass-market agreement allow owners to contract directly with end users in a cost-effective manner. The Committee observes that it may therefore be easier to enforce a contract with an end user than was previously the case.

4.136 The AVCC stated that, as a practical matter, restrictions on the use of hard-copy resources apply to a very small proportion of material acquired by universities as ‘[m]ost works in print are acquired by purchase and the purchaser does not sign or otherwise agree [to] any restrictions on use of the work’.⁵⁵³

4.137 The ADA noted the uncertain status of notices in hard-cover materials. It also stated that ‘[t]here is...little chance of enforcing such a ‘contract’ [as] [a]ny breaches are likely to be small-scale and off-line...’⁵⁵⁴ The Committee notes that this is in contrast to large scale infringements which can more easily be effected online.

4.138 The Committee accepts that, consistent with submissions and commentary, contracts connected with online trade are more likely to be enforced, whether by technological or legal means.

⁵⁵² ACA submission, p. 3.

⁵⁵³ AVCC submission, p. 6.

⁵⁵⁴ ADA submission, p. 5.

Contracts are more likely to be governed by foreign law

4.139 Submissions from users noted the tendency of licences to be governed by foreign, and particularly US law.⁵⁵⁵ Submissions from the library sector viewed this as a matter for particular concern, with some noting that the vendors of scholarly publications are often based in the United States.⁵⁵⁶ FLIN noted that jurisdictional issues compounded the difficulties faced in attempting to negotiate licences.⁵⁵⁷

4.140 On the other hand, owner interests argued that jurisdictional problems raised by online contracting have the potential to be addressed by contracts which can provide clarity and predicability. Difficulties associated with different terms of protection for photographs in different jurisdictions were raised at the consultative forum in this context.⁵⁵⁸ The AIIA submitted that:

‘Jurisdictional issues can cause uncertainty regarding applicable law and enforcement in particular. To the extent that these issues can be clarified by the use of contractual terms, AIIA would support them. This may provide the licensor with some means of controlling the use of their material where the law of the recipient would otherwise allow it.’⁵⁵⁹

Jurisdictional and choice of law issues associated with transnational online agreements are discussed in Part II of Chapter 5.

4.141 The AVCC stated that even if Australia modified its copyright law to limit the operation of contracts which exclude or modify the exceptions, users could find themselves in breach of contracts enforced overseas. It submitted that appropriate provisions in Australian legislation could nevertheless prevent overseas owners from obtaining injunctive relief in Australian courts to restrain uses of copyright material in ways allowed by Australian law (but which would otherwise be in breach of contract). It also argued that, ‘[i]n any event, the possibility of different approaches in overseas jurisdictions...should not deter

⁵⁵⁵ For example, Monash submission, p. 4; Deakin submission, p. 6; ALIA submission, p. 14; CAUL submission, pp. 8–9; AVCC submission, p. 10; and ADA submission, p. 14.

⁵⁵⁶ For example, Monash submission, p. 4.

⁵⁵⁷ FLIN submission, p. 2.

⁵⁵⁸ Anna Ward, Executive Officer, Vi\$copy at the consultative forum. There are differences across all categories of copyright materials between the term of protection in Australia on the one hand and the US and EU countries on the other.

⁵⁵⁹ AIIA submission, p. 7.

Australia from adopting an approach which protects its own public interests and puts its courts in a position to decide these issues appropriately.⁵⁶⁰

4.142 The AVCC nonetheless expressed concern that foreign owners may terminate access to online work in response to alleged breaches of contractual restrictions which override Australian copyright law exceptions.⁵⁶¹

4.143 A number of submitters raised objections to governing law clauses. For example, the ADA submitted that '[n]o Australian individual or organization should be forced to comply with the laws of a foreign jurisdiction unless they are operating outside Australia's jurisdiction.'⁵⁶² This was supported by CAUL,⁵⁶³ ALIA⁵⁶⁴ and the NLA.⁵⁶⁵

4.144 The Committee gives further consideration to jurisdictional issues in Part II of Chapter 5.

4.145 The Committee has concluded on the basis of academic commentary, evidence presented by submitters and its own investigations that agreements are being used to exclude or modify the copyright exceptions. As discussed in Chapter 3, these exceptions are crucial to the copyright balance. Together, the exclusive rights of copyright owners and the exceptions to those rights define the copyright interest. The Committee is therefore of the view that this practice undermines the copyright balance established by the Copyright Act.

4.146 The Committee observes that the digital environment allows cost-effective and enforceable contracts to be executed with end-users which may also be backed by technological protection measures. The Committee notes that this is in contrast to agreements which purportedly govern the use of hard-copy materials. Whether agreements which exclude or modify the copyright exceptions could be successfully challenged under existing law is explored in the following Chapter.

⁵⁶⁰ AVCC submission, p. 10.

⁵⁶¹ *ibid.*

⁵⁶² ADA submission, p. 14.

⁵⁶³ CAUL submission, p. 9.

⁵⁶⁴ ALIA submission, p. 14.

⁵⁶⁵ NLA submission, p. 4.