
Chapter One

Preface

1.01 The Copyright Law Review Committee was established in 1983 by the Attorney-General as a specialist advisory body to report to the Government on specific copyright law issues referred to it from time to time.

1.02 From 1983 to 1995 the Committee was chaired by the Hon. Justice I.F. Sheppard AO, then a Justice of the Federal Court of Australia and President of the Copyright Tribunal. During that period the Committee reported on nine references: the meaning of 'publication' in the *Copyright Act 1968* (Cth) (the Act); the use of copyright material by churches; performers protection; moral rights; the importation provisions of the Copyright Act; conversion damages; journalists' copyright; and computer software protection.

1.03 After a brief period under Mr Peter Banki, the Committee was chaired by Professor Dennis Pearce from September 1996 until April 2000. The Committee completed two reports during this period. The first was a report on the simplification of the Copyright Act in two parts. Part 1: Exceptions to the Exclusive Rights of Copyright Owners was published in September 1998. Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues was published in February 1999. In February 2001, the Committee published a report on the Jurisdiction and Procedures of the Copyright Tribunal.

1.04 In April 2001 the Attorney-General appointed Professor James Lahore as the Chairman of the Committee.

The Committee

1.05 Professor James Lahore is Chairman of the Committee. The other members of the Committee are Ms Maureen Barron, Mr Tom Cochrane, Mr Charles C. Britton, Mr Chris Creswell, Professor Michael D. Pendleton and Dr Warwick A. Rothnie.

1.06 The Committee is assisted by a permanent Secretariat, based within the Copyright Law Branch, Attorney-General's Department, Canberra.

1.07 Ms Fiona Phillips is the Director of the Secretariat. The other members of the Secretariat are Ms Erin Driscoll and Ms Rebecca Bigg-Wither (both from November 2001), Ms Jo Clay (from April to October 2001), Ms Rachel Redmond (from April 2001 to February 2002), and Ms Christine Kong (September 2001, and from February to April 2002). Ms Kirsti Haipola, Ms Elena Down and other members of the Copyright Law Branch also contributed to the work of the Secretariat.

1.08 Enquires concerning the Committee and its work should be directed to:

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Course of reference

1.09 On 26 April 2001 the Attorney-General presented the Copyright Law Review Committee with the task of inquiring into the relationship between contract and copyright. The Committee's terms of reference are set out on the following page. In carrying out its reference, the Committee advertised widely, invited submissions from a variety of interests and carried out consultations with key interest groups and affected parties. The Committee made active use of its website during this process, posting information about the reference including submissions on the site. It received many hits on its site during this period. It also received and responded to many queries via the CLRC Secretariat's e-mailbox.

1.10 In June 2001, the Copyright Law Review Committee released an Issues Paper, *Copyright and Contract*. The Committee received thirty-six submissions in response to that paper. (A list of those who made submissions to the Committee is at Appendix A).

1.11 On 4 October 2001 the Committee held a half-day forum in Sydney with particular interests to discuss issues relevant to its reference. Representatives from copyright industry bodies and user organisations, as well as interested individuals attended the forum. (A list of interests represented at that meeting is at Appendix B).

1.12 Prior to the forum, the Committee published a Discussion Paper. The purpose of the paper was to promote discussion and invite further comments on key matters raised in submissions, and on some preliminary suggestions of the Committee.

1.13 Representatives of the Committee also spoke at various conferences and seminars during the course of the reference and addressed questions from members of the public. The Committee presented its Final Report to the Attorney-General on 30 April 2002.

The Terms of Reference

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

1. The Government regards it as important that Australian copyright law maintain an appropriate balance between the rights of copyright owners and the rights of

copyright users. Against that background, the Copyright Law Review Committee is to inquire into and report on:

- (a) as far as is reasonably ascertainable, the extent to which electronic trade in copyright works and other subject matter is subject to agreements which exclude or modify exceptions to the exclusive rights of copyright owners provided under the Copyright Act;
- (b) as far as is reasonably ascertainable, the extent to which trade in copyright works and other subject matter, otherwise than online, is subject to agreements which exclude or modify exceptions to the exclusive rights of copyright owners provided under the Copyright Act, and the nature of the difference, if any, with (a);
- (c) the ability of owners or users of copyright to enforce agreements which exclude or modify exceptions to the exclusive rights of copyright owners;
- (d) whether agreements which exclude or modify exceptions provided under the Act should be enforceable under the Act;
- (e) the views of the owners and users of copyright material on (c) and (d);
- (f) the possible relevance of the Committee's findings in response to (c) or (d) for exceptions provided under the *Circuit Layouts Act 1989*;
- (g) a strategy to implement and review the preferred option(s), including whether the preferred options can be implemented by non-legislative change;
- (h) incidental matters arising out of points (a)-(g) which are able to be addressed within the time frame for the reference.

2. In undertaking the inquiry, the CLRC will have regard to:

- (a) any amendments to the Act that are introduced into Parliament, or which the Government announces are proposed to be introduced or are being considered;
- (b) the recommendations and findings of relevant Government reviews or inquiries and any reports by or views of relevant expert or advisory bodies and other interests;

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

Chapter Two

Executive Summary

2.01 This inquiry has been brought about by the Government's stated concern to maintain an appropriate balance between the rights of copyright owners and the rights of copyright users. Chapter 3 begins with a discussion of the copyright balance. The Committee recognises that the exclusive rights of copyright are partly defined by the exceptions, in that the rights only exist to the extent that they are not qualified by the exceptions. The Committee then goes on to analyse the nature, scope and policy basis of the principal exceptions to the exclusive rights of copyright owners in the *Copyright Act 1968* (Cth). This discussion forms the theoretical basis for assessing the extent to which contracts should be able to exclude or modify the exceptions later in the Report. For the purpose of this analysis the exceptions are categorised into five main groups: fair dealing; libraries and archive exceptions; other technology-based exceptions; statutory licences and miscellaneous exceptions. The Committee observes that the principal exceptions, such as those for fair dealing, are fundamental to defining the copyright interest, while others, such as the statutory licences, are not true exceptions to the exclusive rights of copyright owners and might more appropriately be termed limitations.

2.02 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'.¹ Chapter 4 addresses these issues. In Part I of Chapter 4 the Committee conducts a review of literature about what is happening in the digital environment. While this indicates that the traditional copyright balance is being challenged by the digital environment, the Committee expresses the view that the literature is divided over the extent to which the use of technology and transactional arrangements is detrimentally impacting on this balance.

¹ The Committee notes that the term 'online' can be misleading as some digital media, such as CD-ROMs, are not 'online'.

2.03 Part II of Chapter 4 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 and the nature of any differences between online and offline trade, based on material presented to the Committee and its own collection of data.

2.04 The Committee found that submissions from both owner and user interests 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.

2.05 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. It is the Committee's view that, should such agreements be enforceable, there would be a displacement of the copyright balance in important respects.

2.06 Chapter 5 looks at the question of whether agreements that purport to exclude or modify the copyright exceptions are enforceable. Part I briefly discusses whether agreements governed by Australian law might fail at the outset for lack of proper formation. It then goes on to discuss to what extent agreements might be affected by the doctrine of unconscionable conduct, consumer protection legislation, the application of equitable maxims, considerations of public policy, or competition law. The Committee concludes that the enforceability of such agreements is unsettled as a matter of domestic law. Even where remedies of the kind discussed in Chapter 5 are theoretically available, the Committee is most concerned that, in practice, there are very considerable disincentives to users ever seeking to defend their rights while there are very powerful incentives for copyright owners to seek to enforce what might otherwise be objectionable terms.

2.07 Part II of Chapter 5 discusses the jurisdictional issues raised by agreements transacted across national borders. The Committee observes that agreements the subject of this reference are increasingly likely to be governed by foreign law (as well as subject to the jurisdiction of foreign courts). The Committee notes, in particular, that where the laws of a foreign country govern these agreements, remedies available under Australian law may be of limited relevance.

2.08 The Committee is, however, unable to give full consideration to the private international law issues raised by contracts which purport to exclude or modify the copyright exceptions within the context of this reference. Nor is the Committee satisfied that domestic proposals to resolve these issues would serve any practical purpose.

Recommendation

5.182 The Committee recommends that the Government work actively to promote an international solution to private international law issues relating to agreements the subject of this reference.

2.09 Chapter 6 examines approaches adopted elsewhere to determine whether they provide any guidance for the Committee in considering what should be done about contracts that purport to exclude or modify the copyright exceptions. To this end, Part I of Chapter 6 looks at the European Union and Part II surveys developments in the United States. The Committee concludes that while in both Europe and the US legislators have sought to provide for the legal protection of technological protection measures as required by the World Intellectual Property Organisation Copyright Treaty (WCT), as in Australia, neither jurisdiction has resolved the issue of whether copyright exceptions can be set aside by contract. While there have also been initiatives for uniform European and US contract legislation, these have been met with mixed responses.

2.10 While the Committee is mindful of the increasing need to take into account the laws of other jurisdictions, it considers that these examples do not provide a template for Australia. The circumstances in these jurisdictions are different to our circumstances. Not least of these differences is that Australia's legal and constitutional

setting differs from that of the EU, which is subject to the European Convention of Human Rights, and the US, where there are broad constitutional guarantees.

2.11 Based on its findings that agreements are being used to exclude or modify the copyright exceptions and that existing remedies are not adequate, the Committee has concluded that there is a displacement of the copyright balance. The Committee then goes on in Chapter 7 to make certain recommendations for change. These recommendations seek to preserve the integrity of the exceptions which were the subject of submissions and its own research and which it has identified as being fundamental to the copyright interest in Australia.

Recommendations

7.49 The Committee recommends that the Copyright Act be amended to provide that an agreement, or a provision of an agreement, that excludes or modifies, or has the effect of excluding or modifying, the operation of ss. 40, 41, 42, 43, 43A, 48A, 49, 50, 51, 51AA, 51A, 52, 103A, 103B, 103C, 104, 110A, 110B, 111A of the Act, has no effect.

7.50 The Committee also recommends that the integrity of the 'permitted purposes' in s. 116A(3) (4) and (7) of the Copyright Act be retained by preventing a copyright owner from making it a condition of access to his or her work or other subject matter that users will not avail themselves of a circumvention device or service for the 'permitted purpose' of doing an act that is not an infringement of copyright under ss. 47D, 47E, 47F, 48A, 49, 50, 51A, 183 and Part VB.

7.51 The Committee considers that its recommendations should not alter the effect of s. 9(3) of the Copyright Act insofar as it relates to confidentiality agreements.

7.52 The Committee recommends the encouragement of the development of codes of conduct and model licences for dealings with the remaining exceptions in the Copyright Act where relevant.

2.12 The Committee's terms of reference require it to consider the possible relevance of the Committee's findings in relation to agreements which exclude or modify exceptions to the exclusive rights of copyright owners, for exceptions provided under the *Circuit Layouts Act 1989* (Cth) (Circuit Layouts Act). This is dealt with in Chapter 8.

2.13 No evidence is available to the Committee to demonstrate that legislative change is necessary to address the interaction between contract and the exceptions to the exclusive rights of owners of circuit layouts.

Recommendation

8.18 The Committee makes no recommendation for change to the Circuit Layouts Act.

