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***Second Submission to
Copyright Law Review Committee on
Copyright and Contracts***

October 2001

1. In this second submission to the Committee, we respond to issues in the Committee's Discussion Paper prepared for its Forum on 4 October 2001.

Summary of position

2. We maintain the position in our first submission to the Committee that under the current law (apart from section 47H) a party to a contract may agree not to do something otherwise allowed by the Copyright Act, in a similar way that a party may be given permission to do something otherwise prohibited under Copyright Act.¹ We also maintain our view that amendment of the Copyright Act in relation to contractual provisions governing the use of copyright material is not warranted. We note that the US Copyright Office, following a review of provisions of the Digital Millennium Copyright Act, has recently stated that such amendments to the US Copyright Act would be premature.²

Australian Copyright Council

3. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policy.
4. Some of the organisations affiliated with the Australian Copyright Council have made separate submissions to the Committee.

¹ We note that Committee needs to take into account provisions such as 135Z and 135ZZH, 135ZZC and 109(2), which provide that nothing in the statutory licences allowing educational use, retransmission and broadcasting effects the right of a copyright owner to grant a licence in relation to the activities covered by the statutory licence.

² *A Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act*, August 2001: http://www.loc.gov/copyright/reports/studies/dmca/dmca_study.html

The Executive Summary says:

The question of contract preemption was raised by a number commenters who argued that the Copyright Act should be amended to insure that contract provisions that override consumer privileges in the copyright law, or are otherwise unreasonable, are not enforceable. Although the general issue of contract preemption is outside the scope of this Report, we do note that this issue is complex and of increasing practical importance, and thus legislative action appears to be premature. On the one hand, copyright law has long coexisted with contract law. On the other hand, the movement at the state level toward resolving questions as to the enforceability of nonnegotiated contracts coupled with legally-protected technological measures that give right holders the technological capability of imposing contractual provisions unilaterally, increases the possibility that right holders, rather than Congress, will determine the landscape of consumer privileges in the future. Although market forces may well prevent right holders from unreasonably limiting consumer privileges, it is possible that at some point in the future a case could be made for statutory change.

The “balance” between the rights of owners and users

5. The most useful reference for determining the appropriate “balance” between the rights of owners and users is the three-step test in the international treaties to which Australia is a party.³ The three-step test envisages that exceptions and limitations will change over time; the “balance” intended by a legislature at one point in time may not be appropriate later as markets and types of use evolve. Exceptions and limitations which apply in an environment of change must therefore be reviewed periodically to check that they still meet the three-step test. This was acknowledged by the Government when it referred to the Digital Agenda amendments as “entering uncharted waters” and undertook to review its operation.⁴
6. We do not think that the Government sufficiently took into account the differences between the digital and non-digital environments when introducing the new exceptions in the Digital Agenda Act, and in any event the digital environment has changed even in the time that the Digital Agenda Act was passed in August 2000.
7. We ask that the Committee takes more account of the differences between the digital and non-digital environments, including matters such as options for acquisition and sharing of online resources in libraries and educational institutions which are not available for physical resources, having regard to the ease of remote access and simultaneous access the one resource.

Purposes of exceptions

8. The exceptions at the centre of the Committee’s inquiry – the fair dealing exceptions, the library provisions and the educational use provisions – are there, we submit, for situations in which there is no contractual relationship between the parties. This is usually the case in the offline environment, and often the case in relation to Internet resources. We note the submission from Monash University, which says the Digital Agenda amendments made little difference for online material, to which it had already negotiated suitable use conditions (but did make a difference for digitising print materials).
9. For the history and rationale of the fair dealing provisions, we refer the Committee to our publication B92 *Fair Dealing in the Digital Age*.⁵ There is also discussion of exceptions in our publication B97 *Copyright Rights*.

³ Exceptions and limitations must:

- only apply in certain special cases
- not conflict with a normal exploitation of a work and
- not unreasonably prejudice the legitimate interests of the rightsowner.

⁴ The review of one aspect of the legislation – the application of the library provisions to corporate libraries – began early this year before the Digital Agenda amendments had even come into force.

⁵ 2nd ed, November 1998

10. For a history of the library provisions, and a comparison with other jurisdictions, see *A Comparative Study of Library Provisions: From Photocopying to Digital Communication*.⁶
11. Our position in relation to exceptions in the Copyright Act is set out in our submissions to the Committee in connection with its inquiry into Simplification of the Copyright Act, and our response to Part 1 of the Committee's report.

Contracts allow more tailored access conditions

12. Governing uses of copyright material by contract allows parties to achieve more tailored access in an environment of rapid change. It also allows the parties to address issues left uncertain or unspecified in the Copyright Act.⁷
13. The submissions received by the Committee show that institutional consumers can, and do, negotiate tailored arrangements to suit their needs, including the jurisdiction of the contract.⁸ In some cases, they are forming consortia to assist with their negotiations.⁹
14. These negotiations require the institutions to have appropriate policies and staff training in relation to who can enter into contracts, and access to legal advice – as you would expect for any contract binding on the institution and any expensive acquisition. We submit that it is not role of Copyright Act to remedy failures to institute proper contracting practices.
15. Some of the institutions have said that they are able to negotiate for more extensive access than allowed by the Copyright Act, and that this possibility must be maintained.¹⁰
16. Some of the institutions give examples of contractual obligations which they say do not allow them to do certain things the Copyright Act would allow them to do if they had contract-free access. However, it is not clear:

⁶ Ian McDonald, *A Comparative Study of Library Provisions: From Photocopying to Digital Communication*, Centre for Copyright Studies, Sydney 2001. Available from <http://www.copyright.org.au/new.htm> and <http://www.copyright.com.au>, and in printed form from Centre for Copyright Studies, and.

⁷ For example:

- when a work is “available within a reasonable time”;
- whether a body is “the Commonwealth or a State” and whether its activities are for the “purposes” of the Commonwealth or a State;
- the meaning of “reasonable portion” for a compilation or composite work; and
- whether research or study which benefits a corporation is “fair dealing”.

⁸ One institution – Monash – said it negotiates all licences, including “click-one” licences

⁹ See, for example, the National Library of Australia submission and the annexed Consortium Statement of Principles Guiding Licence Negotiation.

¹⁰ See, for example, the submissions from Monash, FLIN and MCEETYA.

- what the practical effects of such obligations are, and why they are undesirable;
- whether the institution attempted to negotiate the contract;
- whether the contract, viewed as a whole, includes benefits to the institution not given by the Copyright Act (eg simpler compliance); and
- whether there may be any implied licences in the contract.¹¹

17. The following are responses to the main examples given in the Discussion Paper.

Responses to examples of “contracting out”

Making available to third party; “authorised user”

18. Paragraph 9 of the Discussion Paper refers to a clause, in a contract relating to a database, prohibiting supply to third parties. This would seem to be a similar issue to the requirement in contracts to provide access only to “authorised users” (referred to in paragraph 12 of the Discussion Paper).
19. We submit that the requirement is reasonable; without it, the supplier risks exhausting the market with the first supply. In addition, it is entirely reasonable for a supplier to have a pricing structure whereby the price for the supply varies according to the number and/or nature of authorised users.
20. The people to whom access can be given is a matter of negotiation between the purchaser and the supplier, and, as indicated in paragraph 12 of the Discussion Paper and at the Forum, institutions are able to negotiate access for certain third parties.

Reverse engineering

21. Paragraphs 9 and 16 of the Committee’s Discussion Paper refers to prohibitions on reverse engineering. We do not understand the Committee’s concern given that such purported prohibitions are enforceable as a result of section 47H.

Use of insubstantial extracts and public domain material

22. Paragraph 10 of the Discussion Paper refers to licences which “sought to expand the scope of copyright by imposing restrictions over the use of insubstantial extracts and material that is in the public domain”. It refers to an example given by the Australian Digital Alliance (ADA) regarding a CD-ROM containing treaties which are “in the public domain”. It is not clear in what sense “public domain” is used here,¹² but in any event treaties are available from a range of

¹¹ A licence may be implied as a matter of commercial efficacy or as a matter of necessity.

¹² A treaty is not in the public domain, in the sense that copyright has expired, until at least 50 years after is published.

sources, including for free download from websites. If a library wants to supply extracts of the treaties from the CD-ROM rather than from another source (for example because it has features such as search facilities not available for other sources), then that is a matter for negotiation at the time of purchase.

23. If copyright in a work has expired, there is no obligation on a person who owns a physical object embodying that work to give unconditional access to the work (or any access at all),¹³ and we submit that there should be no such obligation in the digital environment.

Library supply of material to other libraries and clients

24. This issue is raised in paragraph 11 of the Discussion Paper. In our view, libraries are not entitled under the Copyright Act to supply materials, to which they have online access, to clients or other libraries, as the materials do not form part of the library's collection. For material in the library's collection – such as CD-ROMs – this is an issue for negotiation at the time of purchase.
25. Reference is also made to “site clauses” and inclusion of material in course packs – again, these are issues for negotiation at the time of purchase.

Preservation by libraries of material in its collection

26. This is raised by paragraph 11 of the discussion paper.
27. It is difficult to see how copying for preservation is applicable for material accessible for a licence period – any more than it would be applicable to a rented or borrowed item such as a video. In any event, even without a contractual prohibition, it is doubtful that material accessed for a licence period forms part of the library's collection, as required by section 51A.

Responses to other issues raised
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Contract formation, breaches of consumer protection standards and choice of law

28. The Committee states that contract formation, breaches of consumer protection standards and choice of law are issues it regards as problematic, having conducted its own survey of online licences (see paragraph 14).¹⁴ None of these issues is exclusive to copyright, and none should be addressed in isolation in the

¹³ Galleries restrict photographing of public domain works in their collections. This is at least partly to preserve the market for the galleries' reproductions of those works.

¹⁴ It would be useful for the Committee to provide more information about this survey, so we have an opportunity to assess whether we share the Committee's concerns in relation to the contracts surveyed.

Copyright Act. These issues are the subject of consideration elsewhere in a wider context, particularly in connection with facilitating ecommerce.

Managing resources with different conditions

29. Some of the submissions refer to the need for new administrative systems for managing a range of resources with different conditions. This is one of the many changes in the way libraries are administered now compared to the past. Even if a section 47H type provision would obviate the need for such systems (and we are not sure it would), we submit that the need for new administration systems is not a justification for a section 47H type provision.

Individual consumers
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30. Individual consumers may not have the same ability to negotiate as institutional consumers, but they are not devoid of negotiating power – we note the comment of the Australian Digital Alliance (on p5 of its submission) that books are not shrink-wrapped because consumers would not accept it.
31. We note that the concerns raised in relation to individual consumers are not about whether they can get access to information, but rather the extent to which they are entitled to reproduce and/or communicate the accessed work. The Discussion Paper notes that “many” of the agreements the Committee looked at allowed personal, non-commercial use. If there are agreements which prohibit an individual consumer from fair dealing for research or study, then this may be a consumer protection issue. If so, consumer protection legislation is the appropriate place to address it.

A “sliding scale”
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32. “Sliding scale” is probably an inapt metaphor for our understanding of the Committee’s proposal – that is, that there be a provision similar to section 47H applying to some, but not all, of the exceptions to infringement. There is no gradation; an exception either is, or is not, covered by such a provision.
33. The only exceptions which we think may warrant such a provision are the fair dealing provisions for criticism or review and for reporting news – and we doubt the need even for these, particularly for institutional consumers.¹⁵
34. We note that fair dealing for criticism and review has very limited application to parody and satire, contrary to the suggestion in para 16 of the Discussion

¹⁵ It is not clear, for example, why the ABC – whose concerns are referred to in para 23 of the Discussion Paper – could not have negotiated for the uses it required.

Paper, because of the requirement of sufficient acknowledgment and the possibility of a breach of moral rights.¹⁶

35. We note also that section 137 of the Broadcasting Act 1996 (UK) applies to fair dealing for reporting current events, but not fair dealing for criticism or review (as stated in the Discussion Paper). It provides as follows:

137. - (1) Any provision in an agreement is void in so far as it purports to prohibit or restrict relevant dealing with a broadcast or cable programme in any circumstances where by virtue of section 30(2) of the Copyright, Designs and Patents Act 1988 (fair dealing for the purpose of reporting current events) copyright in the broadcast or cable programme is not infringed.

(a) "relevant dealing", in relation to a broadcast or cable programme, means dealing by including visual images taken from it in another broadcast or cable programme, and

(b) "broadcast" and "cable programme" have the same meaning as in Part I of the Copyright, Designs and Patents Act 1988.

36. We also note that section 30(2) of the Copyright, Designs and Patents Act 1988 – fair dealing for the purpose of reporting current events – does not apply to photographs, which “ensures that the most valuable sources of revenue for certain types of photography is not lost.”¹⁷

Unfair contracts

37. We think that consumer protection issues are best dealt with in legislation whose objectives include consumer protection – such as trade practices legislation, fair trading legislation and the NSW Unfair Contracts Act – and not in the Copyright Act. We think the objectives of section 47H would have been more appropriately addressed in consumer protection and competition legislation.

¹⁶ See Copinger and Skone James on Copyright, 14th ed, Sweet & Maxwell. London 1999 at 9-18

¹⁷ Copinger and Skone James, 14th ed, Sweet & Maxwell, London, 1999 at para 9-19.

Model licence or code of conduct

38. We support the development of guidelines for negotiating contracts for online access, for both suppliers and users of online material. Such guidelines may be more useful than model contracts, which may not be applicable to many of the large range of different requirements and conditions.¹⁸

Libby Baulch
Executive Officer
October 2001

¹⁸ Many industry organisations do have model contracts. In addition, we note that the Australian Multimedia Enterprise – funded by the Government – published a range of contracts relating to multimedia on its website for free download. The Committee may want to review the usefulness of that project, having regard to the proposals before it.