

10 August 2001

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

Dear Madam

Copyright And Contract Reference

Thank you for the opportunity to make this submission to the Copyright Law Review Committee.

The Australian Publishers Association

The Australian Publishers Association (APA) is the trade association representing book publishers in Australia. Based on the Australian Bureau of Statistics measurement of industry turnover, the APA represents 91% of the book publishing industry.

Our Submission

We address our remarks principally to Term of Reference 1(d). The Australian Publishers Association submits that contractual licensing is an important although imperfect tool in managing the use of copyright information on-line and facilitating electronic commerce. There are many reasons for contracts being an imperfect tool, including the difficulties in enforcement of cross-jurisdictional agreements. The APA believes that the Government should be considering ways to reduce the barriers to on-line licensing and to strengthen the protection of Australians in cross-border contracting. We believe this is important to encourage the development of e-commerce in Australia.

We submit that the Government should not act to deny the validity or enforceability of otherwise valid contractual terms merely because they exclude or modify exceptions provided under the Copyright Act¹. Our reasons are set out below, after we briefly address terms of reference 1(a) and (b).

¹ This submission does not address the current legal status of such agreements. We take the reference to "agreements which exclude or modify exceptions" as being terms in contracts where a party agrees not to do an act covered by an exception. We assume that the breach of such a term would give rise to an action in breach of contract rather than infringement of copyright.

Contracts modifying exceptions are uncommon in book publishing

The Committee's Terms of Reference 1(a) and (b) concern the extent to which current trade in copyright works are subject to agreements modifying or excluding exceptions to exclusive rights of copyright owners.

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.

The Government's "light-touch" e-commerce policy

According to the National Office for the Information Economy:

The government aims to ensure that the lives, work and well being of Australians are enriched, jobs are created, and the national wealth is enhanced, through the participation of all Australians in the growing information economy.

An important part of the strategy for achieving this objective is the development of a light-touch legal and regulatory framework for electronic commerce to help increase consumer confidence in, and business uptake of, e-commerce.

NOIE: Framework for e-commerce project.

In the APA's view, legislative interference to restrict flexibility in copyright licensing arrangements is not consistent with the "light-touch" approach.

Encouragement of on-line licensing

Nationally and internationally there is a recognition of the importance of contract for digital information transactions. For example, the United Nations Commission on International Trade Law (UNCITRAL) has developed the Model Law for Electronic Transactions. Countries around the world are implementing legislation based on the UN model, including Australia in the form of the Electronic Transactions Act to facilitate electronic contracting. The APA supports these endeavours and submits that it would not be consistent with these efforts if the Australian Government were to seek to limit copyright licences in the manner under consideration by the Committee.

Inconsistent with the Digital Agenda policy balance

The policy underpinning the Copyright Amendment (Digital Agenda) Act 2000 is that the “balance” between users and owners in the real world was to be replicated in the virtual one with existing print-based exceptions to infringement being very largely translated across to the digital. It potentially upsets this balance if the ability to modify the law by contract is not also translated across.

Inconsistent with freedom to contract with non-copyright information

Contract is an important method of protecting non-copyright material such as facts and information. It would be odd if a contract limiting reproduction of someone’s betting tips were valid but not so a contract limiting unauthorised copying of a novel. It would also be odd if a contract limiting reproduction of Shakespeare in e-book format were valid but not so a Grenville or Carey.

Legislative intervention is premature

On-line publishing is still an infant industry where new business models are being sought and tested.

In our view it would be unwise for Australia to seek to limit the flexibility of copyright content providers and consumers when they are still experimenting with various commercial models to see which will be embraced.

At the policy level, although there is interest in these policy issues internationally, there has been very little actual debate or research. Australia may be out of step with international developments if it acts prematurely.

Publishers may be reluctant to publish on-line

APA members collectively hold rights in a great wealth of copyright material, little of which is currently available on-line. The 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. There must be sufficient protection against unauthorised use that would injure the potential market.

We note that the Copyright Amendment (Digital Agenda) Act 2000 already permits the use of circumvention devices to overcome technological protection measures in certain cases. In our submission, limitations on contracting have the potential to further discourage on-line publishing. We ask the Committee to consider how the Government might legislate to encourage on-line publishing.

Emerging business models demand contractual flexibility

Contracts, of course, have always coexisted with copyright law. Just as a licence can 'overcome' the copyright owners' exclusivity, so a contract can impose limitations beyond the exceptions to infringement such as fair dealing.

Such contracts are necessary to support the many and varied publishing business models that are emerging in the digital marketplace. Publishers can respond to the different needs of users. For example, pricing can be tailored to the user and the use, so that an individual user might pay a modest fee and agree to the terms of a standard form licence agreement, while an institutional user has an agreement negotiated with regard to the commercial nature of the anticipated use.

Contracts can be more important in on-line information transactions. They can create a higher level of certainty in global and cross-border transactions where there may be differences in the exceptions to infringement under national copyright laws.

Current Examples of Licensing Options

Publishers currently offer a variety of licensing terms and conditions in order to satisfy different user needs.

For example, in a joint venture between the National Library of Australia, RMIT Publishing and Copyright Agency Limited, libraries can subscribe to an on-line service offering access to journals indexed in the APAIS Index. Much of the use made of this service could be covered under the library exceptions to infringement in the Copyright Act by those who choose to exploit them. Nonetheless subscribers prefer the convenience of the service. This, while not directly an example of a contract seeking to modify an exception, is an example of remunerated alternatives to the exceptions.

There are many other experimental business models; for example, tokens for articles from newspapers that students could otherwise copy for free if they were prepared to forego the convenience of the search engine and the access from their desk at home.

All of this activity depends upon contractual licensing arrangements. Although these examples do not include contractual terms preventing reliance on exceptions, we believe that many licensees would like to be in a position to trade the potential reliance on an exception if there is something they value more highly.

Non-negotiated licenses are not necessarily bad

The APA appreciates that non-negotiated licences in the form of "shrinkwrap" and "clickthrough" agreements are an area where potentially copyright owners might seek to impose contractual restrictions on non-infringing activities. We submit that these "take-it-or-leave-it" contracts should continue to be enforceable. They are common in other areas. They are an efficient means to conduct certain types of transactions involving uniform terms on a mass-market basis. And not all limit the user's freedoms. Web site notices

typically permit visitors to download or copy materials found on the site for specific purposes or under certain conditions. Digital equivalents to blackline masters (allowing customisation and multiple copying) in educational publishing are also increasingly common on-line.

Perhaps not a copyright matter

Were non-negotiated licences to be used in the future in an unfair manner, we submit that consumer protection and fair trading regulation might be an appropriate avenue to address concerns. It does not seem appropriate to pre-empt such problems with heavy handed, blanket restrictions on intellectual property agreements. We ask the Committee to consider how our copyright and contract law can be used to foster creativity and encourage the widest publication of copyright works.

Conclusion

Thank you for the opportunity to make this submission. The APA would be pleased to provide clarification or further information to assist the Committee.

Yours faithfully

Susan Bridge
Chief Executive