

Australian Vice-Chancellors' Committee*the council of Australia's university presidents*

(A.C.N. 008 502 930)

**SUBMISSION TO THE COPYRIGHT LAW REVIEW COMMITTEE REFERENCE
ON COPYRIGHT AND CONTRACT
AUGUST 2001****EXECUTIVE SUMMARY**

1. The AVCC is concerned about licence agreements governing the supply of copyright material electronically which
 - restrict the ability of a university to make use of the material in ways in which it is entitled to do pursuant to the Part VB Statutory Licence;
 - cut across the fair dealing rights under section 40 of the Act;
 - override the section 49 library exception, or
 - impose restrictions on copying or communication for the purpose of inter-library loans which can be made under section 50.
2. Restrictions such as those referred to above and discussed in detail in the main submission erect unnecessary barriers to efficient and legitimate access and use of resources by students, researchers and education providers.
3. The wider concern of the AVCC is that of principle: the danger that widespread and legitimised contracting out of exceptions which apply under Australian copyright law, such as fair dealing and library copying, will eventually erode recognition of and support for maintaining these provisions in the law so that we have a system entirely based on the "pay per use" principle.
4. The AVCC is not aware of any attempt by copyright owners to enforce restrictions of this type against universities in the off-line world. Where universities purchase copies of print publications, written contracts which include provisions which limit access to and use of the purchased work are very rare and of doubtful validity.
5. The AVCC submits that it should not be possible to override exceptions which limit the scope of copyright by means of contract.
6. The AVCC is of the view that no actions or remedies, or combination of actions and remedies, adequately protect against the use of agreements to override copyright exceptions. Appropriate legislative protection which rendered void or unenforceable contractual provisions to the extent that they purport to exclude or limit statutory exceptions would adequately address the concerns that AVCC has expressed in respect of both mass-market products and those offered on a more individual subscription basis.
7. The 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.

8. The AVCC supports changes to the *Copyright Act* which:

- (a) make attempts to contractually override copyright exceptions unenforceable;
- (b) broaden the exceptions to the circumvention offences where a supplier can establish that a circumvention device was supplied to a person for use for a legitimate or non-infringing purpose and that it was only used for that legitimate or non-infringing purpose.

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**AVCC SUBMISSION TO THE COPYRIGHT LAW REVIEW COMMITTEE
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Introduction

The Australian Vice-Chancellors' Committee (AVCC), the peak body representing 38 Australian universities, acts as a consultative and advisory body for all university affairs. The AVCC welcomes this opportunity to make representation to the Copyright Law Review Committee on the important issues of Copyright and Contract.

The issue of balance in copyright law is a very important issue for universities in their central mission of providing educational and information resources for teaching and research. Access to information for these purposes is crucial if universities are to fulfil their mission. Australian copyright law has been instrumental in providing this balance through the statutory licences in Part VA and Part VB of the *Copyright Act 1989*, and through the fair dealing and library exceptions. The benefit to the university community of the Part VA and Part VB licences is that copies of copyright material can be distributed to students for educational purposes, within certain limits and subject to payment of equitable remuneration, without the need to obtain permission from the copyright owner. The fair dealing and library exceptions, by enabling access to information by students and researchers generally, are additionally of benefit to the wider community, assisting the educational and intellectual advancement of our society. The Digital Amendments to the *Copyright Act* which came into force on 4 March 2001 extended the library, fair dealing and statutory licence provisions to enable universities and others to take advantage of new technologies, a development which the AVCC welcomed.

The AVCC is aware that licence agreements or contracts for the use of copyright material are becoming more prevalent with the increase in the electronic distribution of such material. It is the AVCC's firm position that copyright law should prevail over the provisions of such licence agreements or contracts which purport to override the exceptions enshrined in the *Copyright Act*. It is also of the view that in order for those exceptions to operate in the online environment in the manner intended by the government, i.e, in a way which replicates the balance which exists in the off-line world, changes need to be made to the technological protection provisions of the Act.

In making this submission the AVCC will deal with those issues raised in the Committee's Terms of Reference on which it can make an informed contribution. The AVCC also draws attention to and generally supports the submission of the Australian Digital Alliance (ADA), of which it is a member, and the Australian Libraries Copyright Committee (ALCC).

Issue 1.

The Committee seeks your views as to the extent that electronic trade in copyright material is subject to agreements that try to exclude or modify limitations to the exclusive rights of copyright owners provided in the Copyright Act. Can you provide the Committee with examples of any such agreements?

University libraries have many contracts which place limitations on what can be done with electronic material. Many come from overseas, particularly the United States, and these contracts will often address the question of what subscribers or licensees can or cannot do without reference to the underlying balance established by Australia's *Copyright Act*. These contracts are far from uniform in their approach to the uses and activities allowed by the copyright exceptions. Most contracts give universities and their staff and students rights which are in many respects broader than those allowed for by the exceptions - as you would expect given the subscription or licence fees that are paid by universities. However, in most cases there will also be provisions which exclude or restrict uses and activities that would be allowed by copyright exceptions and it is these provisions which concern AVCC.

The ADA/ALCC submission provides a number of examples of online licence contracts, and documents some of the restrictions that they contain. The AVCC refers the Committee to these examples. Of particular concern to the AVCC are:

- restrictions on the ability of a university to copy, download or otherwise incorporate excerpts from the relevant copyright work into hard copy or electronic coursepacks, something which they are entitled to do pursuant to the Part VB statutory licence;
- restrictions on the creation of an electronic reserve within a university by the copying or downloading of extracts from licensed copyright material. Such reserves may carry significant advantages in terms of convenience of search and access for students, and management of resources by universities. Again, the Part VB statutory licence allows the copying and communication of limited amounts of copyright material for this purpose;
- not allowing users who have access to licensed copyright material to print or download that material to the full extent that they would otherwise be allowed to in the exercise of their fair dealing rights under section 40 of the Act;
- restricting the extent to which non-authorized users can be granted access to material or allowed to make copies from that material. Often the definition of authorised users will be limited to enrolled students and staff of the relevant university or even faculty. Such provisions cut across the exercise of the section 49 library exception. Even where members of the public are entitled to access material, there will often be requirements that this is done on the premises of the licensed subscriber which overrides the sub-section 49(2C) exception which enables access to copyright material (other than by attending the library) where a person is remote from the library;
- limits on the ability of a university to charge for copies of copyright material made pursuant to Part VB even though the Act allows charges to be made provided there is no intention to make a profit (see Full Federal Court in the *Victoria University of Technology* case 30 IPR 140);
- restrictions on copying or communication for the purpose of inter-library loans which can be made under section 50 and on copying done on behalf of other universities which is allowed under the Part VB licence. Copying done pursuant to these exceptions underpins the Australian Interlibrary Resource Sharing Code to which all universities are party. This initiative helps secure relative equality of access to information for all students, staff and members of the public notwithstanding the different allocation of university and library resources as between different locations in Australia.

In Annexure "A" to this submission, the AVCC outlines provisions drawn from various relatively standard form agreements to which universities are party and which give rise to the above concerns.

Restrictions such as those listed above erect unnecessary barriers to efficient and legitimate access and use of resources by students, researchers and education providers. The wider concern of the AVCC is that of principle: the danger that widespread and legitimised contracting out of exceptions which apply under Australian copyright law, such as fair dealing and library copying, will eventually erode recognition of and support for maintaining these provisions in the law so that we have a system entirely based on the "pay per use" principle.

Part of the community service role of libraries is to provide information to the public. The public interest is being eroded by contracts limiting the availability of electronic products to authenticated users and thereby excluding the ability of the wider public to access information through the section 49 and 50 library privileges. University libraries have always been open to public access, and it is open to any government to make public access a condition of funding. Although universities' statutory licences do not allow multiple copying of material for the public, public access to works in print has never been restricted. If access to electronic products is restricted while at the same time information is increasingly only available in electronic form, university libraries can no longer fulfil their community service role.

Issue 2.

The Committee seeks your views as to whether the situation is any different in relation to trade in copyright material that occurs off-line. Can you provide the Committee with examples of any such agreements?

Examples of restrictions on the use of hard-copy resources have been provided by the ADA/ALCC. However, as a practical matter, such restrictions apply to a very small proportion of material acquired by universities. Most works in print are acquired by purchase and the purchaser does not sign or otherwise agree any restrictions on use of the work. The only restrictions are those imposed by the *Copyright Act*. As a result, the transaction does not impact on the statutory exceptions and their exercise. Where there are contractual restrictions, the legal status of those restrictions is unclear. In most cases it will be doubtful that they have been sufficiently brought to the attention of the purchasing university at the time of purchase in order to be contractually binding. The AVCC is not aware of any attempt by copyright owners to enforce restrictions of this type against universities in the off-line world.

Issue 3.

The Committee seeks your views as to the nature of any such difference.

The major difference is that all subscription and licence agreements take the form of a contract with the opportunity for provisions which override copyright exceptions. Where universities purchase copies of print publications, written contracts which include provisions which limit access to and use of the purchased work are very rare and, for the reasons outlined above, of doubtful validity.

While electronic publications and subscriptions have existed for some years, there has been a significant increase in their importance in recent times. This is particularly the case with respect to academic publishing where many academic journals and works are now only available in electronic form.

Issue 4.

The Committee seeks your views as to whether the express prohibition on contracting out in s.47H suggests that provisions elsewhere in the Act can be overridden by contract. Should it be possible to achieve the result by contract? In this regard, should all exceptions be treated alike?

AVCC has read and agrees with the submission of ADA/ALCC on the question of the proper construction of section 47H. There is no evidence to suggest that the introduction of this section in the context of software decompilation was meant to alter the position with respect to the ability of parties to override other exceptions to copyright by contract. However, given the uncertainty as to both the extent to which parties could contractually override exceptions prior to the introduction of section 47H, and as to the effect of section 47H, AVCC submits that it is important that the Act be amended to clarify the position. The increasing importance of the licensing paradigm to public access and use of information, to which reference is made above, makes clarification of this issue even more important.

As to whether it should be possible to override exceptions which limit the scope of copyright by means of contract, AVCC's starting position is that it should not. Copyright does not give copyright owners a right to maximise the economic return from their works or other subject matter. In return for the State creating property rights and making available the resources of the State to enforce those rights for the benefit of the owner, exceptions have been defined which look to protect or further a variety of public interests. These include access to and use of information for research and study, educational purposes and criticism and review. For copyright owners to utilise the new licensing paradigm by insisting upon contractual provisions to undermine these exceptions, while at the same time insisting on ever stronger copyright protection through strengthened legislation and enforcement regimes, is contrary to the public interest. This is particularly the case in Australia which has a net deficit in copyright licence fees which was assessed at greater than \$1 billion per year in 1999 (see Sir Anthony Mason "Reading the Future" at <http://www.nla.gov.au/nla/staffpaper/mason.html>) and which in all likelihood will increase over time. As Samuelson (1999EIPR 386) and others have pointed out, to allow copyright owners to use contract to achieve this end is to enable them to contractually define their property rights, the equivalent of private legislation, while at the same time taking the full benefit of State-sanctioned and supported copyright laws and enforcement regimes.

As to whether all exceptions should be treated the same, the AVCC limits its view at this stage to those exceptions which are relevant to educational institutions, and would certainly see no basis for differentiating any of those exceptions as less deserving of protection than others. However, there is an argument that the library provisions of sections 49 and 50 of the Act are particularly important, as they provide a means of access to copyright works which is essential if fair dealing and other user rights are to be exercised. An example may help.

As noted above, in the off-line world the prevailing paradigm is the sale of copyright works. If a student or member of the public wishes to access a book and read it they can buy it, borrow it from a friend who has bought it (or borrowed it from another), buy it second hand, or borrow it from a library. Similarly, a university lecturer who wishes to copy and make available a chapter from a book to his or her students can access the book in these and other ways. Having accessed the book the person can exercise fair dealing rights or, in the case of the lecturer, the statutory licence under Part VB to make multiple copies for educational purposes.

In the online world there will increasingly be copyright works to which access is only available through subscription and other licensing transactions. The licensee will typically not be able to lend, or otherwise make available, the work to a friend or others. Not only will this often involve infringement of the new exclusive right of communication, it will be prohibited by the terms of the subscription or licence agreement. The terms on which universities or libraries take a subscription or licence for the work may also prohibit making available the work to others unless they are authenticated users for whom a payment has been made, or have read-only or other limited access.

The library provisions provide limited access to copyright works and thereby facilitate the exercise of other exceptions. Contracts which attempt to override the section 49 and 50 exceptions therefore have a particular significance.

One further comment might be made in respect of exceptions that facilitate access to and use of copyright material for educational purposes. This relates to the argument that is sometimes put that the market will constrain the extent to which copyright owners can afford to give less or charge more without losing business and profitability. It may be the case that if a member of the public wishes to acquire an electronic version of a novel he or she can refuse the terms of one publisher and choose to acquire a different novel from a competing publisher. The 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. The casualty may be that members of the public are prohibited by the terms of the subscription agreement from accessing articles in those journals by means of the section 49 library exception. It is not difficult to see the divisions that such contracts will build between authenticated users with access to information-rich resources and those who do not have that access. Similarly, staff and students at wealthy universities will have advantages over those at smaller, less established and less well-funded universities. Similarly again, such contracts carry the potential to advantage those with access to large, well-funded libraries in major cities where they can at least browse (and perhaps exercise the section 49(5A) right to make a print copy of) material which is the subject of an electronic subscription, as opposed to their country cousins who at best have access to much smaller and less resourced library facilities.

Issue 5:

The Committee seeks your views about whether: (a) there are legal remedies other than those outlined above to protect against the use of agreements to override copyright exceptions granted under the Act; and (b) the existing legal remedies provide adequate protection against the use of agreements to override copyright exceptions granted under the Act.

It may be that in particular situations there are other actions or remedies available but the AVCC is of the view that no actions or remedies, or combination of actions and remedies, adequately protect against the use of agreements to override copyright exceptions. Notwithstanding the existence of licence agreements which remove or limit those protections, there are no cases of which AVCC is aware in which these provisions have been challenged. In any event, AVCC notes that:

- (a) there is relatively little law on the scope and operation of many of the unconscionability and other grounds of challenge outlined in the CLRC paper, let alone decisions relating to the applicability of these actions and remedies in a copyright context;
- (b) many of the outlined actions and remedies, such as actions under Part IV of the Trade Practices Act are notoriously complex and expensive to litigate; and
- (c) it seems inappropriate to leave it to private litigation to defend public interest provisions in copyright legislation. This is particularly so when in many cases the respondents will be multi-national publishers with whom a university must continue to have a relationship in order to access information.

Issue 6:

The Committee seeks your views as to whether there should be any limitations to the enforceability of mass-market agreements. For example, should mass-market agreements be treated as a special category and subject to special rules as to the validity and enforceability?

Appropriate legislative protection which rendered void or unenforceable contractual provisions to the extent that they purport to exclude or limit statutory exceptions would adequately address the concerns that AVCC has expressed in respect of both mass-market products and those offered on a more individual subscription basis. The market power and bargaining power of major electronic publishers is such that even users of the size of a major university require protection against contracts which dilute or remove altogether important copyright exceptions. Indeed, the better question for the CLRC to ask may be whether there are any situations in which a consumer should not be protected against these exceptions being diluted or removed. For example, there may be a question as to whether any restrictions on freedom of contract should apply to contracts between, say, public companies who wish to acquire electronic subscriptions to copyright works for use in the course of a business conducted for profit. Approaches along these lines are taken to the implied conditions and the limits on the ability to exclude or restrict liability under Division 2 of Part V of the Trade Practices Act. Those provisions define both the class of consumers who are protected and the types of goods or services with respect to which they get protection. The AVCC expresses no view as to whether they are appropriate in the copyright context.

Issue 7.

The Committee seeks your views on whether jurisdictional issues are likely to result in copyright exceptions being overridden and, if so, on suggested solutions

It is true that licence agreements with respect to copyright works in electronic form will often be governed by the laws of a foreign jurisdiction. As noted above, this merely reflects the fact that the owners of copyright in most of the electronic publications and works that will be licensed for use in Australia will be resident overseas. The AVCC recognises that this will mean that even if Australia's copyright law limits the extent to which contracts can override copyright exceptions, an Australian user may nevertheless be in breach of contract, at least where the relevant contract is enforced overseas. However, AVCC notes the following:

- (a) it is nevertheless important that uses of copyright material within the limits allowed by Australia's copyright exceptions should not involve breaches of contract which Australian courts will enforce. If for a public policy purpose Australian copyright legislation dictates that overriding contractual provisions are unenforceable in Australian courts then this will benefit the vast majority of users who are unlikely to be sued for breach of contract in other jurisdictions where they hold no assets ;
- (b) appropriate provisions in Australia's copyright legislation will also prevent overseas copyright owners from obtaining injunctive relief in Australian courts to restrain the continued use of copyright material in ways allowed by Australia's copyright exceptions but in breach of overriding contractual provisions. Given that injunctions are the remedy which a copyright owner will almost always seek, the fact that there is a residual exposure to a damages liability in a breach of contract action overseas may be more of a theoretical than real risk. In many if not most cases the copyright owner is unlikely to have suffered any significant damage in any event;
- (c) it may well be that the legislation or courts of the United States and other countries whose laws are likely to govern many online transactions will also address the extent to which contracts can override relevant copyright exceptions. The debate on this issue in the United States in the context of UCC Article 2B suggests that it is far from certain that an approach which enshrines the priority of contract over copyright will be adopted in those countries. In any event, the possibility of different approaches in overseas jurisdictions where there are powerful copyright owner economic interests should not deter Australia from adopting an approach which protects its own public interests and puts its courts in a position to decide these issues appropriately.

Notwithstanding these comments, there will remain practical concerns if foreign copyright owners can terminate use of online works in response to alleged breaches of contractual restrictions which override Australian Copyright exceptions.

Issue 8.

The Committee seeks your views as to whether any, and if so what, lessons can be learned from the overseas experience?

AVCC notes that the issues raised in the CLRC paper have been the subject of extensive debate in both the United States and Europe. A bibliography referring to some of the key

articles, websites and draft legislation is attached as Annexure "B" to this submission. As the CLRC will be aware, these debates have not resulted in definitive conclusions as to the appropriate public policy in the United States or elsewhere, let alone the passing of relevant legislation with respect to information contracts. Nevertheless, AVCC notes the following points of interest arising from the debate:

- (a) it is important to identify the principles and policies underlying the statutory licences, fair dealing exceptions and library privileges and how they might be adversely affected by contract. Samuelson articulates the innovation, competition and free expression policies which underlie the balance struck by the law in the United States in this area (see [1999] EIPR386). The CLRC has looked at these issues from an Australian viewpoint in the context of an earlier reference. Only by identifying and understanding the importance of these policies can the CLRC and government understand the way in which the copyright balance and Australia's public interest will be affected if copyright owners (many of them overseas) are given liberty to reconstruct the balance through their contracts;
- (b) in the online world the ability to access information for the purpose of exercising copyright exceptions is critical to maintaining the balance in Australia's copyright law. The introduction of the new exclusive right of communication to the public gives copyright owners the ability to control not just copying of their works but also the way in which they are made available. The AVCC recognises that this is appropriate and necessary in the digital world where the exploitation paradigm involves controlling distribution rather than copies. However, the new exclusive right 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. Commentators have begun to draw attention to this issue in Australia as well as overseas (in respect of Australia see, for example, Forsyth at 12 AIPJ 82, Gamertsfelder at AIPLB 13 at page 127 and McLean & Flahvin (attached as Annexure "C")). AVCC submits that the CLRC cannot adequately respond to the issues raised by its reference without also addressing the question of whether or not the provisions in the *Copyright Act* with respect to technological protection devices have unintentionally altered the balance in Australia's copyright law by significantly reducing the ability of the user to take advantage of public interest exceptions.

Issue 9.

The Committee seeks your recommendations as to any specific action, legislative or otherwise, in relation to the issues raised in your submission.

As indicated above, the AVCC supports changes to the *Copyright Act* which:

- (c) make attempts to contractually override copyright exceptions unenforceable;
- (d) broaden the exceptions to the circumvention offences where a supplier can establish that a circumvention device was supplied to a person for use for a legitimate or non-infringing purpose and that it was only used for that legitimate or non-infringing purpose.

Additional comments

In addition to responding to the specific issues raised by the Committee, the AVCC makes the following additional general comments:

- (a) It is important to recognise that the exceptions in the *Copyright Act* are very narrowly drawn. They allow the use of limited amounts of copyright material for very particular purposes. In the case of the statutory licences they require the payment of equitable remuneration. There are restrictions on how the exceptions are exercised with a view to preventing them from being exploited in ways which could aid infringement activity. The AVCC supports strong copyright legislation which protects the economic interests of owners against infringement. To this end, it also supports reasonable limitations on the operation of copyright exceptions to ensure they serve their intended purpose and do not function as aids to infringement. Having said this, concerns (expressed by copyright owners in the past) that Australia's copyright exceptions create the means for widespread infringement are unfounded. There is no evidence that serious copyright piracy or infringement activity has been built upon exploitation of the copyright exceptions. This is hardly surprising as those exceptions allow copying and communication of very limited portions of copyright works for very limited purposes. Serious pirates and infringers will find many other ways to access and use the entire copyright work for which there is usually a much larger market. They brazenly take the risk of copyright infringement and do not engage in their infringing activities in the hope or belief that they will be able to take advantage of exceptions or defences.
- (b) The balance between owners and users under Australian copyright law has been closely considered by the legislature in the context of the *Copyright (Digital Agenda) Amendment Act* which came into force earlier this year. The copyright exceptions have also been looked at by your Committee as part of a separate reference and by the Ergas Committee. Whether these copyright exceptions comply with Australia's international obligations has also been considered. There is good reason to take steps to give effect to the balance that as a matter of public policy Australia's government has taken such care to define and bring into law. There can be no possibility that giving effect to that balance by preventing contractual provisions from overriding it will give rise to any additional questions of compliance with international obligations.
- (c) The AVCC acknowledges that the exact scope of some of the copyright exceptions, particularly the fair dealing exceptions, can be less than clear in a particular fact situation. It might be argued by copyright owner interests that contracts can more clearly articulate what the parties can and cannot do. It is not unusual for parties to have to define their contractual position while at the same time conceding that if either of them enjoys non-excludable rights under legislation then those rights must remain unaffected. It would be a relatively simple matter in most contracts to include language along the following lines: "Nothing in this Agreement is intended to exclude or restrict any fair dealing, statutory licence or other rights that the licensee may have under the *Copyright Act 1968* to the extent that the provisions of that Act prevent their exclusion or restriction".

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The AVCC thanks the Committee for the opportunity to make submissions on these issues. It would welcome the chance to discuss any questions that the Committee may have in relation to the above and looks forward to the Committee's report on this very important reference.

Annexure A

On-line subscription/licence agreements – Universities

1. LBC Information Services Agreement for LBC Online

Clause 1(b): "Subscriber may not copy, download, store, publish, transmit, transfer, sell or otherwise use the data ... in any form or by any means, except (i) as expressly permitted by this Agreement, (ii) with LBC's prior written permission, or (iii) if not expressly prohibited by this Agreement ... as allowed under the fair use provision of the Copyright Act 1968. Downloaded Data shall not be stored or used in an archival database or other searchable database except as expressly permitted by this Agreement ..."

The last sentence of the above clause prevents the university from exercising its rights under the Part VB statutory licence to incorporate material into an electronic coursepack or into an electronic reserve within its library. To the extent that other provisions of the agreement would prevent certain fair dealings the above clause makes it clear that they override the fair dealing exceptions in the Copyright Act.

2. UMI Electronic Products License Agreement

1(c): "... if you represent a public library, educational institution, governmental agency or non-profit institution allowing public access to data and information, then, subject to any special restrictions of the copyright owner, you may provide public access to and retrieval of data and information through the products by or for public users. You will limit such use to the customary services provided to patrons and you will not commercially re-distribute the materials retrieved from the Products or provide access to the Products to other libraries or third parties, unless specifically authorised by UMI."

This clause purports to override the section 50 library exception and to limit all other copyright exceptions to the extent that any copyright owner imposes "special restrictions". Quite how the university would be aware of those restrictions is left unclear.

3. Kluwer Online – general terms and conditions for online access for Institutional Subscribers

"The electronic form 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."

This clause limits the library exceptions which apply to all libraries and prevents the supply of an article in electronic form (which is clearly contemplated by subsections 50(7C) and (10). By requiring the university to refuse requests from individuals the clause also overrides the section 49 exception.

4. Terms of access and use of CSIRO Publishing websites

Clause 1(e) "Permission to recompile, adapt, manipulate or publish new material from this site must be obtained from CSIRO Publishing."

This clause would prevent a university from using Part VB for the purpose of creating a coursepack or electronic reserve.

5. Biochemical Journal Online: Terms and Conditions

Clause 4: "Authorised users include faculty (visiting or permanent), students and staff of the institution, and any on-site users, which may include the general public, of the institution's library and campus computer networks."

This provision restricts those living in remote areas from taking advantage of the section 49 exception which would enable a library to make available copies of limited portions to them for the purpose of research and study without them being an "on-site user".

Clause 6: "authorised users may make multiple copies of any items from the database or from a hard copy of the Journal for inclusion in coursepacks, which may then be distributed to other authorised users, provided that such copies are only used for teaching purposes within the institution and that no charge is made for such copies".

This provision restricts the scope of the university's rights under Part VB which allows for the making of multiple copies for educational purposes of limited portions of a work or journal even if a charge is made to enable the university to recover its costs.

Clause 8: "the on-line version of the Journal may not be used by institutions or their authorised users for making inter-library loans".

This excludes the use of the section 50 exception.

6. American Institute of Physics – Terms and Conditions

Clause 5: ".. the making of print or electronic copies for transmission to non-subscribers or non-subscribing institutions (such as an inter-library loan) are prohibited."

For the purpose of this clause subscribers are defined in terms of the employees, staff and students of the relevant university so that it has the effect of overriding the section 49 and 50 library exceptions.

Clause 4: "the Subscriber and Authorised Users are permitted online access to the AIP Journals ... and may download or print text, search results, or other information from such AIP online journals solely for the private use or research of the Subscriber and the Authorised User."

This provision prevents the university from exercising the statutory licence under Part VB for the purpose of creating coursepacks or closed reserve sections in libraries.

7. Westlaw Subscriber Agreement

Clause 2.1.4 "except as otherwise provided ... the licence includes the right to download and temporarily store insubstantial portions of Data ... to a storage device under Subscriber's exclusive control ..."

By limiting rights of downloading, copying and use to "insubstantial portions" this provision limits the ability of the university to utilise the Part VB statutory licence.

Clause 2.2.1: "accept as expressly permitted by this Agreement, or with Supplier's prior written permission, Subscriber may not themselves: (a) copy, download, store, publish, transmit, transfer, sell or otherwise use the Data or any part of the Data in any form or by any means ...".

Again, this would prevent the university from exercising its Part VB rights to copy and communicate limited portions of the work for the purpose of creating a coursepack, closed reserve, electronic reserve, etc.

Clause 2.2.6: "Subscriber undertakes to use its reasonable endeavours to ensure that the Service shall not be accessed or used by third parties other than those entitled to do so by virtue of this Subscriber Agreement".

This clause prevents the university from allowing public access and use under section 49 and inter-library loans pursuant to section 50.

Annexure B

1. Literature Review: Copyright/Contract Issues

Braucher J, "*Why UCITA, Like UCC Article 2B, Is Premature and Unsound*" <<http://www.2bguide.com/docs/0499jb.html>>

Cohen J, "*Copyright and the Jurisprudence of Self-Help*"

- Anti Article 2B – believes it will threaten the constitutionally mandated limits on copyright protection.

Elkin-Koren N, "*Copyright Policy and the Limits of Freedom of Contract*" 12(1) Berkeley Technology Law Journal <<http://www.law.berkeley.edu/journals/btlj/articles/vol13.html>>

- Discusses how contractual arrangements create rights in personam while copyright creates rights in rem
- Discusses whether parties should be allowed to contract around copyright provisions, the dangers of using contractual arrangements to expand copyright (at 10) and whether using contractual arrangements that expand copyrights in mass market distribution may conflict with public policy and freedom of contract principles.

European Commission DGIII Esprit Project IMPRIMATUR Consensus Forum, "*Copyright & Contract: The Legal Framework for Future Electronic Copyright Management*" An International Forum on Contracts, Copyright and the Internet, London, July 1998.

European Commission DGIII Esprit Project IMPRIMATUR Consensus Forum 1997, "*Rights, Limitations and Exceptions: Striking a Proper Balance*", The Netherlands, October 1997.

Evans G & Fitzgerald B, "*Information Transactions Under UCC Article 2B: The Ascendancy of Freedom of Contract in the Digital Millennium*" (1998) UNSWLJ

- Australian perspective on information licensing and public interest. Discusses implications of strengthening the law of private obligations at the expense of the public interest. Unconscionability issues are raised (at 9).

Friedman D, "*In defense of Private Offerings: Comments on Julie Cohen's 'Copyright and the Jurisprudence of Self-Help'*" <http://www.law.berkeley.edu/journals/btlj/articles/13_3/Friedman/htm/text.html>

- Argues that contract and technological protection in addition to intellectual property laws should be encouraged and not discouraged.
- Believes the fundamental justification for intellectual property is market failure, and insofar as digital technology is eliminating that market failure, we should adapt our legal rules to encourage the change and not block it: at 13
- Supports the efficacy of form contracts.

- Refutes Cohen's argument that mass-market contracts are inconsistent with copyright.

Ginsburg J, "*Authors as 'Licensors' of 'Informational Rights' Under UCC Article 2B*" 13(3) Berkeley Technology and Law Journal

- See discussion on Article 2B at 1.2 above.

Gonsalves M, "*Copyright Amendment (Computer Programs) Act 1999*" (2000) 18(1) Copyright Reporter 35

- Overview of Article 47 including interoperability.

Guibault L, "*Contracts and Copyright Exemptions*" Institute for Information Law, Amsterdam, December 1997

- Discusses contract/copyright issues from both a market failure and public interest perspective.

Hardy T, "*Contracts, Copyright and Preemption in A Digital World*" (1995) 1 Richmond Journal of Law and Technology 2, <<http://www.richmond.edu/jolt/vlil/hardy.html>>

Kitagawa Z, "*Future of the Copyright Law System: Part 1*" (2000) 13(2) IPLB 13

Kitagawa Z, "*Future of the Copyright Law System: Part 2*" (2000) 13(3) IPLB 33

Litman J, "*The Tales that Article 2B Tells*" (1998) 13 Berkeley Technology Law Journal 935

- Argues against Article 2B. Believes it is creating rights beyond those provided for by any branch of intellectual property law.

McManis C, "*McManis Motion*" Motion to Members of the American Law Institute re: UCC Article 2B, 5 May 1998 <<http://www.ali.org/ali/McManis2.html>>

Merges R, "*The End of Friction? Property Rights and Contract in the 'Newtonian' World of On-Line Commerce*"

- Discusses the market failure rationale of Fair Use (at 10)
- Analysis the interface between property rights and Contract with respect to intellectual property.

Miller F & Ring C, "*Article 2B's New Uniform: A Free-Standing Computer Information Transactions Act*" <<http://www.2Bguide.com/docs/nuaa.html>>

Nimmer R, "*Breaking Barriers: The Relation Between Contract and Intellectual Property Law*", <www.law.berkeley.edu/journals/btlj/articles/13_3/Nimmer/html.text.html>

- Extensive discussion on contract and informational rights, misuse, unconscionability (at 26) and fair use.

Nimmer D, Brown E & Frischling G, *"Symposium: The Metamorphosis of Contract into Expand"* (1999) 87 California Law Review 17,
<eon.law.harvard.edu/openlaw/DVD/research/metamorphosis.html>

- See discussion on Article 2B at 1.2 above.

O'Rourke M, *"Copyright Preemption After the PROCD Case: A Market Based Approach"* 12(1) Berkeley Technology and Law Journal <http://www.law.berkeley.edu/journals/btlj/articles/12_1/O'Rourke/html/text/html>

- Discusses enforceability of shrinkwrap licenses
- Interesting conclusion discussing how electronic technology is different from hard copy publications for which copyright law was designed.

Ring C, *"Positive Attributes of Article 2B"*
<<http://www.law.upenn.edu/bll/ucl/ucc2b/uccposit.htm>>

- See discussion on Article 2B at 1.2 above.

Samuelson P, *"Intellectual Property and Contract Law for the Information Age: Foreword to A Symposium"* (1999) 87 California Law Review

- See discussion on Article 2B at 1.2 above.

Samuelson P & Opsahl K, *"Licensing Information in the Global Information Market: Freedom of Contract Meets Public Policy"* [1999] EIPR 386

- Analyses article 2B, how far parties can contract around public policy; licensing in libraries;
- Creation of contractual rights which take on the characteristic of property rights.
- Policy theories behind statutory license and fair dealing provisions, including innovation, competition and free expression.

Wolfson J, *"Contract and Copyright Are Not At War: A reply to 'The Metamorphosis of Contract into Expand'"* (1999) 87 Californian Law Review 79

- Discussion of Nimmer's views on copyright/contract issues.
- Argues that it is inappropriate to use contract law to define the boundaries of copyright policy – Article 2B would allow not copyright material to gain copyright protection.

2. Article 2B Uniform Commercial Code

(a) Criticisms of Article 2B

Samuelson P, *"Intellectual Property and Contract Law for the Information Age: Foreword to a Symposium"*

- This article provides a critique of Nimmer's *"Metamorphosis of Contract into Expand"*, the McManis Motion, and Wolfson's reply to Nimmer entitled *"Contract and Copyright Are Not At War"*.
- Argues that the drafters of Article 2B relied on risky predictions about the future of information age commerce. The danger lies in applying codified law to forms of electronic commerce that are immature, emerging or yet to be developed; p1

Nimmer's *"Metamorphosis of Contract into Expand"*

- Describes Article 2B as an "unwelcome intermeddler" insofar as it aspires to protect the interests of copyright proprietors at the expense of copyright users, thereby enabling licensors to disrupt the delicate balance that has long been embodied in copyright law. This would place the cost of defending the proper bounds of copyright on copyright users.
- If it is to be enacted, it must proscribe contracting practices that seek to extend copyright protection beyond its current scope.
- Recognises the danger of information industries using mass market licenses to undermine user rights and federal copyright policies. Believes Article 2B favours those with concentrated interests and large financial resources.

McManis Motion

- Recommended an amendment to the mass-market license provisions of Article 2B, arguing that licenses should not be used to override fair use or other specified copyright policies limiting the rights of copyright owners.

Wolfson J, *"Contract and Copyright Are Not At War: A reply to 'The Metamorphosis of Contract into Expand'"* (1999) 87 Californian Law Review 79

- Argues that it is inappropriate to use contract law to define the boundaries of copyright policy – Article 2B would allow not copyright material to gain copyright protection.

Braucher J *"Why UCITA, Like UCC Article 2B, Is Premature and Unsound"* <<http://www.2bguide.com/docs/0499jb.html>>

- Detailed codification is premature given the rapidly changing nature of the industry, and is likely to freeze practices or channel them in undesirable ways.
- UCITA would create greater uncertainty as the statutory text and scope of provisions are far from clear.
- UCITA's concern about free speech and the public interest seems only to operate in favour of licensors.
- Unconscionability provisions requiring that public policy must be 'fundamental' and the interest in enforcement of the contract term must be 'clearly outweighed' by the public policy creates difficult burdens for users to meet and would chill the exercise of user freedoms that are presently taken for granted.

(b) Arguments in favour of Article 2B

Miller F & Ring C, "Article 2B's New Uniform: A Free-Standing Computer Information Transactions Act" <<http://www.2Bguide.com/docs/nuaa.html>>

- Provides greater clarity and certainty in the law of computer software and commercial transactions;
- Provides licensee protection equal to or greater than the current common law;
- Unconscionable terms are not enforceable under 2B-110;
- Terms that are clearly outweighed by fundamental public policy are not enforceable under 2b-105(B)
- Preserves freedom of contract principles in computer information transactions;
- Establishes a remedy structure that is fashioned to provide clear and appropriate rules when a contract is breached.

Ginsburg J, "Authors as 'Licensors' of 'Informational Rights' Under UCC Article 2B" 13(3) Berkeley Technology and Law Journal

- Article 2B works both for and against authors, depending on the level of detail that informs their agreements; p2
- Article 2B offers valuable safeguards to authors whose dealings with exploiters are so informal that the default rules would fill in the substance of their agreements.
- However, by reducing the procedural barriers to the formation of licenses, Article 2B would make it too easy for an author to assent to contract terms that may heavily favour an exploiter of the author's work.

(c) For information on Contractual Rights taking on Characteristics of Property Rights see:

Elkin-Koren N, "Copyright Policy and the Limits of Freedom of Contract" 12(1) Berkeley Technology Law Journal <<http://www.law.berkeley.edu/journals/btlj/articles/vol13.html>>

Litman J, "The Tales that Article 2B Tells" (1998) 13 Berkeley Technology Law Journal 935

Merges R, "The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce"

Nimmer R, "Breaking Barriers: The Relation Between Contract and Intellectual Property Law" , <www.law.berkeley.edu/journals/btlj/articles/13_3/Nimmer/html.text.html>

Samuelson P & Opsahl K, "Licensing Information in the Global Information Market: Freedom of Contract Meet Public Policy" [1999] 8 European Intellectual Property Review 386.

- (d) For information on decompilation Privileges, interoperability non-waivable by contract, see:

Samuelson P & Opsahl K, *"Licensing Information in the Global Information Market: Freedom of Contract Meet Public Policy"* [1999] 8 European Intellectual Property Review 386.

- This article discusses Directive 96/9 of the European Parliament which provides that a European contract cannot waive decompilation privileges.
- In Australia, decompilation will infringe copyright unless it is done with a license from the copyright owner. There are 3 exceptions to this:
 - (i) Decompilation for interoperability: 47D
 - (ii) Decompilation for error correction: s 47E
 - (iii) Decompilation for security testing: s 47F
- Under s 47H, contracting out of these provisions is prohibited.
- Issue: Could you make browsing remunerable, despite government policy to the contrary?

Gonsalves M, *"Copyright Amendment (Computer Programs) Act 1999"*, (2000) 18(1) Copyright Reporter 35

- (e) Fair Dealing: Defence or Affirmative Right?

The Copyright Law Review Committee considers that fair dealing in Australia is not a defence to infringement; rather, it defines the boundaries of copyright owners' rights: See "Simplification of the Copyright Act 1968" at <law.gov.au/clrc/gen_info/clrc/clrc%20report/chapter4.html>. Also see attached article, Brennan D, "Locksmiths and Safecrackers in Cyberspace", p3.

In the United States, this issue was discussed by the Committee on Intellectual Property Rights and the Emerging Information Infrastructure. The Committee's Report *The Digital Dilemma: Intellectual Property in the Information Age* contains the following conclusions:

Some committee members favour subjecting mass market licenses to fair use limitations, viewing fair use and other limiting doctrines of copyright as having an affirmative character--i.e., as providing a right for users under copyright law, rather than solely a defence to infringement. According to this view, rescinding that right in a license should not be possible (even though other rights may, with few exceptions, be waived by agreement). Those who do not favour subjecting mass market licenses to fair use conditions generally perceive copyright as providing default rules that should be overridable by a contract in free market transactions.

Samuelson P, *"The Digital Dilemma" A Perspective on Intellectual Property in the Information Age*", Paper presented at the 28th Annual Telecommunications Policy Research Conference, 2000 at 13:

"If fair use is an affirmative right ... then it ought to be acceptable to take positive actions, such as circumventing technical protection mechanisms (eg decoding an

encrypted file) in order to exercise fair use. However if fair use is merely a defence to an infringement, the same action may be unjustifiable. This point is very controversial. While one legal scholar has labelled as 'absurd' the notion that fair use could be an affirmative right, other scholars suggest a constitutional basis for affirmative fair use rights".

In Canada, fair dealing is generally considered a defence as opposed to an exception. According to an article published by Industry Canada, entitled "Copyright and the Information Highway", 27 February, 1997, <strategis.ic.gc.ca/SSG/ih01109e.html>:

"Fair dealing is a valid defence for users in cases where an infringement has occurred: it is not an exception to the rights of copyright owners. The usefulness of the fair dealing defence is that it can be raised in any situation of infringement. It is a window on equity in what would otherwise be a mere black and white situation. It can only serve its purpose, if it remains vague enough to be invoked in a variety of unforeseen situations. Clarity is the domain of exceptions: vagueness is the domain of this equitable defence."

In the UK, Under the 'Copyright design, & Patents Act (CDPA) 1988, the Fair Dealing exception to copyright is also considered not to be a legal right, but a defence: See <www.ilrs.mdx.ac.uk/copyright/copywww1.htm>.

(f) Literature Review: Fair dealing/fair use

Bell T, "*Fair Use v Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*" (1998) 76 North Carolina Law Review 557

- Argues that allowing copyright owners and consumers to exit copyright law and freely contract under a "fared use" system may offer freer access to works.

Brennan D, "*Locksmiths and Safecrackers in Cyberspace*" <http://www.law.murdoch.edu.au/dtlj/articles/vol2_1/brennanDTLJ2_1.html>

Committee on Intellectual Property Rights and the Emerging Information Infrastructure, "*The Digital Dilemma: Intellectual Property in the Information Age*" (2000) Chapters 4 & 6 <http://books.nap.edu/html/digital_dilemma/ch6.html>

Hugenholtz P, "*Fierce Creatures: Copyright Exemptions – Towards Extinction?*" A paper presented at the IFLA/IMPRIMATUR Conference, "Rights, Limitations and Exceptions: Striking a Proper Balance", Amsterdam, Netherlands, 31 October 1997

Samuelson P, "*The Digital Dilemma*" A Perspective on Intellectual Property in the Information Age", Paper presented at the 28th Annual Telecommunications Policy Research Conference, 2000

Samuelson P, "*Copyright, Digital Data and Fair Use in Digital Networked Environments*" <<http://www.lexum.umontreal.ca/en/equipes/technologie/conferences/ae/samuelson.html>>

3. Libraries and Licensing

For articles relating to Libraries and Licensing, see Folder 3.

Wodetzki J, "*Commentary on the Copyright Amendment (Digital Agenda) Bill 1999*, ALIA Copyright Services, <<http://www.alia.org.au/copyright/digital.agenda/1999/09b/index.html>>

Cornish G, "*Libraries and the Harmonisation of Copyright*" [1889] *European Intellectual Property Review* 241

Lahore J, "*Fair Dealing and the Digital Agenda: Will the Copyright Balance Survive*" (2000) 18(1) *Copyright Reporter* 23

MacMillan F, "*Adapting the Copyright Exceptions to the Digital Environment*" <http://wwwlaw.murdoch.edu.au/dtlj/articles/vol1_2/macmillan2.html>

- Contends that the application of exceptions to the Digital environment alter the current balance of interests between copyright owners and copyright users in favour of copyright owners.

MacMillan F, "*Libraries, Copyright and Digitisation*" (2000) 8(1) *Australian Law Librarian* 36

- Discusses impact of the Digital Amendment on libraries

Oakley R, "*UCC Article 2B: Some Preliminary Comments on a New Issue for the Library Community*" Prepared for presentation at the Annual Meeting of the Association of Research Libraries, October 1997, <<http://www.arl.org/info/frn/copy/uccspeech.html>>

Pascoe R, "*Virtual Libraries – Long Overdue – The Digital Agenda Act and Australian Libraries*" Gilbert & Tobin, 2001, <<http://www.gtlaw.com.au/pubs/virutallibrary.html>>

- Contains a comparison of what rights copyright owners and users had prior to the Digital Agenda Act (at 3), and what rights and limitations have been implemented as a result of the Amendment. Discussion focuses specifically on libraries and library copying for users (at 4-5).

Power T, "*Digitisation of Serials and Publications: The Seminal Objective of Copyright Law*" [1997] 8 *European Intellectual Property Review* 444

- Article discusses educational licensing, remuneration and fair dealing from an Australian perspective. (NB: 1997 article)
- Contains analysis of the impact of digitisation on universities: at 449

Annexure C

The Digital Agenda Act: how the new copyright law (and contract) is redefining the relationship between users and owners of copyright

Ross McLean and Anne Flahvin*

“Copyright law is not just about protecting information. It’s just as much about affording reasonable access to it as a means of keeping our democracy healthy...”¹

Introduction

The long-awaited *Copyright Amendment (Digital Agenda) Act* 2000 (the "*Digital Agenda Act*") came into force on 4 March 2001. Despite the arguments from copyright owners that "digital is different", the drafters set out to strike essentially the same balance between owners and users of copyright as existed immediately prior to the amendments. The *Explanatory Memorandum*, for example, states that "as far as possible, the exceptions (to copyright) replicate the balance struck between the rights of owners and the rights of users that has applied in the print environment."

On its face, the new Act reflects that intention. Against the protestations of copyright owners, the fair dealing exceptions, including the so-called "quantitative test", were extended to the new exclusive right of communication to the public. But does the form mask what is, in substance, a shift in favour of copyright owners?

In our view, the *Digital Agenda Act* – despite the stated intention of the drafters – has tilted the balance in favour of copyright owners. It is no exaggeration to say that as more and more information is available in electronic form only, the shift brought about the *Digital Agenda Act* has the *potential* to dramatically effect access to information by rendering fair dealing and other exceptions to copyright effectively meaningless. Whereas copyright has traditionally been concerned to control *copying* of protected works, the focus in respect of material distributed electronically has shifted to controlling *access*. We do not suggest that this shift in focus from copying to access is an inappropriate response to the changed information paradigm, and the very different supply models which digital technology has given rise to. We do, however, question whether our legislators have got the balance right. Failure to do so would be serious enough if all that was at stake was the right to copy works for fair dealing purposes. But what is at stake now is access. A failure to strike an appropriate balance between the rights of copyright owners and the rights of users will have far more dire consequences in the digital age than it would have ever had in the age of print.

Access to works – how the terrain had begun to change *before* the Digital Agenda Act

The failure of the Digital Agenda Bill to address the relationship between contract and copyright was not particularly high in the minds of users in the drawn out lobbying process

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¹ Statement by US Congressman Bliley during the US Commerce Committee hearings into the DMCA, August 4 1998

that preceded the passing of the Bill.² There were more immediate concerns in terms of maintaining the existing balance in respect of copying, statutory licences, library use and the like in a digital environment and it was clear that the Government's focus was limited to these core issues.

Long before the 4 March 2001 introduction of the Digital Agenda Act, copyright owners were turning increasingly to digital technology as the means of delivering published material to the public. While bookshops (if not record shops) have a way to go before becoming a quaint example of a bygone era, in the world of academic publishing, e-journals are rapidly replacing print.

It was contract law, not copyright, that was first called into aid by copyright owners to protect these electronic versions of their works. Electronic works are sold subject to contractual terms that restrict the ways in which they can be used. The numbers of people who are allowed to have access to them, the sorts of people who are allowed to have access and the permitted purposes of such access, are determined in the contract between publisher and purchaser.

No longer do copyright owners need to rely solely on the *Copyright Act* to protect their interests, and no longer do they have to accept the balance between their rights and those of users struck in the Act. With digital delivery of works, copyright owners can strike their own balance.

Consider the student who walks into a library and takes a book off the shelf. The student is entitled to take advantage of the fair dealing exception in s 40 of the Act to copy a “reasonable portion” of the book for the purposes of his or her research or study. But what if the library has purchased the work electronically? Notwithstanding that the student could copy a reasonable portion of the work without infringing *copyright*, if the contract between the library and the publisher does not allow this, the student will be prevented from taking advantage of the fair dealing rights delivered by copyright law.³ While at present, most contracts do allow this kind of use, it is also the case that the library is paying a licence fee struck according to the expected or actual use. Uses that would have amounted to fair dealings – and thus not infringed copyright, nor required payment – if the work were contained in a printed book, are now at the gift of the publisher. Some publishers, no doubt, strike their licence fees in such a way as to avoid claiming payment for uses that would amount to fair dealings. But others do not. They “contract out” of fair dealing.

Consider a lecturer preparing a coursepack, or book of readings, for students. The lecturer is free to copy one article from a periodical, or a “reasonable portion” of a book, in reliance on

² The Copyright Act is silent as to whether private agreements can displace the fair dealing exceptions contained in the Act. As we discuss below, however, the Copyright Law Review Committee has been asked to inquire whether such agreements ought to be enforceable.

³ The question also arises; “what is a work” in the digital context? The fair dealing exceptions allow for users to copy or communicate a “reasonable portion” of a work for the purpose of research or study. The Act provides some assistance by deeming that where no more than 10 per cent of the words of the work are reproduced for the purpose of research or study, this is a “reasonable portion”. But how does a user who wishes to take advantage of this exception determine what the “work” is? Increasingly, works that were once published in printed form as a single book, are being offered in electronic form as separate “bits”. Is each “bit” a separate work now, simply because the publisher has decided that it makes economic sense to offer what was once a book as several stand-alone “works”? Will the economic imperatives of the publishing industry re-define what is a “work”, and thus re-draw the boundaries between an infringing act and a fair dealing?

the educational statutory licence contained in Part VB of the Copyright Act.⁴ But if the relevant work had been purchased electronically, the right conferred by the Part VB licence may be rendered effectively useless. The work can only be copied for inclusion in a coursepack for students if the *contract* allow this. Some do, some don't. The Part VB educational statutory licence, like the fair dealing provisions, can be contracted out of.

Clearly, neither the lecturer relying on the Part VB statutory licence, nor the student relying on the s 40 fair dealing exception, would be in breach of *copyright* if, despite the contractual limitations, they went ahead and copied from an electronic version of a work. But the university may well be in breach of its *contract with the publisher* if it allows them to exercise the rights extended to them by the *Copyright Act*. Contract has begun to take over from copyright – at least with respect to works that are sold in electronic form – and to re-write the balance struck by Parliament and enshrined in the *Copyright Act*. Not only can publishers determine how much of their works can be copied, and for what purposes, they can also decide whether or not their works could even be *accessed*.

But of course, contract cannot deliver complete protection to copyright owners in a digital world. The doctrine of privity of contract confines its reach, and copyright still has a role to play in protecting works.

How has the Digital Agenda Act further strengthened the hand of copyright owners?

The World Intellectual Property Organisation (WIPO) Copyright Treaty in December 1996 requires signatories to give effect to certain norms with respect to the application of copyright law to the digital environment. These included:

- copyright owners should have an exclusive right to control the communication of their works to the public; and
- countries should have adequate legal protection and effective legal remedies against the circumvention of technological measures used by copyright owners to protect their works from infringing uses.

The Digital Agenda Act addressed each of these issues, amongst others.

The new communication right

The first of these norms is reflected in the new exclusive right of communication to the public.⁵

A new definition of “communicate” has been inserted in s 10(1) of the Act. It is defined to mean:

⁴ This statutory licence allows universities to copy and communicate works for the educational purposes of the university provided they agree to pay equitable remuneration to the copyright collecting society administering the licence, CAL.

⁵ For a discussion of this new right see McLean and Flahvin, *Aspects of the New Right to Communicate*

"make available online or electronically transmit (over a path, or a combination of paths, provided over a material substance or otherwise) a work or other subject matter".

The right is subject to the fair dealing exceptions, as well as a modified version of the library copying provisions, which applied under the old Act. These concessions to the interests of users attracted widespread criticism from copyright owners, and are already under attack, with copyright owners flagging their intention to seek a watering-down of the exceptions when the Digital Agenda copyright reforms come in for legislative review.⁶

But how real are the owners' concerns? Will the fact that the new communication right is subject to the fair dealing exceptions, the library copying provisions and the educational statutory licence result in the fledgling digital publishing industry being stalled before it even gets off the ground? There is no evidence that we are aware of that suggests that copyright pirates of any scale or size use or need to use these limited exceptions as a platform for their activities.

Once again, the example of a student dropping into the university library helps to illustrate the way in which the terrain has changed. If the student wishes to browse the university's collection of books and print journals, she can. The university, in allowing her to do so, is not engaged in any of the exclusive rights of copyright, and cannot be asked by the copyright owner to pay for allowing its students to browse the works. Any copying the student might wish to do in reliance on the fair dealing exceptions contained in the *Copyright Act* is a matter for the student. Once again, the university cannot be asked to pay. But what if the material that the student wishes to browse has been electronically scanned by the library (in reliance on the Part VB statutory licence, and therefore paid for by the university) for inclusion in a digital reserve? If the student wishes to browse *this* material, the university will be engaging in one of the rights of copyright – the communication right – by allowing her to do so. CAL considers that copyright owners are entitled to payment for this activity, and has put schools and universities on notice of its view.⁷ So while it is true that the copyright owner in this case cannot *prevent* the library from digitising the work and providing electronic access to its students, it can⁸ ask the university to pay for this. In this way the new communication right has the potential to restrict access every bit as much as though the copyright owner were entitled to deny access to universities. If universities are required to pay every time one of their students browses an electronic version of a work – an activity which is completely unremunerable if the work is a printed book or journal – universities may be forced to impose their own cost-driven restrictions on access to such works.

The anti-circumvention provisions

The second of the WIPO norms is reflected in the anti-circumvention provisions, which are intended to prevent circumvention of the technological measures that copyright owners use to protect their works from infringing uses. The *Digital Agenda Act* provides for civil and

⁶ For a discussion of the planned review of the Digital Agenda Act, see below.

⁷ The Universities have agreed to pay CAL a flat rate per student covering all copying and communication in reliance on the Part VB licence. This agreement expires in December 2002. Unless it is renewed, or the universities and CAL reach agreement on a new rate, the Copyright Tribunal will be required to determine what rate should apply. Part of such a determination would include deciding what activities ought to attract payment by universities to CAL.

⁸ Subject to a determination by the Copyright Tribunal which holds otherwise

criminal penalties for certain conduct relating to “circumvention devices” and “circumvention services”. The definition of circumvention device is contained in s 10(1):

a device (including a computer program) having only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of an effective technological protection measure.

Circumvention service is defined in similar terms.

Technological protection measure is defined as:

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 by either of both of the following means:

- (a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling, or other transformation of the work or other subject matter) with the authority of the owner or licensee of the copyright;
- (b) through a copy control mechanism.

Contrary to the approach adopted by the US legislature when drafting that country’s *Digital Millennium Copyright Act*, the drafters of the *Digital Agenda Act* declined to prohibit *use* of a circumvention device or service. Instead, s 116A of the Act prohibits certain commercial dealings in circumvention devices:

- (i) making a circumvention device capable of circumventing, or facilitating the circumvention of, the technological protection measure;
- (ii) selling, or letting for hire, or by way of trade offering or exposing for sale or hire or otherwise promoting, advertising or marketing, such a circumvention device;
- (iii) distributing such a circumvention device for the purpose of trade, or for any other purpose that will affect prejudicially the owner of the copyright;
- (iv) exhibiting such a circumvention device in public by way of trade;
- (v) importing such a circumvention device into Australia for the purpose of:
 - (a) selling, letting for hire, or by way of trade offering or exposing for sale or hire or otherwise promoting, advertising or marketing, the device; or
 - (b) distributing the device for the purpose of trade, or for any other purpose that will affect prejudicially the owner of the copyright; or
 - (c) exhibiting the device in public by way of trade;
- (vi) making such a circumvention device available online to an extent that will affect prejudicially the owner of the copyright;

(vii) providing, or by way of trade promoting, advertising or marketing, a circumvention service capable of circumventing, or facilitating the circumvention of, the technological protection measure.

The prohibition only applies where a work or other subject-matter (within the meaning of the Copyright Act) is protected by a technological protection measure; and a person does any of the prohibited acts without the permission of the owner or exclusive licensee of the copyright in the work or other subject-matter, and the person knew, or ought reasonably to have known, that the device or service would be used to circumvent, or facilitate the circumvention of, the technological protection measure.

The anti-circumvention provisions represent a most extraordinary extension of the power of copyright owners to control not only reproduction of their works, but also access to those works. They have effectively increased the reach of copyright protection to non-infringing uses such as fair dealings and uses in relation to insubstantial parts of a work. If a work is protected by a technological protection measure, no user will be able to access (let alone copy) even an insubstantial portion of that work, unless they fall within one of the very few exceptions which will enable them to legitimately obtain a circumvention device.

Public domain works can also receive the benefit of de-facto copyright protection by being subjected to technological protection measure. Some may ask; "how troubling is this"? As Jane Ginsburg has noted, "copyright law does not oblige publishers to give away copies of the plays of Shakespeare." But the problem is that the anti-circumvention provisions effectively prevent more than just access to the copy. "The publishers can now charge not only for an electronic edition of Shakespeare (assume no copyrightable value added to the text of the play) but for each reading of *Much Ado*."⁹

Section 116A is subject to certain exceptions, including the supply of a circumvention service or device to a person for a permitted purpose. The permitted purposes include: copying of computer programs in reliance on ss 47 D, E and F; copying by educational institutions in reliance on the Part VB statutory licence; copying by libraries under the library copying provisions (ss 49 and 50); copying of works for preservation and other purposes (s 51A); and Crown copying (s183). As is evident from this list, libraries and universities fared reasonably in the lobbying which took place over this provision.

Notably, however, fair dealing is not a "permitted purpose". Universities and other educational institutions can be lawfully supplied with a circumvention device by signing a declaration that the device will only be used for a permitted purpose (eg, the library copying provisions in ss 49 and 50, or the educational statutory licence contained in Part VB of the Act). Having obtained the device legitimately, can the university then allow its staff or students to use the device in order to exercise *their* fair dealing rights? While the answer to this question is not clear-cut, the university would run the risk of being liable under s 116A(1)(b)(iii) for distributing a circumvention device for a purpose "that will affect prejudicially the owner of copyright".¹⁰

⁹ J Ginsberg, *Copyright Legislation for the Digital Millenium*, 23 Colum-VLA Journal of Law and the Arts (No 3, 1999)

¹⁰ It would be a nice question whether the use of such a device to exercise fair dealing rights – which have not themselves been diminished in any way – could ever "effect prejudicially" the owner of copyright. Use of the device, after all, is not prohibited. A person who is able to obtain a circumvention device is not prohibited from using the device.

The fact that using a circumvention device to exercise fair dealing rights (or for any other purpose) is not prohibited by the Act is of cold comfort to the beneficiaries of those rights if they cannot access the work. In relation to works that are subject to technological protection, those rights have effectively been extinguished.

Should fair dealing be a 'permitted purpose'?

Copyright owners feared that a fair dealing exception to the anti-circumvention provisions would be a chink in the armour of technological protection measures, enabling copyright pirates, as well as legitimate users, to obtain circumvention devices with ease. While the drafters of the *DMCA* and the *Digital Agenda Bill* responded in slightly different ways to that fear, the result in both jurisdictions has been a dramatic emasculation of the fair dealing (fair use) exception to copyright.

In the US, the *Universal v Reimerdes* case is working its way through the courts. The case was brought by the motion picture industry against the publisher of the 2600 Magazine and www.2600.com website, which were both devoted to the culture of computer hacking. The website incurred the wrath of the movie moguls by linking to sites containing a code – DeCSS, developed by a Norwegian schoolboy – which unscrambled the encryption code which otherwise prevented Digital Versatile Discs (DVD's) from being copied.

When the case came before the District Court, Judge Kaplan found that the publisher, Eric Corley, had violated the anti-circumvention provisions of the *DMCA*. The judge enjoined Corley from making the DeCSS program available, including by providing links to sites containing it. "Taking what is not yours and not freely offered to you is stealing", Judge Kaplan, opined. It was no defence to argue, as Corley did, that the possibility of non-infringing fair use by someone who gained access to a protected copyright work through use of the DeCSS program excused him from liability for making the circumvention device available.

The judgement was welcomed in the publishing world. As the Association of American Publishers had testified before a Congressional hearing into the draft *DMCA*, "fair use does not allow you to break into a locked library in order to make 'fair use' copies of the books in it, or steal newspapers from a vending machine in order to copy articles and share them with a friend."

The "breaking and entering" metaphor for circumvention activities¹¹ has clearly been persuasive both here and in the US. But does it withstand scrutiny? Isn't it in fact the case that fair dealing *has* allowed the taking of what is not yours – without the need to seek permission and without the need for payment – in the interests of scholarly pursuit and democratic discourse. In the offline world, access to the work never required "stealing".

The *Reimerdes* case in the US has sparked widespread public and academic debate about the balance struck between copyright owners and users in the *DMCA*. The question being asked in the appeal currently before the US Court of Appeals for the Second Circuit is whether the anti-circumvention provisions are limited to the goal of shielding copyright owners from

¹¹ See Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, http://www.sims.berkeley.edu/~pam/papers/Samuelson_IP_dig_eco_htm.htm

infringement; or whether they are a “sword that empowers them to wield unprecedented control over the private viewing of copyrighted works”.¹²

The difficulty for legislators, of course, is that in the digital age, a law that shields copyright owners from infringement without, at the same time, adding to the copyright owners’ ability to control every access to a work, is proving to be elusive. Digital IS different, and it would be futile to pretend otherwise. The question we would like to pose, however, is whether our legislators have been too ready to accept the copyright owners’ cataclysmic vision of a world in which users remain fully free to exercise their traditional fair dealing rights without the authority of the copyright owner.

The next step – review, reflect and fine tune?

The willingness of our legislators to review and reflect upon the effects wrought not just by the new copyright law, but also by the rise of contract over copyright, will be crucial in ensuring that the public interest in continuing access to information, and appropriately crafted exceptions to copyright, do not fall foul of the new “publishing paradigm”.

The *DMCA* directs the US Librarian of Congress to undertake a study with a view to determining whether certain classes of works, or users, have been adversely affected by the new provisions prohibiting the *act of circumvention*. The factors which the Librarian of Congress is directed to take into account include “the impact [of] the prohibition ...on criticism, comment, news reporting, teaching, scholarship or research” as well as “the effect of the circumvention of technical measures on the market for or value of copyrighted works.”¹³

The Government has promised to undertake a review of the *Digital Agenda Act* within three years of its introduction. However, in response to growing concerns about the likely impact of the Digital Agenda copyright reforms, the Government last month directed the Copyright Law Review Committee to conduct an inquiry into the relationship between copyright and contract. The terms of the CLRC reference include an inquiry into whether agreements which exclude or modify exceptions provided under the Copyright Act *should* be enforceable. The Committee is due to report its findings by April 2001. The CLRC inquiry will be watched with interest by the international copyright community. Australia is leading the world by turning the attention of its copyright policy makers to *contract* as well as copyright.

Wisely, our government – like that of the USA – has provided opportunities for these and other issues important to the balance struck by our Act to be reconsidered. This time fair dealing, the circumvention provisions and contract will be central to the debate.

¹² Appellate Reply Brief, p 5

¹³ 17 USCA s 1201 (a) (1) (C)