

**BUSINESS SOFTWARE ASSOCIATION OF AUSTRALIA**  
**SUBMISSION TO THE COPYRIGHT LAW REVIEW**  
**COMMITTEE**

**COPYRIGHT AND CONTRACT REFERENCE**

**1 Introduction**

1.1 The Business Software Association of Australia (BSAA) is very pleased to have the opportunity to present this brief submission to the Copyright Law Review Committee (CLRC) in relation to its Copyright and Contract reference.

1.2 The BSAA was formed in 1989 and is an association leading software publishers and distributors operating in Australia. The BSAA members include Adobe Systems, Autodesk, Bentley Systems, Macromedia, Microsoft and Symantec. The BSAA is affiliated with the Business Software Alliance which has since 1988 been the voice of the world's leading software developers for governments and the consumers in the international marketplace.

**2 Support for IIPA Submission**

2.1 We refer to the submission to the Committee made on 9 August 2001 by the International Intellectual Property Alliance (IIPA). The Business Software Alliance is a member of the IIPA.

2.2 The BSAA fully endorses IIPA's submission to the Committee. For the reasons advanced by IIPA in its submission, the BSAA considers that:

(a) Freedom of contract will become increasingly important in the digital environment as copyright owners exploit their works online through licensing agreements;

(b) Any issues relating to objectionable provisions in mass market or other agreements can be adequately dealt with under the existing legal regime governing enforceability of contracts generally; and

(c) Restrictions on the ability of owners and users of copyright works to agree on terms of use of those works are not only unnecessary but could also impede the objective of encouraging innovation and exploitation of copyright works.

2.3 In addition to supporting the IIPA's submission, the BSAA would like to make a few brief observations from the perspective of the software industry.

**3 Importance of shrinkwrap licences and other mass market agreements to the software industry**

3.1 The use of shrinkwrap licences has been of fundamental importance to the software industry from its earliest days. There are a number of reasons for this.

3.2 Computer software is used by first having it installed on a computer. Both the installation of the program on the computer and its subsequent use involve reproductions within the

meaning of the Copyright Act which require the licence of the copyright owner. Licence terms are used to clarify the rights of a user who buys legitimate copy of a particular software program. For example, it is possible to buy a single user or multiple user version of a particular program. Clearly a multiple user version of a program will be more expensive than a single user version of the program. The only way in which the copyright owner can regulate the number of copies which the user is entitled to make is by means of an appropriate licence. This issue of regulating the number of copies a user can make is all the more important given the immense problem of illegal copying which the software industry has faced from the outset, due to the ease with which software can be copied.

- 3.3 Many programs, including those of BSAA members, are distributed on a very wide scale in vast quantities. In this environment it is not possible to conclude a signed contract with each user and as a result the use of shrinkwrap licences and other mass market agreements has become standard in the software industry.
- 3.4 In the light of the importance of shrinkwrap licences and other mass market agreements to the software industry, the BSAA considers it vital to preserve the enforceability of these agreements.

#### **4 Exception for normal use of computer programs - section 47B**

- 4.1 Section 47B(1) of the Copyright Act provides an exception to infringement for an owner or licensee of a copy of a computer program who reproduces the program incidentally and automatically as part of the technical process of running the program. However, there is a very important proviso to this exception in section 47B(2). Under this subsection, the exception does not apply to the making of a reproduction of a computer program from an infringing copy of the computer program or contrary to an express direction or licence given by the owner of the copyright in the computer program to the owner or licensee of the copy. This proviso is vital because of the essential role which licence terms play in the marketing of computer programs as described above. Without section 47(b)(2) it would be possible for a purchaser of a single user copy of a program to use it on a 100 user network and claim the benefit of the exception in section 47B(1).
- 4.2 As the Committee points out in paragraph 40 of its issues paper, section 47H provides that an agreement which purports to limit or exclude the exceptions in sections 47B(3) to 47F has no effect. However, section 47H does not apply to section 47B(1) because it would be inconsistent with the proviso in section 47B(2). BSAA submits that this distinction is extremely important and that section 47H should not be amended to include section 47B(1).

#### **5 Conclusion**

- 5.1 In light of the above, the BSAA submits that owners and users of copyright works should be free to agree on contractual terms for use of their works and that the Copyright Act should not be amended so as invalidate contractual terms that may be inconsistent with or purport to modify or override exceptions contained in the Copyright Act.
- 5.2 The BSAA is reinforced in this view by the fact that it is unaware of any problems which have been caused in practice or complaints made to its members relating to the interface between shrinkwrap licence terms and the exceptions to infringement contained in the Copyright Act. This is despite the long and extensive use of shrinkwrap licence terms in the software industry.