



13 August 2001

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

Dear Sir/Madam,

COPYRIGHT AND CONTRACT

Introduction

1. The Copyright Agency Limited (CAL) is a copyright collecting society who administers, on a non-exclusive basis, the copyright controlled by its members.
2. CAL currently represents the reproduction rights of 5500 author and publisher members who, in turn, represent many thousands of authors and publishers. CAL also represents thousands of other copyright owners through reciprocal agreements with overseas collecting societies.
3. CAL has been declared by the Attorney-General to be the collecting society for the reproduction and communication of works by educational institutions under Part VB of the *Copyright Act* 1968 (the Act). CAL has also been declared by the Copyright Tribunal to be the

collecting society for government copying for the purposes of Part 2 of Division VII of the Act.

4. Pursuant to these declarations, CAL administers statutory licences through which educational institutions and Commonwealth, State and Territory governments remunerate copyright owners for the copying of their works.
5. In addition, CAL offers voluntary licences to the public and corporations for the right to copy published works. As a single resource, CAL can provide copyright clearances for hundreds of thousands of books, articles and essays through its licences to copy.

The Copyright Balance

6. The Act grants exclusive rights to creators, the purpose of which is to reward and encourage intellectual and creative effort.
7. The granting of these rights means that creators have the exclusive right to exclude third parties from the use covered by those rights.
8. These exclusive rights are subject to certain defences to infringement of copyright by third parties which apply in particular circumstances, also commonly referred to as exceptions or qualifications. Some examples include the fair dealing defences, the library and archive copying provisions, and the statutory licences for education and government. These defences to infringement appear in the Act in response to the need to balance the copyright owners' exclusive rights with one or more public policy objectives.
9. Like most legal defences, the exceptions in the Act are not automatic. In order for a user not to infringe a creator's copyright that user will normally be subject to one or more of the following:
 - (a) a specific purpose test;
 - (b) a test for fairness;
 - (c) reasonable portion test;
 - (d) payment of remuneration to the copyright owner.
10. CAL supports the continued balancing of protecting creators works, in order to encourage intellectual effort, and providing exemptions for the public benefit within the scope set out in the TRIPS Agreement , the Berne Convention and the WIPO Copyright Treaty.

Exceptions under the Act

11. Different public policy objectives underlie each of the defences to infringement under the Act. Some examples of these public policy objectives include the administration of justice, the advancement of education and protection of the public's right to be informed. Consequently, all exceptions should not be treated alike.
12. A policy objective underlying the Act is to facilitate the markets for copyright material so that they may operate in the most efficient way for the benefit of owners and users of copyright material. That operation will include contractual modification of the relationship between the parties where such modification is dictated by the market.
13. It is difficult to discern any public policy reason to exempt any of the exceptions from modification by contract. Each of the exceptions are shaped by a balance of the particular factors contributing to the public interest in the exception – for example, the public policy underlying s.41, fair dealing for criticism or review is different from that underlying s.43, fair dealing for the giving of professional advice. Consequently, the policy relating to the existing balance reached in each provision should be carefully considered before making any changes to the Act.
14. The relationship between contract and copyright and the ability to modify the scope of exceptions by contract must have been considered, implicitly if not explicitly in achieving the copyright balance when each of the exceptions was introduced into the Act. This is evident with reference to modification by contract for certain provisions in the Act at s.47H; and also at s.135ZZF and s.135Z in respect of the statutory licences.

Mass Market Agreements

15. Mass market agreements are a response to just that – businesses having to deal with a mass market.
16. With more and more businesses going online it is becoming increasingly impractical, given the volume of transactions that may occur, to have separately negotiated agreements for each purchaser. Moreover, the nature of e-commerce is that in most instances both the buyer and seller want to conclude the purchase online.
17. On-line publishing in Australia is in its formative stages where the testing of new business models for viability is still a major concern. Legislative intervention would be a serious mistake at this stage of the industry's development. Copyright content providers and consumers require a flexible environment in which they can continue to investigate and embrace suitable commercial models.
18. Since the decision in *ProCD v. Zeidenberg* (US 7th Circuit 1996), courts in the United States have generally enforced both shrinkwrap and clickwrap agreements (see *Groff v. America Online* (R.I. Superior Court 1998) for an enforcement of a clickwrap agreement).
19. The key to mass market agreements being enforced by the US courts are that they need to be commercially reasonable and do not contain terms which are unconscionable, overreaching or otherwise unfair or prejudicial to the consumer. In the case of *ProCD*, the fact that the end user could receive a full refund if they would not or did not agree to the terms and conditions of the agreement was a significant factor for the court in upholding the agreement.
20. The three European Union (EU) directives¹ which cover online agreements import many of the same elements as the US courts have done in determining whether an agreement is enforceable. In

¹ These directives are The Long Distance Selling Directive, The Long Distance Selling of Financial Services Directive and the E-Commerce Directive.

particular, the requirement that the consumer can rescind within a certain timeframe, that adequate information is given to the consumer and written confirmation of the agreement is given to the consumer.

21. The combination of the *Trade Practices Act* 1974 and the various state acts governing contracts would give Australian consumers the same sort of protection afforded by the US Courts and the EU directives over online contracts.
22. It is CAL's position that the CLRC should not make any recommendations that would make the position in Australia different from what might be called "world standards", especially since most of the copyright material in use in Australia comes originally from overseas. Copyright is a highly international form of property and general conformity with world standards is itself a desirable aim.
23. CAL therefore suggests a watching brief regarding developments in contracting in an online environment by government, unless sufficient evidence of actual harm to consumers comes forward as part of this enquiry.

Circumvention Devices and ECMS

24. The use of an Electronic Copyright Management System (ECMS) is becoming the most important method for copyright creators and owners to control access to and use of copyright material in electronic form. An ECMS will normally include features that satisfy the definition of a *technological protection measure* in the Act, and therefore any use of circumvention devices is crucial to the performance of the market for copyright material in electronic form.
25. It is somewhat disturbing to observe the emphasis in the Issues Paper published by the CLRC at paragraph 34 on the concern over whether "individuals or libraries are being presented with

agreements attempting to contract out of **their rights to acquire and use** circumvention devices or services for permitted purposes” (emphasis added).

26. Section 116A of the Act prohibits various activities relating to circumvention devices, and then provides exceptions to the prohibited activity of supplying a circumvention device when it is to be used for a permitted purpose. Section 116A does **not** provide any user of copyright material with a **right to acquire and use** a circumvention device. These provisions relate to enforcement of copyright owners’ rights, not to any alleged rights of users of copyright material. The Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 2000 that introduced Division 2A (which includes s.116A) into the Act states that “these provisions will operate to provide copyright owners and their licensees with an effective means of enforcing their rights in the online environment whilst simultaneously allowing for the operation of some exceptions to the exclusive rights of copyright owners”.
27. At this stage, the nature of the application of Division 2A of the Act is something that will be determined by the market for online works. This market for online works for CAL’s author and publisher members is still slowly developing and the effect of Division 2A is not yet known.
28. There has been no case law in Australia to our knowledge to test any aspect of the provisions in division 2A of the Act. However, a case concerning the DeCSS code to break the encryption on DVDs in the United States has considered the application of provisions relating to technological protection measures and circumvention devices introduced by the US Digital Millennium Copyright Act (DMCA) in 1998. The case has been referred to in the Issues Paper at paragraph 66. It would seem that the Australian provisions in Division 2A would similarly apply to prohibit the publication or promotion of a code which qualifies as a circumvention device,

unless there was a supply of a device to be used for a permitted purpose. There seems little guidance from this case on the prevalence of any party attempting to contract out of the provisions relating to circumvention devices.

29. As the Committee is aware, the European Union has recently finalised Directive 2001/29/EC, the full title of which is the *Directive on the harmonisation of certain aspects of copyright and related rights in the information society* (the Copyright Directive). Member States are required to comply with the Directive shortly before the end of 2002.
30. Article 6 of the Directive contains provisions relating to technological protection measures and circumvention devices which directly reflect the requirements of the WIPO Copyright Treaty.
31. The approach of the EU in the Directive is clear from the Articles of the Directive that it does not compel Member States to provide exceptions to the rights of copyright owners, excluding the exception for making temporary copies in the course of a technical process. Article 9 specifically states that the Directive applies without prejudice to other legal provisions including the law of contract.
32. There is also clear intention indicated in the Recitals to the Directive to allow contract law to operate in conjunction with copyright. Recital 30 allows rights referred to in the Directive to be subject to the granting of contractual licences. Further, Recital 45 provides that the exceptions contained in Article 5 (excluding temporary reproductions as part of a technological process) should not prevent contractual relations designed to compensate rightsholders.
33. Clearly the power of digital technology must be distinguished from analog technologies which are used to reproduce copyright material. One only has to consider services such as Napster, or the various

types of file trading networks operating that allow perfect copies of files to be made simply which can be distributed to an enormous number of users within an instant. Owners of copyright in musical works and sound recordings have clearly been subjected to the most flagrant infringement of their rights by these types of services, and it would be unrealistic to suggest that this will not occur for other copyright material, such as literary and artistic works.

34. Proceeding from the fact that technology has been used to illegitimately reproduce works digitally, it makes little sense to believe that a circumvention device is a mere instrument which will allow those entitled to circumvent technological protection in the appropriate way. However, this debate was considered at length in the course of finalising the Digital Agenda legislation. The Advisory Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs is indicative of this debate in that it concludes at paragraph 4.43 that it would be “prudent to delay possibly altering the balance until the ramifications of copyright in the emerging digital age are better and more widely understood. For this reason the Committee considers a ban on the use of circumvention devices for all purposes inappropriate”.

Direct Response to the Issues raises by the Committee for Comment

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 Act. Can you provide the Committee with examples of any such agreements?

35. CAL is not aware of any Australian agreements relating to digital works that excludes or modifies the limitations to the exclusive rights of copyright owners.

36. CAL has been provided with a copy of the Australian Publishers Association's (APA) submission to the committee. CAL notes that the APA approached all of its members, approximately 88% of the book publishing industry, none of whom could offer up any positive examples of contracts expressly seeking to exclude or modify exceptions in the Act.
37. CAL agrees with the APAs findings that in the book publishing industry there does not seem to be a reliance on such contracts. In particular, CAL supports the position of the APA that there does not appear to be any harm to be overcome by legislation at present.
38. CAL has developed a number of licence schemes, in respect of works in electronic form, in consultation with user groups. For example, RMIT Training Pty Ltd (under licence by CAL and with the technical support of the National Library of Australia) currently offers online access to subscribers to the full text of a broad range of journal articles through both *Australian Public Affairs Full Text™* and *Meditext™*.
39. In these licence schemes, the parties acknowledge that some or all of the copying or communication that is covered by the licence scheme may be copying that may otherwise be permitted under an exception in the Act.
40. Many of the subscribers to these services are libraries in educational institutions. It could be argued that these subscribers may have been able to rely on the library copying provisions in the Act to both access and make available to some users, free of payment of a copyright royalty, the materials contained in these two services.
41. However, those subscribers have chosen to access these services for a fee, for a number of reasons. From the perspective of the library subscribers, these reasons include the streamlining of administrative

requirements which would otherwise be required to comply with the Act, and the certainty that the copying was licensed, rather than possibly permitted under an exception. CAL acknowledges that the quantum of licence fee was influenced by the fact that some of the copying could possibly be undertaken free of payment of any copyright fee.

42. In CAL's view, preserving the option of such flexibility in negotiations is critical to the functioning of the market.
43. It should be noted that, in the subscription agreements entered into with subscribers, CAL and RMIT Training Pty Ltd made a conscious decision *not* to restrict or circumscribe the statutory rights of libraries or educational institutions under the Act. Had we elected to try to contractually restrict those rights, it is our opinion that the market would not have accepted those restrictions.
44. A further type of practice that may affect a users right under the Act is in relation to the practice by educational publishers to provide free ancillary items to an educational institution who subscribe to a textbook.
45. At all levels of education there is a growing demand for technology applications to support textbooks (especially web sites, CD-ROMs, question banks and test generators). Usually this sort of support material is bought in very small numbers and is therefore only produced to support textbooks - essentially a hidden establishment cost that in previous eras would not have been part of the picture. If the textbook is reproduced and not bought, this cost is not recouped.
46. As a result, educational publishers only supply a valid password to those educational institutions that currently subscribe to the textbook that the web site or other ancillary items support.

47. For publishers in a competitive market, such value-added services are an important component of competitive products. Those publishers are concerned that the existence of statutory licences which permit the use of circumvention devices to overcome such marketing tools will limit their options for pricing their products.
48. The types of contract practices that are developing are give and take, and that any attempts to limit the scope of the exceptions are market driven. It is CAL's view that these developments should not be inhibited except if a component of the contract is unconscionable.

Issue 2

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

49. Copyright owners and users have always used the existence and use of exceptions as one of the matters that are relevant in contract negotiations.
50. A number of educational publishers provide licences either to the purchasing teacher or to the school or to both to copy all or certain pages from their books. These works with their licences are known in the educational publishing industry as blackline masters.
51. Blackline master licences vary from publisher to publisher. Generally however they require that for the educational institution to copy from the work that they must have purchased the work. The educational statutory licence does not require an educational institution to own a work to copy from it.
52. The benefit to the consumer of the blackline master contract is that the licence allows copying in excess of the scope of the educational

statutory licence or alternatively the production quality of the work has been enhanced to afford better quality photocopies. The purchase price of the book containing the blackline master is adjusted accordingly.

53. Another example of copyright owners licensing users who already have exception under the Act is the Australasian Mechanical Copyright Owners Society's (AMCOS) licence with schools allowing photocopying of print music.
54. Under the educational statutory licence, schools are able to copy 10% of a musical work for their educational purposes. Music teachers found that in many instances the copying of 10% of a musical work was not sufficient for their teaching purposes. As a result, AMCOS (on behalf of its music copyright owners) negotiated a voluntary licence with the major educational bodies in Australia on behalf of the schools that they represented.
55. As illustrated by both the AMCOS licence and publisher's blackline master licences, in many circumstances contracts are more responsive to users needs than the exceptions in the Copyright Act.

Issue 3

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

56. Whilst it is clear that the nature of digital technology is different and its capability to copy and distribute copies is greater than other older forms of technology, the precise effects of the use of such technology on the market for the various types of works is not yet known. For example, an important driver in the hard copy world is the availability or unavailability of works and access to those works. In a digital world, availability may not be the issue, rather the main driver for new communication services may be price. Consequently, exceptions for consumers may not be the best guarantee of access.

57. The contracting practices for supply of works may vary between works supplied online as opposed to offline, but CAL does not believe it is evident that trends and established practices have emerged. CAL also believes that this aspect of exceptions to copyright in the online environment is an important part of the more extensive digital agenda debate. The digital agenda amendments were debated in detail, and the three year review of that legislation will be the appropriate forum for assessing their application and effect.

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 this result by contract? In this regard, should all exceptions be treated alike?

58. CAL's view is that if there is no express prohibition in the Act on "contracting out" then the scope of provisions may be modified by contract.
59. Further, CAL does not believe all exceptions should be treated alike. In CAL's view the exceptions inserted into the Copyright Act are responses to market failure and different public policy concerns. In shaping many of these exceptions the relationship between provisions in the Act and contract may have been one of the matters taken into account at the time the exception was created. To revisit only one aspect of each of the exceptions, without examining them holistically would upset the balance.
60. Subsequently, adding an over arching provision exempting exceptions to the Copyright Act from being modified by contract would be inappropriate and may be contrary to other important public purposes of government such as freedom to contract, and trade initiatives.
61. As illustrated by the examples given above in many circumstances contracts are more responsive to users needs than the exceptions in the Copyright Act and to the benefit of all parties.

Issue 5

The Committee seeks your views about whether:

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

62. It is CAL's view that contract may override copyright exceptions, thus there are no other legal remedies to stop such contracting out.
63. There are however very powerful remedies for users in relation to agreements that are unconscionable or in relation to the practices of the copyright owners business. Specifically these remedies can be found in the Trade Practices Act, the various state and territory contract review acts and the various state and territory fair trading legislation.

The existing legal remedies provide adequate protection against the use of agreements to override copyright exceptions granted under the Act.

64. CAL is of the view that it is not necessary to include contractual, fair dealing or trade practices remedies in the Copyright Act, as these remedies are already provided elsewhere. CAL notes that section 195AWB of the Act, relating to the consent of an author in regard to moral rights, is superfluous as the making of false statements and signing an agreement under duress are dealt with in other legislation. Furthermore, the concepts of duress, false statements and the like are fully tested in the jurisdiction of contract and consumer protection law.
65. It should be noted that Australia's laws in regard to trade practices and consumer protection are some of the strongest in the world.
66. Furthermore, the inclusion of provisions in the Act which merely seek to limit the effectiveness of contractual terms agreed by willing and able parties could severely harm the emerging e-commerce market. In particular, agreements such as the previously mentioned AMCOS licence or the RMIT projects that benefit all parties would be affected.

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 validity and enforceability.

67. CAL's is of the view that mass market agreements should not be treated as a special category but that standard unconscionable contract and consumer rights rules should apply. Both of these rules are currently contained in other legislation, namely the *Trade Practices Act*, the various state and territory fair trading acts, the

various state and territory contract acts and common law principles for each of these areas of law.

68. CAL suggests that rather than the government legislating in this areas it promote the development of industry code of practice and guidelines on the terms to be included in mass market contracts. Any code, however, should be based on existing principles of law.

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.

69. It is CAL's view that an Australian copyright licensing agreement would be subject to the various contracts review acts, fair trading acts and the Trade Practices Act.
70. US and EU contracts would be subject to their own jurisdiction, however the laws relating to unconscionable contract in these jurisdictions are similar to Australia. Furthermore, it is in the interest of Australia to legally aligned with international law in relation to this issue.

Issue 8

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

71. CAL notes that the present inquiry is the first of its kind in any country. To date, the international experience has been a "light-touch" approach. That is to allow existing laws, such as contract and trade practice laws, to govern electronic contracts (see for example the US case law on click-wrap agreements, which were brought under contract law).
72. We re-iterate that it is CAL's position that the CLRC should not make any recommendations that would make the position in Australia different from what might be called "world standards", especially since most of the copyright material in use in Australia comes originally from overseas. Copyright is a highly international form of property and general conformity with world standards is itself a desirable aim.

73. CAL's is also of the view that non-legislative solutions can provide valid responses which are sensitive to the changing needs of copyright owners and copyright users and that such avenues should be pursued in Australia.

Issue 9

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

74. CAL's response is that no legislative action should be taken unless the Committee forms the view that the Trade Practices Act unconscionability provisions do not sufficiently apply to contracts under the Copyright Act and if so provisions regarding unconscionable contracts be inserted into the Copyright Act itself.
75. In addition, the government should actively to seek to develop codes of practice and guidelines for contracting with relevant industry groups.

Conclusion

76. If you have any queries in relation to this submission please do not hesitate to contact CAL.

Yours sincerely,

Michael Fraser
Chief Executive