

**Department of Communications
Information Technology
and the Arts**

Submission to the Copyright Law Review Committee

Copyright and Contract

The Department of Communications, Information Technology and the Arts (Department) is jointly responsible for copyright policy with the Attorney-General's Department¹.

The purpose of this submission is to assist the Copyright Law Review Committee (Committee) through the provision of relevant information and by highlighting a number of factors that the Department considers relevant to this inquiry. This submission outlines a number of areas for consideration and is not a comprehensive analysis of copyright and contract.

The Department considers that many of the contractual provisions that relate to copyright material are strongly linked to both the technological capabilities of copyright material distribution and to industry practices, such as standard terms in relevant contracts. Both the technology associated with copyright distribution and related industry practices are undergoing considerable development.

Much of the copyright material that can be managed by technology is still being distributed in analogue format (e.g. as paper format books) or as packaged digital format (e.g. music on compact discs). In many areas, the online environment and digital distribution environments are still in their infancy compared with some traditional forms of distribution such as book distribution. For instance, the amount of e-book distribution is comparatively minor compared with the levels of printed book distribution².

Current industry practices for all formats, but particularly in packaged digital format and online formats are likely to change as distribution technology develops. Contractual terms are also likely to change to reflect such development.

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?

Trade and Jurisdiction

There is a growing electronic trade in copyright material, and a large proportion of this trade is overseas-based. According to the National Office for the Information Economy (NOIE)

the ABS estimated that at 30 June 2000, approximately A\$5.1 billion in sales was generated via Internet e-commerce by 38,000 e-commerce active businesses (an average return of A\$134,210 per business). The majority of this activity was in the B2B [business to business rather than business to consumer] sector. [attachment 1]

NOIE has also published figures that indicate that in the 24 months to November 2000 Internet shopping grew by 67% (from 6% to 10%). In November 2000, 52% of Australian Internet shoppers purchased / ordered goods or services from Australia only, while 23% shopped from overseas web sites. Another 22% shopped online from web sites in Australia and overseas.

¹ <http://www.dcita.gov.au/ip>

² Bryan, M, *Publishers undeterred as e-books gather dust*, AFR, 25/05/01.

Of the trade surveyed in November 2000, books & magazines were the goods most purchased by Australians on the Internet (36% of online buyers). Other goods and services purchased online included music products (20%), and computer software (18%). A comparison of this set of data with data for November 1999 shows that books and magazines remain the most purchased products online over time. Other items that performed consistently over time included music products, computer software, entertainment/tickets, holidays, and clothing or shoes³. The most popular products of Australian electronic trade seem to be copyright material. This includes material in analogue format such as books, digital packaged format such as music compact discs, and downloaded material such as software files.

The above figures indicate that there is a strong electronic trade in copyright material including a considerable number of transactions that relate to other jurisdictions⁴. A number of major copyright content providers purport to base such transactions in foreign jurisdictions. For example, Amazon.com purports to base all transactions through its site in the state of Washington US, 'without regard to principles of conflict of laws'⁵. CDNow.com purports to base jurisdiction in Montgomery county, Pennsylvania, U.S.A. in similar terms⁶ and BlackStar DVD purports to subject all purchases to Northern Ireland law⁷. Often such jurisdictions are net exporters of copyright material and have legislation that varies considerably to the Australian jurisdiction.

Digital rights management systems

Electronic trade in copyright material, often across multiple jurisdictions, is increasingly based on the distribution of digital copyright material (although the trade still encompasses large amounts of non-digital material such as books). Until recently, copyright owners have mainly relied on copyright legislation to remedy copyright infringements of their material, whereas digital control measures now provide copyright owners with an increasing level of active control over the use of digital copyright material. This capability has been used for software for some time. It seems that the primary purpose of digital control measures has been, until recently, to prevent unauthorised copying or use of software. For example, dongles (hardware devices required for software use) are used in SolidWorks 2001 (computer aided design software)⁸. Also, some software products use disc delivery systems to manage software use. For example, Typequick software (learn-to-type software) requires specific installation procedures from an original disc to function⁹.

³ National Office of Information Economy, *The Current State of Play*, June 2001 (attachment 1), http://www.noie.gov.au/projects/information_economy/research&analysis/ie_stats/CSOP_June2001/index.htm.

⁴ [Electronic Copyright Management Systems are featured in the WIPO Second International Conference on Electronic Commerce and Intellectual Property to be held in Geneva on September 19 to 21, 2001. An e-commerce 'primer' to that conference is available at http://e-commerce.wipo.int/primer/index.html](http://e-commerce.wipo.int/primer/index.html)

⁵ <http://www.amazon.com/exec/obidos/tg/browse/-/508088/t/103-2814034-1383045> as at 26 July 2001.

⁶ <http://www.cdnow.com/cgi-bin/mserver/SID=390190534/pagename=/RP/HELP/policies.html#termsandconditions> as at 26 July 2001.

⁷ http://www.blackstar.co.uk/help/help_terms as at 26 July 2001.

⁸ <http://www.solidworks.com>

⁹ <http://www.typequick.com.au>

Recently there has been considerable development of a number of digital control measures and these have evolved into increasingly complex systems able to be used to control copyright material to an unparalleled degree. These are known as Digital Rights Management Systems (DRMS) or copyright management systems.

DRMS allow systemic control of diverse content over the entire life cycle of the product. DRMS can be used for different media and formats (mainly digital), whether these be software, music, text, film, television broadcast, artistic works or combinations of these either online, on disc or preloaded onto hardware.

ContentGuard, Intertrust, EMMS and IPR Systems are prominent DRMS, although there are a number of DRMS and they are often branded differently or can be invisible at consumer level¹⁰. We attach relevant articles and examples of several DRMS which provide copyright owners and users with a number of conditions of use, delivery, types of access, levels of use, and tracking options (attachments 2-7). Underlying the operation of all DRMS is the encryption of content to prevent unauthorised access to copyright material.

DRMS provide:

- **conditions of use of material** – The terms of the contract can be many and varied. In a number of instances copyright material is provided as a service rather than a product. For instance Office Windows XP (an operating system) may be ‘rented’ annually including updates¹¹.

A number of terms and conditions require the use of other products or services. For instance it seems to be a requirement of using Microsoft Reader (an E-book reader format) that a user sign up for Microsoft Passport (a set of identification, purchase and information services that use member information in a variety of ways)¹². Some copyright products or services may also require that the content be automatically upgraded (these upgrades may well have additional terms and conditions)¹³.

Many of the free (and purchased) software players (such players are generally a software download that allows users to listen to, watch, read or play copyright material) incorporate terms and conditions in a ‘click through’ agreement. An example of such software is Microsoft Media Player 7 which installs a ‘digital rights management’ software component on installation¹⁴.

- **content delivery options** – Whilst a book is usually only delivered to a geographic location, digital content such as an e-book can be delivered to be read on a specific computer for a specified time in a specified format (such as a chapter

¹⁰ <http://www.intertrust.com>, [http://www-contentguard.com](http://www.contentguard.com), <http://www-4.ibm.com/software/is/emms/> and <http://www.iprsystems.com>. Further information on DRMS and similar services can be found at <http://www.reciprocal.com/>, <http://www.netpd.com/b.htm>, <http://www.odrl.net/>, <http://www.indecs.org/>, <http://www.imprimatur.net/> and <http://www.digitalrightsmedia.com/>.

¹¹ <http://www.microsoft.com/australia/offers/xpsubscription.asp>

¹² <http://reader.microsoft.com/activate/en/default.asp> redirects to <http://www.passport.com/Consumer/>.

¹³ Although the vast majority of upgrades are likely to be beneficial to users, some upgrades may require different hardware or introduce incompatibilities or bugs, or even reduce functionality, an issue of concern especially if it is an automatic upgrade (see <http://www.asktog.com/columns/045ReplayTV.html>).

¹⁴ <http://www.microsoft.com/windows/windowsmedia/EN/software/v7/v7faq.asp#Q12>

of a book that is viewable on the purchasing computer in proprietary format). There are a variety of content delivery options, usually relating to computer hardware, geography, other types of software, or personal identifying information (such as passwords or fingerprint readers)¹⁵.

An example of the type of delivery options that digital material provides is Microsoft Windows XP (a computer operating system) that 'locks' to a users hardware configuration and requires the user to contact Microsoft to activate the software initially and again to 'unlock' the software if it detects computer hardware changes. The content is delivered to a specific computer and seems to be required to be used on that computer.

Some technology restricts use to geographic regions, such as that used in Digital Video/Versatile Discs (DVD) regional coding systems. It restricts the users in each country to a geographically based set of DVDs; Australia is in region four with New Zealand, Pacific Islands, Central America, Mexico, South America, and the Caribbean¹⁶. Similar regional coding systems are used in game consoles such as Sony Playstations.

- **access types** – An access measure usually determines who can use copyright material. Copyright owners can restrict access to copyright material such as text, music, software, film and artistic works. For instance, content may be a freely accessible demonstration (feature limited) version, it can be time-limited, 'locked' to a specific computer, it may be 'permission per use' or 'payment per use' content.

Examples of such access types include a subscription for an online version of an encyclopaedia¹⁷, use-on-permission such as Microsoft Windows XP (an operating system) requires permission to change hardware and still use the operating system, time-limited use which is common in software such as the graphics program Paint Shop Pro¹⁸ and other shareware. Copyright material can be limited in quantity or scope, for example a number of types of shareware are a free limited-feature version and on payment become full featured versions (this is not limited to software, a free chapter of an e-book is common).

- **levels of use** – Technology can permit or restrict the types of use a user can undertake. Users may have access to content, but levels of use may be restricted. Types of use include the viewing of content on screen, the ability to listen, print, cut and paste, copy or lend material.

It appears that Real.com provides streaming audio, audio-visual and other services, often on a subscription basis, and generally this material can only be played (not copied).

OzAuthors provides differing levels of use for an e-book copy of *Great Moments in Science* by Dr Karl Kruszelnicki: a five page preview (free), a copy to view on

¹⁵ Greg Melloy, the 'Solution Manager for Digital Content & Media IBM Asia Pacific' indicated that digital rights management systems can distribute material to a specific country, and that some material distributed using their DRMS is currently restricted to Japan. IMMEDIA MEMO conference, August 4, Digital Rights Management session.

¹⁶ <http://www.dvddemystified.com/dvdfaq.html>

¹⁷ <http://www.britannica.com>

¹⁸ Paint Shop Pro and a wide range of other shareware is available from sites such as <http://www.tucows.com>.

any computer (\$10), or a copy to view and print locked to a single computer (also \$10)¹⁹.

- **tracking of customers and rights holders** – It is difficult to discern the exact extent of tracking features of DRMS as the full details of such features are often not made public. Many DRMS can communicate with (and track) content distributors, DRMS managers, rights holders and users. Tracking is undertaken for various reasons, usually to authorise access, provide payment, to check that content is being used according to license conditions, to upgrade content, and to allow payments to be made to royalty owners on the basis of use²⁰. Some systems can collect consumer data and report infringements.

An example of a tracking system is that some products using authentication services (such as Microsoft passport) require users to logon when dealing with copyright material.

It appears that most DRMS provide a wide range of options that enable content and user behaviour to be controlled to varying degrees, from permissive uses such as full playing, modification, distribution and printing/reproduction rights to tightly restricted uses such as content being ‘locked up’ except for pay-per-view on specified hardware. Whilst digital control measures have been in use for some time, the range of options available under DRMS are still developing and the amount and types of material being released in DRMS format is expanding.

Although we are able to provide some examples of agreements which relate to technology that is available, the volume and range of content currently available in DRMS format is limited, with the possible exception of software. We are not aware of the extent to which technology will be used to attempt to exclude or modify limitations to the exclusive rights of copyright owners in practice. It may not be clear whether there will be common contractual conditions for copyright material, and if so the nature of common conditions, until the volume of material distributed in DRMS format increases sufficiently in each market.

Closed systems

The Department considers complex technology arrangements (and consequential copyright arrangements) associated with business transactions to be an issue. For example, business to business (B2B) exchanges are usually a collaborative technology arrangement allowing select business entities to undertake transactions in a secure environment. B2B exchanges are increasingly used to allow businesses to reduce the cost of transactions and to increase the responsiveness of businesses to changes in the business environment. B2B often allow direct integration of accounting and stock holding systems into a B2B exchange. If a B2B exchange is no longer supported, for instance where the technology provider withdraws support, it can be extremely difficult to ascertain who owns the elements that make up the exchange (copyright in various software and database elements) and to ascertain the jurisdiction of each element of the B2B exchange. This is important where businesses have spent large amounts on their systems to ensure compatibility and they may wish to negotiate with the copyright owners for the purchase of software and/or the relevant database(s) that

¹⁹ <http://www.ozauthors.com.au/generic/root/home.jsp?schemeIdentifier=wwe-37&b=b/work/profile>

²⁰ It is possible that DRMS may be used to distribute payments to copyright owners and/or artists and consequently these systems may alter the role of collecting societies.

make up the exchange or wish to maintain relationships using B2B elements with 'surviving' entities.

In addition, there are also closed system DRMS that are used by broader discrete communities such as those used within public and education institutions. The Department does not currently have extensive information on these systems, however it seems likely that such systems will have a number of similar considerations to those outlined above.

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?

The Department is unable to provide any specific information regarding business to business electronic commerce involving copyright material at this time due to the non-public nature of such transactions. The considerations below primarily relate to business to consumer electronic transactions, although some of the considerations are general.

The distribution and use of digital material can be controlled by copyright owners to a much greater extent in the electronic environment than in the offline environment. These extra capabilities are likely to be reflected in contracts for use of such content, (see attachments 13-17). These capabilities can be used for any digital content, regardless of the price, thereby extending the capacity for fine control of copyright content and any accompanying contractual agreements to most forms of copyright material, even material of negligible value.

Digital material allows the introduction of extra conditions of use over and above those previously available in the offline environment. For instance, the conditions of use of some copyright material can require joining other services, only using certain sorts of hardware, downloading and being subject to other software operations, giving personal information, buying only from designated suppliers, and asking permission for some operations. Permission may be required for making backup copies and to load content onto new hardware. Online provision of copyright content also makes it easier for content to be sold as a service rather than a product (e.g. Microsoft Office XP, a set of computer application software²¹, is to be available as a subscription).

Contract is an area of law that operates within a legislative framework, such as consumer, privacy and statute of limitations legislation. The framework of each jurisdiction affects the interpretation of contractual provisions.

The degree of compliance of copyright owners or distributors using electronic distribution, whether overseas or in Australia, with the Australian legal framework can be difficult to assess. There may be non-compliance with copyright legislation regarding collection societies, moral rights, and legal deposit as well as other Australian legislation relating to competition and privacy. It appears that in some cases in both domestic and international consumer e-commerce the purported

²¹ <http://www.microsoft.com/australia/offers/xpsubscription.asp>

contractual terms have not been revealed to the purchaser prior to purchase and privacy legislation may not have been complied with²².

DRMS technology and the increasingly sophisticated technology used in the provision of website based content to specific classes of users may have competition implications. It is possible that such technology could be used to restrict markets. Australian purchasers may only be able to acquire an Australian version of content (for example, DVDs are sold as regional versions), a high Australian price may be set, and/or the Australian release may be significantly delayed when compared with the international market.

There is a significant amount of copyright material that can be bought on a non-commercial basis from overseas jurisdictions (particularly by individuals) that is not able to be bought into Australia on a commercial basis without permission from the Australian copyright holder (items prevented from being parallel imported such as books and software). This increases the likelihood that a substantial amount of material will be legitimately bought directly by consumers from other jurisdictions.

Where transactions may be determined to be based in large numbers of other jurisdictions it decreases the level of certainty that a buyer can have regarding contract terms. A buyer requires knowledge of the implications of agreements in order to make an informed decision about them, and this becomes more difficult where there are large numbers of foreign jurisdictions potentially affecting these terms. There are many substantive differences in copyright and other law across jurisdictions (such as competition legislation and types of statute of limitations). The complexity of dealing in multiple jurisdictions is compounded where there are multiple parties involved in transactions, such as when an Australian user downloads Canadian content (that includes part authorship by a United Kingdom rights holder) and that content is authenticated using an American server.

E-books bought in Adobe e-book format are an example of a multi-party transaction using DRMS; the user contacts an Internet book seller such as Barnes and Noble.com, purchases an e-book, and then a series of transactions take place between the electronic bookseller, an Adobe server and the customer's computer. The user does not see or control the process of verification/decryption taking place between the e-book file and the e-book reader. The customer may only open and view the encrypted e-book (on an Adobe reader) on the specific computer that the user utilised to buy the e-book and they cannot copy the book²³.

Significant resources can be required by the purchaser to dispute transactions in foreign jurisdictions and this may constrain the ability of Australian copyright users to dispute agreements. It can be costly to assess the full conditions of use of material as these are reliant upon each possible jurisdiction. It can be costly to dispute the transaction regardless of the facts due to the cost of obtaining foreign advice and representation. In addition, judiciary systems can vary significantly among jurisdictions, particularly in relation to procedure. Such resource considerations may also apply to rights holders seeking to enforce their rights in other jurisdictions.

²² Burstin, F. 'E-tailers failing customers' in *Herald Sun* 24 July 2001, p 10.

²³ http://www.usaondca.com/press/assets/applets/2001_07_17_sklyarov.pdf and http://www.eff.org/IP/DMCA/US_v_Sklyarov/20010707_complaint.html

We are aware of concerns that increased exposure to multiple jurisdictions, where there are substantive and procedural differences, could result in systemic erosion of Australian copyright law. If the jurisdiction of the purchaser is able to be overridden, it is open to the copyright owner to 'forum shop', that is to choose the jurisdiction where the legal system is most favourable to the copyright owner. Concern has been expressed that 'forum shopping' may significantly affect the balance of rights in copyright, impeding access to copyright material and affecting sectors such as education and research. The Department is interested in information regarding different models used for contract in multiple jurisdictions.

The possibility of a contract being based in multiple jurisdictions may well add to the possible substantive and procedural avenues of dispute. This can encourage 'deep pocket' litigation, allowing the entity with the most resources to prolong disputes until the other party cannot afford to continue to dispute the matter.

Issue 3: The Committee seeks your views as to the nature of any such difference.

Digital distribution of copyright content allows finely delineated technological restrictions and permissions on user conduct. Contractual provisions can support these restrictions and permissions. The restrictions and permissions provide copyright owners with a greater level of control over copyright material than that available in the offline environment.

Electronic distribution has the potential to offer great benefits to copyright owners, users and distributors such as the ability to benefit from:

- access to a wider range of product options and services, such as viewing a portion of a technical manual in digital form for a cheaper price than purchasing a printed copy,
- access to streamed content on demand,
- access to frequently updated material, such as a subscription to an online encyclopedia,
- the provision of test or sample content such as software or music by using time-limited or feature limited evaluation copies,
- immediate distribution of content on release such as the latest article or song,
- access to cheaper content through disintermediation (reduced costs of distribution through more direct distribution),
- access to bonus (or upgraded) material or interactivity by directly liaising with content providers or distributors (for example bands often provide such material to fan club members), and
- access to personal collections of material from anywhere with an Internet connection.

There is also considerable potential scope for disadvantages to copyright owners, users and distributors through:

- reduced levels of certainty and understanding relating to the types of material being purchased and the contractual terms of such purchases, and

- reduced ability to assess the terms of, and dispute terms of, contracts due to the complexity and expense of dealing with multiple parties and jurisdictions, and
- exposure to wide variations in substantive and procedural law.

There is also considerable potential scope for disadvantages to users of copyright material through:

- reduced access to some types of material except on a commercial basis, and
- restricted ability to use copyright exceptions,
- reduced access to consumer, privacy and other law,
- a narrowing of access channels for content and a consequent increase in potential for price discrimination, and
- a restricted ability to use material (e.g. the ability to transfer material to new hardware).

Factors such as those outlined above are likely to have the greatest impact on those with the least resources, such as self-represented defendants. For more information generally, see attachments, particularly attachments 8-12.

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?

The Department does not comment on this issue at this time.

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.

The Department does not comment on this issue at this time.

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?

The Department does not comment on this issue at this time.

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.

The Department does not comment on this issue at this time.

Issue 8: The Committee seeks your views as to whether any, and if so what, lessons can be learned from the overseas experience?

The Department does not comment on this issue at this time.

Issue 9: The Committee seeks your recommendations as to any specific action, legislative or otherwise, in relation to the issues raised in your submission.

The Department does not comment on this issue at this time.

Attachments

The Department does not endorse any of the views contained in the attached material and merely provides them to the Committee for information purposes.

Reports

1. National Office of Information Economy, *The Current State of Play*, June 2001.

Digital Rights Management Systems

2. Adobe Everywhere (web site extract, www.adobe.com)
3. Content Guard (web site extract, www.contentguard.com)
4. Inter Trust (web site extract, www.intertrust.com)
5. Microsoft Passport (web site extract, www.passport.com)
6. Microsoft Reader (web site extract, www.microsoft.com)
7. IBM Electronic Media Management System (web site extract <http://www-4.ibm.com/software/is/emms/>)

Articles

8. Brandt, A. and Wallace, W. 'What have you signed away today?' in *PCWorld.com*, August 2001 issue.
9. Burstin, F. 'E-tailers failing customers' in *The Herald Sun*, 24 July 2001, p10.
10. Lai, D. 'Digital rights management: Fasten your seatbelt' in *Copyrites*, issue 33, p 4.
11. Wilcox, J. 'Microsoft's XP: Hardware changes a turnoff' in *cnet.com* 27 July 2001.
12. Hugenholtz, B. 'Copyright, contract and technology' in *Copyrites*, issue 31, p 7.

Contracts (examples of purported terms)

13. Adobe Acrobat (adobe.com e-book reader format) end user license agreement
14. Amazon.com (e-commerce website, book, DVD, music and video sales, US based)
15. Blackstar.co.uk video (ecommerce website, DVD sales, UK based)
16. CDNow.com (e-commerce website, CD sales, US based)
17. Microsoft Reader (microsoft.com e-book reader format) end user license agreement