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IFPI Comments on the Copyright Law Review Committee Issue Paper 'Copyright and Contract'.

1 August 2001

EXECUTIVE SUMMARY

The Copyright Law Review Committee comments paper looks at the contractual arrangements between right holders and the end user of creative content.

Copyright provides a system of protection to right holders that is available irrespective of a contract between the right holder and the user. Naturally, licensing contracts develop within this framework and often specify usage rights that are also covered by Copyright. Aside from that, licensing contracts, like any kind of contract, have to relate to a wider variety of aspects of the transaction in order to be useful and to create a basis of understanding among the parties. In so far, contracts with the end user may go beyond mere copyright provisions and touch upon other areas of the law. This is not only a phenomenon of rather general nature but also seems inevitable given the purpose of contractual arrangements.

In this light, it is little surprising that none of the legal systems surveyed in the course of preparing this response have found it necessary to create specific links between copyright and contract law in general terms. Indeed, IFPI is not aware of any frictions between contractual practice and Copyright in this area.

INTRODUCTION

IFPI, the international federation representing the recording industry, represents more than 1,700 producers of sound recordings world-wide.

IFPI welcomes the opportunity to comment on the discussion paper on 'Copyright and Contracts' issued by the Copyright Law Review Committee in June 2001. The following comments address first the questions raised in regard to Copyright exemptions and mass market agreements in Australia, provide the international background information that might be useful, and finally refer to the implications on Copyright of developments in the area of applicable law and jurisdiction.

I. THE SITUATION IN AUSTRALIA

IFPI is not aware of any friction between Copyright and contractual arrangements with users of creative content.

Contractual arrangements are used in the area of Copyright as well as anywhere else in so far as they are necessary and useful to either party to understand the nature of the transaction. As far as the sale of physical copies (i.e. of CDs) is concerned, the transaction does not usually entail the use of a detailed contractual agreement. The use of online means of dissemination and licensing may – for music just as much as for other products and services – offer more flexibility and more room for consumer choice. As

always, the level of detail in the contract will depend on the need to describe the transaction. The specifications of the product or service (which may be a physical copy, a license and/or a usage right), and of the obligations and benefits resulting from the agreement, are the very essence of any contractual arrangement.

Consequently, Copyright does not, for creative content in general, provide for restrictions on modes of agreements with end users. There is, both in Australian law and in the law of the other countries surveyed, an exemption to the general rule as far as computer programs are concerned: in regard to a very specific kind of use a rule has been formulated to ensure that contracts do not preclude users from doing the most essential things necessary to make sensible use of the software.

The specific situation for Computer Programs:

S. 47H of the Australian Copyright Act contains a rule about the validity of contracts as regards two main groups of activities:

- certain narrowly defined acts necessary on the side of the user in order to make the software run and function properly (i.e. to run the program, make a back-up copy, correct errors as a self-help measure where necessary, ensuring security levels)
- acts done in order to create an interoperable product in the absence of other means of obtaining the information necessary. This provision is aimed at dealing with competition law concerns and is therefore not well placed in the Copyright Act neither does it carry much weight in practice.

There is no need to single out certain exemptions for the purposes of contract law:

In academic circles it has been argued that there may be a benefit in differentiating between different classes of exemptions depending on their basis and purpose. Though this may be at first glance intellectually satisfying it bears no benefit and makes little sense on the market place.

All exemptions in Copyright are carve-outs and limitations to the exclusive rights bestowed by the Copyright Act *inter omnes*. They merely prevent right holders from invoking exclusive rights against the beneficiary of the exemption. In so far, both the right of the rightholder and the carve-out from it in the form of an exemption are distinctly different from and unconnected to contractual agreements that are valid only *inter partes*. In particular, exemptions do not create any prejudice to individual agreements and do not call for a move to impede the reliability of agreed terms among parties.

As a matter of fact and as shown above, the existing specific rules on contractual arrangements with end users of software do not attempt to secure any such specific kind of use. They merely aim to prevent obvious contradictions in arrangements that could result if clauses were interpreted in a way that would hinder those ways of use that are necessary for the fulfillment of the contract or required by competition law concerns.

In this light, a change in the system at this stage would not only be untimely but also it would seriously lessen the level of predictability that is the very basis for the development of the new business models that have only recently started to emerge.

II. SURVEY OF THE SITUATION IN NATIONAL LAW AND REGIONAL REGULATION OUTSIDE AUSTRALIA

The following overview of international legislation and regulation refers to the issues raised in the CLRC and is meant to provide background information on those countries and regions of interest (European Union, US, Canada).

A. European Union

(1) Copyright Directive¹

The Copyright Directive does not contain any provisions on contracts between right holders and user. The Directive applies to all groups of works and objects of neighboring rights but leaves existing directives in the area of Copyright such as the Computer Programs Directive and Database Directive untouched.

The Copyright Directive provides for strong exclusive rights and contains an agreed maximum standard of exemptions that member states may not go beyond. Member states do not have to and, as far as the implementation process allows for conclusions, do not aim to amend their laws to include new exemptions.

The Copyright Directive also provides for strong protection of technological measures against circumvention as well as prohibition of circumventing devices. The Copyright Directive respects the rightholders need to create a market place to begin with and puts forward incentives to take the existing balance and expectations into account. The Directive creates the basis for member states to react to market developments and to influence and steer the market by means of appropriate measures mainly in view of so called public purpose exemptions. However, the Directive does not in itself limit the overreaching protection against circumvention and circumventing devices.

It is important to note that for on demand services, member states are prevented from intervening in the market if these services are offered in the framework of contractual arrangements. Article 6 (4)(4) provides that subparagraphs 1 and 2 (on national adaptation of the level of integrity) do not apply 'to works and other subject-matter made available to the public on *agreed contractual terms* in such a way that members of the public may access them from a place and at a time individually chosen by them' (emphasis added) – stressing by reference to contractual terms the importance of respecting the contractual arrangements on the online market place.

(2) Computer Programs Directive²

As the paper of the CLRC points out, Article 5(1) expressly recognises the possibility that the exceptions may be contractually modified. The Directive contains provisions on contracts with end users, which are aimed at dealing with specific characteristics of the exploitation and use of software. The provisions are limited to narrowly defined specific situations and are subject to a catalogue of conditions. The limitations to contractual freedom can be found in Article 9 with regard to decompilation, back-up copying or observation, study or testing in the course of normal use. In so far, these provisions apply only to lawful users and do not lend themselves to any conclusions with regard to other works or subject-matters. Article 5(2) only allows the making of one back-up copy. Article 9(1) only prevents contractual provisions that would prohibit the making of the back-up copy itself. It does not aim to prevent contractual provisions that specify e.g. the further transfer/distribution of the back-up copy. In so far, it is a very limited provision touching upon the chore or of what is necessary from the user point of view merely to prevent self-contradicting contractual arrangements.

The provisions on interoperability are motivated by competition policy considerations which are unique to the market place for software. With regard to decompilation, Article 6 (3) states that, in accordance with the Berne Convention, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program.

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

² Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

(3) Database Directive³

The Database Directive, adopted in 1996, requires the recognition of two separate protection systems. Member States have to protect databases by copyright as intellectual creations and introduce a *sui generis* right for compilations of data, including non-creative databases, based on the substantiality of the investment. In both cases, the protection does extend to the information and elements contained in the database. Under the *sui generis* rights regime, the exclusive rights do not cover the use of insubstantial parts of the database.

The directive contains one provision for each protection regime (Copyright and *sui generis right*) limiting contractual freedom in respect to contracts with end users. For databases protected on the merit of their originality, Article 6 (1) provides that the lawful user of a database, i.e. somebody who has concluded a contract about the use of the database, shall always have the right to access the contents of the database and to make the normal use of its contents as far as necessary. For databases protected under the *sui generis* right regime, (Article 8 (1)) provides that the maker of a database which has been made available to the public may not prevent the lawful user of the database from extracting and/or re-utilising insubstantial parts of its contents for any purposes whatsoever.

Again, these provisions are limited in application and based on very specific reasoning that do not apply to any other works and subject-matter. Both Article 6 and Article 8 are restricted to the lawful user and motivated by the intention to prevent self-contradictory contractual arrangements.

(4) Directive on Rental and Lending Rights and Related Rights

The Rental and Lending Directive deals with the relations between different groups of rightholders. While it is true that Article 4 of the directive provides for authors and performers limited unwaivable rights to equitable remuneration, this limitation of contractual freedom has a completely different purpose and application from the one discussed in general in the paper. The question of rights transfer and buy-out has no implications for the questions raised in the CLRC paper

(5) Directive on Unfair Terms in Consumer Contracts

The Directive applies to non-mandatory, non-negotiated contractual terms incorporated in contracts drawn up between a professional and a consumer (Article 1). The Directive establishes three important principles:

- (1) Unfair terms shall be unenforceable (Article 6).
- (2) Unclear terms shall be interpreted in the consumer's favour (Article 5).
- (3) Effective measures shall be introduced by the Member States to enable consumer organizations to challenge the use of unfair contract terms (Article 7).

Article 3 (1) provides that, to be unfair, the contractual term has to cause a significant imbalance in the parties' rights and obligations *contrary to the requirements of good faith*. An allegedly unfair contractual term is assessed in the light of the nature of the goods or services covered by the contract, the circumstances in which the contract is drawn up and other terms in the contract or in another contract to which it relates (Article 4). An indicative and non-exhaustive list of terms which may be regarded as unfair is annexed to the Directive. Copyright has not been made an issue either in the list of unfair terms annexed to the law or in existing case law.

³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

(6) Selected Country reports: Situation in the UK

The Copyright, Designs and Patent Act does not restrict contractual freedom aside from the known situations for computer programs and databases.

Chapter III of the CDPA deals with acts that are permitted in relation to copyright works. The introductory provisions establish the principle that the provisions in this Chapter 'relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts.'⁴ This means that an activity as covered by an exemption can still be a breach of some other right or obligation, such as an express contractual term.⁵

Any restrictions to contractual freedom are strictly limited to the narrow groups specified in the Computer Programs and Database Directives.

Caselaw on the Enforceability of Shrinkwrap Licenses affirms the respect for contractual arrangements.

*Beta v. Adobe*⁶ has been the first British court decision dealing with the enforceability of shrinkwrap licenses. Adobe Systems had placed an order with Beta computers for the supply of Informix software. After procuring the software package and delivering it to Adobe, Beta sued for payment of the invoiced price. Adobe attempted to return the package which Beta refused. The shrinkwrapped package stated the words: 'Opening the software package indicated your acceptance of these terms and conditions'. The court had to decide the question whether a contract had been concluded at all and the validity of the shrinkwrap licence came up as an incidental issue. Lord Penrose found that there was one contract between the supplier Beta and the user Adobe for 'the [supply] of the medium in which the ... program material is recorded, associated with the conferment of a right of access to that material.'⁷ As a result, Adobe had to pay for the software and could not return it. With regard to the shrinkwrap license terms, his lordship approved the importance of contractual agreements stating: 'There is little doubt, in my mind, that the interests of the industry as a whole in the efficient and sensible management of transactions requires that effect should be given to the conditions if possible.'⁸

A flexible approach to Unfair contract terms regulation

The Directive on Unfair Terms in Consumer Contracts was implemented into UK law first by the Unfair Terms in Consumer Contracts Regulations 1994, but these were revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999⁹. The new Regulation follows even more closely the terms of the Directive. Schedule 2 contains an indicative and non-exhaustive list of terms which may be regarded as unfair. As in the directive, the listed terms do not cover the case where right holders try to limit copyright exceptions. Section 5 of the Regulation implements Article 3 (1) of the Directive providing that a term shall be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations, arising under the contract, to the detriment of the consumer.

The Office of Fair Trading has attached very considerable significance to the notion of balance, so that a term which may look severely prejudicial to the rights of a consumer may yet be considered fair if it is counterbalanced by a corresponding term which could act to the consumer's advantage.¹⁰

⁴ CDPA, Article 28 (1).

⁵ Copinger and Scone James on Copyright, 1999, p. 494.

⁶ Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd, FSR [1996] 367.

⁷ Ibid., at 377.

⁸ Ibid., at 379.

⁹ Statutory Instrument 1999 No. 2083, as amended by the Unfair Terms in Consumer Contracts (Amendment) Regulations 2001, Statutory Instrument 2001 No.1186.

¹⁰ Beale, H G, Chitty on Contracts, London 1999, at 15-038.

The Unfair Contract Terms Act 1977 does not seek to control unfair contract terms generally. It applies mainly to terms that purport to exclude or restrict liability and is therefore of no relevance to clauses overriding copyright exceptions.

(7) Selected Country reports: Situation in France

France has implemented the *sui generis* database right of the database directive in Title IV of Book III of the French Code de la Propriete Intellectuelle, as amended on 1 July 1998.

On 7 May 1999, the Tribunal de commerce de Paris handed down one of the first decisions dealing with the database right in the case *Electre v. T.I. Communication et Maxotex*.¹¹ The case is particularly interesting as it deals implicitly with the issue of the relationship between the database right and rights arising out of contract. The case concerned the unlicensed use on a website of a CD-ROM comprising bibliographic information works published in France. In the subscription contract with Electre, T.I. Communication had agreed not to disseminate the CD-ROM's content. The court held T.I. Communication liable for breach of contract and did not consider it necessary to examine whether the defendant was also liable for an infringement of the database right. This judgement clearly indicates that parties are not restricted in protecting their information against copying contractually even in the case that such information is not protected by copyright.

B. The United States

The US Copyright Act does not include any explicit provisions that would restrict contracting parties to agree provisions that would override exceptions. Several court decisions have upheld contracts restricting acts that would be permissible under an exception to copyright. For example, in the *National Car Rental* case¹² the court referred to the House committee report to the Copyright Act that stated: "Nothing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract."¹³ Copyright law does neither restrict the ability of parties to license a restricted right of use of information that is not protected by copyright at all. Nimmer correctly points out that an entire, major industry exists based on licensing of customer lists for limited periods of use for a specific fee, despite the fact that a customer list is unlikely to qualify for copyright protection under US law.¹⁴

(1) Preemption of state contract law by federal copyright law

Contract law establishes when an agreement becomes enforceable in law between the parties. As contract law is state law, it can be subject to pre-emption by federal law. Under s. 301 of the Copyright Act, federal copyright law preempts all state "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright." Although contract rights are enforced on the basis of state contract law, section 301 was clearly not intended to preempt state contract law. Section 301 only applies if the state rights sought to be enforced are *equivalent* to rights established by the Copyright Act. There have been no cases in which section 301 preemption was used

¹¹ *Electre v. T.I. Communication et Maxotex*, Tribunal de commerce de Paris 7 May 1999, <http://www.juriscom.net/txt/jurisfr/da/tcparis19990507.htm>.

¹² *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F. 2d 426 (8th Cir.1993).

¹³ *Id.* at 433 (quoting H.R. REP.NO. 94-1476, at 132 (1976) reprinted in 1976 U.S.C.C.A.N. 5659,5748)

¹⁴ Raymond Nimmer, *Breaking Barriers: The Relation between Contract and Intellectual Property Law*, Berkeley Technology Journal http://www.law.berkeley.edu/journals/btlj/articles/13_3/Nimmer/html/reader.html, p. 31.

successfully to challenge and invalidate a contract term that was enforceable as a matter of general state contract law.¹⁵ Contract rights derive from an agreement between parties and not from the fact that the given work is protectable under the Copyright Act.¹⁶ In contrast to copyright, contract rights can only be enforced *inter partes* and are not good against third parties.

This basic difference has been confirmed by the *Pro CD* decision. To illustrate the background of this important case it might be helpful to shortly summarize the facts: ProCD Inc. compiled at a cost of more than \$10 million a computer database of telephone listings. ProCD charged retailers and manufacturers a higher price than the general public. To maintain the price difference, ProCD enclosed a shrinkwrap licence that restricted the use of the consumer product to non-commercial uses. The defendant, Matthew Zeidenberg, bought the consumer product and then started to resell the database of telephone listings over the Internet.

The court decided that shrinkwrap licences are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable).

More important for the subject of this paper, the court confirmed that rights created by contract are not equivalent to the exclusive right provided by the Copyright Act: "Rights 'equivalent to any of the exclusive rights within the general scope of copyright' are rights established by law – rights that restrict the options of persons who are strangers to the author. Copyright law forbids duplication, public performance, and so on, unless the person wishing to perform the work gets permission; silence means a ban on copying. A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create 'exclusive rights.' Someone who found a copy of plaintiff's software in the street would not be affected by the shrinkwrap license – though the federal copyright laws of their own force would limit the finder's ability to copy or transmit the application program."¹⁷ As a result, there was no pre-emption. The decision confirmed that also contract provisions in mass-market agreements that extend protection to not protected subject-matters are enforceable.

(2) Enforceability of shrink-wrap and clickwrap agreements

Before considering UCITA, it is important to first have a look at the general enforceability of shrink-wrap and click-wrap agreements. As mentioned above, *ProCD v Zeidenberg* was the first landmark decision to hold shrinkwrap licenses enforceable. The *ProCD* case has been followed by other decisions. For example, in *Brower v. Gateway 2000*¹⁸ the court upheld the enforceability of shrinkwrap license agreement, including the arbitration clause in question, which was included in the box in which the computer was shipped to the consumer. In *Hill v. Gateway 2000*¹⁹ the court held that contract terms provided in a Gateway 2000 computer box were enforceable, as long as a refund was offered. In that case a customer had ordered a computer over the phone and the computer arrived in a box that included a list of terms, said to govern unless the customer returns the computer within 30 days. As for the enforceability of click-through licenses, *CompuServe*

¹⁵ See Raymond Nimmer, Breaking Barriers: The Relation between Contract and Intellectual Property Law, Berkeley Technology Journal http://www.law.berkeley.edu/journals/btlj/articles/13_3/Nimmer/html/reader.html, p.21.

¹⁶ Founds, G., Shrinkwrap and Clickwrap Agreements: 2B or not 2B?

¹⁷ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir.1996).

¹⁸ *Brower v. Gateway 2000, Inc.* (1998 N.Y. Slip Op. 07522, 1998 WL 481066 (N.Y.A.D. 1 Dept.), Supreme Court Appellate Division, First Department, August 13, 1998

¹⁹ *Hill v. Gateway 2000* (7th Circuit, January 6, 1997), <http://www.law.emory.edu/7circuit/jan97/96-3294.html>.

*v. Patterson*²⁰ held these licenses to be enforceable. In the California spamming case of *Hotmail Corp. v. Van Money Pie*²¹ the court held that a valid license agreement between Hotmail and the defendants existed by click-wrap agreement. The general validity and enforceability of click-wrap contracts has also been confirmed by *In re RealNetworks*²². U.S. lawyers generally believe that click-wrap agreements present an even stronger argument for enforceability, as the Internet user is in fact able to review the terms of such an agreement prior to purchase and affirmatively indicate his or her acceptance of the terms.

Some cases that have to be distinguished are dealing with so-called "browse-wrap" licenses. In *Pollstar*²³ a notice of a license agreement appeared on the plaintiff's web site. Clicking on the notice links the user to a separate web page containing the full text of the license agreement, which allegedly binds any user of the information on the site. The court expressed concerns about the enforceability of the browse-wrap license because the user was not required to click on an icon expressing assent to the license. However, the general validity of standard agreements concluded online was not questioned.

(3) UCITA

UCITA is based on the principle that contract law should preserve freedom of contract so the parties can best adapt legal principles to their transaction and that uniform commercial codification should be means to facilitate commercial practice, not override or regulate it.

It is certainly true that under UCITA shrinkwrap and clickwrap agreements are generally enforceable. However, as shown above these contracts are usually enforceable even under general contract law. All that UCITA does is to codify their validity and thereby to add legal certainty.

UCITA clearly resisted all attempts to force a straitjacket on parties entering into a contract and thought it more appropriate to rely on general principles which can be applied by the courts in a flexible way. NCCULS comments on UCITA are instructive: 'Moreover, it is clear that limitations on the information property rights of owners that may exist in a copyright regime, where rights are good against third parties, may be inappropriate in a contractual setting where courts should be reluctant to set aside terms of a contract. Subsections (a) and (b) strike the balance between fundamental interests in contractual freedom and fundamental public policies such as those regarding innovation, competition, and free expression. The use of these general principles will enable the courts to react to changing practices and technology; more specific prohibitions would lack flexibility and would inevitably fail to cover all relevant contingencies.'²⁴

(4) Technological Measures

While it is true that the provisions in the DMCA dealing with circumvention devices do not prohibit the act of circumventing copy-control measures, the new provisions clearly do not restrict right holders in their capability to apply copy-control measures. The DMCA does not contain any provisions that would force right holders to apply such measures in a way that users can enjoy exceptions provided by copyright.

²⁰ *CompuServe v. Patterson* (6th Circuit, July 22, 1996), <http://www.law.emory.edu/6circuit/july96/96a0228p.06.html>.

²¹ *Hotmail Corp. v. Van\$ Money Pie, Inc.*, No.C 98-20064, 1998 WL 388389 (N.D. Cal. April 16, 1998).

²² *In re RealNetworks, Inc. Privacy Litigation*, No. 00C1388, 2000 WL 631341 (N.D. Ill. May 8, 2000).

²³ *Pollstar v. Gigmania Ltd.*, No. CIV-F-00-5671, 2000 WL 33266437 (E.D.Cal. Oct. 17, 2000).

²⁴ <http://www.law.upenn.edu/bll/ulc/ucita/ucitaFinal00.htm>, comments on s.105.

The legislation also recognised that it is important to observe the development of the market and not to interfere at a too early stage. Under s. 1201(a)(1)(B), every three years the Librarian of Congress, upon the recommendation of the Register of Copyrights, has to make the determination of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition to circumvent technological measures in their ability to make non-infringing uses of a particular class of copyrighted works. Under the latest rule-making procedure the Librarian of Congress adopted a very narrow exemption, as far as the focus of this study is concerned, only for measures blocking access based on a malfunction or fault ('mechanisms that fail to permit access because of malfunction, damage or obsolescence').²⁵

III. CANADA

The Canadian Copyright Act²⁶ does not contain any explicit provisions that would restrict contracting parties to agree provisions that would override exceptions.

Canada has not yet adopted provisions that prohibit circumvention devices and services. However, this issue is discussed in the Consultation Paper on Digital Copyright Issues.²⁷ The paper acknowledges the concerns of copyright stakeholders and recognises the need to protect them against the circumvention of their technological measures. While the paper stresses the importance of keeping the balance between copyright protection and the exceptions, it also refers to the importance of contractual solutions: "In essence, a change of this nature would be tantamount to bringing within the realm of copyright law, matters (e.g., restrictions on use) which may be more properly within the purview of contract law."²⁸

JURISDICTIONAL ISSUES

The CLRC Issues Paper invites views on whether jurisdiction issues are likely to result in Copyright exceptions being overridden. Looking at the multitude of problems in the area of private international law, it is hard to see any particular problem as regards to Copyright exemptions.

The main questions in this area are centered around the negotiations of a **Convention on Jurisdiction and the Recognition and Enforcement of Judgments in the area of civil and commercial law in the Hague Conference**. Under this instrument, which aims at a widespread international membership, rules are laid down specifying in which cases and under which conditions countries can undertake an international obligation to recognize and enforce judgments from other signatories of this Convention. The draft convention does not refer to questions of choice of law; neither does it harmonize any standards within the law applied. At the same time, it is clear that a foreign court may apply a set of law other than the Australian law and may come to a different outcome than if it had been based on Australian law and precedent.

Consequently, the draft convention, like any instrument on the recognition and enforcement of judgments, would lead to the effect of judgments within Australia despite the fact that they may not be completely in line with Australian law. This is true for exemptions just as much as for exclusive rights under Copyright, protection of privacy, liability standards and level of duty of care, environmental protection requirements, consumer protection, etc., as long as the claims are adjudicated under civil and

²⁵ See at <http://www.loc.gov/copyright/1201/anticirc.html>.

²⁶ Copyright Act 1985 as last amended in 1997.

²⁷ Consultation Paper on Digital Copyright Issues of June 22, 2001, issued by: Intellectual Property Policy Directorate Industry Canada, Copyright Policy Branch Canadian Heritage, <http://strategis.ic.gc.ca/SSG/rp01099e.html>.

²⁸ *Ibid.*, at 19.

commercial law. **IFPI is therefore of the opinion that it is unnecessary to create copyright specific rules.**

In order to facilitate the substantiation of this position, some comments on the background and the progress of the current discussions internationally may be helpful.

The status of debate and the next steps in The Hague

The discussions in the Hague Conference have been based, for some time now, on a draft text for a convention dating from 1999. During the past two years, this text has been subject to comments and motions for amendments to virtually every issue. Consequently, no final compromise has been reached in any area. The grounds for jurisdictions in cases involving consumers is one of the most controversial issues and the only understanding is the bottom position that most countries are not prepared to move away from the system established on the respective national or regional level and therefore see the need for ways of avoiding recognition of such judgments.

The discussions are meant to lead to an international instrument and the first part of a diplomatic conference to these ends has already taken place. The first part of the diplomatic conference in The Hague from 6 June 2001 led to a further extension of the list of options and suggestions. Final positions have not been reached at this stage. In particular the coverage of consumer-related issues remains to be resolved.

As a next step, consultations are taking place in the participating countries. Another meeting, in January 2002, will be dedicated to discussions on the scope and outline of the convention and the preparation of the second part of the diplomatic conference.

In which way is Copyright covered in the Draft convention?

The convention at present does not create Copyright-specific rules; apart from clarifying that copyright is not to be subject to the exclusive allocation of jurisdiction reserved for patent and trademark and other registered rights. Contracts in the area of Copyright are subject to the general rules on contract (Art. 4) and the more specific rules on contracts with consumers (Art. 7). Copyright infringement is subject to the general provisions on tort (Art. 10).

What are the general implications?

As outlined above, the Hague Convention if adopted and implemented in Australia would – as far as prescribed by the convention – lead to the enforcement of judgments in the area of civil and commercial law issued in other signatory states. The foreign courts will apply their national regime of applicable law; often leading to the application of law other than Australian law. As far as the concerns about the enforcement of judgments with results diverging from Australian precedent is concerned, the draft convention contains some safeguards. According to Art. 28, a member states can refuse recognition and enforcement if either the procedures are incompatible with fundamental principles of the addressed country (Art. 28.1.c) or if the ‘recognition or enforcement would be manifestly incompatible with the public policy of the State addressed’ (Art. 28.1.f). Both thresholds are understood to be measures of last resort and cannot be understood to allow for refusal of recognition merely based on diverging results or remedies.

Does Copyright pose any specific problems?

During the debate so far it has been understood that Copyright is covered by the general provisions. Also, the overwhelming majority of countries participating have re-affirmed what is already prescribed in the 1999 draft text: that there is no basis for the allocation

of exclusive jurisdiction over copyright-related actions (Art. 12.). A line-up of country delegates and the various right holders from the Copyright community (incl. IFPI, FIAPF - film producers- and IPA, the international publishers association) have pointed out that a regime of exclusive jurisdiction would not be justified and would create an obstacle that in many cases would amount to a depriving them of effective remedies. For infringements with international effect, a system of exclusive jurisdiction would force Copyright holders to address a high number of courts in order to get effective redress. In many cases, the costs, efforts, and accumulated risks would be prohibitive and prevent rightholders from bringing action.

It is in any case clear that Copyright does not pose any specific or new problems.

What is the status of the Ginsburg/Dreyfuss proposal mentioned in the CLRC Issue paper?

The Ginsburg/Dreyfuss proposal is a piece of ongoing academic work at a preliminary stage drafted jointly by the two Professors. It was introduced at the WIPO conference on International Private Law in January 2001. However, it is by no means a WIPO document. WIPO has neither endorsed this preliminary text nor has WIPO declared an official agenda for active engagement in the drafting of an international agreement in this field.

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