

Law Council of Australia
Submission to the Copyright Law Review Committee
"Copyright and Contract"

This submission has been prepared by the Copyright Sub-Committee of the Intellectual Property Committee of the Law Council of Australia ('the Committee'). It may not reflect the views of the Intellectual Property Committee as a whole.

The Committee is pleased to provide this response to the Issues Paper of the Copyright Law Review Committee ('CLRC') for its Copyright and Contract reference. The Committee has attempted to keep its response short and directed to the central issues of concern to the CLRC.

Executive Summary

The Committee's submission to the CLRC is summarised as follows:

1. It is likely that online agreements such as 'click-wrap' contracts are enforceable in Australia, provided the agreements meet usual contract requirements;
2. Online agreements concerning copyright rights and the ability of users to exercise exceptions may include:
 - agreements governing the supply of and access to copyright products; and
 - agreements containing the terms and conditions of use of a website or webpage;
3. The critical issue for the CLRC is whether private arrangements can displace the statutory exceptions in the *Copyright Act 1968* ('the Copyright Act').
4. Any policy decision on whether contractual arrangements should be permitted to modify existing copyright exceptions should be governed by a recognition of the importance of preserving a balance of interests in the Copyright Act between the rights and incentives of copyright owners, and the reasonable public interest in appropriate access to information.
5. It is unlikely that s.47H of the Copyright Act creates a general presumption that contractual arrangements may override statutory exceptions. However the situation is not entirely clear.
6. In order to ensure an appropriate balance in the Copyright Act, the Act should be amended to clarify that s.47H does not have the effect of allowing other exceptions in the Act to be modified or excluded by contractual means.

Introduction

The Law Council addresses four issues in this submission:

- the enforceability of 'click-wrap' contracts and other online mass market agreements;
- the types of online contracts which may affect the ability of users to access copyright material in accordance with the exceptions in the Copyright Act;
- the importance of maintaining an appropriate balance in the Copyright Act; and
- the likely effect of s.47H of the Australian Copyright Act.

1. The enforceability of 'click-wrap' contracts

The two most common types of online agreement dealing with the supply of or access to copyright material online, are 'click-wrap' and 'browse-wrap' contracts.

'Click-wrap' licences present a user with a message on the computer screen, requiring the user to assent to the terms of a licence agreement by clicking on an icon such as "I accept". Access to the website or copyright product cannot be obtained unless the icon is clicked by the user¹.

A 'browse-wrap' licence is where a visitor to a website is directed via a hyperlink to a licence agreement contained on a separate webpage. The agreement purports to bind the user, despite the fact that the user is not required to click on an icon to assent to the terms of the agreement, or to even view the agreement before downloading copyright material from the website. Concerns have been expressed about the enforceability of 'browse-wrap' licences, largely because it can be unclear whether a user has positively assented to the terms of the contract².

There have been no cases to date in Australia on the issue of whether a 'click-wrap' contract is enforceable. However based on the reasoning in several United States decisions, it is likely that such contracts would be enforced in Australia in appropriate circumstances. This submission is based on the proposition that assent to a contract may be registered by a handshake or a signature, and thus the click of a computer mouse should have the same effect³.

The principles distilled from the United States decisions suggest that an online contract may be enforceable in Australia if:

- the user has the opportunity to review the terms of the contract before accessing or downloading the website or product⁴;
- the user has indicated assent to be bound by the terms of the contract⁵;
- the contract complies with general contractual principles⁶; and

¹ *Specht & Ors v Netscape Communications Corp. and America Online Inc.*, United States District Court, Southern District of New York, 3 July 2001, per Hellerstein J at p.14.

² see *Pollstar v Gigmania Limited* No. CIV-F-00-5671, 2000 WL 33266437 (E.D. Cal. October 17 2000).

³ see *Specht and Ors. v Netscape Communications and America Online* (above at note 1)

⁴ *ibid.*

⁵ see *Caspi v The Microsoft Network, LLC et al*, 1999 WL 462175, 323 NJ Super. 118 (NJ App. Div July 2 1999).

⁶ see *Hotmail Corp. v Van Money Pie Inc.* C98-20064 (N.D. Cal. April 20 1998).

- the terms of the agreement are not simply included on a website where the user is not required to positively assent to the terms and conditions⁷.

The Committee suggests that a contract formed in the online environment would be enforced in Australia if the contract meets the usual requirements of Australian law. This position would be consistent with the policy underlying the *Electronic Transactions Act 1999*, which attempts to put paper-based and electronic dealings on an equal legal footing.

2. Online contracts which may affect the operation of Copyright Act exceptions

There are two categories of online contracts that may impact on the ability of members of the public to access information in accordance with the recognised exceptions in the Copyright Act:

1. agreements governing the terms and conditions of use of a website; and
2. agreements governing access to or supply of a copyright product.

Agreements governing the terms of use of a website may not specifically concern access to a copyright product, such as an e-book, music file or computer software. However the website or webpage might itself be a copyright work, and the agreement might be more restrictive in its terms of usage than the terms of the Copyright Act.

An example of this type of arrangement might be a webpage containing a condition that provides:

"You may not reproduce this site for any purpose whatsoever"

Assuming that this condition was contained in an enforceable online contract (for example, in a click-wrap arrangement where the user reviewed and accepted the conditions prior to accessing the body of the website), would this contract prevent a school from capturing a reasonable portion of the page for display on a school's intranet under Part VB of the Copyright Act? Could it prevent a journalist from copying part of the site for the purposes of criticism or review?

The second category of online contract relates to agreements which govern the supply of copyright products, or the terms and conditions of accessing copyright material. Products which may be governed by these types of agreement include e-books, articles published on a website or computer software or MP3 files available for download.

Some examples of this type of arrangement might be:

A librarian enters a click-wrap contract before downloading an e-book for the library's collection. The terms of the click-wrap contract state that only one print copy of the e-book may be made. Would this arrangement prevent the librarian from supplying a chapter of a book in response to a user request under s.49 of the Copyright Act?

⁷ *Ticketmaster Corp. v Tickets.com Inc.* (C.D. Cal. March 27 2000).

A student visits a website containing a series of articles in an online journal when researching an assignment. The click-wrap contract which they were required to enter before accessing the articles states that the user may print no more than a reasonable extract of an article on the site. Does this prevent the user from saving one article to disk for research and study purposes?

The Committee does not have any evidence as to the prevalence of such agreements. However the above examples are based on actual contractual provisions that have been drawn to the Committee's attention. These examples highlight the uncertainty created when contractual provisions purport to modify the rights of individuals to access copyright material in accordance with the Copyright Act exceptions.

3. The importance of balance in the Copyright Act.

The 1996 World Intellectual Property Organisation ('WIPO') Internet Treaties were the first international treaties to expressly recognise the importance of balance in international copyright regimes. The Preamble to the WIPO Copyright Treaty states that "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information" should be recognised by all copyright regimes.

Maintaining an appropriate balance between the rights of copyright owners and copyright users in the digital environment was also one of the key objectives in the recent digital agenda reforms that was supported by all sides of the political debate.⁸

The Committee endorses the need for copyright laws to preserve such social policy objectives as access to information, and the ability of libraries and educational bodies to appropriately disseminate copyright material. These public policy concerns are largely met through the inclusion in the Copyright Act of exceptions to the exclusive rights of copyright owners.

The Committee also recognises the continued importance of creating sufficient incentives for the production of new copyright products, and the need for copyright owners to enforce their rights, particularly in a digital environment.

The Committee submits that the existing copyright exceptions provide an appropriate balance between the interests of both sides of the copyright debate, and notes that this view was shared by the Final Report of the Intellectual Property and Competition Review Committee⁹. As a result, the Committee recommends that copyright owners should not be permitted to modify statutory exceptions (and in particular, public access provisions such as the fair dealing and library and archives exceptions) by contractual means.

⁸ See the Explanatory Memorandum to the Digital Agenda Act at p1, the speech by the Hon. Robert McClelland MP, House of Representatives Second Reading Debate on the *Copyright Amendment (Digital Agenda) Bill 2000*, Tuesday 27 June 2000, Hansard p.16910, and the speech by Senator Stott Despoja, Senate Second Reading Debate on the *Copyright Amendment (Digital Agenda) Bill 2000*, 17 August 2000, Hansard p.15332.

⁹ Final Report of the Intellectual Property and Competition Review Committee, September 2000, at p9.

4. Section 47H of the Copyright Act

The critical issue which must be addressed by the CLRC is whether otherwise valid and reasonable private arrangements can or should be used to displace the provisions in the Copyright Act which provide for statutory exceptions to some of the exclusive rights of copyright owners?

Section 47H of the Copyright Act clearly provides that any arrangement which excludes or limits the operation of certain computer software exceptions has no effect. All other exceptions in the Copyright Act are silent on the issue of whether they may or may not be modified by contractual means.

Sections 195AW and 195AWA specifically state that authors may consent to acts or omissions which would otherwise infringe their moral rights. However this is akin to other provisions in the Act stating that copyright owners may allow individuals to exercise one or more of their exclusive rights¹⁰, rather than allowing 'contracting out' of an exception.

The CLRC has asked for comments on whether s.47H suggests that exceptions in the Act not listed in that section can be modified or excluded by contract.

Expressio unius est exclusio alterius ('the Expressio Unius principle')

The Expressio Unius principle means that an express reference to one matter indicates that other matters are to be excluded. This principle is based on the notion that where legislation includes provisions relating to similar matters in different terms, there is an implication that there is a deliberate intention to deal with them differently. An argument based on the Expressio Unius principle might assert that because Parliament has specifically stated that it is not possible to modify certain provisions in the Copyright Act by contractual means, that the principle would apply to the effect that contractual modification is permissible for other exceptions in the Act.

Factors affecting the application of the Expressio Unius principle include:

- the history of the piece of legislation, and the separate origin of particular provisions¹¹;
- the precision of the drafting of the legislation, and the similarity in subject matter in the provisions being considered¹²;
- the particularity with which the legislature turned its mind to the subject matter of the legislation¹³; and
- whether the intention asserted is discoverable on the face of the instrument¹⁴.

¹⁰ See for example s.135ZZF(1).

¹¹ *Heatley v Tasmanian Racing and Gaming Commission* (1977) 14 ALR 519

¹² *Commissioner of Taxation v Lincoln Industrial Cleaners Pty Ltd* (1975) 7 ALR 118.

¹³ DC Pearce and RS Geddes *Statutory Interpretation in Australia* (4th ed.) Butterworths 1996 at p.105

¹⁴ *Saunders v Evans* (1861) 8 HL Cas 721 at 729

Several cases have referred to the dangers of applying the *Expressio Unius* principle. For example, Lopes LJ in *Colquhoun v Brooks* stated that the maxim:

"is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice"¹⁵.

The High Court has refused to apply reasoning which, at its simplest, would be an application of the *Expressio Unius* principle. Aickin J. stated that such an approach would be "fraught with difficulty and danger"¹⁶.

Explanatory material relating to s.47H of the Copyright Act

In the absence of an express statement in the Copyright Act regarding the relationship of s.47H to other exceptions in the Act, a court would look to extrinsic material to evince any legislative intention. The Explanatory Memorandum to the *Copyright Amendment (Computer Programs) Act 1999* ("Computer Programs Act"), which introduced Division 4A of Part III, does not address the issue of whether the legislature intended s.47H to affect the interpretation of other exceptions in the Copyright Act, nor does it provide any explanation from a drafting perspective as to why Parliament thought it necessary to introduce s.47H into the Copyright Act. Consequently, it is also unclear whether the legislature intended s.47H to effectively allow parties to contract out of other exceptions under the Copyright Act. Indeed, it is not clear whether Parliament turned its mind to this issue at all.

The Explanatory Memorandum does however state that the Computer Programs Act was enacted as a result of the recommendations made in the CLRC's report on *Computer software protection*¹⁷.

Paragraph 10.106 of the CLRC's report on computer software protection states that provisions regarding interoperability, back-up copying and decompilation of locked programs would have little practical effect if parties could rely on contractual provisions to prevent these acts, and recommended that the Copyright Act be amended to ensure that these exceptions could not be avoided by contractual means. The CLRC did not address the issue of whether such a provision was in fact necessary, or how such a provision would impact on the interpretation of other exceptions in the Act.

It is unclear whether Parliament turned its mind to the issue of whether a provision such as s.47H was required to ensure that contracts couldn't be used to modify the computer software exceptions listed in s.47H, or to the potential effect of such a provision on other exceptions in the Act. It is also important to note that the Copyright Act has undergone numerous and substantive amendments since 1968. The number of amendments, combined with changes in drafting style, may account for some of the ambiguity in relation to the effect of s.47H.

¹⁵ at p65. Followed in *Rylands Bros (Aust) Ltd v Morgan* (1927) 27 SR (NSW) 161.

¹⁶ *Heatley* *ibid* note 11 at p.539.

¹⁷ Explanatory Memorandum to the *Copyright Amendment (Computer Programs) Bill 1999*, at p.1.

The effect of s.47H of the Copyright Act

To apply the Expressio Unius principle with the effect of interpreting s.47H to mean that all other exceptions in the Act may be overridden by contract would lead to a peculiar result. Such results are to be avoided¹⁸. It would be a particularly peculiar result if the primary mechanism for maintaining an effective balance in the Copyright Act was found to be capable of contractual modification by the application of a maxim that is such a 'dangerous master' as the Expressio Unius principle.

In the Committee's view, it is unlikely that the Expressio Unius principle would be applied with the result of allowing copyright owners to exclude all copyright exceptions by contractual means. It is however arguable that the principle would be applied in relation to the provisions in Division 4A of Part III of the Copyright Act. Although the Explanatory Memorandum is silent on this issue, a court may therefore find that it is possible to contract out of s.47B(1) based on its exclusion from s.47H.

Although the Committee believes it is unlikely that the Expressio Unius principle would be applied in determining the effect of s.47H on the remaining statutory exceptions in the Act¹⁹, it is nevertheless impossible to determine how this question would be resolved by a court. The fundamental question to be addressed is "What message is the legislature intending to convey in this communication?"²⁰ In the case of s.47H of the Copyright Act, the message is ambiguous, and may be open to diverse interpretation. The Committee submits that any uncertainty should be eliminated by legislative means.

Summary

The Committee submits that the continued operation of the exceptions in the Copyright Act is of fundamental importance to achieving the appropriate balance between the interests of rights holders and the public interest. The importance of this balance has been recognised both domestically and internationally.

The Committee submits that the CLRC should recommend that the Copyright Act be amended to clarify that contracts may not be used to modify or exclude the exceptions to the exclusive rights of copyright owners.

¹⁸ see *Heatley* ibid at note 11, where the High Court refused to apply the Expressio Unius principle to achieve a result that would be contrary to principles of natural justice.

¹⁹ with the possible exception of s.47B(1).

²⁰ Pearce and Geddes, above at note 13 at p.85.