

**MINISTERIAL COUNCIL ON EDUCATION EMPLOYMENT TRAINING AND YOUTH  
AFFAIRS TASKFORCE ON COPYRIGHT**

**SUBMISSION TO THE COPYRIGHT LAW REVIEW COMMITTEE  
COPYRIGHT AND CONTRACT INQUIRY**

**Introduction**

This submission is made on behalf of the Ministerial Council on Education, Employment, Training and Youth Affairs Taskforce on Copyright ('the Taskforce'). The Taskforce represents almost all State Departments of Education, all Catholic Education Offices and the National Council of Independent Schools Association, and the great majority of TAFE colleges. It represents almost all primary and secondary school educational authorities in Australia.

**Executive Summary**

The key aspects of the Taskforce's submission to the Copyright Law Review Committee ('CLRC') are summarised as follows:

- In the Taskforce's view, online contracts purporting to modify or exclude the statutory exceptions in the *Copyright Act 1968* (the 'Copyright Act') are not prevalent at this time. However it is not possible to predict how online management of copyright material will develop.
- Although the Taskforce believes it is unlikely that a court would interpret s.47H as allowing contractual means to override all copyright exceptions, the legal effect of s.47H on other exceptions is unclear.
- Any policy decision on the issue of where a contract should be used to nullify or modify copyright exceptions should be made against a background where the preservation of the existing copyright balance is a paramount concern.
- Maintenance of the balance in the Copyright Act between protecting the rights of copyright owners, and the public interest in reasonable access to information (particularly for educational and cultural purposes) is of critical importance. The importance of this balance has been recognised both domestically and internationally.
- The Copyright Act should be amended to specifically provide that it is not possible to modify or exclude all exceptions (including statutory licences) by contractual means.

- It is particularly noted that allowing contractual modification exclusion of the 'permitted purposes' provisions introduced by *the Copyright Amendment (Digital Agenda) Act 2000* ('the Digital Agenda Act') would lead to a problematic result. It would be inconsistent for the Copyright Act to allow the manufacture and supply of circumvention devices and services to ensure the continued operation of these permitted purposes exceptions, but then allow copyright owners to limit or prevent access under the same exceptions by contractual means.
- Nothing in the Copyright Act should prevent the ability of owners or users to negotiate for greater access or use than provided by the statutory exceptions, if conditions can be negotiated that are acceptable to both parties.

## INTRODUCTION

1. In this submission, the Taskforce will address two general issues:
  - the importance of the continued operation of the copyright balance; and
  - the manner in which existing exceptions in the Copyright Act should be categorised.

The submission will then specifically address selected issues identified by the CLRC, in the order that they appear in the CLRC's Issues Paper.

### The Importance of Balance in the Copyright Act

2. Paragraph one of the CLRC's Terms of Reference states that the Government regards it as important that Australian copyright law maintains an appropriate balance between the rights of copyright owners and the rights of copyright users. The Government has consistently stated that it has attempted to ensure that the copyright balance is appropriately maintained in the digital environment.<sup>1</sup> This is reflected in the objects section of the Digital Agenda Act, where the aims of the Act include:
  - providing reasonable access and certainty for end users of copyright material on-line; and
  - ensuring that cultural and educational institutions can access, and promote access to, copyright material in the on-line environment on reasonable terms, including having regard to the benefits of public access to the material and the provision of adequate remuneration to creators and investors.<sup>2</sup>
3. The need for balance in copyright legislation has also been expressly recognised at the international level. The Preamble to the 1996 WIPO Copyright Treaty states that copyright laws should recognise:

'the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention'.

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<sup>1</sup> For example, see the Second Reading Speech on the *Copyright Amendment (Digital Agenda) Bill 1999* by the Hon. Daryl Williams, AM QC MP, 12 September 1999.

<sup>2</sup> Item 3 of Schedule 1 of the Digital Agenda Act.

4. The Taskforce recognises the importance of providing sufficient incentives to copyright owners, and the importance of the exclusive rights granted to copyright owners. It also supports the need for an appropriate balance in the Copyright Act, and recognises the strong public benefits in public access to information, particularly for educational and cultural purposes. The Taskforce supports the comments of the Intellectual Property and Competition Review Committee ('IPCRC') on this issue:

'[The] balancing element that underpins copyright law is of critical importance... existing copyright laws contain a variety of exemptions, statutory licences and other mechanisms, which place limits on the rights to ensure availability of protected materials to certain classes of user. Although technological change alters the protection needed, it does not undermine the vital nature of these limits. Rather, the limits must be maintained, within the changes imposed by technological developments.'<sup>3</sup>

5. The importance of the balance in the Copyright Act will only increase as technology continues to develop. Technologies such as encryption, and other technological protection mechanisms, will mean that copyright owners will have increasing levels of control over public access to copyright materials. The Copyright Act must continue to protect the public interest exceptions to the exclusive rights of copyright owners.
6. The Government has already recognised the importance of ensuring that certain exceptions in the Copyright Act continue to operate in an environment where copyright material will be increasingly protected by technological means. The Digital Agenda Act identified a number of exceptions sufficiently important to the copyright balance that technological protections should not be able to prevent their operation.
7. The Digital Agenda Act introduced new enforcement provisions into the Copyright Act to provide protection for copyright owners who use technological means to protect their copyright works online. Criminal and civil provisions were introduced to make it an offence or infringement to deal in devices and services enabling circumvention of this technological protection.

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<sup>3</sup> Final Report of the Intellectual Property and Competition Review Committee, September 2000, page 34.

8. The Digital Agenda Act attempted to ensure that these circumvention device provisions did not alter the balance in the Copyright Act too far in the direction of copyright owners. The permitted purpose exceptions were determined to be essential to ensuring appropriate access to information in an online environment.
9. In the Taskforce's view, it would lead to a nonsensical result if the Copyright Act specifically ensured continued access under the permitted purposes exceptions, yet enabled access to be prevented or limited by contractual means. Copyright owners could achieve a result by contract that the Act doesn't permit through technical means.

### **Categorisation of Exceptions**

10. The Taskforce suggests that exceptions in the Copyright Act can be classified into two broad categories: fair dealing and other 'free' exceptions, and statutory licences where remuneration is paid to copyright owners. The Taskforce contends that the operation of both categories of exceptions should be expressly preserved in the Copyright Act.

#### **Fair Dealing**

11. Traditional 'free' exceptions such as the fair dealing provisions, have historically been a legislative mechanism to ensure that the ability of members of the public to appropriately access information for research and other socially desirable purposes is not jeopardised by the 'monopoly' possessed by copyright owners through the exclusive rights granted by the Copyright Act. The IPCRC described the operation of these exceptions as "a key part of the copyright balance", and important "for promoting access to information and ideas, particularly for purposes such as research or study"<sup>4</sup>.
12. Other non-remunerable exceptions, such as the computer software exceptions contained in Division 4A of Part III of the Copyright Act, can be seen as a more modern legislative response to the need to ensure that certain activities determined by Parliament to be in the public interest<sup>5</sup> are not prevented by the exclusive rights granted in the Copyright Act.

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<sup>4</sup> IPCRC Final Report, *ibid* at note 3, at p.92.

<sup>5</sup> Such as allowing security testing to combat the potential disruption to business and the community by computer hackers and viruses. See the Explanatory Memorandum to the *Copyright Amendments (Computer Programs) Bill 1999* at p4.

## Statutory Licences

13. The statutory licences in Parts VA and VB of the Copyright Act are an efficient and administratively convenient way of providing the educational sector with the ability to reproduce limited amounts of copyright material, and at the same time ensuring equitable remuneration for copyright owners. An additional safeguard is provided by enabling the rate of equitable remuneration to be determined by an independent expert body.
14. Although the statutory licences are comparatively recent introductions to the Australian copyright regime, they have become an integral part of the modern copyright balance. The statutory licences for Crown use of copyright material, and the educational statutory licence in Part VB, were determined to be so critical to the copyright balance that the Government decided that technological means should not be employed to prevent these statutory licences from operation. In explaining why these particular statutory licences were included as 'permitted purposes', the Explanatory Memorandum to the Digital Agenda Act noted that these particular exceptions provide for remunerated use of copyright material and therefore will not have a prejudicial impact on the owners of copyright in the material.<sup>6</sup>
15. The Taskforce submits that, in addition to promoting the public interest of appropriate access to information for educational purposes, the statutory licences provide an equitable and administratively convenient mechanism for managing copyright use and payment across the educational sector. The licences are an efficient and enforceable means of maintaining an appropriate balance in the Copyright Act.

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<sup>6</sup> Revised Explanatory Memorandum, P61.

## ISSUES RAISED BY THE CLRC

16. The Taskforce will now address selected issues raised by the CLRC. The Taskforce does not express a view on Issues 5, 7 or 8 of the Issues Paper.

***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?***

***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 Committee seeks your views as to the nature of any such difference.***

17. The Taskforce does not believe that contracts purporting to exclude or modify copyright exceptions are used extensively at this time, in either the 'hardcopy' or online environments. The Taskforce is aware of certain examples of online contracts attempting to limit the technological format of copies made by users (eg. only allowing users to reproduce using a photocopier or printer). However these examples do not appear to be commonplace in schools and TAFE's at this stage.
18. Although such contracts may not occur to a great extent at present, the Taskforce submits that online contracts attempting to modify the usage allowed by copyright exceptions may become increasingly more commonplace. The Taskforce notes the increasing use of 'click-wrap' contracts to govern downloads of computer software, and suggests that it is likely that these contracts may eventually be used to govern the supply of copyright products more generally.
19. The Taskforce is concerned by the implications for the schools and TAFE sector if contracts attempting to displace copyright exceptions become more prevalent. The Taskforce submits that there is sufficient evidence at this early stage to suggest that contracts may become commonly used by copyright owners to attempt to modify or displace statutory exceptions. It is therefore critical that the Copyright Act ensure the continued operation of existing exceptions.

***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 Effect of Section 47H

20. The Taskforce believes that it is unlikely that a court would interpret s.47H to mean that it is possible to 'contract out' of all other exceptions in the Copyright Act. The rule of statutory interpretation 'expression unis est exclusio alterus' (an express reference to one matter means that other matters should be excluded) would be unlikely to be applied unless this intention was discoverable on the face of the Copyright Act itself.<sup>7</sup> The Taskforce suggests that this view is supported by the absence of any statement that the Parliament intended such an effect in the Explanatory Memorandum to the *Copyright Amendment (Computer Programs) Act 1999*.
21. The Taskforce believes that a sensible interpretation of s.47H would not find a general implication that Parliament intended other statutory exceptions to be capable of contractual modification (with the possible exception of s.47B(1)). However the Taskforce submits that the precise effect of s.47H in relation to other parts of the Act is not clear, and that it would be beneficial to amend the Copyright Act to remove any potential uncertainty.

#### Should it be possible to override statutory exceptions by contract?

22. The Taskforce strongly believes that the continued operation of all exceptions in the Copyright Act is essential to maintaining an appropriate balance in the Act. The existing non-remunerable exceptions, and in particular the fair dealing provisions, are the most effective means of ensuring that public interest concerns are appropriately reconciled in the Copyright Act. It is the Taskforce's view that it should not be possible to use contractual means to modify or exclude the limitations that Parliament has determined should be placed on the exclusive rights of copyright owners.
23. In relation to the statutory licences in the Copyright Act, the Taskforce believes that the licences in their current format appropriately preserve both the interests of copyright owners in allowing for limited, remunerated use, and the interests of the educational sector in an administratively convenient mechanism for the use of copyright material in an educational context. In addition, benefits to copyright owners are provided by

minimising the risk of copyright infringement in the educational sector, and ensuring an independently determined rate of equitable remuneration.

24. The Taskforce submits that while the statutory licences continue to allow only limited reproduction and communication, for which equitable remuneration is paid, copyright owners should not be able to use contractual means to restrict the terms of the statutory licences, or prevent them being used.
25. One of the key criteria for the effective operation of any statutory licence scheme is that the licence applies to the entire class of copyright material covered by the licence. Allowing individual copyright owners to modify the way the schemes applied to some or all of their material would defeat not only the balance created by the statutory schemes, but jeopardise the functioning of the licences by imposing an unworkable administrative burden on the educational sector.
26. The Taskforce suggests that the CLRC recommend that the Copyright Act be amended to specify that neither the 'free' exceptions in the Copyright Act, nor the statutory licences in their current form, be subject to modification or exclusion by contractual means. This should not prevent copyright owners and users from negotiating for greater access and use if they can agree on terms acceptable to both parties.

Should all exceptions be treated alike?

27. Parliament has determined that it is in the public interest that these exceptions continue to operate, irrespective of whether the copyright owner has attempted to control access to their material through technological protection. It would be an illogical result if the copyright owner could achieve the same outcome through contractual means.

***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?***

28. The Taskforce does not believe that any special rules are necessary for mass-market arrangements, provided that:
  - an arrangement complies with the usual legal requirements for a valid contract; and
  - copyright law is clarified to ensure that contractual arrangements do not prevent the full operation of the statutory exceptions.

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<sup>7</sup> *Houssein v Under Secretary, Department of Industrial Relations Technology* (1982) 38 ALR 577 at 581

29. The Taskforce is not aware of any cases in Australia dealing with issues regarding the enforceability of an online contract such as a 'click-wrap' agreement. However in the Taskforce's view, such contracts would be found valid in Australia if both the formation of the contract (eg. 'offer and acceptance') and the subject matter are consistent with general contractual requirements.
30. Various United States decisions have found online contracts to be valid as long as the person entering into the agreement has an opportunity to review the terms of the agreement before accessing the product,<sup>8</sup> the person has positively assented to be bound by the contract,<sup>9</sup> and the contract complies with general contract principles.<sup>10</sup>
31. As long as copyright law clarifies that the Copyright Act exceptions may not be modified contractually, the Taskforce can see no reason why the general law of contract should not apply to online mass-market agreements.

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

32. It is critically important to the educational sector that the existing balance in the Copyright Act is maintained. An integral part of this balance is the operation of the exceptions to the exclusive rights of copyright owners.
33. The Taskforce submits that:
- A. The CLRC should recommend that the Act be amended to clarify that copyright owners cannot use contractual means to prevent the operation of all exceptions in the Copyright Act, including the statutory licences; and
  - B. If the CLRC does not accept the view that private arrangements should not be used to displace copyright exceptions, the CLRC should recommend as a 'minimum standard' that contractual means cannot be used to modify or exclude both the exceptions listed as 'permitted purposes', and Part VA of the Copyright Act.

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<sup>8</sup> *Specht & Ors v Netscape Communications Corp and America Online Inc*, Unites States District Court, Southern District of New York, 3 July 2001.

<sup>9</sup> *Caspi v The Microsoft Network, LLC et al*, 1999 WL 462175, 323 N.J.Super.118 (N.J.App.Div.July 2 1999)

<sup>10</sup> *Hotmail Corp. v Can Money Pie Inc*, C98-20064 (N.D.Cal. April 20 1998)

34. The Taskforce would be happy to appear before the Committee to respond to any questions the Committee may have, if the Committee thinks that this is appropriate.

**Ann Grieve**

Chair

MCEETYA Taskforce on Copyright

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