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***Submission to
Copyright Law Review Committee on
Copyright and Contracts***

August 2001

Australian Copyright Council

1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policy.
2. Some of the organisations affiliated with the Australian Copyright Council have made separate submissions to the Committee.

Contracts facilitate trade in copyright

3. Copyright owners are – and should continue to be – able to regulate by contract the use of their copyright material. Such contracts may allow activities that may require a licence in one or more jurisdictions to which the contract applies,¹ and conversely may prohibit activities that may otherwise be allowed in one or more jurisdictions to which the contract applies. The use of contract to regulate use of copyright material encourages trading in other countries (including online trading), partly because contracts can overcome some of the difficulties for trading in multiple jurisdictions caused by jurisdictional differences in copyright laws. The use of contracts can also reduce areas of uncertainty in relation to the application of exceptions to infringement.
4. We submit that the Committee's focus should be measures to encourage and facilitate online transactions in copyright material, and in particular measures to overcome barriers to concluding enforceable contracts online for licensing and assigning copyright.

Exceptions regulate use, not access

5. Exceptions to infringement regulate the use of material which is accessible. They do not require a copyright owner to give access to material which is otherwise inaccessible, or to give unconditional access to material which is accessible subject to certain conditions (for example, in return for payment).
6. This state of affairs is highlighted by section 116A(4), which allows the making or importation of a circumvention device or service for a "permitted purpose"; the provisions which allow a use for a "permitted purpose" do not themselves

¹ Examples in the educational field include "black-line masters" (where the purchase of a textbook gives a licence to copy pages from the book in excess of copying allowed under Part VB of the Copyright Act) and the AMCOS schools licence (which allows copying of sheet music in excess of copying allowed under Part VB, provided a certain number of copies is purchased). Such licences are expressly allowed by section 135ZZF.

give a right of access.² Section 201 also arguably deals with access – it requires the legal deposit of a free copy of certain published material with the National Library – but the access is given via an acquisition of physical property; there is no exercise of copyright involved.³

Other limitations to copyright

7. Exceptions or defences to infringement are not the only limitations on copyright: there is a finite term of protection,⁴ some uses of copyright material are outside the copyright owner's "bundle of rights" (such as lending of articles containing copyright material, or rental of videos),⁵ and copyright only protects the expression of information, not the information itself. Again, these limitations allow the use of accessible material; they do not require anyone to provide access to material.

Contract should be viewed as a whole

8. A contractual provision which prohibits an act otherwise allowed under the Copyright Act should not be viewed in isolation. It is perfectly reasonable, for example, that a contract between a copyright owner and a library allow the library to supply material to library clients (perhaps with lower compliance costs for the library than would be incurred by reliance on the library use provisions in the Copyright Act) but not allow supply to other libraries. It is also reasonable, for example, that a contract for access to online material require an undertaking not to circumvent a technological protection measure to get access to material other as than allowed by the contract.

Some exceptions inconsistent with three-step test

9. In particular, we think that a copyright owner should be able to prohibit activities which may be allowed under an exception but which contravene the three-step test.⁶ For example, we think certain aspects of the library provisions

² The provisions are sections 47D (decompilation of computer programs for interoperability), 47E (error correction of computer programs), 47F (security testing of computer programs), 48A (use by Parliamentary libraries), 49 (library supply to clients), 50 (library supply to other libraries) and 183 (government use), and Part VB (use of works by educational institutions).

³ Section 201. The provision arguably effects a compulsory acquisition on other than just terms.

⁴ Except for some unpublished works (section 32) – and even these may be published under section 52 if they are held in a library.

⁵ Rental of a copy of computer program or a sound recording, or of a work embodied in a sound recording, requires the copyright owner's licence. Rental of other material (including videos and books) does not require the copyright owner's licence.

⁶ Under the Berne Convention and the TRIPS Agreement, any exceptions or limitations to copyright in Australian law must only apply in certain special cases, not conflict with a

are not consistent with the three-step test (in particular, their application to corporate libraries), and there are a number of uncertainties about the scope of the government use provision.⁷ The recommendation of the Committee, in its report on the Simplification of the Copyright Act, to introduce an “open-ended” fair dealing provision is also inconsistent, we submit, with the three-step test.

Unfair contracts addressed by consumer protection legislation

10. We think that any concerns about unfair contracts should be addressed in consumer protection legislation such as the Trade Practices Act. We do not think that the fact that a contract governs the use of copyright material warrants any additional special regulation. We are not aware of any provisions in contracts dealing with copyright which are not adequately covered by existing consumer protection provisions.

Some examples of the relationship between contractual obligations and copyright limitations

11. The Committee has requested examples of situations in which the relationship between limitations or exceptions to copyright rights and contractual obligations have arisen. Examples we are aware of include:
- an educational film distributor provided a preview copy of an educational video with a document setting out the terms and conditions of use; contrary to those terms and conditions, a school showed a video in class and then returned the video without purchasing it;⁸
 - schools want to know whether they can show in class videos they have hired from a business hiring videos for domestic viewing (as opposed to a business hiring videos for educational viewing);⁹
 - rental of films on videocassette and DVD does not require the copyright owners’ consent in Australia, but is regulated by contract;¹⁰
 - libraries want to know whether they can lend CD-ROMs to clients;¹¹

normal exploitation of the work, and not unreasonably prejudice the legitimate interests of the rights owner.

⁷ Uncertainty relates both to which bodies (apart from government departments) may rely on the provision, and the scope of “the services of the Commonwealth or State”. The systematic digitisation of material by government departments and agencies is of particular concern.

⁸ Showing a video in class is allowed by section 28.

⁹ In some cases, customers of the domestic outlet may have a contractual obligation to view the video in the home only.

¹⁰ There may be an argument that section 31(1)(d) applies to DVDs which contain computer programs, but the provision is probably excluded by section 31(5) because the computer program is not the “essential object of the rental”.

¹¹ The contract of purchase may prohibit lending. If it does not – or if there is no contract affecting use of the CD-ROM – lending may authorise an infringing reproduction, if material from the CD-ROM must be reproduced (onto a hard disk or into RAM) in order to view the contents of the CD-ROM. Section 47AB (which allows reproduction for normal use) only applies to the owner or licensee of the copy.

- art galleries require visitors not to photograph artworks in the gallery, whether or not the artworks are still protected by copyright, or could be reproduced pursuant to an exception;¹²

Differences between contracts relating to online/offline trade

12. The Committee has asked for comment on the differences between trading online and offline in copyright material. Differences include:
 - online trade – particularly in material delivered online – is more likely to occur in more than one jurisdiction; and
 - for electronic products (whether delivered online or as a physical article) there may be a relationship between technological protection measures and contractual obligations, which is not the case for non-electronic products such as printed books.

Legal effect of contractual undertaking not do something allowed by Copyright Act

13. In general, if a contractual provision prohibits an activity otherwise allowed by the Copyright Act, that activity will not infringe copyright, but may breach the contract. The exceptions in the Copyright Act are not excluded or “overridden” by contract, but an activity allowed under the Copyright Act may breach a contract. It may also breach other areas of law.¹³
14. It may, however, be arguable that a contractual undertaking not to do an act can be taken into account in assessing whether doing that act is fair, if the person who made the undertaking subsequently seeks to rely on a fair dealing defence.¹⁴ The contractual obligation will not be relevant, of course, to the reproduction of a “reasonable portion” of a work for research or study, as such reproduction is deemed to be fair.
15. There may also be an argument that a person who undertakes not to do a certain act is estopped by that undertaking from relying on a defence to infringement that allows that act.

¹² Such as section 65 (which allows reproduction of a sculpture or work of artistic craftsmanship in a public place), section 41 (fair dealing for criticism or review) or section 42 (fair dealing for reporting news).

¹³ For example, copying a defamatory document for a class may be allowed by Part VB, but nevertheless defamatory; similarly copying a document obtained on a confidential basis may be allowed by Part VB but nevertheless breach the obligation of confidence.

¹⁴ Access to a work by circumventing a technological protection device may also mitigate against a finding that a dealing was fair.

EU Copyright Harmonisation Directive

16. The EU Copyright Harmonisation Directive provides that it is without prejudice to other laws, including the law of contract.¹⁵
17. The Recitals provide that the exceptions and limitations referred to in Article 5(2), (3) and (4) “should not ... prevent the definition of contractual relations designed to ensure fair compensation for rightholders insofar as permitted by national law.”¹⁶
18. The Recitals also provide that where interactive on-demand services are governed by contractual arrangements, the first and second subparagraphs of Article 6(4) do not apply.¹⁷

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¹⁵ Article 9

¹⁶ Recital 45

¹⁷ Recital 53. These subparagraphs allow a Member State to take “appropriate measures” to ensure that rightholders allow the beneficiaries of certain exceptions to benefit from that exception – for example, to allow people otherwise prevented by technological measures to make private copies. The Recital goes on to provide that non-interactive forms of online use remain subject to the first and second subparagraphs of Article 6(4).