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*Response to report of
Copyright Law Review Committee on
Copyright and Contracts*

July 2003

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 responding to the Committee's report.

The Committee's recommendations

3. The committee's recommendations were as follows:
 - 5.182 The Committee recommends that the Government work actively to promote an international solution to private international law issues relating to agreements the subject of this reference.
 - 7.49 The Committee recommends that the Copyright Act be amended to provide that an agreement, or a provision of an agreement, that excludes or modifies, or has the effect of excluding or modifying, the operation of ss. 40, 41, 42, 43, 43A, 48A, 49, 50, 51, 51AA, 51A, 52, 103A, 103B, 103C, 104, 110A, 110B, 111A of the Act, has no effect.
 - 7.50 The Committee also recommends that the integrity of the "permitted purposes" in s. 116A(3) (4) and (7) of the Copyright Act be retained by preventing a copyright owner from making it a condition of access to his or her work or other subject matter that users will not avail themselves of a circumvention device or service for the "permitted purpose" of doing an act that is not an infringement of copyright under ss. 47D, 47E, 47F, 48A, 49, 50, 51A, 183 and Part VB.
 - 7.51 The Committee considers that its recommendations should not alter the effect of s. 9(3) of the Copyright Act insofar as it relates to confidentiality agreements.
 - 7.52 The Committee recommends the encouragement of the development of codes of conduct and model licences for dealings with the remaining exceptions in the Copyright Act where relevant.
4. Sections 40 to 43 and 103A to 104 allow fair dealing for research or study, criticism or review, reporting the news, and professional advice; and reproduction in connection with judicial proceedings.
5. Sections 48A to 51A, 110A and 110B allow certain activities of libraries and archives, including supply to clients, supply to other libraries and administrative activities.

6. Section 52 allows the publication of an old unpublished work in the collection of a library or archives.
7. Sections 43A and 11A allow the temporary reproduction of copyright material as part of the technical process of making or receiving a non-infringing communication.
8. Section 116A prohibits the manufacture, importation and supply of devices and services which circumvent technological protection measures, except where the supply is for a "permitted purpose". The permitted purposes are: library use provisions (sections 48A, 49, 50 and 51A); reproduction and communication by educational institutions for educational purposes (Part VB); use by and on behalf of Commonwealth and State government departments and agencies; and the reproduction of a computer programs for the following purposes: to make interoperable products (section 47D), to correct errors (section 47E) and for security testing (section 47F).

Summary of position

9. We oppose recommendations at paragraphs 7.49 and 7.50 of the Committee's report. We support recommendations at paragraphs 5.182, 7.51 and 7.52.
10. We maintain the position set out in our two submissions to the Committee (August 2001 and October 2001). We also maintain our objections to the existence of "permitted purposes" for which circumvention services and devices may be supplied, set out in our submission on the Digital Agenda Bill of August 2000, and thus oppose the Committee's recommendations relating to them.
11. We have set out further reasons for our position below.

The Committee's analysis of current law and practice

12. We take issue with the Committee's analysis of current law and practice, particularly in relation to the following:
 - the Committee's view that a contractual provision which may be inconsistent with the application of an exception to copyright infringement is necessarily unfair;
 - the Committee's failure to distinguish individual from corporate or government consumers; and
 - the lack of information about the practical effects of the contractual provisions referred to in the report.

“Contracting out” presumed to be unfair

13. The Committee took the view that a contractual provision is necessarily unfair if it purports to prohibit the doing of something allowed under a copyright exception, irrespective of the context of the provision (including the benefits to the licensee from the contract as a whole) and of the circumstances in which the contract was made. Its view was that any “contracting out” necessarily “displaces” the copyright balance in the Copyright Act.
14. Presumably as a result of this view, the Committee did not discuss the context of the Committee’s examples of contractual provisions which may exclude the effect of copyright exceptions. We do not know, from the report, the context of each provision cited, the practical effect (if any) on the licensee, or whether the licensee attempted to negotiate removal or amendment of the provision. For the examples in Appendix E, which are the results of the Committee’s own research, a reader may use the URLs given to view the entire contract containing the cited provision. The practical effects on licensees, and the extent to which the provision was the subject of negotiation, remain matters of conjecture. There is no opportunity to view in context the examples reproduced, at pages 120 to 125 of the report, from submissions to the Committee.
15. We submit that a true picture of the current situation required an analysis of the context of the provisions the Committee cites as a cause for concern. It is necessary to consider, for example, all the benefits the licensee received under the contract, whether these met the licensee’s requirements, and if not, why not.

No distinction between contracts for entities and contracts for individuals

16. The Committee’s recommendations would apply to contracts entered into by profit making entities, not for profit entities and governments in the same way that they would apply to contracts entered into by individuals.¹ The application of the recommendations would not be affected by the nature of the licensee, its bargaining power or the overall benefits to the licensee.
17. It was evident from the submissions to the Committee, however, that entities such as libraries and educational institutions can and do negotiate licence conditions for online material. A library looking to purchase an online resource has notice of the terms of the agreement, has an opportunity to get advice, to assess whether the use it can make of the material is worth the consideration sought, and determine whether to accept the agreement as is or to negotiate it. One would expect the same approach as for any other contract (for example, a contract engaging a software developer).
18. It is not clear from the report why, as part of the negotiation for copyright material, a licensee should not be able to trade off something it could do under the Copyright Act for other benefits. For example, the library use provisions require a library to keep a detailed record of every copy it makes for its clients under those provisions. A library may want to contract out of this obligation, and document its copying in a different way, and a copyright owner may agree

¹ The library use provisions are available to libraries in profit making corporations provided the library itself is not conducted for profit (section 18).

in return for the library's undertaking to take certain steps to inhibit infringing uses of digitised material supplied by the library, or to pay for certain types of copying. Under the Committee's proposal, the library, midway through the agreement, could unilaterally abandon the negotiated term.

19. Individual consumers will usually have less bargaining power, but they do have an opportunity to assess whether the uses they can make of the material is worth the consideration sought. According to the Committee, contracts commonly allow personal use or private use of material. There is no "personal use" or "private use" exception in the Copyright Act, and there are personal or private uses which are not fair dealing for research or study. If personal use is what the consumer wants, then that may be more valuable to the consumer than any of the Copyright Act exceptions.
20. Finally, it is not clear from report why, having regard to other sources of consumer protection, the Committee thought that consumers of copyright products (including corporate and government consumers) should have a higher level of protection than that for consumers of other products.

Lack of information about practical effects of contracts

21. There is commentary in the report about how the various contractual provisions cited may be inconsistent with copyright exceptions, but no information about the practical effect of the provisions. We do not know, from the report, what, if any, have been the detrimental consequences of the cited provisions.

"Preserving the balance"

22. The terms of reference began with the following:
 1. The Government regards it as important that Australian copyright law maintain an appropriate balance between the rights of copyright owners and the rights of copyright users. Against that background, the Copyright Law Review Committee is asked to inquire into and report on: [the matters set out in paragraphs 1(a) to 1(h)]
23. The Committee's view, as we understand it, was that the "appropriate balance" referred to in its terms of reference was that of the Copyright Act at the time the Committee began its inquiry. It did not see its terms of reference as requiring it, or even allowing it, to assess or review what the "appropriate balance" in the Copyright Act should be. It took the view that its task was to identify whether users of copyright material lose the benefits of any exceptions in the Copyright Act when they enter contracts, irrespective of any compensatory benefits they might receive under those contracts, and of the extent to which the contracts meet their needs.
24. The correct approach, in our view, would have been to assess the contracts in their entirety, having regard to their effects in practice for both parties.

25. We also note that some of the exceptions identified by the Committee as “fundamental” to preserving the balance are, in the view of Professor Sam Ricketson, inconsistent with Australia’s international treaty obligations. We submit that the Government should be reviewing these exceptions in the light of Professor Ricketson’s advice, rather than exacerbating the breach by accepting the Committee’s recommendations.²

26. We would be happy to discuss further the Committee’s recommendations and our response.

Libby Baulch
Executive Officer
July 2003

² Sam Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions*, Centre for Copyright Studies, Sydney, 2002