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Article for Copyright World

Recommendations on Copyright and Contract

Helen Dakin Australian Copyright Council, 22 October 2002

The Copyright Law Review Committee has published its report *Copyright and Contract* (Commonwealth of Australia, 2002), in which it recommends sweeping changes to the law to prevent contracts between copyright owners and users from excluding fair dealing and other provisions of the Copyright Act.

The Committee was asked to report on matters relating to the “appropriate balance” between owners and users of copyright. In particular, the reference addresses the extent to which in practice contracts licensing electronic material exclude legislative provisions that would otherwise permit people to use the material; and whether such agreements should be enforceable. The Committee commenced work on the reference in April 2001.

The report examines the fair dealing exceptions to infringement, the exceptions relating to libraries, and the statutory licence schemes for educational institutions and government. It canvasses current practices in the digital environment, and the scope of various digital rights management techniques. The report notes the Committee’s efforts to identify current practices concerning “contracting out” of exceptions to copyright, and states its findings on the situation for Australian copyright users. It goes on to discuss the various legal and equitable provisions that can modify the effects or enforceability of contracts and the jurisdictional issues that arise in the digital environment. It also compares Australian law with other jurisdictions, in particular the European Union and the United States.

The report discusses the differences between the digital and non-digital environments in the context of the effects of the exceptions to copyright infringement, noting that some submissions argued that a distinction should be recognised and maintained.

In discussing the distinction, the report notes that material in digital form is normally accessed under a licence agreement and that such agreements have the capacity to restrict uses of the material to a greater extent than contracts under which hard copy material is purchased. Thus, some submissions argued that the rights of copyright owners are greater in relation to digital material because they are able to control uses such as access and reading, which were not traditionally subject to copyright. On the other hand, copyright interests maintained that because of the ease with which high-quality infringing copies of digital material can be made and distributed, copyright owners should be entitled to continue to licence material subject to terms and conditions more restrictive than in the print environment.

The report notes that the nature of digital technology is such that copyright owners can contract directly with users on a mass scale, facilitating the development of universal contract terms that are not subject to individual negotiation. Such contracts will frequently be governed by foreign law, in particular US law, raising difficulties of enforcement and jurisdiction.

The Committee devoted considerable attention to the implications of mass-market contracts, and to technological protection measures (TPMs) and their capacity to expand the uses of material that can be controlled by copyright owners.

The Committee asked those making submissions to comment on their experiences of contracts licensing use of copyright material in digital form. The comments noted in the report are principally based on “standard” licences entered into by universities in relation to electronic material. The submissions were inconclusive: some users reported that few licensors attempted to exclude exceptions under the Copyright Act, and that they were generally able to negotiate changes when necessary; others stated the opposite.

The report nonetheless recommends changes to the Act:

to prevent the exclusion or modification of exceptions identified as being fundamental to the copyright interest in Australia, namely:

- fair dealing for purposes of research or study, criticism or review, reporting news, and giving legal advice;
- library and archives exceptions; and
- exceptions designed to promote the proper functioning of technology, such as those allowing works and other subject matter to be temporarily reproduced in the course of communication.

The report is available from <http://www.ag.gov.au/clrc>.

The Attorney-General's press release on the report is available from http://www.ag.gov.au/copyright_eneews. However, the Government has not yet made a formal response to the Committee's recommendations.