

# Copyright and contract

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Australia is the first country to investigate the problem of those contracts and licences attached to information which restrict information access and uses permitted by existing copyright law.

As a result of its inquiry, the Copyright Law Review Committee (CLRC) has recommended to the Commonwealth Government that the *Copyright Act* be amended to protect fair dealing and library exceptions from being modified or excluded by the terms of such licences.

The CLRC has also recommended that the government work through international forums to provide global agreement on this problem, since most countries recognise the need for some free access to information as a public good. This will provide certainty of responsibilities and rights for copyright owners and users and overcome the problems of dealing with publishers in other legal jurisdictions.

ALIA supports these key recommendations and will be urging the government to act on them.

ALIA members provided valuable evidence, summarised in our submission to the inquiry, to show that licence terms attached to digital and print information do indeed modify or inhibit the ability of libraries, students and researchers to access information in ways permitted by the *Copyright Act* for at least the last thirty years.

Copyright owners and the Copyright Agency Limited argued that licences and contractual arrangements attached to information presented no problems. In its favour, CAL has a policy that its licences do not interfere with fair dealing and library exceptions.

However, many publishers' licences have terms which are unnecessarily restrictive. Often these are not accessible until the item has been purchased or the online information already accessed.

Some CD-ROM publishers have tried to restrict access to information in the public domain.

A familiar situation in law libraries concerns the publisher who puts a lock-up date on online service and then fails to follow through with the promised up-date. There is no offer of a refund on an online subscription which is incomplete, out-of-date or simply unavailable.

Librarians are also familiar with the problems of licences restricted to a geographical location for a single library serving users at different sites.

ALIA, the Australian Digital Alliance, the Federal Libraries Information Network and the Australian Vice-Chancellors' Committee as well as a number of individual universities all provided different examples of unfairly restrictive licences.

The CLRC conducted its own investigation, which supported the claims of the copyright users. It also noted the range of technological devices now available to publishers to lock up or monitor access to and use of their information.

The CLRC report, entitled *Copyright and contract*, is a government publication available in print or at the Commonwealth Attorney-General's website: <http://152.91.15.12/www/clrHome.nsf/AllDocs/RWP092E76FE8AF2501CCA256C44001FFC28?OpenDocument>.

The report is an excellent reference source in its summary of domestic and international copyright law, development of issues through various Government inquiries and the present tensions between copyright owners and users in the digital environment. The report also looks at international comparisons.

The terms of reference required the CLRC to report on the extent to which trade in copyright material is subject to agreements which modify or exclude those exceptions to the rights of copyright owners which are permitted under the *Copyright Act*, in the interests of preserving the balance between owners' rights and reasonable access.

The CLRC considered the views of owners and users and took into account relevant domestic law, international obligations, reports of other committees, competition principles, complications arising from any legislative change particularly in relation to private contracts, options with or without the need for legislation and compliance costs for small business.

Its recommendations are summarised as follows, that:

- the government work actively to promote an international solution to private international law issues relating to copyright contracts and licences.
- 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 certain named sections of the Act, have no legal effect. These sections are those permitted under international treaties, limited free uses of information such as fair dealing, library exceptions, unpublished works, works in Australian archives, and the preservation of works.
- the integrity of the 'permitted purposes' in s116A(3) (4) and (7) be retained... [so that users are able to circumvent blocking devices for lawful purposes]
- confidentiality agreements under s9(3) should not be affected. This subsection states that: This Act [that is, the *Copyright Act*] does not affect the operation of the law relating to breaches of trust or confidence.

The CLRC also suggested that codes of conduct and model licences should be generally encouraged.

Chapter four of the report examines the controls and technological protections relating to digital information, the extent to which contracts over-ride copyright exceptions and differences between online and offline or print material in this regard.

The committee found, on this evidence and from its own investigations, that licence terms were modifying or over-riding copyright exceptions and that there were significant differences between the licensing of online information and information in print format.

Chapter five examines the enforceability of publishers' licences, especially of mass-market agreements and others where practical bargaining power is one-sided, with the implications of Australian consumer protection and trade practices law.

Since many of the contracts under scrutiny are non-Australian in origin, jurisdictional difficulties and international obligations are canvassed with overseas comparisons, especially US legislation and the European Directive, in Chapter six.

The conclusion of chapter five is that domestic law is uncertain regarding the enforceability of such contracts,

In looking at other countries, chapter six shows that Australia is the first jurisdiction to consider the problem methodically and seriously.

Chapter seven considers whether such contracts should be enforceable and if not, what action to take.

This is a report which all librarians should read. It provides a valuable basis for our case in the government's review of the *Copyright Act* in the digital age. ■