

บทคัดย่อ

จุดมุ่งหมายของการเขียนบทความนี้เพื่อพิจารณาระบบสัญญาในกฎหมายลิขสิทธิ์ออสเตรเลีย ระบบสัญญาเกิดขึ้นเพื่อก่อให้เกิดความสะดวกแก่ผู้ทรงสิทธิ์ที่จะอนุญาตบุคคลที่ตนเห็นสมควรในการใช้งานอันมีลิขสิทธิ์ของตนผ่านระบบสัญญา แต่อย่างไรก็ตาม ยังมีข้อโต้แย้งที่ว่าระบบสัญญาอาจทำให้ความสมดุลแห่งลิขสิทธิ์ลดลง และข้อตกลงระหว่างเอกชนด้วยกันเองนั้นอาจเข้ามาแทนที่บทบัญญัติที่กฎหมายลิขสิทธิ์บัญญัติว่าด้วยการเข้าถึงงานอันมีลิขสิทธิ์โดยสมควรและเป็นธรรม ซึ่งข้อโต้แย้งดังกล่าวยังไม่ได้รับการเยียวยาจากกฎหมายลิขสิทธิ์ออสเตรเลีย บทความนี้วิเคราะห์ประเด็นข้อสงสัยเกี่ยวกับปัญหาการปรับใช้ระบบสัญญาในกฎหมายลิขสิทธิ์ ปี 1968 เป็นที่ปรากฏว่าระบอบกฎหมายลิขสิทธิ์ปัจจุบันนั้นไม่สามารถจัดการลิขสิทธิ์และระบบสัญญาได้อย่างดีพอ โดยจะเห็นได้ว่ายังไม่มีข้อห้ามอย่างชัดเจนในกฎหมายลิขสิทธิ์เกี่ยวกับ “การเซ็นสัญญาให้ใช้สิทธิ” ดังนั้นจึงเป็นไปได้ว่าขอบเขตแห่งบทบัญญัติอาจได้รับการเปลี่ยนแปลงโดยตัวสัญญา นอกจากนี้ยังพบว่าไม่มีหลักเกณฑ์หรือความต้องการที่ชัดเจนในการกำหนด “หลักสุจริต” ในความสัมพันธ์แห่งสัญญา ซึ่งก่อให้เกิดอำนาจต่อรองที่ไม่เท่าเทียมกันระหว่างผู้ทรงสิทธิ์และผู้ใช้

ABSTRACT

The article is aimed to review the contractual system in the Australian Copyright Act 1968. Contractual system is shaped to facilitate copyright owners to authorize potential target to make use of their copyright work through the contractual system. However, it is still arguable that there is possibility that contractual system would curtail copyright balance. Nevertheless, the Australian Copyright Act 1968 is silent as to whether private agreements can displace provisions of the Copyright Act which provide for reasonable access to copyright material. This article also analyzes the concerns about the problem in contractual agreement applied in the Act 1968. The current legislative regime is inadequate in dealing with copyright and Contract Law; which is there is no express prohibition in the Copyright Act on “contract out” then the scope of provisions may be modified by contract. Additionally, there are no clearly defined criteria or requirement to formulate “good faith” in a contractual relationship. This can causes unequal bargaining power between the copyright owners and users.

Reviewing Contractual System in Australian Copyright Balance

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The Australian Copyright Act 1968 grants a number of rights on copyright owners to encourage the creation of copyright materials, and at the meantime, provides exceptions to those rights to maintain the public benefit in access to such materials. The 1968 Act grants the right users four general exceptions in order to cut down the monopoly of the right holders. The copyright owners are concerned about the application of these exceptions in these present days-- a digital environment. This is because, with respect to copyright owners' viewpoint, the copyright owner cannot ensure that the exceptions are being applied to respond to strike a balancing interest in this society. Thus, it is not surprising for copyright owners to create their own measure to preserve the legitimate interests. Contractual system is shaped to facilitate copyright owners to authorize potential target to make use of their copyright work through the contractual system. However, it is still arguable that there is possibility that contractual system would curtail copyright balance. Nevertheless, the Copyright Act is silent as to whether private agreements can displace provisions of the Copyright Act which provide for reasonable access to copyright material (with the exception of s.47H which provides that an agreement which excludes or limits, or has the effect of excluding or limiting, the operation of sections providing for the reproduction of computer programs for decompilation, security testing and error correction has no effect).

It is necessary to be convinced that nothing in a contractual system should be able to extinguish fair use or limit the rights of stakeholders under the Copyright Act. National

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copyright legislation should render invalid any terms of a contractual system that restrict or override exceptions or limitations embodied in copyright law. National copyright laws should aim for a balance between the rights of copyright owners to protect their interests through technical means and the rights of users to circumvent such measures for legitimate, non-infringing purposes.

Existing Provisions concerning Copyright Balance in Australia

There are four general categories of exceptions to copyright stipulated in the Australian Copyright Act 1968 in order to contribute the copyright balance. Additionally, the *Digital Agenda Amendment Act 2000* (DAA) was reformed in order to replicate in the digital environment the balance struck in the traditional forms. These four categories of exceptions are reviewed as follows;

Fair Dealing

Fair Dealing exceptions can be utilized as exceptions against infringement if it is undertaken for the purposes of research or study (sections 40 and 103C), criticism or review (sections 41 and 103A), reporting news (sections 42 and 103B) or giving professional advice (section 43(2)). The exhaustive fair dealing exceptions stem from common law, and judicial determinations applying the concept has seen it as a matter of degree or impression. In relation to fair dealing for research and study, the underlying policy for maintaining the exception is to ensure that public interest in the free flow of information in education and research is balanced against the economic impact on the exclusive rights of copyright owners.

Libraries and archives provisions

In Australia there has been a distinct policy decision to include the library (sections 49, 50, 51, 51A110B, and 110B) and archives (sections 51, 51A, 110B, 110A, and 10(4)(b)) provisions as royalty-free exceptions rather than leave this type of copying to voluntary licensing or subject it to statutory licensing schemes. Historical development of the provisions have stemmed from regard to the role of libraries as keepers and preservers of information, practical or technical obstacles (such as geographical

distance), administrative considerations and economic impact of copying.¹ The library and archives provisions have been implemented as a logical extension to a student's permission to copy, enabling a librarian to act on the student's behalf to access information.²

The Copyright Reform Committee has identified the close relationship between the fair dealing exceptions and the libraries and archives exceptions. Although the library and archives exception is far narrower than that for fair dealing, both have been aimed at ensuring reasonable access to information to achieve the public interest in education and research, the free flow of information and the freedom of expression.

Technology-based exceptions

Exceptions to exclusive rights have been designed to make allowance for the reproduction that occurs incidentally through normal computer usages which stated in section 47B, for making of back-up copies which stipulated in section 47C, to allow for legitimate activities such as error correction which stated in section 47E, security of the computer indicated in section 47F, and to promote the development of interoperable technology which indicated in section 47D. The exceptions have been introduced for both practical reasons and to maintain Australian's competitiveness in the computer industry internationally. The DAA has introduced prohibitions under section 116A which prohibits the making, importing, selling, distributing (including online) and promoting of circumvention devices and services though use of the services is not prohibited for a range of permitted purposes which provide an important means of maintaining the copyright balance in the digital environment. The permitted purposes are defined as those under sections 47D, 47E, 47F, 50, 51A and also 48A concerning copying by parliamentary libraries, regarding use of copyright material for the services of the Crown

¹ Copyright Law Review Committee 'Summary of Copyright Reform Committee: Report on Copyright and Contract' 2002. <<http://www.digital.org.au/downloads/CLRCcontractsrepsumm.doc>> (20 July 2011)

² Copyright Law Review Committee 'Summary of Copyright Reform Committee: Report on Copyright and Contract' 2002 <<http://www.digital.org.au/downloads/CLRCcontractsrepsumm.doc>> (20 July 2011)

and uses under Part VB concerning reproduction and communication by educational institutions and institutions assisting persons with a print or intellectual disability.

Statutory Licences

A number of statutory licenses allow for the use of copyright material provided that equitable remuneration is paid. The following license schemes have developed as a consequence of industry specific arrangements and to facilitate practical and efficient transaction of material rather than out of policy decisions:

a) Part VA schemes-copying and communication of broadcasts by educational institutions assisting persons with intellectual disability

b) Part VB schemes -reproduction and communication of certain copyright material by educational institutions/institutions assisting persons with intellectual or print disability Both a) and b) recognizes the need for educators to have easy access to copyright material for teaching purposes.

c) Part VC schemes- payment of equitable remuneration to holders of rights in underlying works used in the retransmission of free to air broadcasts.³

Miscellaneous exceptions

Exceptions such as reproduction of buildings, reproduction of writing on labels etc are considered to have no underlying rationale and of little significance for this reference.

The Copyright Reform Committee recognized that the exclusive rights of copyright are partly defined by the exceptions in that the rights only exist to the extent that they are not qualified by the exceptions. The analysis of policy bases for the exceptions is considered as a crucial step by the Copyright Reform Committee of assessing the extent to which contracts should be able to set aside or modify the exceptions, if at all.

³ Copyright Law Review Committee ' Summary of Copyright Reform Committee: Report on Copyright and Contract' 2002 <<http://www.digital.org.au/downloads/CLRCcontractsrepsumm.doc>> (20 July 2011)

Nature of Contractual System

Contractual system is another layer of protection available to copyright holders. Copyright holders are able to set the terms of use through licences. To operate the markets for copyright materials in the most efficient way for the benefit of right holders and users of such copyright materials, the operation will include contractual modification of the relationship between the parties where modification is dictated by the market. The right holders will attempt to ensure that usage is governed by contractual terms in private transactions as well as the rights provided by copyright laws to obtain the benefit of extra protection that contractual rights will bring. The right holders have always negotiated contracts which specify the particular nature of the relationships,⁴ in regard to commercial rights such as distribution, reproduction, and translation. Users also accept the need for specific terms to facilitate their use and enjoyment of these works.

Importantly, if copyright law is perceived as inadequate or providing too many exceptions, the right holders may ignore copyright altogether and rely on contractual remedies. Although access to material via contract may provide users with greater certainty as to the scope of “private uses”, use of contract law together with technological forms of protection, such as through encryption, will weaken current rights to access and re-use ideas.⁵ However it should be noted that potential problems may exist under contract and trade practices law when imposing harsh or unreasonable contractual terms in relation to information or copyright material deemed essential to the production of new goods.

Contracts and Technological Protection Measures (TPMs) can complement each other. The technologies may obviate the need to rely on contract as a means of controlling access to and use of copyright work. For example, a contract which requires a user to destroy a CD after a licence expires may not be necessary if the CD can lock itself up at this point. Nevertheless, technological developments have also provided owners

⁴ Graw S, *An Introduction to the Law of Contract*, 5th ed, Thomson Lawbook Co., Sydney, NSW, 2005, pp 442-446.

⁵ Brudenall P, ‘The Future of Fair Dealing in Australian Copyright Law’ (1997) 1997(1) *Journal of Information, Law & Technology* <<http://www.worldlii.org/int/journals/JILT/1997/3.html>> (3 July 2011).

with the means for concluding cost-effective online contracts with end-users of copyright materials.⁶

The extension of electronic and other trade in copyright works and other subject matter is subject to agreements which exclude or modify the copyright exceptions and the nature of any differences between online and offline trade. This is because both owner and user accepted that electronic trade in copyright materials differs from non-electronic trade in that:

- 1) contracts generally provide for licences for access to copyright materials;
- 2) copyright materials in electronic form are more vulnerable to unauthorized copying;
- 3) copyright (and other) materials can be protected by technological protection measures;
- 4) mass direct contracting with end-users is possible; and
- 5) contracts are more likely to be made across national borders.

In general, if a contractual provision prohibits an activity allowed by the Copyright Act, that activity will not infringe copyright, but it 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.

Considering public policy reason, exempting any of the exceptions from modification by contract is not appropriate since each exception is shaped by a balance of the particular factors contributing to the public interest in the exception. Each exception has different underlying public policy, for example, the underlying public policy of section 41, fair dealing for the purpose of criticism or review is different from that of section 43, fair dealing for the giving of professional advice. As a result, it is necessary to consider the relationship between contract and copyright and the ability to modify the scope of exceptions by contract so that the copyright balance when each of the exceptions was introduced into the Copyright Act

⁶ Copyright Law Review Committee, 'Copyright and Contract' 2004 <<http://www.ag.gov.au/www/clrHome.nsf/AllDocs/5E80FC581F65A4B1CA256C4F000E5328?OpenDocument>> (3 May 2011).

could be achieved. This is evident with reference to modification by contract for certain provisions in the Act at section 47H⁷; and also at section 135ZZF⁸ and section 135Z⁹ in respect of the statutory licences.¹⁰ The problems posed by the contractual terms will be discussed in details later in the section entitling The Problem of Response to the New Environment.

Contractual System in Copyright Balance: Stakeholder Concerns and Balancing Interests

Copyright has always been based on a notion of balance. That is, balance between encouraging competition and providing incentives in the areas of innovation and creativity on the one hand, and ensuring access to information on the other. The government particularly pays attention that it is crucial to maintain an appropriate balance between the rights of copyright owners and the rights of copyright users in Australian Copyright law. However, the development of digital technology has triggered out a vigorous debate as to what an appropriate balance is under these new conditions. On the one hand, the risk of unauthorised, high quality reproductions increases exponentially. On the other hand, access to digital material can be denied by technological means without any assessment of the purpose, namely research or study, and non-commercial purposes for which that material is being accessed.

Traditionally, one way in which the copyright balance has been achieved is by granting copyright for a limited term only, following which the material enters the public domain. Another way the balance is struck is through the idea/expression dichotomy, that is, the notion that copyright does not protect ideas, but the expression of those ideas. Recent cases have emphasised that determination of copyright infringement is a question

⁷ Section 47H prohibits the exclusion of those exceptions that allow the reproduction of a program for the purposes of decompilation for studying the program; for making a backup copy; for making interoperable products; for error correction; or for security testing.

⁸ Section 135ZZF of the Copyright Act 1968 (Cth)

⁹ Section 135Z of the Copyright Act 1968 (Cth)

¹⁰ Copyright Law Review Committee, 'Copyright and Contract' 2002 <http://www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Past_Inquiries_Submissions_Sub_No_18_-_Copyright_Agency_Limited> (4 June 2011).

of fact and degree, and that a blanket application of the idea/expression dichotomy can be misleading.¹¹ In addition, the grant of exclusive rights to copyright owners under the *Copyright Act 1968* (Cth) does not include the right to control certain uses of their works.¹² These exceptions to the exclusive rights of copyright owners are a crucial part of the copyright balance and provide the focus for this reference.

In this information society, copyright holders are aware of the advances in digital technology and wish to take advantage of the efficiency which digital technology offers to publish their works via digital devices. They are equally aware that digital technology poses a threat to copyright protection and are supportive to the needs of users to access information regardless copyright holders' consents. Copyright protection should encourage, not inhibit, use and creativity. Copyright law should not give copyright holders the power to use technological or contractual measures to override the exceptions and limitations to copyright and distort the balance set in international and domestic copyright legislation. Licensing agreements should complement copyright legislation, not replace it.

The Committee concluded that while there has been indication that the traditional copyright balance is being challenged by the digital environment, it is unclear as to the extent to which the use of technology and transactional arrangements are detrimentally impacting on the copyright balance.¹³ In addition, it is arguable that the restrictions on the use of copyright material laid down in this contract are much tighter than the minimum standards laid down by the *Copyright Act 1968*. The demand that 'no material' be used seems at odds with the notions of 'substantial similarity' and 'fair dealing' – surely, it should be possible to use insubstantial parts of a work, or even substantial parts of a work provided that they are protected by fair dealing.¹⁴ The exception that a user 'may download one copy of the

¹¹ Copyright Tribunal 'Chapter Three: The Exceptions-The Copyright Balance' no date <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(756EDFD270AD704EF00C15CF396D6111\)~CLRC+Copyright+and+Contract+Report+-+Chapter+3.pdf/](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(756EDFD270AD704EF00C15CF396D6111)~CLRC+Copyright+and+Contract+Report+-+Chapter+3.pdf/$file/CLRC+Copyright+and+Contract+Report+-+Chapter+3.pdf)> (20 July 2011)

¹² Ibid.

¹³ Copyright Law Review Committee, 'Copyright and Contract' 2002 <http://www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Past_Inquiries_Submissions_Sub_No._18_-_Copyright_Agency_Limited> (4 June 2011).

¹⁴ 'CLRC Emergency Management Australia 'Copyright Law and Contract: Australian Library and Information Association' no date <[http://docs.google.com/viewer?a=v&q=cache:3Ij7xhbJxpIJ:www.ema.gov.au/www/agd/rwpattach.nsf/VAP/\(756EDFD270AD704EF00C15CF396D6111\)~CLRC%2BCopyright](http://docs.google.com/viewer?a=v&q=cache:3Ij7xhbJxpIJ:www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(756EDFD270AD704EF00C15CF396D6111)~CLRC%2BCopyright)>

materials on any single computer for your personal use only' is much more limited than the range of dealings permitted under fair dealing. Furthermore, the prohibition against reverse engineering fails to reflect the position under s 47D of the *Copyright Act 1968* that a person may reverse engineer or decompile copies of a program owned by someone else if they intend to make a product that is inter-operable with that program.¹⁵

Analysis of Problem in Contractual Agreement Applied in Copyright Regime

In this article, six main concerns about the problem in contractual agreement are discussed.

First, since the current Copyright Act 1968¹⁶ aimed to protect the right holders more strictly in the digital age, it may exceedingly limit the users' ability to reproduce the copyright materials under the contractual agreement. As Professor Cohen noted,¹⁷ contractual control changes both the amount and nature of access granted to users. Many uses which do not currently require licences, such as fair use or the use of uncopyrightable ideas, may be subject to contract. Further, contractual arrangements exclude the public interest element built into copyright.¹⁸ It was focused on the Copyright Law Review Committee that...public policy and statutory illegality are closely connected in that it is counter to public policy to allow the intentions of the legislature to be overridden. It is also possible that a contract can be held unenforceable on the basis of public policy considerations such that

%2Band%2BContract%2BSubmission%2B%2BALIA.doc/%24file/CLRC%2BCopyrigh
t%2Band%2BContract%2BSubmission%2B%2BALIA.doc+it+should+be+possible+to+
use+insubstantial+parts+of+a+work,+or+even+substantial+parts+of+a+work+provided+t
hat+they+are+protected+by+fair+dealing&hl=en&gl=au&pid=bl&srcid=ADGEESjiFL0
1RjCpwZsU3hQhLETMMDo36TYxxd6YsBlgZ6F4cQ3BJLKGGEsfrxOgbUCduMgqq3
pWcQjHodGbjHmFjMzgYKmnHm8HWiTu6G1B6ibXdTeGy5EwV4ycjOlcKvO1DINu
q9&sig=AHIEtbSb6J_IVaUnzeRY8A18YkVLaQVUTQ> (26 June 2011)

¹⁵ Ibid.

¹⁶ The Copyright Act 1968 (Cth)

¹⁷ Zwart M D, 'Australian Intellectual Property Law Resources, The Future of Fair Dealing in Australia: Protecting Freedom of Communication' 2006 <<http://www.austlii.edu.au/au/other/AIPLRes/2006/2.html>> (7 May 2011). See also Cohen J, 'Copyright and the Perfect Curve' (2000) 53(6) *Vanderbilt Law Review* 1799-1819.

¹⁸ Zwart M D, 'Australian Intellectual Property Law Resources, The Future of Fair Dealing in Australia: Protecting Freedom of Communication' 2006 <<http://www.austlii.edu.au/au/other/AIPLRes/2006/2.html>> (17 May 2011).

agreements which exclude or modify some or all of the copyright exceptions damage or harm the community by restricting the use of copyright material for certain important purposes...

Currently, no longer do copyright owners need to rely solely on the Copyright Act to protect their interest, and no longer do they have to accept the balance struck in the Act between their rights and those of users. Copyright owners can strike their own balance.¹⁹ This causes the conflict between the copyright owners and users. If copyright owners are free to use contractual arrangements to restrict use, and are then able to use copyright to prevent any use that is not subject to these restrictions, owners are gaining absolute monopoly over their works.[http://cyber.law.harvard.edu/ilaw/Contract/Elkin-Koren Excerpt - N72](http://cyber.law.harvard.edu/ilaw/Contract/Elkin-Koren%20Excerpt%20N72)²⁰ When owners exercise absolute monopoly, users' choices become very limited. Users must either accept the contractual restrictions or abandon access to the work altogether.

Secondly, the current legislative regime is inadequate in dealing with copyright and Contract Law.²¹ The students are allowed to take advantage of the fair dealing exception in section 40²² to copy a "reasonable portion" of the book in library for the purposes of their research or study. The students can also copy a reasonable portion of the works without infringing copyright although libraries have purchased such works electronically. However, the students may be prevented from taking advantage of the fair dealing rights granted by copyright law on such works if the contract between the libraries and the publishers do not allow this.²³

¹⁹ Mclean R & Flahvin A, 'The Digital Agenda: How the New Copyright Law (and Contract) Is Redefining the Relationship between Users and Owners of Copyright' 2002 <<http://www.austlii.edu.au/au/other/AIPLRes/2001/3.html>> (12 July 2011).

²⁰ Elkin-Koren N, 'Copyright Policy and the Limits of freedom of Contract' 1997 <<http://cyber.law.harvard.edu/ilaw/Contract/Elkin-Koren%20Excerpt>> (16 May 2011).

²¹ Australian Library and Information Association, 'Copyright Law and Contract' 2003 <http://www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Past_Inquiries_Submissions_Sub_No_7_-_Australian_Library_and_Information_Association> (9 May 2011).

²² Section 40 Of the Copyright Act 1068 (Cth)

²³ Mclean R & Flahvin A, 'The Digital Agenda: How the New Copyright Law (and Contract) Is Redefining the Relationship between Users and Owners of Copyright' 2002 <<http://www.austlii.edu.au/au/other/AIPLRes/2001/3.html>> (12 April 2011).

Recently, although most contracts allow the students to copy a reasonable portion of electronic works, the libraries are required to pay a licence fee for the expected or actual uses. This has now included the uses for the purpose of fair dealing which neither infringe copyright nor require any payment for the printed books. This is because some publishers apply the licence fees in such a way to avoid claiming payment for uses that would amount to fair dealings. However, some publishers do not as they contract out of fair dealing.

In the case that lecturers prepare coursepack or book of readings for students, the lecturers are free to copy an article from a periodical, or a reasonable portion of a book by applying the educational statutory licence contained in Part VB of the Copyright Act 1968.²⁴ However, the relevant work purchased electronically may cause the right granted by the Part VB licence useless. This is because if the contracts allow the reproduction of the electronic works, the reproduction can be made merely for the inclusion in the coursepack for students. Similar to fair dealing provisions, the Part VB educational statutory licence can be contracted out of.²⁵

In conclusion, both the lecturers who rely on the Part VB statutory licence²⁶ and the students who rely on the section 40²⁷ of the fair dealing exception may be in breach of copyright if they reproduced an electronic version of such works. In addition, the university may be in breach of its contract with the publisher if it allows the lecturers and students to exercise the rights extended to them by the Copyright Act.²⁸ In other words, contract could control the copyright at least in regard to electronic copyright works. It also rewrites the balance that Parliament strikes and it is also protected by the Copyright Act 1968. The publishers, therefore, can determine how much of their works can be copied, for what purposes, and even whether or not their works could be accessed.

Thirdly, if there is no express prohibition in the Copyright Act on “contract out” then the scope of provisions may be modified by contract. This is because there are no

²⁴ Part VB of the Copyright Act 1968 (Cth)

²⁵ Mclean R & Flahvin A, ‘The Digital Agenda: How the New Copyright Law (and Contract) Is Redefining the Relationship between Users and Owners of Copyright’ 2002 <<http://www.austlii.edu.au/au/other/AIPLRes/2001/3.html>> (12 April 2011).

²⁶ Part VB of the Copyright Act 1968 (Cth)

²⁷ Section 40 of the Copyright Act 1968 (Cth)

²⁸ The Copyright Act 1968 (Cth)

other legal remedies to stop such contract out. The express prohibition in section 47H²⁹ could be misread to suggest that provisions elsewhere in the Copyright Act 1968 could be overridden by contract.³⁰ Therefore, owners should not be permitted to contract out of the copyright balance. Moreover, it should be an express acknowledgment that none of the exceptions contained in the Copyright Act 1968 can be overridden by contract.

The Committee examined the factors influencing the validity of the legal maxim *expressio uius est exclusio alterius*, which means that an express reference to one matter indicates that other matters are excluded, here, such as similarity of subject matter, whether the asserted application is discoverable on the face of the Act; whether inconsistency or injustice results from applying the principle and the history of the Act and separate origins of particular provisions. After some consideration, the Committee concluded that with the exception of s 47B(1), the effect of s 47H on agreements which exclude or modify the exceptions is ultimately unclear. Accordingly, the Committee is in favour of clarifying this situation by legislative means.

The Australian government should put in place comprehensive measures to ensure that parties cannot ‘contract out’ of the exceptions laid down by the Copyright Act 1968. The combination of technological measures and contract must assure copyright owners and users that the balance of interests in the Act is preserved. The current exceptions under the Copyright Act 1968, should not be directly or indirectly, diminished by contract.³¹ There is no guarantee that contract can deliver complete protection to copyright owners in a digital world. The doctrine of privity of contract confines its reach, and copyright still has a role to play in protecting works. The rights granted to users by the provisions of the Copyright Act relating to research and study, criticism and review,

²⁹ Section 47H of the Copyright Act 1968 (Cth)

³⁰ Australian Library and Information Association, ‘Copyright Law and Contract’ 2003 <http://www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Past_Inquiries_Submissions_Sub_No._7_-_Australian_Library_and_Information_Association> (19 May 2011).

³¹ Australian Library and Information Association, ‘Copyright Law and Contract’ 2003 <http://www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Past_Inquiries_Submissions_Sub_No._7_-_Australian_Library_and_Information_Association> (19 May 2011).

parody and satire, and news reporting are a vital means of ensuring continued public access to and use of copyright material.³²

Pointedly, people often use contracts to exclude the operation of fair dealing. Consequently, there is uncertainty concerning the extent to which contracts that purport to exclude or modify exceptions to copyright infringement are legally enforceable as a matter of copyright law.³³ With one exception, the Copyright Act is silent on the ability of private parties to enter agreements that exclude or modify the statutory exceptions to copyright infringement. User argued that contracts which exclude or modify the exceptions can be unfair to individuals in a way that cannot be accommodated by general law or statutory unconscionability. This was largely because of perceived difficulties in negotiating mass-market agreements.³⁴

Additionally, the Committee found that restraint of trade may have limited potential as a remedy for agreements that exclude or modify the exceptions. Although the Trade Practices Act (TPA) prohibits contracts which facilitate restrictive trade practices, licences and assignments of intellectual property rights are exempt from the provisions of Part IV of the Act (anti-competition provisions); the application of this provision

³² Zwart M D, 'Australian Intellectual Property Law Resources, The Future of Fair Dealing in Australia: Protecting Freedom of Communication' 2006 <<http://www.austlii.edu.au/au/other/AIPLRes/2006/2.html>> (17 May 2011).

³³ Lindsay D, 'The Law and Economics of Copyright, Contract, and Mass Market Licences' 2002 <http://www.copyright.com.au/reports%20&%20papers/IssuesPaper_Lindsay.pdf> (18 August 2006).

³⁴ There are three sufficient notice of and assent to terms particularly relevant to the following new types of mass-market agreement:

- Shrinkwrap agreements, (which commonly accompany software products) in which terms are sealed inside shrinkwrapping and/or appear when software is installed. The terms of these agreements are not accessible until after a product is purchased and opened/installed. The outside of the wrapping may or may not indicate that terms are forthcoming. Where terms are displayed upon installation, the user may also be required to click an "I agree" or similar icon before installation can be completed.
- Clickwrap agreements, in which a party indicates assent to terms of an agreement offered online by clicking on an "I agree" or similar icon.
- Browsewrap agreements, which are used by many websites and deem that the act of browsing the website constitutes acceptance of their terms. Copyright Law Review Committee, 'Copyright and Contract', 2004 <<http://www.ag.gov.au/www/clrHome.nsf/AllDocs/3BF1933B5896CE8C CA256C4F000E85F7?OpenDocument>> (20 August 2006).

however, remains controversial. It is noted that the TPA is only likely to be relevant where it can be shown that imposing technical locking devices constitutes a misuse of market power.

From the analysis of this article, the applications and roles of the licence or contract should not be able to extinguish fair dealing uses or limit the fair dealing exceptions as well as the rights of libraries under the Copyright Act. It is important that the Government ensure that the special provisions for libraries and archives are not undercut by contractual provisions. Similarly, statutory compulsory licences should not be displaced by contractual provisions, which diminish the rights of copyright users. National copyright legislation should render invalid any terms of a licence that restrict or override exceptions or limitations embodied in copyright law. National copyright laws should aim for a balance between the rights of copyright owners to protect their interests through technical means and the rights of users to circumvent such measures for legitimate, non-infringing purposes.

Fourthly, the implied doctrine of good faith is not clearly established within Australian contract law. Therefore there are no clearly defined criteria or requirement to formulate “good faith” in a contractual relationship. Concepts such as cooperation, reasonableness, proper purpose and legitimate interest can at times seem vague; however they are often linked to the implied duty of good faith.³⁵

Fifthly, although the use of TPMs can facilitate the automatic ‘negotiation’ of contracts between copyright owners and users, in this environment, the bargaining power between the copyright owners and users may well be unequal.³⁶ The combined use of TPMs and contracts in this manner could therefore lead to unconscionable transactions. This point can be supported by the expression of some commentators:

Are we heading for a world in which each and every use of information is dictated by fully automated systems? A world in which every information product carries with

³⁵ Harper M, ‘The Implied Duty of “Good Faith” in Australian Contract Law’, September 2004, <<http://www.murdoch.edu.au/elaw/issues/v11n3/harper113.html>>, (12 May 2011).

³⁶ ‘Copyright Policy, Affording Legal protection to TPMs’ 2004 <http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/5_e.cfm#notes> (10 May 2011).

itself its own unerasable, non-overridable licensing conditions? A world in which what is allowed and what is not, is no longer decided by the law but by computer code?³⁷

Where technological constraints substitute for legal constraints, control over the design of information rights is shifted into the hands of private parties, who may or may not honor the public policies that animate public access doctrines such as fair use. Rights holders can effectively write their own intellectual property statute in computer code.³⁸

Lastly, in considering the issue of enforceability, the Commission examined the issue of jurisdiction as it relates in three ways; jurisdiction, choice of law and enforcement. The Committee is of the view that³⁹

...contracts formed via email or through interaction with a website will most likely be formed when and where the offeror's (the copyright owner) computer receives the message sent by the offeree (the copyright user); online trade in copyright material is more likely than offline trade to be governed by foreign law and foreign courts...

At present, the national law of each country determines whether a court has jurisdiction and whether the judgement obtained from a foreign court is enforceable. International case law has not been consistent and the Australian position on jurisdiction is unclear.⁴⁰ Several factors will inform the jurisdictional decision; a choice of law clause in an agreement will generally serve to determine the law to which the agreement is subject but in the absence of such a clause, the law of the country with the "closest and most real connection" with the transaction will be applicable, also the level of interactivity will be likely to influence and attract jurisdiction.⁴¹

³⁷ 'Copyright Policy, Affording Legal protection to TPMs' 2004 <http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/5_e.cfm#notes> (10 May 2011).

³⁸ Burk D L & Cohen J L, 'Fair Use Infrastructure for Rights Management Systems' (2001) 15(1) *Harvard Journal of Law & Technology* 42-83.

³⁹ Copyright Law Review Committee 'Summary of Copyright Reform Committee: Report on Copyright and Contract' 2002 <<http://www.digital.org.au/downloads/CLRCcontractsrepsumm.doc>> (20 July 2011)

⁴⁰ Ibid.

⁴¹ Copyright Law Review Committee 'Copyright and Contract: Chapter 5-Enforceability' 23 August 2004 <<http://www.ag.gov.au/www/clrHome.nsf/AllDocs/3BF1933B5896CE8CCA256C4F000E85F7?OpenDocument>> (23 July 2011)

In a nutshell, copyright law should not give right holders the power to use technological or contractual measures to override the exceptions and limitations to copyright and distort the balance set in international and domestic copyright legislation. Licensing agreements should complement copyright legislation, not replace it. Most copying of material in libraries is for educational, research or private study purposes. It is in the public interest to have access to information in all formats. Importantly, the rights of copyright owners are not entirely unrestricted, but are subject to considerations of what is fair and reasonable use of material for certain worthwhile purposes.

Conclusion and Recommendations

While copyright owners are of the view in this issue that there was no conflict between the operation of agreements used in connection with copyright materials and the copyright exceptions, copyright user interests to varying extents put forward the view that online trade in copyright material is subject to agreements which exclude or modify the copyright exceptions, or which otherwise undermine the copyright balance. Furthermore, user interests presented examples of licenses which limits or excludes the exceptions provided by current legislation and also examples of (less common) licenses which loosely parallels the provisions of the Act. It is noted that in such agreements, there are often provisions for obtaining express written permission for uses not otherwise authorised by the licence, though the legality of such permissions for acts which are otherwise authorised through exceptions in the Act is uncertain.

It cannot be refused that we are in the 21st century which the sophisticated technology plays an important role in our daily life, especially in terms of information access on cyberspace. Also it is hard to refuse that due to the development of technological change, the copyright owner cannot entirely ensure that his copyright material will not be made an unauthorized duplication. Consequently, copyright owners are resorting to alternative measures to control access to and use of their material. Technology has increased the ability to trace, monitor and control the dissemination and use of material. Digital material is often consumed on a pay-per-use basis rather than pay per copy. Moreover, digital environment allows cost effective and enforceable contracts to be executed with end-users which may also be backed by technological measures,

though there is divided opinion as to the extent to which “digital lock-out” was occurring. Thus, there is controversy concerning an “access right” being a copyright owner’s right to control initial access and repeated right of access

Apart from the digital protection measures created to protect copyright work in digital environment, the contractual system is another layer of copyright protection initiatively introduced to control access and copy of copyright work. Notwithstanding, the application of contractual system is still questionable as to whether it diminishes the value of the copyright balance or not. The stakeholders argue that the current legislative regime is inadequate in dealing with copyright and contract law and that the government put in place comprehensive measures to ensure that parties cannot contract out of the exceptions laid down in the *Copyright ACT 1968*. It is therefore essential to a study of the operation of the so-called right of first digitisation, the scope of the safe harbour provisions, and the combination of technological measures and contract to ensure that the balance of interests in the Act is preserved.

According to the analysis, in order to preserve the copyright balance to get along with the application of contractual system, five recommendations are proposed in this article in accordance with the Law Review Committee. First, the express prohibition in section 47H could be misread to suggest that provisions elsewhere in the *Copyright Act 1968* could be overridden by contract. And that there be an express acknowledgment that all the exceptions contained in the *Copyright Act 1968* cannot be overridden by contract. Secondly, collecting societies should be regulated a greater powers to balance the exercise of contracts, agreements, and licences. Thirdly, special protection for consumers of mass-market products, such as shrink wrap and other restrictive licences, to protect their rights under the *Copyright Act 1968 should be effectively operated*. Fourthly, the Australian government should put in place comprehensive measures to ensure that parties cannot ‘contract out’ of the exceptions laid down by the *Copyright Act 1968*. Fifthly, copyright licences should not prohibit-disclosure of license terms.