

**RELATIONSHIP
BETWEEN LICENSING
AND COPYRIGHT LAW**

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What is copyright?

- **Not idea/concept, technique or theory**
- **Expression of the idea**
- **Reduced to a material form (written down, recorded on tape)**
- **original “skill and labour/effort”**

What does copyright protect?

Works

- **literary works** (novels, essays, poems, journal articles, books, instruction manuals, training programs, reports, computer programs)
- **Dramatic works** plays, screenplays and dances (choreography)
- **Musical works**
- **Artistic works** paintings, drawings, graphic art, illustrations, cartoons, photographs, maps and plans, sculpture

Subject matter other than works

- **Sound recordings**
- **Films**
- **Television and Sound broadcasts**
- **Published Editions**

Exclusive Rights of copyright owners

- **Reproduce the work in material form**
- **Publish the work**
- **communicate the work (making available on line or electronically transmit)**
- **Perform the work in public (not artistic works)**
- **Make an adaptation (not artistic works)**

Exceptions and Copyright Balance

- **Fair Dealing**
- **Libraries and Archives**
- **Technology Based**
- **Statutory Licences**
- **Copyright Balance**
 - **Owners (innovation and reward)**
 - **Users (access for research)**

What is Fair dealing

- Research and study
- Criticism or review
- Reporting news
- Judicial proceedings and legal professional advice
- Must be fair - Limits apply/legislative factors

Libraries and Archives

- **Reproduction and communication of works for:**
 - **users for research and study**
 - **other libraries or archives**
 - **preservation and replacement**

Technology based exceptions

- **Computer programs**
 - Acts that would otherwise infringe copyright may be done (back up copy, study the program, error correcting etc..)
 - S. 47H states that “an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of subsection 47B(3), or section 47C, 47D, 47E or 47F, has no effect”
- **Simulcasting**

Technology based exceptions

- **Circumvention Devices**

- Unlawful to make, import and distribute circumvention devices (eg decryption software) to circumvent a TPM or make TPM ineffective except where it is for a permitted purpose.
- **Technological protection measure (TPM)**
 - Device designed to prevent copyright infringement (use of access codes, access processes or copying control mechanisms such as a software lock)
- Not an offence to use but note Digital Agenda Review

Circumvention Devices

Exceptions

- **Permitted Purposes include:**
 - **Reproducing and communicating works by libraries for users;**
 - **Reproducing and communicating works for other libraries;**
 - **Reproducing and communicating works by libraries for preservation;**
 - **Statutory licences;**
 - **Computer programs exceptions**
 - **Not fair dealing**

Statutory Licenses

- **Part VA (Statutory Licences for Copying and communication of broadcasts)**
- **Part VB (Statutory Licences for reproduction and communication of certain copyright works – not computer programs)**
- **Part VC (Retransmission of free to air broadcasts)**
- **Crown copying for services of Cwth or State (not computer programs)**

Copyright Law Review Committee Report “*Copyright and Contract*” 2002

- **Terms of Reference include**
 - **Extent to which contracts being used “online” to exclude or modify copyright exceptions;**
 - **Enforceability of such contracts**

Examples – modifying and excluding exceptions

- *You agree not to copy, republish, frame, download, transmit, modify, rent, lease, loan, sell, assign, distribute, license, sublicense, reverse engineer.*
- *All rights reserved. No part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording or by any information storage and retrieval system, without prior permission in writing from the publisher*

Examples

“ You cannot copy, reproduce, broadcast, email, display on your website, use for commercial purposes, or the like any of these items subject to copyright, without the explicit permission of XXXXX or if allowed under the Copyright Act 1968 (Commonwealth of Australia) or like legislation.”

Findings of CLRC

- **Findings of CLRC**
 - **Contracts are being used to exclude or modify the copyright exceptions**
 - **TPM used to control access and copying of materials**
 - **If enforceable, will undermine the copyright balance**

Enforceability

- **Law is unsettled**
- **Jurisdictional issues**
 - **Most contracts governed by foreign law**
 - **Remedies available in Australia of limited application**

Recommendations of CLRC

- **International solution to jurisdiction issue;**
- **Amend Act so that an agreement that excludes or modifies the operation of specific provisions of the Act has no effect. Includes:**
 - **Fair dealing (ss. 40, 41, 42, 43, 43A)**
 - **Copying by Parliamentary libraries (s.48A)**
 - **Reproducing and communication works by Libraries and Archives for users for research and study, for other libraries, in Australian Archives, for preservation of works, sound recordings and films**

Recommendations of CLRC

- 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

What next?

- **Government yet to formally respond to CLRC (no obligation)**
- **Recommendations impacts on Digital Agenda Review, implementation of Australia/US Free Trade Agreement (TPM) and proposed fair dealing review**

References

<http://www.ag.gov.au/agd/www/Clrhome.nsf>

[Copy of CLRC Report]

<http://www.ag.gov.au> [Issues paper on Fair
Dealing]

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- **Views expressed are my personal views and not of La Trobe University.**
- **No legal advice is given in this presentation.**
- **You should obtain your own legal advice**