

20. Contracting Out

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Summary

20.1 ‘Contracting out’ refers to an agreement between owners and users of copyright material that some or all of the statutory exceptions to copyright are not to apply—so that, for example, the user will remunerate the copyright owner for uses that would otherwise be covered by an unremunerated exception; or the user agrees not to use copyright material in ways that would constitute fair use or fair dealing.

20.2 Contracting out raises fundamental questions about the objectives of copyright law, the nature of copyright owners’ exclusive rights and exceptions, and the respective roles of the *Copyright Act*, contract, and competition and consumer law and policy.

20.3 This chapter considers whether the *Copyright Act* should limit the extent to which parties may effectively contract out of existing, and recommended new, exceptions to copyright.¹

20.4 The ALRC recommends that the *Copyright Act* should be amended to provide that contractual terms restricting or preventing the doing of any act which would otherwise be permitted by the libraries and archives exceptions are unenforceable.

¹ There are existing limitations on contracting out of certain exceptions relating to computer programs: *Copyright Act 1968* (Cth) s 47H.

20.5 The *Copyright Act* should not provide any statutory limitations on contracting out of the new fair use exception. However, if the fair use exception is not enacted, limitations on contracting out should apply to the new fair dealing exception.

20.6 The primary reason for these recommendations is to ensure that certain public interests protected by some copyright exceptions are not prejudiced by private arrangements, promoting fair access to content.² However, broader limitations on contracting out—for example, extending to all exceptions, or to all fair uses—would not be practical or beneficial. Generally, removing freedom to contract risks reducing the flexibility of the copyright regime, and the scope to develop new business models for distributing copyright materials.

What is contracting out?

20.7 Agreements that include ‘contracting out’ may be in writing, or entered online in the form of a ‘clickwrap licence’ or other electronic contract. To enter a ‘clickwrap licence’, for example, the terms of the licence are presented to the user electronically, and the user agrees to the terms of the licence by clicking on a button or ticking a box labelled ‘I agree’, or by some other electronic action.³

20.8 Contractual terms in licensing and other agreements may require copyright users to contract out of exceptions—purporting to prevent users from relying on statutory exceptions and, for example, engaging in fair dealing with copyright materials.

20.9 Copyright owners may also limit permissible uses of copyright materials by imposing technological protection measures (TPMs) which prevent, inhibit or restrict certain acts comprised in the copyright. The use and circumvention of TPMs raises similar policy issues to those raised by contracting out, and TPMs can be used to enforce the terms of licences and other agreements.⁴

20.10 Legislative limitations on contracting out of statutory provisions are not uncommon, at least in consumer protection law. For example, under the Australian Consumer Law (ACL), a term of a contract is void to the extent that the term purports to exclude, restrict or modify legislative consumer guarantees, such as guarantees as to the fitness for purpose of goods or services.⁵

Contracting out in practice

20.11 The ALRC did not conduct its own research into the nature or prevalence of contracting out in Australia. However, there is reason to assume that terms contracting out of copyright exceptions are common.

2 See Ch 2, framing principle 3.

3 D Clapperton and S Coronas, ‘Unfair Terms in Clickwrap and Other Electronic Contracts’ (2007) 35 *Australian Business Law Review* 152, 154.

4 The ALRC is directed not to duplicate work on TPMs being undertaken at international level and by the Attorney-General’s Department. See Australian Government Attorney-General’s Department, *Review of Technological Protection Measure Exceptions made under the Copyright Act 1968* (2012).

5 *Competition and Consumer Act 2010* (Cth) sch 1 s 64.

20.12 In 2002, the CLRC reported information about the extent to which contracting out was being used.⁶ It observed that agreements with online publishing companies may contain clauses that prevent libraries and archives from reproducing and communicating extracts of works, which would otherwise be permitted by the library and archives exceptions. Agreements may also exclude or limit the fair dealing exceptions, and the statutory licensing schemes for educational and other institutions and the services of the Crown.⁷ The CLRC confirmed that many of the online licences it had surveyed involved contracting out of copyright exceptions.⁸

20.13 Academic commentators have suggested that the ‘majority of electronic contracts involving material protected by copyright purport to restrict the uses of that material in ways that conflict with applicable exceptions to copyright, such as fair dealing’.⁹

20.14 Recent research funded by the Australian Research Council is said to indicate that the practice of excluding or limiting exceptions by contract is ‘just as (if not more) prevalent now as it was 10 years ago’.¹⁰ The study, by Robin Wright, found that common contract terms may hinder the ability of libraries to deliver interlibrary loans, reproduce and communicate materials for educational purposes, and prevent researchers or students relying on the fair dealing exceptions.¹¹

20.15 In a submission, Wright confirmed that an examination of excerpts from publisher agreements demonstrates that licence agreements include terms that ‘purport to exclude or limit a library’s ability to use the existing Australian copyright exceptions with licensed digital material’.¹²

20.16 In this Inquiry, many stakeholders submitted that contracting out has continued—and perhaps become more common—since the CLRC reported.¹³ The shift to online distribution of copyright materials was identified as a key driver of this trend.¹⁴

20.17 The National Library of Australia stated that only 21% of its licence agreements for subscription databases permit supply of copies to Australian users through the Australian interlibrary loan network, and 57% prohibit access by users outside the

6 Copyright Law Review Committee, *Copyright and Contract* (2002), ch 4. Information was gathered through submissions in response to the CLRC inquiry, and from a survey of online licence agreements.

7 *Ibid*, ch 4.

8 Uses that were prohibited by the licences included ‘reproducing, making derivative works from, or commercially exploiting the material and communicating, distributing or publishing the material’. Exceptions that were explicitly excluded included the computer programs exceptions and (in one case) exceptions allowing copying for satire or parody under the fair dealing doctrine. Further, many of the agreements examined prohibited the use of even insubstantial portions of material: *Ibid*, 129.

9 D Clapperton and S Corones, ‘Unfair Terms in Clickwrap and Other Electronic Contracts’ (2007) 35 *Australian Business Law Review* 152, 175.

10 ADA and ALCC, *Submission 213*.

11 R Wright, ‘Libraries and Licensing: the eFuture will Need Legal as well as Technical Skills’ (Paper presented at VALA 2012, Melbourne, 9 February 2012).

12 R Wright, *Submission 167*.

13 See, eg, ADA and ALCC, *Submission 213*; Australian Parliamentary Library, *Submission 107*.

14 Copyright Advisory Group—Schools, *Submission 231*; Society of University Lawyers, *Submission 158*; R Xavier, *Submission 146*.

NLA's premises. Further, none of the agreements permit the NLA to supply copies in response to requests from individuals and, therefore, prohibit it from supplying copies that would otherwise be permitted by fair dealing exceptions.¹⁵

20.18 Other stakeholders provided examples of contractual terms encountered by Australian libraries that potentially affect the availability of document supply and interlibrary loans.¹⁶ For example, contracting out has become an issue for parliamentary libraries, as online information service contracts limit or negate copyright exceptions:

This trend compromises the intended function of the exceptions, which is to provide members of Parliament with unimpeded access to quality information. There is a need for the exceptions to be broadened to provide immunity from infringement when using these services and/or copying from electronic and online services.¹⁷

20.19 Universities Australia stated that the most common forms of contractual limitations on commercially-published journal content were prohibitions on:

- use of content in course packs (otherwise permitted by pt VB of the *Copyright Act*);
- use of material for interlibrary loans (otherwise permitted by ss 49 and 50);
- electronic transmission of content between authorised users (otherwise permitted by ss 40 and 41);
- use of content for the purpose of data mining or text mining; and
- use other than 'personal use' of online broadcast material (otherwise permitted by pt VA).¹⁸

20.20 Stakeholders expressed concerns about the effect of contractual restrictions on fair dealing with copyright materials. The ABC stated that it is 'often placed in a worse position for having entered into a contract with a rights holder, where that contract restricts fair dealing, compared with its competitors for those rights, who have no such contract and who can fair deal with that content across platforms'.¹⁹

20.21 Internationally, a review of contracts conducted for the UK Strategic Advisory Board for Intellectual Property Policy in 2010 looked at empirical evidence from the UK and several other countries. Bargaining outcomes, the review found, are tilted towards rights owners, because consumers 'typically are not in a position to contest the terms of licences offered'.²⁰

15 National Library of Australia, *Submission 218*.

16 For example, Queensland Parliamentary Library, *Submission 718*; WA Parliament, *Submission 696*; ADA and ALCC, *Submission 213*.

17 WA Parliament, *Submission 696*.

18 Universities Australia, *Submission 246*.

19 ABC, *Submission 210*.

20 M Kretschmer, E Derclaye, F Favale and R Watt, *A Review of the Relationship between Copyright and Contract Law for the UK Strategic Advisory Board for Intellectual Property Policy* (2010), 4.

20.22 The review found that the market for electronic services is growing rapidly. The review also found that users' access to copyright content is increasingly governed by contract; and that there was 'robust evidence that licence agreements for software, digital consumer services and educational content routinely conflict with statutory copyright exceptions (for example regarding back-up copies and archiving)'.²¹

Current law

Contracting out and the *Copyright Act*

20.23 The *Copyright Act* generally contains no provisions that prevent agreements excluding or limiting the operation of exceptions, except in relation to the reproduction of computer programs. Therefore, for example:

- copyright owners of filmed recordings of sporting events may make it a condition that their customers do not provide the film to others who might exercise a fair dealing exception (for example, news reporting) or make use of the film other than as specified by contract; but
- software licensees cannot contract out of provisions allowing reverse engineering to make interoperable products or back-ups, and licensors, therefore, make these uses an exception to the restrictions in licences.

20.24 In relation to computer programs, s 47H of the *Copyright Act* expressly provides that 'an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting' the operation of certain exceptions permitting the reproduction of computer programs for technical study, back-up, security testing and error correction 'has no effect'.²²

20.25 These limitations on contracting out were inserted by the *Copyright Amendment (Computer Programs) Act 1999* (Cth), which resulted from the Government's consideration of a CLRC report on computer software protection. In that report, the CLRC stated that provisions regarding interoperability, back-up copying and de-compilation of locked programs would have little practical effect if parties could rely on contractual provisions to prevent these acts. It recommended that the *Copyright Act* be amended to ensure that these exceptions could not be avoided by contractual means.²³

20.26 The existence of an express provision against contracting out in s 47H arguably helps to confirm that exceptions elsewhere in the *Copyright Act* can be overridden by contract.²⁴ After considering the legislative history, the CLRC concluded that the effect

21 Ibid, 4. Similarly, consumer protection legislation is often ignored or hard to enforce—for example, because 'many online licence agreements are not easily understood, and contain excessive exclusions of liability'.

22 *Copyright Act 1968* (Cth) s 47H relating to agreements that exclude or limit exceptions provided under ss 47B(3), 47C–47F.

23 Copyright Law Review Committee, *Computer Software Protection* (1995), [10.106].

24 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.640].

of s 47H on agreements which exclude or limit other exceptions is ‘ultimately unclear’.²⁵

20.27 Several reasons why Parliament enacted an express provision only in relation to computer programs can be identified. These include that:

- s 47H applies expressly to specific exceptions implemented by the same amending legislation, so it is not possible to imply an intention on the part of Parliament that all pre-existing exceptions be subject to contract, no matter when they became part of the Act; and
- the relevant provisions of the *Copyright Amendment (Computer Programs) Act 1999* (Cth) were based on a model provided by a European Directive²⁶ on the protection of computer programs.²⁷

Enforceability of contracts

20.28 Leaving aside provisions of the *Copyright Act* itself, the enforceability of contractual terms excluding or limiting exceptions may also be affected by:²⁸

- consumer protection legislation—for example, provisions of the ACL, which proscribe misleading or deceptive conduct and unconscionable conduct in trade or commerce, and unfair contract terms in consumer contracts;²⁹
- competition legislation—notably provisions of the *Competition and Consumer Act 2010* (Cth), which prohibit misuse of market power;³⁰
- the ordinary principles of contract law concerning the formation of contracts—for example, where there is insufficient notice of, and assent to, the terms of online licences;³¹
- the equitable doctrine of unconscionable conduct—for example, where one party is known by the other to be at a special disadvantage and unfair or unconscientious advantage is taken;³² and
- the law relating to contracts that are contrary to public policy—where a contract term defeats or circumvents a statutory public purpose or policy.

25 Copyright Law Review Committee, *Copyright and Contract* (2002), 179.

26 Council of the European Communities, *Council Directive on the Legal Protection of Computer Programs* (1991).

27 See Copyright Law Review Committee, *Copyright and Contract* (2002), 174–179; J Carter, E Peden, K Stammer, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32, 45.

28 See Copyright Law Review Committee, *Copyright and Contract* (2002), ch 5.

29 *Competition and Consumer Act 2010* (Cth) sch 2, ch 2, pts 2–2, 2–3.

30 *Ibid* s 46.

31 An Attorney-General’s Department review of Australian contract law includes consideration of ‘challenges relating to internet contracting’: Australian Government Attorney-General’s Department, *Improving Australia’s Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law* (2012), 9.

32 The CLRC concluded that this doctrine was unlikely to apply to most contracts the subject of its review: Copyright Law Review Committee, *Copyright and Contract* (2002), 151.

20.29 As discussed below, there are differing views on whether, and in what circumstances, contractual terms excluding or limiting exceptions to copyright may be unenforceable. Depending on the circumstances, and where agreements are governed by Australian law, contractual terms that exclude or limit the operation of exceptions may be unenforceable due to legislative provisions outside the *Copyright Act* or the operation of general law (common law and equity).

Competition and consumer law

20.30 The ACL provides that a court may determine that a term of a standard form consumer contract is unfair and therefore void, including in response to proceedings taken by the ACCC.³³

20.31 Under the ACL, a ‘consumer contract’ includes a contract for the supply of goods and services to an individual who acquires them wholly or predominantly for personal, domestic or household use or consumption.³⁴ The ACL outlines a number of factors that the court must take into account in determining whether a contract is a ‘standard form contract’. Such contracts will typically be those that have been prepared by one party to the contract and are not subject to negotiation between the parties—that is, offered on a ‘take it, or leave it’ basis, as is typically the case with consumer contracts involving copyright.

20.32 The ACL provides that a contractual term is unfair if it:

- would cause a significant imbalance in the parties’ rights and obligations under the contract;
- is not reasonably necessary to protect the legitimate interest of a party to the contract; and
- would cause detriment to a party to the contract if it were to be applied or relied upon.³⁵

20.33 The ACL provides examples of the kinds of terms of a consumer contract that may be unfair, including for example, ‘a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract’.³⁶

20.34 The ACCC observed that it is not clear whether the ACL (or other parts of the *Competition and Consumer Act*) would operate to protect consumers or businesses where there is an imbalance of power between the parties to a copyright licence.³⁷

33 *Competition and Consumer Act 2010* (Cth) sch 2. The ACCC has been active in reviewing standard form consumer contracts in a number of industries, including in the airline, telecommunications, fitness and vehicle rental industries but has not, to date, focused on copyright licensing agreements. See Australian Competition and Consumer Commission, *Unfair Contract Terms: Industry Review Outcomes* (2013).

34 *Competition and Consumer Act 2010* (Cth) sch 2, s 23(3).

35 *Ibid* sch 2, s 24(1).

36 *Ibid* sch 2, s 25(1)(a). Robert Xavier suggested that the ACL’s examples of unfair contract terms could be augmented with a reference to ‘terms that exclude copyright exceptions’: R Xavier, *Submission 531*.

37 ACCC, *Submission 658*.

Choice submitted that the ACL does not provide adequate protection in these circumstances—that is, the ‘mere presence of the potential for action against unfair contract terms is not acting as a sufficient deterrent’ against contracting out.³⁸

Contract and public policy

20.35 It has been argued that some contractual provisions purporting to exclude or limit a licensee’s rights under the *Copyright Act* are ineffective to do so, as such terms are void or unenforceable on public policy grounds. This view is based on the general principle of contract law that, except where permitted by legislation, ‘a contract which purports to oust the jurisdiction of the courts is contrary to public policy and therefore void or unenforceable, but probably not an illegal contract’.³⁹

20.36 In relation to the *Copyright Act*, it may be sufficient that a court has jurisdiction to make orders in respect of rights conferred by the Act and that the rights conferred are of a public rather than private nature. The rights conferred by the *Copyright Act* may be characterised as public rights, because ‘at least some of the relevant provisions confer positive rights, in effect as statutory licences, which may be enforced by action against an owner’; and exceptions may be relied on as a defence in proceedings for infringement.⁴⁰

20.37 The case law on contracting out of legislative rights establishes that, ‘if the operation of a contractual provision defeats or circumvents the statutory purpose or policy, then the provision is inconsistent in the relevant sense and falls within the injunction against contracting out’.⁴¹

20.38 Applying these legal principles to contracting out under the *Copyright Act*, Professor J W Carter, Professor Elisabeth Peden and Kristin Stammer have argued that:

- contractual terms that purport to exclude or limit the fair dealing exceptions are unenforceable because to ‘permit an owner to sue for breach of contract in relation to conduct amounting to a fair dealing would circumvent the scheme of the Act under which fair dealing is permitted’;⁴² and
- contractual terms that purport to exclude or limit the exceptions that provide for the copying of copyright materials in libraries or archives are unenforceable, because these exceptions are based on, and give effect to, important policy concerns and the ‘real beneficiaries’ of the exceptions are the users of libraries and archives.⁴³

38 Choice, *Submission 745*.

39 J Carter, E Peden, K Stammer, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32, 41.

40 *Ibid*, 41–42.

41 *Ibid*, 42, citing *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516, 522.

42 That is, a contractual provision cannot convert fair dealing into an infringement of copyright and the Act ‘also impliedly prohibits a contractual claim in relation to conduct amounting to a fair dealing’: J Carter, E Peden, K Stammer, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32, 46.

43 *Ibid*, 47.

US copyright misuse doctrine

20.39 Some comparison with United States law is useful, given that the US has a fair use exception similar to that recommended for Australia in this Report.

20.40 US law has developed a copyright-specific defence against copyright infringement based on a doctrine of copyright misuse. Under this doctrine, US courts may refuse to enforce agreements that attempt to extend protection of copyright material beyond the limits set by copyright law, including limits on the duration of copyright protection. Once a defence of copyright misuse has been proven, the rights holder is prevented from enforcing its copyright until the misuse has been removed.

20.41 In *Lasercomb America v Reynolds*,⁴⁴ a licensee had agreed not to develop a competitive computer-aided design program for 99 years—beyond the period of protection by copyright laws. The Court found that the copyright owner was trying effectively to extend the term and scope of its copyright beyond the permitted limits of copyright law, preventing people from legitimately developing competitive software.

20.42 The underlying policy rationale for the copyright misuse doctrine is the copyright and patent clause of the *US Constitution*, which states an intention ‘to promote the Progress of Science and useful Arts’. The application of the doctrine depends on ‘whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright’.⁴⁵ Courts have suggested that anti-competitive licensing agreements and agreements that exclude fair use may conflict with the public purposes of copyright.⁴⁶

20.43 However, there seem to be no clear instances of the application of the copyright misuse doctrine to the multitude of online contracts that exclude otherwise fair use of copyright materials. Rather, courts have generally followed a ‘freedom of contract’ line.⁴⁷ In a submission to this Inquiry, the Kernochan Center for Law, Media and the Arts, at the Columbia University School of Law advised that the doctrine of copyright misuse is capable of invalidating contract provisions only in the ‘most egregious’ or ‘obviously overreaching’ of cases.⁴⁸

44 *Lasercomb America v Reynolds*, 911 F 2d 970 (4th Cir, 1990).

45 *Ibid*, 978.

46 *Video Pipeline Inc v Buena Vista Home Entertainment Inc*, 342 F 3d 191 (3rd Cir, 2003), 204–205.

47 V Moffat, ‘Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking’ (2007) 14(1) *University of California Davis Law Review* 45, 50.

48 Kernochan Center for Law and Media and the Arts Columbia Law School, *Submission 649*. See also M Kretschmer, E Derclaye, F Favale and R Watt, *A Review of the Relationship between Copyright and Contract Law for the UK Strategic Advisory Board for Intellectual Property Policy* (2010), 104–105.

Should contracting out be enforceable?

20.44 Many stakeholders disagreed with proposals to place statutory limitations on contracting out.⁴⁹ This view is held primarily because unhindered freedom of contract is seen as important in facilitating the efficient and competitive distribution of copyright materials; and statutory limitations on contracting out may cause uncertainty concerning the enforceability of contracts.

20.45 BSA/The Software Alliance, for example, stated that freedom of contract is vitally important to business in the digital economy because copyright owners are increasingly reliant on licensing agreements (in providing access to content rather than selling copies). Freedom to agree on the terms of licensing agreements

is fundamental to the development of new products and services, which may depend upon new and innovative business models. The ability to agree on specific licence terms, such as the duration of a licence, geographical restrictions, technological platforms, reproduction of material, is essential to those business models.⁵⁰

20.46 The Australian Recording Industry Association stated that, in order to foster the active participation of Australian businesses in the digital economy, it is important to provide them with ‘flexibility to contract and certainty regarding for example, the provision of content from creators and effective protection measures’.⁵¹ Similarly, Australian Film/TV Bodies submitted that, in ‘guaranteeing freedom of contract, the *Copyright Act* promotes distribution and efficient use of copyright material in online and multi-jurisdictional environments’.⁵²

20.47 Sporting bodies also expressed concerns about limitations on freedom of contract. The AFL emphasised that licensing arrangements with media companies are undertaken on ‘an arm’s length basis with large corporations’, which should be ‘free to contract on whatever terms they see fit in relation to copyright exceptions’.⁵³ The NRL stated that limitations on contracting out ‘even if limited to private and domestic use’ would be problematic as it would prevent, for example, a sporting body ‘licensing digital downloads on a once only or limited use basis’.⁵⁴

49 Foxtel, *Submission 748*; ASTRA, *Submission 747*; News Corp Australia, *Submission 746*; iGEA, *Submission 741*; Australian Film/TV Bodies, *Submission 739*; NRL, *Submission 732*; ARIA, *Submission 731*; Cricket Australia, *Submission 700*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*; Music Council of Australia, *Submission 647*; Screenrights, *Submission 646*; Springer Science and Business Media, *Submission 639*; COMPPS, *Submission 634*; Australian Publishers Association, *Submission 629*; Association of American Publishers, *Submission 611*; BSA, *Submission 598*; Motion Picture Association of America Inc, *Submission 573*; AIPP, *Submission 564*; ALPSP, *Submission 562*.

50 BSA, *Submission 598*.

51 ARIA, *Submission 731*. For example, consumers typically pay higher prices for greater access so that different delivery models ‘provide varied consumer offerings and services which benefit both consumers and creators’ and are also ‘the business models of third party suppliers’: ARIA, *Submission 241*.

52 For example, ‘a download service may allow a fixed number of copies of downloaded content, a streaming service may prohibit the copying of streams, and a service may supply a time limited copy to be reviewed within a fixed window’: Australian Film/TV Bodies, *Submission 739*.

53 AFL, *Submission 717*.

54 NRL, *Submission 732*. See also COMPPS, *Submission 634*.

20.48 Certainty was a significant concern for stakeholders.⁵⁵ John Wiley & Sons observed that ‘agreeing the scope of a use under licence can provide a pragmatic business solution satisfactory to both parties and thus increase legal certainty and mitigate risk, both essential elements of a robust policy for innovation’.⁵⁶

20.49 Springer Science and Business Media stated that contracts and licensing ‘allow specifically defined and tailored agreements and therefore enable legal certainty that exceptions often do not give’. In contrast, if copyright exceptions ‘override commercial terms, this is likely to lead to disagreements between rights holders and users about the scope and reach of exceptions’.⁵⁷

20.50 More generally, contract was seen as having an important role in protecting the legitimate interests of copyright holders.⁵⁸ For example, an artist who releases music for children may not wish to see his or her sound recordings used in contexts that are ‘adult or perverse’, even though the use may be considered as a ‘fair dealing’.⁵⁹ The Coalition of Major Professional and Participation Sports, for example, observed that its members and their licensees may contract out of exceptions to protect the reputation or integrity of their sports—for example, to restrict the use of violent sports ‘highlights’.⁶⁰

20.51 The international competitiveness of Australia was considered to be at risk, if contracting out is limited.⁶¹ That is, limitations on contracting out in Australian law may make Australia ‘less attractive as a hub for business’.⁶² The Interactive Games and Entertainment Association stated that Australian creators need to be able to ‘develop new and innovative business models without the risk of such business models being undermined by local copyright exceptions’.⁶³

20.52 The fact that the US does not have statutory limitations on contracting out was also considered to be significant, given the ALRC’s proposals to introduce a fair use exception.⁶⁴

20.53 Finally, it was suggested that enacting limitations on contracting out might conflict with Australia’s obligations to comply with the three-step test under the *Berne Convention*,⁶⁵ as ‘rights owners would not be able to resolve by contract any exceptions which may conflict with the normal exploitation of their work’.⁶⁶

55 See, eg, Australian Film/TV Bodies, *Submission 739*; International Association of Scientific Technical and Medical Publishers, *Submission 560*.

56 John Wiley & Sons, *Submission 239*.

57 Springer Science and Business Media, *Submission 639*.

58 CSIRO, *Submission 242*; ARIA, *Submission 241*.

59 ARIA, *Submission 241*.

60 COMPPS, *Submission 634*.

61 Springer Science and Business Media, *Submission 639*; ARIA, *Submission 241*; IASTMP, *Submission 200*; iGEA, *Submission 192*; Thomson Reuters, *Submission 187*.

62 IASTMP, *Submission 200*.

63 iGEA, *Submission 192*.

64 Australian Publishers Association, *Submission 629*.

65 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 9(2).

66 ALPSP, *Submission 562*.

Limitations on contracting out

20.54 In the Discussion Paper, the ALRC proposed that limitations on contracting out should apply to the exceptions for libraries and archives, and the fair use or fair dealing exceptions, only to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.⁶⁷

20.55 Essentially, if a fair use exception were introduced, the proposed limitations on contracting out would have applied to some, but not all, fair uses. That is, the proposal would have created a ‘hierarchy’ of fair use, for the purposes of limiting contracting out.

20.56 The rationale for taking this approach was that while the libraries and archives exceptions and fair dealing exceptions promote important public interests, any broader limitation on contracting out—for example, extending to all fair uses—would not be practical or beneficial.

20.57 While this approach was welcomed by some stakeholders,⁶⁸ others who favoured limitations on contracting out, criticised the proposed hierarchy of limitations in relation to fair use,⁶⁹ or otherwise considered that the limitations did not extend far enough.⁷⁰

20.58 The ADA and ALCC strongly supported limitations on contracting out, but raised detailed concerns about distinguishing between categories of fair use for this purpose. These included concerns that the ALRC proposal would:

- be unworkable in practice because of the difficulties involved in differentiating between illustrative purposes, because many uses have multiple purposes (for example, study and education)⁷¹ and other uncertainties concerning what uses would be covered;

67 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 17–1.

68 Free TV Australia, *Submission 865*; ABC, *Submission 775*; CAMD, *Submission 719*; Arts Law Centre of Australia, *Submission 706*; Cyberspace Law and Policy Centre, *Submission 640*; SBS, *Submission 556*.

69 R Xavier, *Submission 816*; Copyright Advisory Group—Schools, *Submission 707*; Australian Parliamentary Library, *Submission 694*; Communications Alliance, *Submission 652*; Google, *Submission 600*; ADA and ALCC, *Submission 586*.

70 Copyright Advisory Group—Schools, *Submission 861*; University of Sydney, *Submission 815*; AIATSIS, *Submission 762*; eBay, *Submission 751*; NFSA, *Submission 750*; Choice, *Submission 745*; Internet Industry Association, *Submission 744*; Queensland Parliamentary Library, *Submission 718*; EFA, *Submission 714*; WA Parliament, *Submission 696*; Australian Parliamentary Library, *Submission 694*; ACCAN, *Submission 673*; R Giblin, *Submission 660*; ACCC, *Submission 658*; Communications Alliance, *Submission 652*; Association of Parliamentary Libraries of Australasia, *Submission 650*; Google, *Submission 600*; National Archives of Australia, *Submission 595*.

71 A student ‘primary user’ and a ‘third party’ educational institution facilitating the use may have different purposes. Therefore, it may be difficult in practice to avoid addressing questions about ‘who made the copy’, rather than focusing on questions of fairness: Copyright Advisory Group—Schools, *Submission 707*.

- undermine the operation and rationale of the fair use exception, by introducing an emphasis on purpose rather than fairness—that is, limits on contracting out would depend on whether a use falls within a particular illustrative purpose, and not on whether use is fair;
- be contrary to public policy, because protecting illustrative purposes that align with the current fair dealing provisions, at the expense of the other illustrative purposes, jeopardises public interests such as education and public administration; and
- undermine any attempt to ‘future-proof’ the *Copyright Act*, because new uses and markets may not be able to develop if constrained by contract.⁷²

20.59 A particular concern expressed by stakeholders was that any division of illustrative purposes risks creating a presumption that some illustrative purposes are more likely to be fair use than others, (which would be contrary to the ALRC’s intention).⁷³

20.60 Google expressed concern that purposes considered ‘non-core’ to the public interest may come to be seen as more presumptively fair than those that are not.⁷⁴ The Communications Alliance objected to what it characterised as a situation where ‘old media’ uses—such as criticism or review and reporting news—would, in effect, be ‘quarantined while new uses which are just as critical from a public interest perspective will be considered as second tier’.⁷⁵

20.61 CAG Schools had particular concerns about contracting out and educational uses. It submitted that, as a matter of public policy, treating education as a ‘non-core’ fair use would be ‘at odds with the universal acknowledgement of the role of the education sector in advancing the public interest’. Further, it considered ‘any attempt to divorce the public interest in education from the public interest in libraries, and in research and study’ to be highly artificial.⁷⁶

20.62 More generally, CAG Schools submitted that the contracting out proposal would ‘undermine the flexibility and balancing of interests’ sought by the ALRC. It considered that the proposal would enable rights holders, not Parliament, to set the scope of fair use for ‘non-core’ illustrative purposes.⁷⁷

72 ADA and ALCC, *Submission 586*.

73 R Xavier, *Submission 816*; Copyright Advisory Group—Schools, *Submission 707*; Australian Parliamentary Library, *Submission 694*; Communications Alliance, *Submission 652*; Google, *Submission 600*; ADA and ALCC, *Submission 586*.

74 Google, *Submission 600*.

75 Communications Alliance, *Submission 652*.

76 Copyright Advisory Group—Schools, *Submission 707*.

77 Ibid.

20.63 Many stakeholders submitted that limitations on contracting out should extend to all fair uses,⁷⁸ or all copyright exceptions.⁷⁹

20.64 The ADA and ALCC, for example, proposed that ‘the specific library and archive exceptions and fair use in its entirety [should be] protected from contracting out’. Limitations on contracting out were justified on the basis that the ALRC’s reform proposals ‘describe a cohesive and balanced copyright system, offering protection and incentives to users and creators of content’ and, therefore, it is ‘important that that balance is preserved and not skewed by contractual arrangements’.⁸⁰

20.65 There may also be a competition policy rationale for broader limitations on contracting out. The ACCC advised:

A fair use exception should properly reflect a cost-benefit framework for copyright protection and seek to address inefficient transaction costs and the potential for the extent and use of the rights conferred by copyright to restrict competition and create market power. In such circumstances, the ACCC considers that it necessarily follows that contracting out is more likely to be economically detrimental than beneficial.⁸¹

20.66 CAG Schools submitted that limitations on contracting out should extend to all copyright exceptions. The effect of a such a statutory limitation should be to ensure that ‘contracts cannot be used to automatically rule out reliance on fair dealing’. However, contractual terms that purport to restrict or prevent certain uses should remain relevant to an analysis of fairness.⁸² Dr Rebecca Giblin also considered that a determination of fair use should depend ‘upon consideration of all relevant factors, including any public interest considerations and the precise terms of the licence’.⁸³

20.67 Commonwealth and state parliamentary libraries submitted that there should be no contracting out of exceptions applying to their operations.⁸⁴

20.68 Given the importance of the public interests served by copyright exceptions and the ease with which exceptions can be overridden by contract, Dr Giblin stated that broader limitations on contracting out should be considered. She suggested that it should be made explicit that, in addition to the categories of exception covered by the ALRC’s proposal, contracting out will not be enforceable where it is ‘against the public interest’.⁸⁵

78 R Xavier, *Submission 816*; eBay, *Submission 751*; Choice, *Submission 745*; Internet Industry Association, *Submission 744*; EFA, *Submission 714*; ACCAN, *Submission 673*; R Giblin, *Submission 660*; ACCC, *Submission 658*; ADA and ALCC, *Submission 586*.

79 Copyright Advisory Group—Schools, *Submission 707*.

80 ADA and ALCC, *Submission 586*.

81 ACCC, *Submission 658*.

82 Copyright Advisory Group—Schools, *Submission 707*.

83 R Giblin, *Submission 660*.

84 Queensland Parliamentary Library, *Submission 718*; WA Parliament, *Submission 696*; Australian Parliamentary Library, *Submission 694*; Association of Parliamentary Libraries of Australasia, *Submission 650*. The National Archives of Australia proposed that contracting out of the use of material for ‘public administration’ and ‘cultural heritage’ should also be restricted: National Archives of Australia, *Submission 595*.

85 R Giblin, *Submission 660*.

20.69 The Law Council expressed concerns about a ‘blanket limitation’ on contracting out and submitted that the question should be ‘whether a term of an agreement that purports to exclude or limit the operation of the relevant copyright exception is fair and reasonable in all of the circumstances’.⁸⁶

Approach to reform

20.70 Contracting out raises fundamental questions about the objectives of copyright law; the nature of copyright owners’ exclusive rights and the exceptions to those rights; and the respective roles of the *Copyright Act*, contract and competition law and policy in governing licensing practices.

20.71 The issue has been characterised as involving a collision between two important legal principles: statutory rights reflecting public policy on the one hand; and freedom of contract on the other⁸⁷—or public versus private ordering of rights.

20.72 Copyright owners generally oppose limitations on contracting out because this challenges freedom of contract, with possible unintended consequences. Contractual terms are said to provide clarity and certainty for copyright users about how they may deal with copyright materials.

20.73 The economic value of freedom of contract is an important factor. Arguably, most contractual restrictions imposed on licensees ‘are designed either to protect the integrity of the work or the owner’s financial interests’. Both these interests are legitimate concerns.⁸⁸

20.74 From this perspective, copyright users should be able to effectively agree that they will pay for uses covered by unremunerated exceptions in the *Copyright Act*, for example, under the libraries and archives exceptions. Any restrictions on permissible uses should, in theory, be reflected in the price paid to the copyright owner.

20.75 At the same time, copyright users may gain benefits under the contract that they might otherwise not have, for example, access to the whole of the work for the making of copies or for the purposes of communication or adaptation. A contractual term is not ‘necessarily unfair’ if it prohibits something allowed under a copyright exception when the context in which the term is used is fully considered, including the benefit to the user of the contract as a whole.⁸⁹

86 The Law Council stated that ‘[i]n this way, both freedom of contract and the public interests protected by copyright are protected’. For example, where an author provides his or her novel to a book reviewer, for the purpose of writing a review and a term of their agreement is that the review must not be published until three months later, when the novel is publicly released. ‘This is a fair and reasonable contractual term that limits the fair dealing exception for criticism and review’: Intellectual Property Committee, Law Council of Australia, *Submission 765*.

87 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.640].

88 J Carter, E Peden, K Stammer, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32, 34.

89 Copyright Council, *Response to report of Copyright Law Review Committee on Copyright and Contracts* (2003).

20.76 However, contracting out has the potential to render exceptions under the *Copyright Act* inoperative. Contractual terms excluding or limiting copyright exceptions are commonly used. While contracts may create clarity and provide copyright users with permission to use materials in ways that would otherwise be an infringement, some contractual terms can also erode ‘socially and economically important uses of copyright works’.⁹⁰ Further, copyright users are often unable to negotiate the terms on which copyright materials are licensed, particularly where contracts are entered into online.

20.77 Where copyright owners are in a strong bargaining position, they may overreach and circumvent the provisions of the Act, so that ‘private ordering’ leads to a different balancing of parties’ rights than is contemplated in the many complex and carefully structured statutory provisions of the *Copyright Act*.⁹¹

20.78 There are differing views on the extent to which the general law and legislation outside the *Copyright Act* are adequate to constrain contracting out, at least where agreements are governed by Australian law.

20.79 In particular, as discussed above, it has been argued that many contractual terms that restrict user rights under the *Copyright Act* are invalid through the application of ‘the public policy rule relating to the ouster of the jurisdiction of the courts’.⁹² Therefore, expressly prohibiting contracting out may not be necessary, because ‘the common law already provides for invalidity in cases where the public interest requires it’.⁹³ Other commentators, however, observe that there is nothing in the *Copyright Act* to suggest that copyright exceptions cannot be pre-empted contractually.⁹⁴

20.80 The ALRC has concluded that contracting out puts at risk the public benefit that copyright exceptions are intended to provide and, therefore, some express limitations should be considered. This conclusion is consistent with 2002 recommendations of the CLRC,⁹⁵ and with proposed reforms in the UK and Ireland.

20.81 In its 2012 response to the Hargreaves Review,⁹⁶ the UK Government announced that it would legislate to ensure that new copyright exceptions ‘cannot be undermined or waived by contract’.⁹⁷ In June 2013, the UK Intellectual Property

90 UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 19.

91 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.640].

92 J Carter, E Peden, K Stammer, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32, 54. Carter, Peden and Stammer consider that, as the rights conferred by the *Copyright Act* include positive rights—for example, statutory licences that may be enforced by action against an owner, and rights that may be relied upon by way of defence in proceedings for infringement, this is sufficient to bring the public policy rule into operation: *Ibid*, 41–42.

93 J Carter, E Peden, K Stammer, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 *Journal of Contract Law* 32, 54.

94 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.640].

95 Copyright Law Review Committee, *Copyright and Contract* (2002).

96 The Hargreaves Review recommended, in 2011, that the UK Government should change the law to make it clear that no exception to copyright can be overridden by contract: I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 51.

97 UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 19.

Office released draft legislation to modernise copyright exceptions, including new exceptions for private copying, parody, quotation and public administration, which include limitations on contracting out.⁹⁸

20.82 In Ireland, the Copyright Review Committee recommended in 2013, just before completion of this Report, that any contract term which unfairly purports to restrict an exception permitted by Irish copyright law should be void.⁹⁹ Whether a term is unfair would, under the Committee's recommendation, depend on all the circumstances of the case and, in particular, where a contract 'has not been individually negotiated, a term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the party who had not drafted the term in question'.¹⁰⁰

Scope of new limitations

20.83 Reform in this area should address public policy problems caused by contracting out, without unnecessarily restricting innovation and flexibility in licensing practices.

20.84 New limitations on contracting out might apply to all exceptions, or only some exceptions—for example, those that serve certain important public interests, or which are fundamental to the copyright balance. In this context, the CLRC recommended that the 'traditional fair dealing defences and the provisions relating to libraries and archives which permit uncompensated copying and communication to the public within specified limits, and which embody the public interest in education, the free flow of information and freedom of expression, should be made mandatory'.¹⁰¹

20.85 The CLRC's recommendations were based on a view that contracting out may upset the copyright 'balance'.¹⁰² The CLRC considered that the fair dealing exceptions are 'an integral component of the copyright interest'.¹⁰³

20.86 The idea of balance is an underlying theme of those seeking to defend the operation of copyright exceptions from contractual arrangements. The concern is that 'privately enforced arrangements have the potential to upset important public policies

98 Intellectual Property Office (UK), *New Exception for Quotation* (2013); Intellectual Property Office (UK), *Technical Review of Draft Legislation on Copyright Exceptions—New Exception for Private Copying* (2013); Intellectual Property Office (UK), *Technical Review of Draft Legislation on Copyright Exceptions—New Exception for Parody* (2013); Intellectual Property Office (UK), *Technical Review of Draft Legislation on Copyright Exceptions—Amendment to Exceptions for Public Administration* (2013).

99 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 13.

100 *Ibid.*, 138.

101 Copyright Law Review Committee, *Copyright and Contract* (2002), 266, 274, referring to *Copyright Act 1968* (Cth) ss 40, 41, 42, 43, 43A, 48A, 49, 50, 51, 51AA, 51A, 52, 103A, 103B, 103C, 104, 110A, 110B, 111A. The CLRC also considered that 'exceptions introduced in recent years relating to technological developments should also be made mandatory'—specifically provisions allowing for temporary reproductions in the course of a communication: referring to *Copyright Act 1968* (Cth) ss 43A, 111A.

102 Copyright Law Review Committee, *Copyright and Contract* (2002), 262.

103 *Ibid.*, 266.

embodied in copyright law, which are premised on establishing a balance of interests'.¹⁰⁴

20.87 However, recourse to the idea of a copyright 'balance' that must be maintained in the face of freedom of contract may be criticised.¹⁰⁵ The ALRC is not convinced that limitations on contracting out can be justified by recourse to arguments based on a need to maintain a copyright balance. The idea of balance is constantly contested, as legislators and policy makers seek to determine how rights should be reformulated or modified¹⁰⁶—a process illustrated by this Inquiry.

20.88 Other arguments for and against limitations on contracting out derive from different conceptual understandings of copyright exceptions—on whether exceptions are considered to define the scope of the copyright owner's exclusive rights (that is, are integral to those rights), or are simply defences to claims of infringement of those exclusive rights.

20.89 If the former view is taken, it may be easier to justify limiting contracting out—on the basis that the copyright owner is seeking to extend its exclusive rights beyond their statutory limits. Again, however, the ALRC is not convinced that such an analysis is the most useful prism through which to view the issue, especially because it raises conceptual arguments on which stakeholders have long disagreed.

20.90 A better criterion for identifying exceptions that should be subject to statutory protection from contracting out is the extent to which exceptions serve defined public purposes that warrant protection. Limitations on contracting out of exceptions that serve public purposes may promote fair access to content, consistently with the framing principles for this Inquiry.¹⁰⁷

20.91 A 2010 paper for the UK Strategic Advisory Board for Intellectual Property Policy examined how the rationales for different copyright exceptions may dictate whether or not contractual overriding should be permitted. The paper notes distinctions between exceptions that safeguard 'fundamental freedoms' or 'reflect public policy norms' (such as criticism or review; and news reporting); and those that affect 'less fundamental principles'.¹⁰⁸ While there is a case for protecting the former category of

104 D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd, 8.

105 See, eg, Australian Publishers Association, *Submission 225*. Lindsay notes that simply to invoke the concept of balance says 'nothing about why the objective of copyright law should be to balance owner and user interests, what an appropriate balance should be, and whether the balance established by the current complex combination of exclusive rights and exceptions is anywhere near appropriate': D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd, 8.

106 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.10].

107 Ch 2, framing principle 3.

108 M Kretschmer, E Derclaye, F Favale and R Watt, *A Review of the Relationship between Copyright and Contract Law for the UK Strategic Advisory Board for Intellectual Property Policy* (2010), 73.

exceptions, exceptions that simply address market failure (such as statutory licences), do not justify such protection.¹⁰⁹

Contracting out and fair use

20.92 The nature of an open-ended fair use exception means that limitations on contracting out may have unintended consequences for business models for the distribution of copyright materials. One reason policy makers have been reluctant to be prescriptive about limitations on contracting out is the difficulty of predicting future developments in emerging markets and technologies.¹¹⁰ Unnecessary limitations on freedom to contract may reduce the flexibility and adaptiveness to new technologies of the copyright regime.¹¹¹

20.93 It is significant that, in the US, there are no statutory restrictions on contracting out of fair use. Arguably, freedom to contract becomes more important in a fair use environment:

As the copyright statute becomes less specific and certain in outlining the parameters and boundaries of free-use exceptions, the value of contractual provisions that can translate general statutory ‘principles’ into specific licensing ‘rules’ to which the parties to the contract agree to be bound increases proportionally.¹¹²

20.94 The fair use exception covers an open-ended category of uses, only some of which serve important public interests. However, as discussed above, distinguishing between different categories of fair use for the purpose of limitations on contracting out is problematic and may have flow-on effects for the interpretation of fair use.

20.95 For these reasons, the ALRC does not consider that the *Copyright Act* should provide statutory limitations on contracting out of the fair use exception. In some circumstances, as discussed above, other laws may operate to render contractual terms unenforceable where they are against public policy or unfair.

20.96 The ALRC expects that the contractual background to any dispute over copyright infringement would nevertheless be able to be taken into account in determining whether fair use exists—in particular, as part of the assessment of the ‘purpose and character of the use’ under the first fairness factor. That is, whether a particular use was in breach of contract may be relevant to a fairness determination. It may also be possible to take into account the effect that a finding of fair use would have on a copyright owner’s ability to use contracts to control the market for its works, under the fourth (‘potential market’) factor.¹¹³

109 Ibid, 73–74.

110 D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd, 110.

111 Ch 2, framing principle 4.

112 Motion Picture Association of America Inc, *Submission 573*.

113 So that, ‘contractual provisions that are genuinely reasonable and necessary to protect rights-holders’ markets should not be unduly affected’: R Xavier, *Submission 816*. See also R Giblin, *Submission 660*.

Contracting out and fair dealing

20.97 In the Australian context, the existing fair dealing exceptions¹¹⁴ protect important public interests in education, the free flow of information and freedom of expression, which the CLRC recommended should be protected. Consistently, the ALRC recommends that, if fair use is not enacted, limitations on contracting out should apply to these fair dealing exceptions. These exceptions are long-established and their scope is well understood, so limitations on contracting out should not cause disruption to existing business models.

20.98 The new fair dealing exception incorporates the existing fair dealing provisions and, in addition, provides for fair dealing covering quotation, non-commercial private use, incidental or technical use, educational use, library or archive use, and access for people with disability.¹¹⁵

20.99 In the ALRC's view, these should also be covered by limitations on contracting out. In part, this is a pragmatic recommendation, avoiding the need to distinguish between different categories of fair dealing for the purposes of contracting out. In part, it reflects a balancing of interests. That is, if users of copyright materials continue to be restricted to a closed category of fair uses, these rights should be protected from contracting out. In the less confined, more market-oriented environment of an open-ended fair use exception, limitations on contracting out are harder to justify and more likely to have unintended effects.

Other exceptions

20.100 Whether or not fair use is implemented, statutory limitations on contracting out should apply to the library and archives exceptions.¹¹⁶ These are clearly for public rather than private purposes. The beneficiaries of the rights are users of the libraries. For example, under s 48A of the *Copyright Act*, the copyright in a work is not infringed by anything done by a parliamentary library for the sole purpose of assisting a person who is a member of parliament in the performance of the member's duties. The designated beneficiary is the member of parliament, on whose behalf the act is done.¹¹⁷

20.101 The fact that users of libraries and archives benefit from these exceptions, but are not parties to the licensing arrangements entered into by libraries and archives, makes it easier to argue that these exceptions should not be able to be removed by contract. An express limitation on contracting out from these exceptions may help remedy problems being experienced by libraries, in particular. Such an approach would be consistent with the principle of promoting fair access to, and wide dissemination of, content.¹¹⁸

114 *Copyright Act 1968* (Cth) ss 41, 103A; 41A, 103AA; 42, 103B; s 43(2).

115 See Ch 6.

116 *Copyright Act 1968* (Cth) ss 48A, 49, 50, 51, 104A and the new exception for preservation copying recommended in Ch 12.

117 J Carter, E Peden, K Stammer, 'Contractual Restrictions and Rights Under Copyright Legislation' (2007) 23 *Journal of Contract Law* 32, 46–47.

118 See Ch 2, framing principle 3.

20.102 Arguably, the judicial proceedings exceptions¹¹⁹ and government use exceptions¹²⁰ should also be subject to express limitations on contracting out. The rationale for these exceptions is to protect the public interest in the efficient functioning of the justice system and public administration more generally. The new exceptions cover use of copyright material for public inquiries; where a statute requires public access; and where copyright material is sent to governments in the course of public business.¹²¹

20.103 However, a contractual term that sought to prevent copyright material being used in judicial proceedings or a public inquiry would be among those most likely to be found contrary to public policy and, therefore, void or unenforceable under the common law doctrine discussed above. In any case, the copyright material used under the recommended new exceptions will not often have been acquired under a contract.

Framing the limitations

20.104 The wording of the ALRC's Discussion Paper proposal on contracting out was based on the language used in s 47H, the only existing limitation on contracting out contained in the *Copyright Act*.¹²² This section 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 [the computer program exceptions], has no effect.

20.105 The Law Council submitted that any new limitation on contracting out should not follow this model because s 47H purports to invalidate agreements that exclude or limit exceptions, whether or not a particular act infringes copyright. A contracting out provision should focus on the acts contemplated by the exception.¹²³

20.106 While the exact wording of an Australian provision is best left to specialist parliamentary drafters, the proposed UK provisions appear to avoid this particular problem in providing that:

To the extent that the term of any contract purports to restrict or prevent the doing of any act which would otherwise be permitted by [an exception], that term is unenforceable.

20.107 The ALRC recognises that the recommendation, if implemented, will not affect contracts governed by foreign law. Licensing agreements may specify that the law of another country will apply in determining the rights of the parties, or that a foreign court has exclusive jurisdiction over disputes. Parties to a contract can choose

119 *Copyright Act 1968* (Cth) ss 43(1), 104.

120 See Ch 15.

121 These new exceptions would be available to Commonwealth, state and local governments. See Ch 15.

122 Another model is provided by the Australian Consumer Law: *Competition and Consumer Act 2010* (Cth) sch 1 s 276.

123 The Law Council submitted that limitations on contracting out should provide that 'a term of a contract is void if (a) the term prevents a person from doing an act falling within one of the nominated exceptions; and (b) the term is unfair or unreasonable. The provision could set out factors to be taken into account in determining whether the term is unfair or unreasonable': Intellectual Property Committee, Law Council of Australia, *Submission 765*.

the proper law by an express provision in their agreement. Where the parties have not chosen the proper law, the contract is, in general, governed by the system of law with which the transaction has its closest and most real connection.¹²⁴

20.108 While Australian statutory limitations on contracting out would not affect contracts governed by foreign law, it is also possible to enact accompanying provisions that override the parties' ability to choose foreign law,¹²⁵ or will apply despite the parties' express choice of law.¹²⁶ The Australian Government may wish to consider whether to recommend such a provision, limiting parties' ability contractually to choose a foreign system of law, where the contract would otherwise be governed by Australian law.¹²⁷

20.109 Finally, in recommending limitations on contracting out that are only applicable to some exceptions, the ALRC is not indicating that contractual terms excluding other exceptions should necessarily be enforceable. Rather, this is a matter that should be left to be resolved under the general law or other legislation, including the *Competition and Consumer Act*.

20.110 If the ALRC's recommendation is implemented, explanatory materials should record that Parliament does not intend the existence of an express provision against contracting out of some exceptions to imply that exceptions elsewhere in the *Copyright Act* can necessarily be overridden by contract, but that this would need to be determined on a case by case basis.¹²⁸

Recommendation 20–1 The *Copyright Act* should provide that any term of an agreement that restricts or prevents the doing of an act, which would otherwise be permitted by specific libraries and archives exceptions, is unenforceable.

Recommendation 20–2 The *Copyright Act* should not provide statutory limitations on contracting out of the fair use exception. However, if fair use is not enacted, limitations on contracting out should apply to the new fair dealing exception.

124 Thomson Reuters, *The Laws of Australia*, [5.11.1180].

125 See, eg, *Bills of Exchange Act 1909* (Cth) s 77.

126 See, eg, *Insurance Contracts Act 1984* (Cth) s 8.

127 For example, *Insurance Contracts Act 1984* (Cth) s 8 provides that, 'where the proper law of a contract or proposed contract would, but for an express provision to the contrary included or to be included in the contract or in some other contract, be the law of a State or of a Territory in which this Act applies or to which this Act extends, then, notwithstanding that provision, the proper law of the contract is the law of that State or Territory'. CSIRO submitted that the exercise of copyright exceptions in Australia should be protected 'notwithstanding governing law of the relevant contract': CSIRO, *Submission 774*.

128 The ADA and ALCC expressed concern that, in protecting some exceptions and being silent as to others, 'general principles of statutory interpretation' may operate to create a 'strong presumption' that the unprotected exceptions were not intended by Parliament to be protected: ADA and ALCC, *Submission 586*.

Technological protection measures

20.111 Concerns about contracts supplanting copyright law are ‘commonly coupled with concerns that technological forms of protection, such as encryption, will give copyright owners effective control over access to, and uses of, copyright material in digital form’.¹²⁹

20.112 The use and circumvention of TPMs raise similar policy issues to those raised by contracting out. It has been argued, for example, that if parties are not able to contract out of the fair dealing exceptions, neither should copyright owners be able to make fair dealing irrelevant by means of technological access controls.¹³⁰

20.113 Just as the CLRC recommended that the operation of some copyright exceptions should be preserved by statutory restrictions on contracting out, a number of previous reviews have reached similar conclusions in relation to TPMs.

20.114 In 2004, the Digital Agenda Review concluded that the *Copyright Act* should be amended to provide that ‘any attempt to contractually prohibit the use of a circumvention device or service for the purposes of fair dealing is unenforceable’.¹³¹ In 2006, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that an exception for ‘fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice’ be included in new TPM provisions of the *Copyright Act*.¹³²

20.115 The TPM provisions subsequently enacted by the *Copyright Amendment Act 2006* (Cth) did not contain any such exception, in part because of obligations under the Australia-US Free Trade Agreement.¹³³

20.116 If limitations on contracting out are implemented, consistent amendments to TPM provisions may be justified. That is, there may be little point in restricting contracting out of exceptions if TPMs can be used unilaterally by copyright owners to achieve the same effect.

129 D Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (2002), Research Paper prepared for the Centre for Copyright Studies Ltd, 5.

130 M De Zwart, ‘Technological Enclosure of Copyright: The End of Fair Dealing?’ (2007) 18 *Australian Intellectual Property Journal* 7, 38.

131 Phillips Fox, *Digital Agenda Review: Report and Recommendations* (2004), [1.6].

132 Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Review of Technological Protection Measures Exceptions* (2006), rec 27, [4.169].

133 *Australia-US Free Trade Agreement*, 18 May 2004, ATS 1 (entered into force on 1 January 2005), art 17.4.7(e)(viii). See M De Zwart, ‘Technological Enclosure of Copyright: The End of Fair Dealing?’ (2007) 18 *Australian Intellectual Property Journal* 7, 21.

