

3 July 2018

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Dear copyright modernisation consultation team,

**COPYRIGHT MODERNISATION CONSULTATION - CONTRACTING OUT OF COPYRIGHT EXCEPTIONS**

Thank you very much for the opportunity to provide a submission on reforms options for the *Copyright Act 1968*. I am an Australian academic living abroad, with research interests in the relationship between copyright exceptions and inconsistent contractual provisions. My submission, therefore, focuses on questions 3 and 4 of your consultation paper.

Noting that the 1 May 2018 Roundtable on contracting out summary made reference to recent related changes in UK law, my comments aim to provide context on legislative developments in the UK. Recent legislative proposals at the EU level may also be of interest to the consultation team. Australian law in this area has historically drawn from relevant EU directives – for instance, the section 47H contractual override provision of the *Copyright Act 1968* was heavily influenced by the EU Computer Programs Directive.<sup>1</sup> The European Commission is currently pursuing a project of modernising European copyright rules, and their proposed ‘Directive on Copyright in the Digital Single Market’ contains a number of new exceptions which include explicit provisions on the relationship between exceptions and contract.

To aid the consultation team I **attach** my publication on the UK amendments (Aronsson-Storrier, A. (2016). *Copyright exceptions and contract in the UK: the impact of recent amendments*, Queen Mary Journal of Intellectual Property, 6(1), 111-123.). The licence to publish I entered into with the publisher restricts republication, and I would be grateful if the attached final published version of the article was not made available online with this submission. That said, please note that a pre-publication version of the article is freely available to the public via the Social Science Research Network (available at <https://ssrn.com/abstract=2732025>).

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<sup>1</sup> See paragraph 10.106 of the Copyright Law Review Committee Report on *Computer Software Protection* (1994), discussing the (then) Article 9 of the EC Directive on Computer Programs (Directive 91/250/EEC). That EU Computer Program Directive has subsequently been updated (Directive 2009/24/EC) and the relevant contractual override provision is now Article 8. The EU Directive’s influence on section 47H was also discussed in the 2002 Copyright Law Review Committee Report on *Copyright and Contract* from paragraph 5.113.

## 1. Lessons from the UK's recent amendments

- 1.1. In 2014 the UK government introduced new and amended copyright exceptions, including new fair dealing exceptions permitting parody (section 30A) and text and data mining (section 29A). These new exceptions include a provision that states '[t]o the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable'. Some of the other exceptions amended in 2014, however, are silent in relation to inconsistent contractual provisions while some amended exceptions include provisions which mediate a more complex relationship between copyright exceptions and contract.
- 1.2. The legislative reform process leading to the amendments to the Copyright, Designs and Patents Act 1988 (UK) is detailed on pages 113 – 116 of my attached article. The article also examined the UK government's rationale for the changes (pages 117 - 118), being to increase certainty for users (who could rely on statutory exceptions, rather than consulting each copyright licence) and to prevent rights holders from acting in a way which undermines the benefit of the exceptions to society.
- 1.3. Aspects of the UK's reform process were unsatisfactory. Core public interest copyright exceptions (fair dealing for criticism and review and reporting current events) escaped legislative review and remain vulnerable to contractual override. This despite wide acceptance that news reporting and criticism and review have greater social importance and human right relevance than many of the new mandatory exceptions introduced in 2014.<sup>2</sup> This outcome was contrary to the recommendations of the government-commissioned Hargreaves Report that provided the impetus for the 2014 amendments, which argued: '[t]he Government should change the law to make it clear *no exception* to copyright can be overridden by contract'.<sup>3</sup> While the Government initially accepted this recommendation and proposed revising to the CDPA to make all exceptions mandatory,<sup>4</sup> after consultation it concluded that such a blanket approach was not permitted under EU copyright rules.<sup>5</sup> As a consequence, the government only gave consideration to the relationship between

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<sup>2</sup> See brief discussion in Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press, 4<sup>th</sup> Ed, 2014) 229 suggesting that this situation was not deliberate and would persist only until a codification of the CDPA. This issue was also discussed in 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.

<sup>3</sup> Ian Hargreaves, *Digital opportunity: a review of intellectual property and growth* (2011) 51 <<https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth>>. Emphasis added.

<sup>4</sup> Intellectual Property Office, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (Intellectual Property Office 2011) 8 <<https://www.gov.uk/government/publications/hargreaves-review-of-intellectual-property-and-growth-governmentresponse>>.

<sup>5</sup> Intellectual Property Office, *Modernising Copyright: A modern, robust and flexible framework* (2012) 19 <<http://copyright-debate.co.uk/wp-content/uploads/Modernising-Copyright-a-modern-robust-and-flexible-framework-Government-response.pdf>> 'There are some permitted acts which under European law may not override contract terms. A blanket ban on contract overriding copyright is therefore not possible. But the general principle that contracts should not be allowed to erode the benefits of permitted acts is accepted. Therefore, to the extent that is legally allowed, the Government will provide for each permitted act considered in this document that it cannot be undermined or waived by contract'.

copyright exceptions and contract for the new exceptions introduced in 2014, rather than the preferable approach of revising all copyright exceptions which pre-existed in the CDPA.

- 1.4. As Australia is not bound by the same EU copyright directives as the United Kingdom we have the possibility of following the recommendation of the UK Hargreaves review and preventing the contractual override of *any* copyright exceptions. Such an approach was recommended by the Productivity Commission,<sup>6</sup> while the ALRC instead recommended an approach of amending the Copyright Act to expressly limit contracting out in relation to certain enumerated exceptions (although such proposed amendment would be without prejudice to the interpretation of other existing exceptions, leaving open the possibility that other exceptions within the Act may also not be capable of being set aside by contract by the operation of existing principles of law).<sup>7</sup> An approach of restricting contracting out of all exceptions would have the advantage of increasing certainty for users, and also avoids the complexity of determining which exceptions are justified as serving important public interests or being fundamental to the copyright balance in contrast to those exceptions which might be said to merely remedy a market failure.
- 1.5. In my view, the strongest counterargument to preventing the contractual override of all copyright exceptions was made in 2002 by Professor David Lindsay in 'The law and economics of copyright, contract and mass market licences'.<sup>8</sup> His research paper, commissioned by the Centre for Copyright Studies, drew on the work of academic Wendy Gordon<sup>9</sup> to outline an economic analysis of copyright law, including the role of uncompensated use exceptions. Professor Lindsay argued that 'that prohibitions on contracting around the limits of copyright protection are generally undesirable'<sup>10</sup> on the basis of economic efficiency-based advantages of private market-based arrangements. Professor Lindsay did however accept that mandatory exceptions might be desirable in limited circumstances:

*'if it is accepted that the principal objective of copyright policy is to ensure an efficient level of creation of copyright material, then to minimise market distortions, any non-economic objectives must be clearly specified and exceptions directed at achieving such objectives narrowly targeted. Insofar as non-economic objectives are clearly identified and exceptions are restricted to those necessary to promote such objectives, there may be a case for making the exceptions mandatory. Nevertheless, given that the precise policy objectives of 'uncompensated use' exceptions under Australian law, such as the defences of fair dealing, have never been*

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<sup>6</sup> Productivity Commission, *Intellectual Property Arrangements* (number 78, 2016) 139.

<<http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>>

<sup>7</sup> Australian Law Reform Commission, *Copyright and the Digital Economy* (DP 79, 2013) 353.

<<https://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79>>. Note that the ALRC also suggested that explanatory materials should be included to 'record that Parliament does not intend the existence of an express provision against contracting out of these exceptions to imply that exceptions elsewhere in the Copyright Act can necessarily be overridden by contract'.

<sup>8</sup> David Lindsay, *The law and economics of copyright, contract and mass market licences*, (2002) Centre for Copyright Studies Ltd.

<sup>9</sup> Wendy J Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors' (1982) 82 *Columbia Law Review* 1600.

<sup>10</sup> Lindsay above n 8, 8.

*clearly identified, it would, at present, be premature to prevent parties entering agreements that override the current exceptions.*<sup>11</sup>

- 1.6. Professor Lindsay's efficiency and transaction cost analysis is powerful and, in my view, should be considered carefully before contractual freedom is limited in connection with exceptions. That being said, I would depart from aspects of his analysis on the efficiency of contract and property<sup>12</sup> - while voluntary contractual exchange may be efficient and value-maximising for rivalrous physical property, I am not convinced that voluntary contractual exchange is necessarily socially efficient where the good is a non-rivalrous work of expression.<sup>13</sup> I personally therefore have less faith in the ability of private market-based arrangements to result in socially optimal incentives for the creation of expression and the efficient level of creation of copyright material and would be more willing to support copyright exceptions which were resistant to contractual override.
- 1.7. In the UK, insufficient attention also seems to have been given to the consistency in the legislative drafting of the contractual override provisions. Prior to the amendments, the CDPA provided that contractual terms restricting computer programme exceptions were 'void',<sup>14</sup> but the new exceptions introduced in 2014 instead provide that restrictive contractual terms are 'unenforceable'. Little attention was given to this drafting choice (as discussed in my article on pages 120 to 122). The UK Intellectual Property Office suggested that there was a meaningful difference between a term being 'void' versus 'unenforceable'<sup>15</sup> and Viscount Younger of Leckie, the Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills, similarly explained to the House of Lords Grand Committee that a court's approach to void and unenforceable terms was 'slightly different' and that 'rendering the term void would be a disproportionate measure in many cases'.<sup>16</sup> No clarity has however been forthcoming from the Government as to the legal distinction between a term of a contract being void and a term being unenforceable.
- 1.8. In the Australian copyright context Carter, Peden and Stammer have written on distinctions between a term being unenforceable; void; or void and illegal.<sup>17</sup> Their paper discusses the impact

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<sup>11</sup> Ibid 48 – 49.

<sup>12</sup> Ibid 16.

<sup>13</sup> See William Landes and Richard Posner, *The economic structure of intellectual property law* (Harvard University Press 2003) 20.

<sup>14</sup> In addition to the provisions of the CDPA on void terms relating to computer programmes, s 137 of the Broadcasting Act similarly provides that 'Any provision in an agreement is void in so far as it purports to prohibit or restrict relevant dealing with a broadcast or cable programme in any circumstances where by virtue of section 30(2) of the [CDPA] copyright in the broadcast or cable programme is not infringed'.

<sup>15</sup> Intellectual Property Office, *Technical Review of Draft Legislation on Copyright Exceptions: Government Response* (Intellectual Property Office 2014) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/308732/response-copyright-techreview.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308732/response-copyright-techreview.pdf)> 2, 'The draft legislation contains clauses providing that to the extent that any contractual terms purport to prevent or restrict the doing of a permitted act allowed by a copyright exception, those terms are unenforceable. This language does not void the term of any contract'.

<sup>16</sup> HL Deb 5 December 2013, vol 750, col GC78.

<sup>17</sup> J Carter, E Peden and K Stammer, *Contractual Restrictions and Rights Under Copyright Legislation* (2007) 23 *Journal of Contract Law* 32. This article was discussed within the ALRC Copyright and the Digital Economy discussion paper above n 7 from para 17.96.

of a term of a contract being ineffective (as either unenforceable, void or void and illegal), and their analysis suggests that s 47H of the Australian Act renders inconsistent contractual terms void or unenforceable, but not illegal; and thus usually subject to severance. The authors provide a detailed analysis of the provision in s 47H that means certain contractual terms 'has no effect', and their analysis provides helpful clarity in an area of law often considered complex.<sup>18</sup> That being said, parts of their analysis proceed on the unsafe basis that the Australian Copyright Act and fair dealing defences confer 'a wide variety of *rights* on the users of works which are the subject of copyright'.<sup>19</sup> While the Canadian Courts have explicitly recognised fair dealing defences as users rights,<sup>20</sup> this is not an approach adopted by Australia or in other fair dealing jurisdictions.<sup>21</sup> Some conceptual clarity here might be provided by the work of theorist Wesley Hohfeld who developed a framework of legal relationships, being made up of sets of interrelated sets or rights and duties; privileges and no-rights; powers and liabilities; and immunities and disabilities.<sup>22</sup> Following Hohfeld's framework, it would not be possible to describe copyright exceptions as users *rights* unless one could identify with precision the scope of the correlative *duty* placed on copyright owners in connection to the exercise of the exception.<sup>23</sup> Conceptualising any such duty is difficult, in circumstances where law leaves copyright owners with the freedom to withhold a work from publication,<sup>24</sup> limit the formats in which the work is released, or impose an unaffordable price to obtain a copy of a work such that the user may be unable to access or make a fair dealing use of the work.

## 2. Interaction of contractual override provisions and effective technological measures – the approach in the UK

2.1. The roundtable on contracting out summary notes concerns from participants about the relationship between contracting out and the enforceability of technological protection measures. Here the (arguably failed) approach in the UK may be instructive to Australian policymakers,

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<sup>18</sup> See for example Lindy Willmott, Sharon Christensen, Des Butler, and Bill Dixon, *Contract Law in Australia* (Oxford University Press 2012) 637.

<sup>19</sup> Carter, Peden and Stammer above n 17, 33

<sup>20</sup> See *CCH Canadian v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR at para 48

<sup>21</sup> See ALRC above n 7 para 17.113

<sup>22</sup> Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 Yale Law Journal 16; Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* [1917] Faculty Scholarship Series <[http://digitalcommons.law.yale.edu/fss\\_papers/4378](http://digitalcommons.law.yale.edu/fss_papers/4378)>.

<sup>23</sup> See David R Johnstone, *Debunking Fair Use Rights and Copyduty under U.S. Copyright Law* (2004) 52 Journal of the Copyright Society of the U.S.A. 345; Devlin Hartline, *Why Copyright Is a Right and Fair Use Is a Privilege* (2013) Law Theories IP Blog <http://lawtheories.com/?p=436>; Zohar Efroni, *Towards a Doctrine of "Fair Access" in Copyright: The Federal Circuit's Accord* (2006) IDEA: The Intellectual Property Law Review 99, 118–119; Lior Zemer, *What Copyright Is: Time to Remember the Basics* (2006) 4 Buffalo Intellectual Property Law Journal 54; David Vaver, *Copyright Defences as User Rights* (2013) 60 Journal of the Copyright Society of the U.S.A. 661.

<sup>24</sup> See e.g. *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142 para 70, noting that a court will be reluctant to say that a use is fair where the work has not been exposed to the public; particularly where it has been acquired by a breach of confidence or other underhand dealings.

subject to the caution that Australian policymakers may have more limited legislative flexibility than their British counterparts due to the provisions of the Australia-US Free Trade Agreement.<sup>25</sup>

2.2. In the United Kingdom a process exists, designed to allow users to benefit from a copyright exception where rightsholders have applied a technological protection measure.<sup>26</sup> This process implements the obligation set out in Article 6 (4) of the EU Information Society Directive (which requires the Member States to ensure that rightsholders make available a way of utilising copyright exceptions in relation to works protected by technological measures where the potential beneficiary of the exception has legal access to the protected work).<sup>27</sup>

2.3. Where a technological measure restricts a users' exercise of certain copyright exceptions (defined as a 'permitted act'), the user may issue a notice of complaint to the Secretary of State. The Secretary of State is then empowered<sup>28</sup> to give directions to the copyright owner to make available to the user the means of carrying out the permitted act (for instance, by providing a version of the work unprotected by the technological protection measure).<sup>29</sup> The section came into force in 2003 and was criticised in the 2006 UK Gowers Review of Intellectual Property.<sup>30</sup> Subsequent Freedom of Information requests suggest that the section and notification procedure has never successfully been invoked.<sup>31</sup> An illustrative example of the practical difficulties associated with recourse to the notification procedure is described by Dr Yin Harn Lee on the '1709 blog', where she discusses the challenges she faced attempting to exercise the then operative UK private copying exception to

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<sup>25</sup> See *Australia-US Free Trade Agreement*, 18 May 2004, ATS 1 (entered into force on 1 January 2005), art 17.4.7(e)(viii), as discussed in the ALRC report above n 7 page 377.

<sup>26</sup> See section 296ZE of the Copyright Designs and Patents Act 1988. In the UK Act such technologies are referred to as 'technological measures', following the terminology in Article 6 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ('the Information Society Directive').

<sup>27</sup> See e.g. Maistry et al, *Technological measures to prevent the illegal uses of intellectual property rights* (2008) Working Paper <<https://www.research-collection.ethz.ch/bitstream/handle/20.500.11850/152383/eth-2193-01.pdf?sequence=1>> for a discussion on the way in which Article 6(4) has been implemented in other member states.

<sup>28</sup> See Gasser, Urs and Girsberger, Michael, *Transposing the Copyright Directive: Legal Protection of Technological Measures in EU-Member States - a Genie Stuck in the Bottle?* (2004). Berkman Working Paper No. 2004-10. Available at SSRN: <https://ssrn.com/abstract=628007>, which says that despite the permissive wording of the statutory language, the relevant consultation paper leading to the exception indicates that there is an obligation on the Secretary of State to act.

<sup>29</sup> See Karina Grisse and Stefan Koroch, *The British private copying exception and its compatibility with the Information Society Directive*, (2005) *Journal of Intellectual Property Law & Practice*, Volume 10, Issue 7, 562 for a discussion of the operation of the provision in connection with the now quashed private copying exception.

<sup>30</sup> See Andrew Gowers, *Gowers Review of Intellectual Property* (2006) available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228849/0118404830.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf), 73, with respondents to the review describing the section as 'slow and cumbersome'.

<sup>31</sup> See Francis Davey, *Private copying - a new copyright exception in the UK* (2014, Francis Davey Blog) <<http://www.francisdavey.co.uk/2014/07/private-copying-new-copyright-exception.html>>. This blog post makes reference to publicly available FOI requests made in 2012 and 2012 <[https://www.whatdotheyknow.com/request/drm\\_notice\\_of\\_complaint\\_2#comment-29512](https://www.whatdotheyknow.com/request/drm_notice_of_complaint_2#comment-29512)> and <[https://www.whatdotheyknow.com/request/details\\_of\\_complaints\\_relating\\_t](https://www.whatdotheyknow.com/request/details_of_complaints_relating_t)> - showing no use had been made of the powers of the Secretary of State. As of August 2014, it does not appear that further use has been made of the notification period - see <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/440384/ipo-foi-2014-432-complaints-to-secretary-of-state-under-s\\_296ze-cdpa.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440384/ipo-foi-2014-432-complaints-to-secretary-of-state-under-s_296ze-cdpa.pdf)>

copy an episode of the 'Sleepy Hollow' television series from DVD onto a USB drive.<sup>32</sup>

- 2.4. Despite the fact that the UK Secretary of State has not made a direction under this provision, the existence of a process may have provided users with indirect access to works protected by technological protection measures. Before making any direction, the Secretary of State requires users to attempt to reach a solution with the rightholder (and to provide the Secretary with copies of the relevant correspondence when requesting a direction).<sup>33</sup>
- 2.5. It *may* be the case that users are successfully negotiating access to works protected by technological measures directly with the rightholders, with the users' negotiating position strengthened by the existence of section 296ZE and the prospect of a direction if negotiations were unsuccessful. If that hypothetical were to be the case then the legislation would be operating as intended and would be a useful model for Australia.
- 2.6. An argument might be made that adopting a similar mechanism to the UK's approach is not precluded by the technological protection measure provisions in Article 17 of the Australia-US Free Trade agreement. Under the UK process neither the user nor the Secretary of State circumvents an effective technological measure in order to exercise an exception – instead, the copyright owner is directed to make the work available to that particular user in a manner which permits them to exercise an exception. As a result, an argument could be made that under the process there would not be circumvention within the meaning of the Australia-US free trade agreement or section 116AN of the Australian *Copyright Act 1968*.

### 3. Position in EU relating to contracting out

- 3.1. Currently, the most significant EU Directive relating to copyright exceptions is the Information Society Directive,<sup>34</sup> adopted in 2001. This Directive implements the WIPO Copyright Treaty,<sup>35</sup> harmonises the reproduction and communication to the public rights,<sup>36</sup> provides protection to Technological Measures and Rights-Management Information<sup>37</sup> and provides a list of copyright exceptions to which member states are limited when designing their domestic law.<sup>38</sup>
- 3.2. The Directive does not set out mandatory rules in relation to the relationship between contract and copyright, stating in Recital 45 that the list of exceptions should not 'prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as

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<sup>32</sup> See Yin Harn Lee, *Adventures in Personal Copying (Part 1)* (2015, 1709 Blog) <<http://the1709blog.blogspot.co.uk/2015/01/adventures-in-personal-copying-part-1.htm>>.

<sup>33</sup> See the relevant Intellectual Property Office 'Notice of complaint to the Secretary of State' form available <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/457660/Notice-of\\_TPM-complaints.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/457660/Notice-of_TPM-complaints.pdf)>

<sup>34</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>35</sup> World Intellectual Property Organization Copyright Treaty (Adopted 20 December 1996)

<sup>36</sup> Information Society Directive Articles 2 and 3

<sup>37</sup> *Ibid*, Art 6 and 7

<sup>38</sup> *Ibid* Art 5

permitted by national law'. Academics have argued therefore that the Directive permits the possibility of contractual override of copyright exceptions,<sup>39</sup> subject to specific rules included within the domestic law of individual member states.<sup>40</sup> Few EU member states have explicitly addressed the relationship between copyright exceptions and contract in their national laws, with copyright legislation in the UK, Ireland, Portugal and Belgium providing for at least some copyright exceptions which cannot be set aside by contract.<sup>41</sup>

3.3. Other EU directives relating to intellectual property have however explicitly addressed the relationship between exceptions and contract. The 1991 Computer Program Directive (subsequently repealed and replaced in 2009)<sup>42</sup> requires member states to protect computer programmes by copyright, as literary works.<sup>43</sup> The Computer Program Directive included exceptions permitting the creation of backup copies of a programme, the privilege to observe, study or test the functioning of the program, and decompilation which could not be excluded by contract.<sup>44</sup> Similarly, the 1996 Database Directive<sup>45</sup> included exceptions which could not be set aside by contract.<sup>46</sup>

3.4. The relationship between copyright exceptions and contract has received relatively limited judicial attention at the EU level. The ECJ cases of *Ryanair Ltd v PR Aviation BV* (Case C-30/14) and *Verwertungsgesellschaft Wort (VG Wort) v Kyocera and others* (case 457/11)<sup>47</sup> do however provide some guidance, and also raise issues that Australian policymakers may wish to address in the drafting of any contractual override provision. The result in the Ryanair case in particular draws

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<sup>39</sup> Dusollier, *Exceptions and Technological Measures in the European Copyright Directive of 2001 – An Empty Promise* (2003) 34 IIC 62–75, 72; Thomas Heide, *Copyright, Contract and the Legal Protection of technological measures* (2002) 50 Journal of the Copyright Society of the USA 315, 330.

<sup>40</sup> Ibid. The role of national law is not addressed in the paper by Thomas Heide, but the various national approaches were discussed in Lucie Guibault, *Copyright Limitations and Contracts, An Analysis of the Contractual Overridability of Limitations on Copyright* (2002) Kluwer Law International, the leading text in this area of law. Similarly, the UK Department for Business, Innovation and Skills has argued that national law is able to define the relationship between exceptions and contract – see Voluntary memorandum from the Department for Business, Innovation and Skills to the Statutory Instruments Joint Committee (27 March 2014) <<http://www.publications.parliament.uk/pa/jt201415/jtselect/jtstatin/13/1321.htm>>.

<sup>41</sup> See R Hilty and S Nérissou (eds), *Balancing Copyright - A Survey of National Approaches* (Springer, 2012).

<sup>42</sup> Council Directive 2009/24/EC of 23 April 2009 on the Legal Protection of Computer Programs (Codified version) [2009] [OJ L111/16] ('Computer Programs Directive')

<sup>43</sup> Ibid, Art 1.

<sup>44</sup> Article 8 and Recital 16 of the Directive requires Member States to provide that certain contractual provisions 'shall be null and void'.

<sup>45</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

<sup>46</sup> Article 15 of the Database directive provides that 'Any contractual provision contrary to Articles 6 (1) and 8 shall be null and void'.

<sup>47</sup> While escaping sustained academic attention at the time it was decided, the UK Department for Business, Innovation and Skills have interpreted the VG Wort case to mean that unless contract or licence terms are expressly allowed to limit the scope of an exception in member state legislation, the default position under EU law is that the exception will prevail over any rights holder authorisation. On this basis, an argument could be made that despite the failure of the UK government to update the fair dealing exception for criticism and review and reporting current events, that exception might in any prevent prevail over any rights holder contract to the contrary. It is an open question as to whether the VG Wort case raises such a presumption around contractual override only in relation to rights holder authorisations relating to works subject to statutory licences, or whether the same logic might also apply where the rights holder purports to restrict or contract out of the operation of an exception.

attention to whether legislative contractual override provisions (in that case relating to databases) are effective where the underlying work is outside the scope of the relevant Directive.<sup>48</sup> In other words, if a work were to lack sufficient originality to be protected under the Australian Copyright Act, would there then be greater scope for the creator of that work use contract to restrict the availability of copyright exceptions such as criticism and review or parody?

#### 4. Current reforms within the EU

4.1. In 2015 the European Commission launched the Digital Single Market Strategy<sup>49</sup> which included the aim of further harmonizing the copyright regime of the EU Member States and increasing legal certainty.<sup>50</sup> As an element of that strategy, the European Commission and Parliament are currently considering the 'Copyright in the Digital Single Market' legislative proposal.<sup>51</sup> Aspects of this proposal have been controversial, including the proposed Article 11 exclusive right for press publishers and the proposed Article 13 liability regime for online intermediaries.<sup>52</sup> The proposals do however also include new mandatory copyright exceptions and include provisions relating to contractual override of those exceptions. The proposal has not yet been adopted and it will next be considered by the European Parliament on 5 July 2018.<sup>53</sup>

4.2. While comparatively little attention has been given to the contractual override provisions in the new proposal, they do provide an insight into trends in the EU around copyright exceptions. The current draft of the proposal introduces a text and data mining exception (Article 3.1), a cross-border teaching exception (Art 4.1) and an exception for the preservation of cultural heritage (Art 5). The proposal provides that 'Any contractual provision contrary to the exceptions provided for in Articles 3, 4(1) and 5 shall be unenforceable'. Examined more carefully however the proposal provides weak protection against contractual override – the text and data mining exception applies only where the research organisation has 'lawful access' to the work, the teaching

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<sup>48</sup> See, e.g. Matěj Myška And Jakub Harašta, *Less Is More? Protecting Databases in the EU after Ryanair* (2016) Masaryk University Journal of Law and Technology Vol 10:2, 170, 187

<sup>49</sup> European Commission, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions - A Digital Single Market Strategy For Europe (2015) COM(2015) 192 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0192>>

<sup>50</sup> See European Commission, *Modernisation of the EU copyright rules* (2016) <<https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules>>

<sup>51</sup> See Committee on Legal Affairs, Report on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD))

<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bREPORT%2bA8-2018-0245%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>> for the version of the proposed directive adopted by the Committee on Legal Affairs. See <http://www.consilium.europa.eu/media/35373/st09134-en18.pdf> for the version adopted by the Commission as the starting point of the negotiating mandate with the Parliament.

<sup>52</sup> See CREATE Centre: University of Glasgow, *EU Copyright Reform: Evidence on the Copyright in the Digital Single Market Directive*. <<https://www.create.ac.uk/policy-responses/eu-copyright-reform/>> and European Copyright Society, General Opinion on the EU Copyright Reform Package (2017) <[https://www.ivir.nl/publicaties/download/ECS\\_opinion\\_on\\_EU\\_copyright\\_reform.pdf](https://www.ivir.nl/publicaties/download/ECS_opinion_on_EU_copyright_reform.pdf)>.

<sup>53</sup> European Parliament, *Copyright: Possible vote to amend committee position in September plenary* (2018) <<http://www.europarl.europa.eu/news/en/agenda/briefing/2018-07-02/5/copyright-possible-vote-to-amend-committee-position-in-september-plenary>>

exception permits a member state to provide that the exception does not apply ‘to the extent that licences covering the needs of educational establishments ... are easily available in the market’ and the cultural preservation exception applies only where the cultural heritage institution has the relevant work ‘permanently in their collection’. Overall however the proposal does indicate that EU lawmakers are conscious of the risk of contractual override of exceptions and that there is a broad political consensus that exceptions should be protected against such override.

4.3. It is interesting to note that the current draft of the proposal makes inconsistent contractual provisions unenforceable, as this contrasts with language used in the Software and Database Directives (which make contractual provisions ‘null and void’) and the language used in the Directive implementing the Marrakesh Treaty, which provides that an exception ‘cannot be overridden by contract’. There have been no public statements from the EU bodies justifying the rationale for the differences in drafting language, and the approach shows parallels to the inconsistent domestic approach adopted in 2014 in the UK, discussed above in section 1.7. Similarly, it is interesting to note that the EU Commission and Parliament have not revisited the existing exceptions in the Information Society Directive, which means that core public interest exceptions are at greater risk of contractual override than the new, arguably less important, exceptions introduced in this recent proposal. This also parallels the oversight in the UK domestic law reform, discussed above in section 1.3.

Thank you once again for the opportunity to provide this submission. Please do not hesitate to contact me if you require any further information about any aspect of my submission.

Best wishes,



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