Little guys in a big industry: Independent artists and the copyright/contract issue online

*Livia Fong Yan**

Livia Fong Yan is a fifth year law student at the University of Sydney.

Metallica's claim for breaches of copyright against the file-sharing service, Napster, brought to the fore a range of issues concerning the prevention of copyright breaches online.[1] For a band like Metallica, with a well-established profile and sizeable inventory to its name, the costs of bringing an action to maintain copyright are clearly justified. Their fans are already familiar with Metallica music and are likely to buy the music regardless of free copies being available.[2]

Compare Metallica's situation to a lesser-known artist who may want to utilise the Internet to increase their profile. For instance, composer Philip Czaplowski uses his website as a means to promote himself publicly.[3] Another composer, James Humberstone, has also set up his site for self-promotion and allowed users of his site to play back his scores as well as download and print copies of his music.[4] One of the users of Humberstone's site did infringe his copyright by deriving commercial gain from selling Humberstone's music on another site, but the benefits to Humberstone from the more flexible copyright which include the ability to promote the music, are not necessarily outweighed by the risk of such activity.

These examples illustrate the differing online copyright needs of small and big artists. These different needs are inadequately catered for in current copyright legislation. The most significant deficiency in the *Copyright Amendment (Digital Agenda) Act* 2000 (DAA) concerns the use of contract to control copyright online and this deficiency has warranted the attention of the Copyright Law Reform Commission whose recommendations on the issue are yet to be released.[5] If contract provisions were to be enacted in the DAA, smaller artists may achieve the balance in copyright control that they desire.

The Internet has enabled artists to reach millions of people globally and instantaneously but has also meant that people around the world can just as easily infringe an artist's copyright. It is this ability that frightens many musicians and has prompted them to search for measures to prevent such infringement. This article will focus on contract law as providing a superior avenue of control for copyright owners, in particular, independent musicians, as compared to current statutory regimes.

While the prevention of copyright infringement online has long been a pertinent issue, discussion seems to have focused upon the interests of the bigger players in the music industry, those well-established artists who are able to bear the costs of added copyright controls. The rights of smaller artists, with less financial backing and lower profiles, need to be addressed more directly as their interests are not entirely the same as the well-known artists'. This article will argue that extended copyright rights would benefit larger artists to the detriment of smaller artists and smaller artists are more likely to benefit from less rigorous controls where their need is to promote rather than monopolise their work.

Issues surrounding the balancing of public interests with copyright owners' rights will also be addressed given that increased control by copyright owners may detract from the right of the public to access music and benefit from its dissemination. How best to balance these sets of competing interests will then be considered, taking into account recent submissions to the Copyright Law Review Committee (the "CLRC") regarding private ordering regimes as well as public ordering avenues such as the *Copyright Amendment (Digital Agenda) Act* 2000 (DAA).

1 Copyright offline

Before addressing the many issues associated with copyright online, the problems attached to copyright in the offline world must be dealt with. In both spheres, the main issues concern the boundaries of owners' rights and the enforcement of those rights. Copyright provides much needed protection for the expression of ideas that are the result of the hard work of individuals. In the area of the arts, protection of expression has an increased importance, as the expression itself is often the most valuable component of the end product. With music, enjoyment of the idea's expression is equally valuable. The public derives enjoyment from watching or listening to a performance and it is this that makes copyright protection for music so important.

A major rationale for the concept of copyright in a work is that having copyright rights provides the incentive to create. According to this economics based argument, unless there are copyright rights to be had, there will cease to be any economic incentive for artists to create new works and market failure will occur in the form of free-riders that will copy without hindrance. The issue for debate, then, is how far this exclusive right should reach. At one extreme it is argued that owners of copyright should have absolute control, while others argue that such stringent controls are unnecessary and may indeed be adverse to the interests of the artists involved.

There are many reasons for not allowing copyright owners absolute control of their works. Most importantly, absolute control of rights would be detrimental to the public interest as the public would be required to pay more in order to access works of artistic merit. This would preclude many members of the public

from enjoying the arts and transform the arts into an arena for the wealthy. Such problems have been recognised in Australia in the *Copyright Act* 1968 (Cth) (the Act) through exceptions to copyright for uses that amount to fair dealing such as use for criticism and review or purposes of research and study. Using the "fair dealing" doctrine, parliament has attempted to balance the interests of copyright owners on the one hand, and on the other hand, the public's right to access and build on the ideas of others.

The strength of the argument for absolute control by a copyright owner can be seen here, as the potential for abuse of the fair dealing exception is high. In addition to this is the fact that it may not be possible to enforce copyright rights in all instances. Unlike real property where the boundaries of the property are clear and hence trespass easy to establish, copyright is intangible and its boundaries are unclear.[6]

While bodies such as the Australasian Performing Rights Association ("APRA"), ensure to some extent the enforcement of copyright rights, a combination of the public's moral views and avenues of copyright circumvention make this a difficult task. With regard to the former, many people do not regard copyright infringement as morally wrong (as opposed to a crime such as theft). Consequently, the rights to "perform in public" and reproduce are constantly infringed. Secondly, there are many digital devices that make enforcement in the offline world increasingly difficult. Despite the fact that the law has been able to adapt to new technologies in the past including the advent of both photocopiers[7] and video recorders, there are sound reasons for concerns that it may not do so this time. Current technology provides a greater challenge to enforcement due to developments in speed, quality, convenience and accessibility that give more people the ability to infringe copyright uninhibited.

2 Moving online

Of all the developments in digital technology, it is the Internet that has provided the most cause for concern in terms of the enforceability of copyright. All the reasons that create difficulties in enforcement offline exist online, only magnified on a global scale. Further, the online environment, with its lack of boundaries and intangible material, creates additional difficulties.

The online world differs from the offline world in many ways. In terms of enforcement, its decentralised nature has the most impact. Computers irrespective of locality are linked and communicate with each other via wireless transmission. As information is transmitted in the form of "packets", each of which travels a different path before reassembling at the other end, it is very hard to pinpoint its location and obtain control. A United States court acknowledged that one of the greatest differences between the offline and online worlds is the lack of physical limitations on communications.[8]

One way of expressing these peculiarities of online space is that online space has seen the creation of "interactivity" and "individuality".[9] Through interactivity, individuals are able to access information, such as musical works, from anywhere whenever they wish. The Internet also enables transmission of works to any one individual or to a large number of individuals ("individuality"). While this argument is used to illustrate the blurring of the public/private distinction, it also highlights the decentralised nature of the Internet, interactivity, and the end to end design of its structure, individuality.

The "interactivity and individuality" argument highlights the blurring of the public/private divide which is further accentuated by the essentially public nature of the Internet. The Internet does not discriminate between computers located in businesses and those in homes. Thus, for infringements of rights such as "performance in public", the performance may not have been "in public" in a traditional sense because it happened in somebody's home and the issue is whether copyright should be enforced in these circumstances at all.

An example of this can be seen in the Society of Composers, authors and Publishers of Music Canada's (SOCAN's) argument in their case against the Copyright Board of Canada.[10] They argued that it is when an end user is able to access the work that there is a communication to the public and that "everyone involved in the Internet transmission should be liable" for that communication.[11] In dealing with the first part of the SOCAN argument, it should also be considered whether there is a difference between the end user accessing the work from a public place or the privacy of their own home. Many people view the Internet as a public place and hence if any information or, here, a musical work can be accessed online, it constitutes a communication to the public. This perception of the Internet mounts a substantial challenge to the public/private distinction. It is difficult to envisage that the divide between our public and private lives has been blurred to the extent that the private sphere can now, in some instances, be classified as public.

It is also impractical to hold every party that may be in some way involved in the transmission of the information, liable for a breach of copyright. The transmission of a work from one user's computer to another necessarily involves numerous copies, for instance in the form of caching.[12] Merely viewing a work that has been provided on the Internet will involve a number of copies being made. These copies are created on the equipment of various ISPs, depending on which route the packets take to reach their destination. To hold multiple ISPs liable would not only be impractical, but would fail to serve the ends that copyright owners wish to achieve, that is, controlling copyright breaches by users of the Internet.

Another peculiarity of online space that is also engendered in any form of digital communication is that broadcasting, cable and Internet transmission have converged.[13] Prior to the introduction of the DAA, this issue was inadequately dealt with by the broadcast and diffusion rights in the Act, as illustrated by the decision in *Telstra Corp Ltd v Australasian Performing Rights Association*[14]. In that case, the court was forced to rely upon the highly confusing diffusion

right to find a breach of copyright where music was played to callers on hold.

Prevention of copyright breaches online can obviously be achieved in two ways. Firstly, through the working of the law either in the public or private sphere; and secondly, by imposing physical barriers to reproduction such as zoning systems or codes that prevent the burning of CDs. Of the most interest in this article are the ways in which the law might adapt to the changes in the environment affecting copyright rather than the physical methods.

In the offline world, copyright has been principally enforced through law in the public sphere, or public ordering. That is, where the Government passes legislation in order to regulate activities. The next two sections of this article will examine whether this manner of regulation is still the most appropriate way of regulating online activities. The alternative to the public ordering regime is to regulate through the private sphere, engaging in private ordering. Private ordering of copyright involves the law of contract enabling owners of copyright to contract with each individual user, most likely in the form of a licence.

3 Public ordering

Australian law has begun its adaptation to the online environment through changes to existing legislation. The Copyright Amendment (Digital Agenda) Bill (the Bill) was tabled in 1999 proposing changes to the existing copyright laws that would enable better enforcement of copyright rights online. These changes conform with international copyright standards as set by the World Intellectual Property Organisation (WIPO) in their Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT).[15] The WCT deals with copyright in artistic, literary, dramatic and musical works while the WPPT deals with the performers and copyright owners of sound recordings and broadcasts.[16] In April 2000, these changes were framed in the DAA, which was drafted to be technology neutral, containing no references to specific forms of technology.[17]

One of the most important reforms made by the DDA was the replacement of the diffusion and broadcasting right with the introduction of the new right of "communication to the public". This right finally recognises that communications now occur over wireless technology. It encompasses the right to transmit information over the Internet as well as making material available online, ie through uploading. This right gives copyright owners control over the Internet space and makes it clear that online transmissions of a work are an infringement of copyright, overcoming the problem in *Telstra v APRA*.

Copyright owners are further protected by superior enforcement measures introduced by the DAA. Firstly, the DAA recognises that most reproductions occur on end user computers.[18] These are difficult to detect due to the decentralised nature of the Internet. The DDA also recognises that not all commercial uses of material, such as streaming, will involve a material reproduction.[19] Thus, copyright owners are given enforcement rights against users who engage in uploading material for the purpose of making it available to the end users or where users initiate or permit the unauthorised communication of a copyrighted work.[20]

The legislature has also been mindful of balancing the competing interests of copyright owners and Internet users, or the public, in drafting the new laws.[21] The DDA acknowledges that numerous reproductions created in the course of transmission are a necessary by-product of Internet transmission, and as such, temporary reproductions of a copyrighted work, such as caching, are excluded from the reproduction right.[22] This is a practical approach as restrictions on reproductions by caching would prevent ordinary use of the Internet such as browsing and hyperlinking.

Thus, public ordering appears to have addressed the many peculiarities that pervade the online environment. It has recognised that end users are numerous, reside in a multitude of locations around the world and are therefore difficult to locate and detect. Still, it seems that the legislation has taken an approach which is inflexible and similar to that taken by Stephens J in *Reno*.[23] It assumes that the law can only be applied in the manner in which it has always been applied even where the space being regulated radically pushes the boundaries of real space. It merely accepts that although the Internet possesses no boundaries and is not located in any one place, that the law must be applied inadequately.

No provisions have been made to adequately enforce the law against small users who infringe copyright. Where the Internet has created an environment that enables reproductions to be produced with ease almost instantaneously, and the tools of reproduction are accessible, there is every reason for copyright owners to be able to impose sanctions against these users. To achieve this does not require the introduction of an entirely new area of law. In fact, utilisation of a traditional area of law would be equally, if not more, successful.

4 Private ordering

The DAA does not make any reference to the use of contract law with regard to copyright, as has been recognised by the CLRC. In June 2001, the CLRC invited submissions regarding the "prevalence, effects and desirability of contracts" in the enforcement of copyright online[24] and it would appear that the CLRC is interested in promoting the use of contracts to override provisions relating to fair dealing and to fill the gaps left by the DAA.

Use of online contracts in the copyright arena is not a new initiative. Copyright owners themselves have long recognised that if their material is made available on the Internet, extra measures are required in order to protect their copyright.[25] By using contractual licences that are enforceable between the copyright owner and the user, greater control is afforded to the copyright owner and they also have more flexibility in the type of rights that they can grant to

users. These terms may restrict the extent, ability and purposes for which the user may access the material. In so doing, copyright owners can redefine the boundaries that determine the balance of interests between themselves and the users.[26]

For instance, where a composer has made compositions available online, that composer has the option of granting a licence that requires the user to pay per view of the composition, to pay per access (perhaps for a certain number of days) or to pay per download (perhaps to print out the music). This allows the composer to control access to their work and the amount that they wish to charge for use of their work. It also has the potential to overcome common perceptions by individuals that copyright law does not apply to them as contracts have always been viewed as binding on the individual.[27] This is consistent with the rationale of copyright law that remuneration is necessary to create the incentive for creativity.

By creating a contract with each user the ease of enforceability is increased as the user can be identified. Also, the principles of contract law do not have to adapt quite so much in the online environment thereby enabling copyright owners to utilise well-established law. However, some potential obstacles arise in terms of the effectiveness of such contracts.

One of these is that contracting in the online world can be less secure as there is no way of truly knowing whom you are contracting with. It becomes a question of trust since the Internet allows users to "cloak or obscure identity".[28] It is impossible to know due to this anonymity and the reach of the Internet, whether the user is telling the truth.

Nevertheless, this does not seem to have deterred users from creating or purporting to create contracts online or companies from using contracts (or purported contracts) as a way of "binding" their customers. Such contracts have primarily been in the form of mass-market licences. Offline, these are often called "shrinkwrap contracts" and online "clickwrap contracts". Shrinkwrap contracts are generally associated with the sale of computer software where the contractual licence is contained within the box of software or the disk itself, and acceptance of its terms occurs upon the breaking of the shrinkwrap. Clickwrap contracts work in a similar fashion. Acceptance of these contracts occurs when users click on an "I agree" or "I accept" button, usually located at the bottom of the page where the terms of use have been stated. Generally, the website will not permit the user to enter the site or a particular part of the site unless there has been acceptance of those terms.

This method of forming a contract challenges some of the fundamental ideologies of contract law, not least of which is the opportunity for contracting parties to negotiate the terms to be incorporated. Shrinkwrap and clickwrap contracts do not allow the purchaser or user to negotiate the terms, raising problems where vendors, in this instance, copyright owners, require the purchaser or user to agree to terms which may be onerous or which require the purchaser or user to waive rights that they would normally have.

In Australia, contracts containing such terms may be actionable under the *Contracts Review Act* 1980 (NSW) which deals with unjust contracts. Section 9 of that Act sets out the circumstances that may render a contract unjust including whether the terms were the subject of negotiation prior to the formation of the contract.[29] However, there is no legislation or case law that has addressed clickwrap contracts in the context of this legislation.

American courts on the other hand, have had the opportunity to address shrinkwrap contracts. The case of *ProCD Incorporated v Zeidenberg*[30] involved an infringement of copyright in breach of a term of a shrinkwrap licence. Judge Easterbrook found that the contract did not bind Zeidenberg into the contract unjustly. In accordance with the Uniform Commercial Code,[31] ProCD had granted the opportunity for Zeidenberg to accept the terms of the contract via his conduct and further, to reject the contract if the terms were found to be unsatisfactory.[32] In this case, purchase of the software was subject to terms which were also given on the outside of the box, strengthening ProCD's position that the consumer assented to the terms upon using the product.

Where contracts must be in the form of "contract-as-product", one commentator has suggested that the best solution is to delegate to policymakers the task of framing the terms that are required to preserve consumer autonomy in standardised contracts.[33] This appears to have been followed through in the United States where the National Conference of Commissioners on Uniform State Laws (US) (NCCUSL) has introduced the *Uniform Computer Information Transactions Act* (UCITA) which validates shrinkwrap and clickwrap contracts and provides terms that should be implied as well as default rules.

With UCITA in place, the copyright owner has the scope to obtain absolute control over their work by virtue of becoming a "private legislator".[34] Their control has the potential to extend to the point where it may become a quasi-intellectual property right in itself and effectively enforceable against the world rather than only between the contracting parties.[35] Such control intrudes upon the idea of a public interest and offends the concept of remuneration as an incentive for creativity. As mentioned earlier, contractual licences enable the licensor to contract out of rights. This means that a copyright owner such as a composer has the ability to contract out of fair dealing provisions, thus tipping the balance strongly in their own favour.[36]

Copyright ideology has its roots in economics. That is, a copyright owner requires incentive to create and produce work. Without incentive, society would be starved of its musical, literary and artistic works, as those members of society would find more incentive (in the form of returns) in putting their energies into other pursuits. Allowing copyright owners absolute control creates a monopoly over intellectual property rights which is a far cry from the free competition model that is espoused in most modern markets.

Monopolies are inherently inefficient and result in losses to society but intellectual property is an inherently inefficient good, requiring economic incentive for its production.[37] To artificially push the price of copyrighted works higher as the result of the copyright owner's control over their licence terms, will cause greater deadweight loss.[38] Thus, more control is not necessarily better where it is imperative that competing interests be balanced.

One of the strongest proponents against the idea of copyright owners being granted absolute control over their works is Yochai Benkler. Benkler highlights the discrepancies in the reliance by those with access to existing inventory on property rights as opposed to those without such resources.[39] With regard to musicians, the situation can be portrayed as the reliance of a lesser-known composer producing on a small scale versus the well-known musician who is already in possession of a large inventory.[40] This raises a number of issues. Firstly, not only do the interests of the copyright owners and the public need to be balanced, but a balance also needs to be maintained between small and large copyright owners.

Also, it recognises that while there are some that benefit from greater property rights, others may be disadvantaged. It seems that where this concerns smaller artists competing with larger artists, it will be the larger artists that win. Moreover, there will be significantly fewer winners and the balance even among the copyright owners may not be in the public interest.

Benkler sees the latter issue to be the product of increased input costs being offset by existing inventories.[41] The costs of information inputs will increase from the costs imposed by copyright owners through their contracts. While large organisations, or well-known, long-established musical artists, are able to overcome the increase in the costs of inputs by utilising existing inventory at little or no cost, individuals and small "producers" must bear the costs and are hence restricted in their ability to produce.[42] Contrary to the copyright rationale then, increased control may actually reduce the incentive to create for many composers.

Given this disincentive and the alternative prospect of copyright infringements where their work is not protected by a contractual licence, lesser-known composers may prefer instead to distribute their work for free whilst still retaining their intellectual property rights in the work.[43] This position is also advocated by John Perry Barlow who has emphasised familiarity as having more value than scarcity.[44] The argument is supported by the continuing success of the software industry where if the program really is worthwhile using, consumers will buy it (rather than obtaining it by some other means) in order to obtain the benefits ancillary to ownership such as technical support. Thus it can be in those composers' interests to relinquish absolute control. When one of their works has penetrated the market, consumers are more likely to purchase subsequent works and related goods such as sound recordings and concert tickets.[45]

The threat more often alluded to when addressing the existence of monopolies in copyright is the threat to the public interest and public choice, particularly where the issue of fair dealing is concerned. The fair dealing exception maintained by copyright legislation is the attempt by parliament to achieve a balance of interests between owners' rights and users' interests.[46] Copyright law should only be available to protect the expression of ideas and not the information contained within the work.[47] As Whitelaw stresses, legislation should not shift so far as to overcompensate for copyright owners' potentially lost rights, that users' rights are prejudiced.[48] Similarly, this should not be attempted via contract law. While the doctrine of privity may normally restrict the effects of a contract, the above discussion on mass-market licensing shows how contract also has the ability to "bind the world".

Public interests and public choice would be highly compromised by a system of pay per use or similar. Freedom of contract, rather than promoting the autonomy of individuals, will restrict the exercise of voluntary choice.[49] Evans and Fitzgerald further argue that contracts in the information society will order wealth and power. With regard to music, only those composers with financial backing could hope to succeed while access to this public form of expression will be exclusive to those who can afford to pay. To so utilise the doctrine of freedom of contract as implying some general licence is to abuse the power of the doctrine and create an oppressive tool of control.[50]

5 Where does the balance lie?

The difficulty with resolving the current problem is that there is a need to balance not one, but two sets of competing interests: between the artists and the public, and between the small and large artists. While these interests do compete in the offline sphere, it is the added complexities of the online world that make it more necessary to establish some guidelines to prevent economic efficiency from allowing well-known artists and corporate interests free reign. Both public and private ordering regimes are open to abuse, and the question becomes: which abuse is more easily regulated and whose interests are most in need of protection?

It seems that as long as music can be made available online, there should be some mechanism that prevents the misappropriation of works and recordings, be they works and recordings of small artists or big artists. All artists need protection against copyright infringement and in no way can it be assumed that copyright no longer applies online.[51] This minimal protection can be provided for in copyright legislation in much the same way as it has done in the past. Copyright lawmakers should also take into account the proposals by the CLRC on incorporating the notions of contract into the copyright legislation, as it is clear that mass-market licensing is a phenomenon that cannot be ignored. However, in order to preserve the interests of the smaller artists and of the public, provisions are also required that limit the scope of freedom of contract so as to prevent monopolistic practices. There is little to be gained from allowing too liberal

a freedom to contract and, taking the Harper and Row argument,[52] it would only be practicable if the music of larger artists was preferable to smaller artists. Further, such control would be at the expense of the smaller artists as well as the public. Yet another consideration is that while the music of larger artists is more popular, perhaps because their music is more desired, affording absolute control to these artists may prevent future big artists from developing.

In the opinion of the author, the CLRC, in considering the submissions made to them, should address the copyright needs of the smaller independent artist. In the giant that is the music industry, it is the "little guys" that are forgotten. It is these artists that will secure the future of Australian music and their interests that need to be promoted. Current copyright legislation with regard to contracts needs to be strengthened in order to achieve a better balance of interests and to ensure growth and creativity in the Australian music industry.

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1 *In Re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087

2 Note, however, that this excludes consideration of a new generation of fans that may be won by Metallica because their music was available online.

3 Czaplowski, P, 'A composer connects: From music to web site to web rings and more...' (2001) 58 *Sounds Australian* at 12

4 Humberstone, J, 'The future of publishing on the Internet' (2001) 58 *Sounds Australian* at 26

5 CLRC Issues Paper 2001. A discussion paper was released in October 2001and a report submitted by the Committee to the Attorney-General on 30 April 2002 has yet to be released.

6 Loughlan, P, *Intellectual Property: Creative and Marketing Rights*, LBC Information Services, Sydney, 1998 at 42

7 *University of New South Wales v Moorhouse* (1975) 6 ALR 193: although an authority on the concept of authorisation in copyright law, this case is also an example of how the law has dealt with copyright surrounding the use of photocopiers.

8 *Reno, Attorney General of the United States, et al v American Civil Liberties Union et al* 521 US 844 (1997) as per Stephens J (*Reno*)

9 Weatherall, K, 'An End to Private Communications in Copyright? The Expansion of rights to Communicate Works to the Public' (1999) 21(7) *European Intellectual Property Review* 342

10 Society of Composers, Authors and Publishers of Music of Canada v Canadian Association of Internet Providers, FC A-764-99

11 Alderson, M, 'Music, Internet Performances and Copyright' (2000) 5(1) *Media and Arts Law Review* 61; the right to 'communicate to the public' is similar to the old Australian broadcast and diffusion rights.

12 Such incidental copies are covered in the *Copyright Act* 1968 (Cth) section 43A

13 Aplin, T, 'Contemplating Australia's Digital Future: The Copyright Amendments (Digital Agenda) Act 2000' [2001] 12 *European Intellectual Property Review* 565 at 566

14 (1997) 38 IPR 294 (*Telstra v APRA*)

15 Note 13 at 565

16 Note 9

17 Simmons, S, 'Digital Killed the Recording Star?' (1999) 39 *Computers and Law* 7 at 10

18 Whitelaw, CJ, 'Copyright and the internet – an appraisal of the Government's digital agenda reforms: Part 3' (2000) 12(9) *Australian Intellectual Property Law Bulletin* 93 at 95

19 Note 18 at 95

20 *Copyright Amendment (Digital Agenda) 2000* Schedule 1—Amendment of the Copyright Act 1968, p25 of Schedule 1 of the Copyright Act para [A9.30]

21 Note 18 at 96

22 However, this is restricted to caching occurring in the technical process of electronic communications and browsing. It is unclear whether permanent caching would fall under this exclusion.

23 Note 8

24 Copyright Law Review Committee, *CLRC Issues Paper: Copyright and Contract*, June 2001

25 McLean, R and Flahvin, A, 'The Digital Agenda Act: how the new copyright law (and contract) is redefining the relationship between users and owners of copyright' <http://www.austlii.edu.au/au/other/CyperLRes/2001/21/> (16/05/02) at 1 of 6

26 Note 25

27 Litman, J, ' "Just Say Yes to Licensing!" ' in *Digital Copyright*, Prometheus Books, New York, 2001 at 112-114

28 Nissenbaum, H, 'Securing Trust Online: Wisdom or Oxymoron?' (2001) 81 *Bond University Law Review* 635 at 647

29 *Contracts Review Act* 1980 (NSW) s9(2)(b)

30 86 F. 3d 1447 (*ProCD*)

31 §2-204(1), 2-606, 2-602(1)

32 *ProCD* at 1452-1453

33 Radin, MJ, 'Humans, Computers and Binding Commitment' [2000] 75 *Indiana Law Journal* 1125 at 1161

34 Evans, GE, and Fitzgerald, B.F., 'Information Transactions Under UCC Article 2B: The Ascendancy of Freedom of Contract in the Digital Millennium?' (1998) *University of NSW Law Journal* <http:www.austlii.edu.au/journals/UNSWLJ/1998/46.html> (07/04/02) at 10 of 23

35 Note 33

36 Note 25 at 2 of 6

37 Benkler, Y, 'A Political Economy of the Public Domain: Markets in Information Goods Versus the Marketplace of Ideas' in Dreyfuss, R et al (eds) *Expanding the Boundaries of Intellectual Property*, Oxford University Press, Oxford, 2001 at 271

38 Deadweight loss is a loss to society as a whole being the result of inefficient pricing. Here, neither the vendor or consumer are able to gain from the rise in price.

39 Note 37 at 272

40 Note 37 at 273

41 Note 37 at 273

42 Note 37 at 282

43 Note 37 at 280

44 Barlow, JP, 'The Economy of Ideas: A framework for patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)', *Wired*, 1994

45 Note 44 at 7 of 12

46 Note 18 at 97

47 Note 34 at 11 of 23

48 Note 18 at 97

49 Note 34 at 13 of 23

50 Note 34 at 13 of 23

51 cf. Barlow, JP, 'Selling Wine Without Bottles: The Economy of Mind on the Global Net' (1994) 2(3) *Wired* 84

52 Note 37 at 290