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# For What Purpose? The Australian Government and the Use of Creative Commons Licences

DILAN THAMPAPILLAI*

*The Australian Government has overwhelmingly adopted the use of Creative Commons licences to facilitate the dissemination of public sector information. However, very little is understood about the consequences in law and policy of using CC licences online on a mass scale. This article considers whether the Australian Government's use of CC licences goes beyond a mere permission to use and tends towards contract. The Government might intend that the CC licences be no more than a conditional promise, but the obsequious nature of contract law makes it quite possible that a browsewrap agreement exists in this context. Further, this article considers how the Australian Government is actually using CC licences and questions whether the endeavour is ultimately worthwhile.*

## I Introduction

Following the report of the Government 2.0 Taskforce's report, 'Engage: Getting on with Government 2.0'[1] the Australian Government quickly adopted the use of Creative Commons ('CC') licences in order to facilitate access to public sector information ('PSI').[2] Copyright forms the cornerstone of all CC licences and it is a useful tool to leverage downstream actions, in terms of attribution and non-

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1 Australian Government, *Engage Getting on with Government 2.0* (Report, 22 December 2009) <https://apo.org.au/sites/default/files/resource-files/2009-12/apo-nid19954.pdf>.

2 See Australian Government, *Government Response to the Report of the Government 2.0 Taskforce* (Report, May 2010) <https://apo.org.au/sites/default/files/resource-files/2010-05/apo-nid21196.pdf>. See also Department of Communications and the Arts*, Australian Government Intellectual Property Manual* (Report, 15 February 2019) 173–4 <https://www.communications.gov.au/documents/australian-government-intellectual-property-manual-0> ('IP Manual'). The manual defines PSI to include text-based publications, legislation and legislative instruments, forms of data, audio visual and visual material containing government information. Whether data would have copyright protection is debatable. This distinction will be discussed further see below nn 12–18 and accompanying text.

commercial uses, while promoting access and dissemination.[3] On this point the interests of the Australian Government and the Creative Commons movement are well aligned in relation to open access and PSI.[4] As it stands, the default position on licensing government materials as set out in the 'Australian Government intellectual property manual'[5] ('IP Manual') is that public sector information ('PSI') 'should be released free of charge under a Creative Commons 'BY' licence.'[6] Similarly, the 'Guidelines on licensing public sector information for Australian Government entities'[7] ('IP Guidelines') expressly recommends the use of the most recent CC licence, including the attribution international licence (CC-BY-4.0).[8]

The Government 2.0 Report made no mention at all of the possibility that CC licences or other open access licences might give rise to contractual obligations. This was an odd omission at the time given that there was a well-established debate regarding open access licences and contracts in the United States.[9] Nonetheless, the recently released IP Manual declares that CC licences are 'in effect ready-made contracts for the use of copyright material.'[10] The IP Manual offers no explanation as to *how* such contracts would have formed nor does there appear to be any contemplation of the consequences of such contracts.[11]

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3 CC licences can potentially circumvent the difficulties associated with obtaining access by presenting a pre-packaged set of permissions and requirements. The goal is to create transactional efficiency so as to facilitate creativity. See, eg, Michael Carroll, 'Creative Commons and the New Intermediaries' (2006) (Spring) *Michigan State Law Review* 45.

4 In theory, the public has funded PSI through their taxes and therefore has a right to some degree of access to the resulting information: Paul Uhlir and Peter Schroder, 'Open Data for public Science' in Brian Fitzgerald (ed), *Legal Framework for e-Research: Realising the Potential* (University of Sydney Press, 2008) 189, 198. Uhlir and Schroder note that taxpayer funds are invested in publicly funded research and that the public has an interest in seeing the 'fruits of those investments'. Moreover, access to the internet makes it easier for those within the broad mass of the general public to form an identifiable subset of the community to which the government can provide information and with whom it may pursue deeper forms of interaction. Uhlir and Schroder were writing in the specific context of publicly funded scientific research, but the principle upon which they touched is capable of broader application to PSI.

5 IP Manual (n 2).

6 Ibid 174.

7 Department of Communications and the Arts, *Guidelines on Licensing Public Sector Information for Australian Government Entities* (Report, 15 February 2019) <https://www.communications.gov.au/documents/guidelines-licensing-public-sector-information-australian-government-entities>.

8 Ibid 5.

9 This is a controversial proposition. Some commentators argue that open content licences are not contracts. See, eg, Christopher Newman, 'A Licence is not a "Contract Not To Sue": Disentangling Property and Contract in the Law of Copyright Licences' (2013) 98(3) *Iowa Law Review* 1101. See also Raymond T Nimmer, 'Legal Issues in Open Source and Free Software Distribution' (Report) <http://euro.ecom.cmu.edu/program/law/08-732/Transactions/LegalIssuesNimmer.pdf>. But see Robert Hillman and Maureen O'Rourke, 'Rethinking Consideration in the Electronic Age' (2009) 61 *Hastings Law Journal* 311.

10 IP Manual (n 2) 175.

11 In effect, the Australian Government would be in a contract with every person who accesses PSI material under a CC licence.

This article looks at (i) whether CC licences tend towards being contracts;[12] (ii) how the Australian Government is actually using CC licences and (iii) questions whether their use in contractual form is worthwhile.[13] A preferable solution might be to house a conditional waiver of copyright rights in Part VII of the Copyright Act. However, the purpose of this article is to question whether the licence as contract idea makes sense. It is beyond the immediate scope of this article to flesh out the idea of a statutory waiver in a more substantial fashion.[14] There are two ideas driving this article. The first is that it is odd that a citizen should have to enter into a contract (albeit unwittingly) in order to access government materials.[15] Second, the complexities of contract are much the same as those of copyright. CC licences are touted as a simple alternative to copyright.[16] In truth, the terms of CC licences and the ancillary rules that Australian Government departments put around them are not easy to interpret. The base problem is that CC licences can easily become more than a simple permission to use content. In part, this problem resides with the permeable boundaries between licence and contract. It is also a result of the choice of language in the CC attribution Australia licence (CC-BY-3.0 AU) and the CC-BY-4.0 International licence (CC-BY-4.0).

Part II of this article looks at the two CC licences identified above and assesses how they might traverse the boundary of licence (mere permission) and contract (legally binding obligation). The view that I advance in Part II is that it is all too easy for the use of an open access CC licence to tilt towards setting up a contractual relationship.[17] In Part III of the article, I outline how the Australian Government is using CC licences via a number of departments.[18] I identify the essential purpose

[12] The question of contract formation is a matter that I will explore in depth in another paper, but this article assumes that it is possible.

[13] This article will confine itself to those entities that form part of the executive.

[14] In my view, this would be a simple matter of legislative drafting. That said, legislative drafting itself is a highly skilled task and in my view possibly beyond the purview of academic scholars. Setting out the general parameters of the waiver though is achievable enough. It would require identifying the range of entities to which it would apply. Likewise, a waiver would be appropriate where the government acts in a non-commercial capacity. The waiver could cease to have effect if there were material distortions of government content or a failure to attribute authorship to the government.

[15] This could occur via the vehicle of browsewrap contracts. While there are no cases on browsewrap contracts in Australia there is jurisprudence establishing such contracts in the United States. See *TopstepTrader LLC v OneUp Trader LLC*, 2018 WL 1859040 (ND Ill, 2018) ('*TopstepTrader*').

[15] *Topstep Trader* (n 15) 3. See also *Sgouros v TransUnion Corp.*, No. 14 C 1850, 2015 WL 507584, 4 (ND Ill, 2015); *Himber v Live Nation Worldwide Inc*, 2018 WL 2304770 (ED NY, 2018) 4; *Meyer v Uber Techs Inc*, 868 F 3d 66, 73–4 (2d Cir, 2017); *Nicosia v Amazon.com Inc*, 834 F 3d 220, 229 (2d Cir, 2016).

[16] Lydia Pallas Loren, 'Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licences and Limited Abandonment of Copyright' (2007) 14(2) *George Mason Law Review* 271, 273–4.

[17] That said, that complex licences tend towards being contracts is a separate question to whether a contract actually forms between the relevant parties.

[18] See below nn 104–16 and accompanying text.

in these instances as being to openly declare the existence of copyright ownership and to seek to impose an attribution requirement in relation to downstream usage. In Part IV of this article, I question whether CC licences are really appropriate tools for the purposes of government. There are two primary problems. The first is that the terms are difficult for a layperson to understand. The second, is that a contract does not really suit the basic relationship contemplated between the government and user.

## II Dual Characterisation as both a Licence and a Contract

In part the sudden acknowledgment in the IP manual that CC licences might be contracts mirrors a noticeable shift in language between the CC-BY-3.0 AU licence and the CC-BY-4.0 licence. The CC-BY-4.0 licence states:

> To the extent this Public License may be interpreted as a contract, You are granted the Licensed Rights in consideration of Your acceptance of these terms and conditions, and the Licensor grants You such rights in consideration of benefits the Licensor receives from making the Licensed Material available under these terms and conditions.[19]

The CC-BY-3.0 AU, which was in effect when the Australian Government accepted the Government 2.0 Taskforce's recommendations, did not expressly consider whether it could form a contract.[20] In the absence of any publicly available materials it is difficult and perhaps unhelpful to speculate upon the previous thinking behind the Australian Government's use of CC licences. It is possible that just prior to the release of the IP Manual the licences were thought of as merely providing 'baseline permissions'.[21] If this thinking has

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[19] Creative Commons, 'Attribution 4.0 International', *Creative Commons* (Web Page, 2020) <https://creativecommons.org/licenses/by/4.0/legalcode>. The US version of the CC-BY-3.0 contained the same language.

[20] Creative Commons, 'Attribution 3.0 Australia', *Creative Commons* (Web Page, 2020) <https://creativecommons.org/licenses/by/3.0/au/legalcode>.

[21] Notably, the Creative Commons Australia website does not mention the possibility of contracts in its description of the licenses: Creative Commons Australia, 'About the Licences', *Creative Commons* (Web Page, 2020) <https://creativecommons.org.au/learn/licences/>. In part the problem might lie with the lack of a clear dividing line between a simple permission to use property and a contractual obligation. There are of course numerous instances where the parties to a contract use the term "licence agreement", but the licence is clearly a contract. See, eg, *BDM Marketing Pty Ltd v Adlinx Pty Ltd* [2008] VSC 26. However, in the United States there is a subset of jurisprudence where the distinction between a licence and a contract is not often clear: *McCoy v Mitsuboshi Cutlery Inc*, 67 F 3d 917 (Fed Cir, 1995) where Rader J noted: 'Whether express or implied, a licence is a contract governed by ordinary principles of state contract law'. In the context of intellectual property law the existence of a licence or contractual obligation may be determinative of whether an infringement has occurred. In *Illumina Inc v Ariosa Diagnostics Inc*, 2014 US Dist 109531, 10–11 ('*Illumina*'), Illston J stated: 'whether an accused infringer has been granted an express or implied licence is an issue that is directly relates to whether a patent has been infringed'. Notably, in *Illumina*, Illston J used the terms 'licence' and 'agreement' interchangeably. See also *Anton/Bauer Inc v PAG Ltd*, 329 F 3d 1343 (Fed Cir, 2003).

indeed changed then the only real basis for it would be under the emerging category of browsewrap contracts.[22] Yet, Australia is still to see any litigation in relation to browsewrap contracts.

Part of the problem that arises in relation to the proper characterisation of CC licences is because the term 'licence' is surprisingly under-conceptualised and often used to mean different things in different contexts.[23] Nonetheless, the essential concept is well-understood. In *Edwards v O'Connor*,[24] Richardson J in the New Zealand Court of Appeal, stated, "A licence is simply an authority or permission to do what is otherwise wrongful or illegal."[25] This statement reflected the observation of Vaughan CJ in the seventeenth century case of *Thomas v Sorrell*.[26] Land law recognises three types of licences; (i) gratuitous or bare licences; (ii) contractual licences or (iii) licences that are coupled with an interest.[27] Whether concepts that have been developed in relation to land law are immediately transferable into online copyright licensing is another question.[28]

A bare or gratuitous licence would be nothing more than a permission to use property.[29] Such an instrument would render no property interest to the non-owner other than a permission to enter and would have no effect in contract. In a manner that is analogous to a bare or gratuitous licence, an open access licence, whether a CC licence or otherwise, could be regarded as a restrictive copyright notice.[30] Again, this would not result in any contractual obligations for either the licensor or licensee.

However, a licence is an instrument that is capable of dual characterisation both as a vehicle for legal obligations in property and contract. The argument that I advance here is that the existence of complex restrictions, consideration and the irrevocable nature of the grant, pivot the licence instrument towards contract. In effect, a CC licence can serve both as a contractual licence, and, in the event that the contract fails, as a bare licence.

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22 For discussion see above n 15 and accompanying text.

23 See also Jonathan Hill, 'The Termination of Bare Licences' (2001) 60(1) *Cambridge Law Journal* 89, 89-90. As Hill notes: 'the term licence is used to describe the right of an almsperson to occupy rooms in an almshouse, the right of a postman to approach a householder's front door to deliver a letter, the right of the purchaser of a cinema ticket to occupy a seat in the cinema while the film is being shown and countless other situations'.

24 [1991] 2 NZLR 542.

25 Ibid [26]. See also *The Carlgarth* (1927) P 93. See also *Georgeski v Owners Corporation Sp49833* [2004] NSWSC 1096, [42] (Barret J).

26 (1673) 124 ER 1098, 1198 where Vaughan CJ stated, 'A dispensation or licence properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful'.

27 Carmel MacDonald et al, *Real Property Law in Queensland* (Lawbook Co. 2nd ed, 2005) 524.

28 The absence of case law makes this matter difficult to resolve.

29 See below nn 32–44 and accompanying text.

30 Nimmer (n 9) 16.

### A. *The bare or gratuitous licence?*

Where the facts of a matter clearly indicate that no contract has arisen, the courts may well find that any permission that exists between the parties is a bare or gratuitous licence.[31] This is a well-established proposition in land law,[32] but its application in an online environment is less clear. As Creative Commons and other open source movements began in the United States the issue of whether open access licences constituted contracts or bare licences has been debated there before. Indeed, much of the commentary that asserts that open source licences are not contracts turns on the contention that the licences in question are simply bare or gratuitous licences.[33] As counsel for GNU at the time that its General Public Licence (GPL) software licences became contentious, Eben Moglen sought to draw upon the concept of a bare licence.[34] Echoing the words of Vaughan CJ in *Sorrell*, Moglen argued in relation to the GNU GPL that a licence is a power to 'grant permission to do what would otherwise be forbidden.'[35] Ostensibly, a bare licence is a mere permission and nothing more, though even this view is debatable.[36]

The notion of a licence as a mere permission and nothing more is a bit too reductionist. In his commentary on licences in intellectual property law, Patterson contends that there is a tangible difference between bare and restrictive licences.[37] Patterson was writing in a US context and it must be borne in mind that the consideration requirement is harder to satisfy in that context.[38] As a consequence, the dichotomy between bare and restrictive licences would make sense in US contract law. However, this notion finds little immediate reflection in Australian law. In fact, the apparent distinction between bare and restrictive licences may well be a false dichotomy. As the permission which is embodied in the licence must be seen in context, it is logical to imply some limitations upon its use. In turn that raises the question of whether there is a perceptible difference between a bare or a restrictive licence. Indeed, if the demarcation line between a contract and licence is unclear, then if it exists at all, the dividing line between a bare licence

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31 *Tamawood Limited v Habitare Developments Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2015] FCAFC 6, [131]–[132] (Jagot and Murphy JJ).

32 *Gallagher v McClintock & Ors* [2014] QCA 224, [24] (Flanagan J).

33 Newman (n 9). See also Eben Moglen, 'Enforcing the GNU GPL' (Blog Post, 10 September 2001) <http://www.gnu.org/philosophy/enforcing-gpl.en.html>.

34 Moglen (n 33).

35 Ibid.

36 *Gallagher v McClintock* [2014] QCA 224 ('*Gallagher*').

37 Mark Patterson, 'Must Licences be Contracts? Consent and Notice in Intellectual Property' (2012) 40(1) *Florida State University Law Review* 105, 106. Patterson disagrees with Newman (n 9) for failing to consider the nature of the restrictions in open access licences. I agree with this criticism and would add that Newman's analysis exhibits an unnecessarily inflexible view of contract law as it mostly bypasses the relevant law on browsewrap licences.

38 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 402 (Mason CJ, Wilson J).

and a restrictive licence is similarly obtuse. This makes it altogether harder to work out whether a contract has arisen.

Nothing is ever acontextual and even a bland permission must be accompanied by some tacit restrictions. The granting of a permission necessarily implies that it may be withdrawn, or at least that some other objection might arise, if the assumptions that underpinned the grant are subsequently not observed or are trifled with in some serious manner. In *The Carlgarth*,[39] Scrutton LJ said: 'When you invite a person into your house to use the staircase, you do not invite him to slide down the bannisters, you invite him to use the staircase in the ordinary way in which it is used.'[40] Similarly, in *Gallagher v McClintock*,[41] Flanagan J stated:

> A licence is personal to the licencee and simply confers a personal right on the licencee to enter the land. It does not confer any proprietary interest in the land. The licence can be granted on both explicit and/or implied terms and conditions. The licence only authorises entry in accordance with those terms. These terms and conditions can limit or regulate, inter alia, the purpose for which entry to land is granted.[42]

It follows then that whether they are express or implied, both permissions and restrictions are essential to a licence.

Notably, the CC-BY-3.0 AU licence contains a detailed set of restrictions in Clause 4 of this licence.[43] These involve restrictions around distribution, attribution and sub-licensing. The latter is simply forbidden under the licence. Distribution is permitted subject to attribution. The CC-BY.4.0 licence contains a clearer statement of the attribution requirement:

> **Attribution.**
>
> 1. If You Share the Licensed Material (including in modified form), You must:
>    A. retain the following if it is supplied by the Licensor with the Licensed Material:
>       i. identification of the creator(s) of the Licensed Material and any others designated to receive attribution, in any reasonable manner requested by the Licensor (including by pseudonym if designated);

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39 *The Carlgarth* (1927) P 93.

40 Ibid 110.

41 *Gallagher* (n 36).

42 Ibid [24]. See also *Barker v The Queen* (1983) 153 CLR 338, 357 where Brennan and Deane JJ stated: 'When the permission or authority ("leave and licence") of the person entitled to possession is relied upon to justify what would otherwise constitute a trespass, a person enters land as a trespasser at common law if his entry is beyond the scope of the permission. If the entry is within the scope of the permission, he will become a trespasser at common law only when the permission to be upon the land is revoked or exhausted or when his conduct upon the land is such that his presence thereon is outside the scope of the permission'.

43 See above n 20.

ii. a copyright notice;
iii. a notice that refers to this Public License;
iv. a notice that refers to the disclaimer of warranties;[44]

The fact that there are detailed requirements around attribution suggests that the permission in both the CC-BY-3.0 AU and CC-BY-4.0 licences are more than mere permissions to use content.

### B. *The contractual licence?*

The existence of restrictions alone should not be enough to tip a licence over into the realm of contract. What then is the dividing line between a licence that has permissions and restrictions and one that is a contract? Formation requirements such as offer, acceptance, capacity and certainty would easily be satisfied by a written CC licence.[45] The presence of consideration is likely decisive and will transform a licence into a contract. For example, in *Western Australia v Ward* ('*Ward*'),[46] McHugh J stated:

> … a licence to use land ordinarily confers only a personal right that is enforceable in contract but not by an action in trespass or ejectment. … In some cases, *a licence may be granted for value*. If it is and it is granted for a definite period, it will not be revocable until the expiration of that period. In some cases, *the licence may even be granted in perpetuity and will be irrevocable*. The distinction between the grant of a licence to use land that is irrevocable or irrevocable for a fixed period and the grant of a lease is often a fine one.[47] (emphasis added)

*Western Australia v Ward* concerned the extinguishment of native title rights and interests. At issue in *Ward*, at least in part, was the difference between a lease (contract) and a licence (mere permission). A similar issue arose in *Radaich v Smith* ('*Radaich*').[48] In *Radaich*, Windeyer stated:

> The distinction between a lease and a licence is clear. "A dispensation or licence properly passeth no interest, nor alters or transfers property in anything but only makes an action lawful which without it had been unlawful": *Thomas v. Sorrell*. Whether when one man is allowed to enter upon the land of another pursuant to a contract he does so as licensee or as tenant must, it has been said, "be in the last resort a question of intention", per Lord Greene M.R. in *Booker v. Palmer*. But intention to do what? - Not to give the transaction one label rather than another. - Not to escape the legal consequences of one relationship by professing that it is another.

44 See above n 19.
45 Intention to create legal relations could be more problematic, though the ticket cases appear to elide past this point: *Parker v South Eastern Railway Co* (1877) 2 CPD 416 and *Thornton v Shoe Lane Parking* [1971] 2 QB 163.
46 (2002) 213 CLR 1.
47 Ibid 222–3.
48 (1959) 101 CLR 209.

> Whether the transaction creates a lease or a licence depends upon intention, only in the sense that it depends upon the nature of the right which the parties intend the person entering upon the land shall have in relation to the land.[49] (citations omitted).

Clearly, matters of consideration and intention are relevant. These matters were clearer in *Ward* and *Radaich* where money changed hands. There is an argument that the existence of an irrevocable permission on the part of the licensor, as required by CC licences,[50] would constitute consideration.[51] What then is the consideration offered by the licensee? A duty not to copy without permission is already imposed by the *Copyright Act 1968* (Cth).[52] Likewise, though albeit in a different form, the Act already provides for moral rights, including attribution, under Part IX.[53] Under Australian contract law, consideration is effectively in the eye of the beholder. The peppercorn principle, set out in *Chappell v Nestle*[54] and endorsed by Australian courts[55] effectively provides:

> A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn.[56]

It follows that a party may stipulate for whatever consideration that they deem suitable, provide that it suffice to demonstrate that there is a contractual promise.[57] Notably, the CC-BY 3.0 states in capitals:

> BY EXERCISING ANY RIGHTS TO THE WORK PROVIDED HERE, YOU ACCEPT AND AGREE TO BE BOUND BY THE TERMS OF THIS LICENSE. TO THE EXTENT *THIS LICENSE MAY BE CONSIDERED TO BE A CONTRACT*, THE LICENSOR GRANTS YOU THE RIGHTS CONTAINED HERE IN CONSIDERATION OF YOUR ACCEPTANCE OF SUCH TERMS AND CONDITIONS.[58] [Emphasis added].

Similarly, CC-BY 4.0 states:

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[49] Ibid 221–2.

[50] IP Manual (n 2) 176.

[51] See *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87 ('*Chappell*'). Some scholars have argued that in a US context consideration would not be satisfied. See Lydia Pallas Loren, 'Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licences and Limited Abandonment of Copyright' (2007) 14(2) *George Mason Law Review* 271, 312–13. See also Stephanie Woods, 'Creative Commons – A Useful Development in the New Zealand Copyright Sphere' (2008) 14 *Canterbury Law Review* 31, 45–6. However, the peppercorn principle, established in *Chappell*, applies in Australia and consequently consideration is rather more manipulable here.

[52] See, eg, *Copyright Act 1968* (Cth) ss 31–6 ('*Copyright Act*').

[53] Ibid ss193–195AB.

[54] [1960] AC 97.

[55] See *Beaton v McDivitt* (1987) 13 NSWLR 162. See also *Evans v Davantage Group Pty Ltd* [2019] FCA 884, [68] (Beach J).

[56] [1960] AC 97, 114 (Lord Somervell).

[57] Ibid.

[58] See above n 20 and accompanying text.

> By exercising the Licensed Rights (defined below), You accept and agree to be bound by the terms and conditions of this Creative Commons Attribution 4.0 International Public License ("Public License"). To the extent this Public License may be interpreted as a contract, You are granted the Licensed Rights in consideration of Your acceptance of these terms and conditions, and the *Licensor grants You such rights in consideration of benefits the Licensor receives* from making the Licensed Material available under these terms and conditions.[59] (Emphasis added).

The language used in both licences is broadly similar.

Overall, the CC-BY-3.0 AU and CC-BY-4.0 use terms that are unmistakeably contractual in nature. As a document the CC license is almost indistinguishable from other standard form contracts that are presented to consumers on a 'take it or leave it' basis. The licences clearly defines the parties, the terms of the grant, the restrictions that apply to the grant, it also disclaims liability under certain contexts and sets out the grounds upon which the license will terminate. In this sense it mirrors the structure of a simple contract. In its detail it is more than a bare license of the type contained in the often-employed example of the dinner invitation. With this in mind it is quite understandable that the proponents of the bare licence view would argue that similar open-source software licences are no more than 'restrictive licences'.[60] Moglen states:

> Licences are not contracts: the work's user is obliged to remain within the bounds of the license not because she voluntarily promised, but because she doesn't have any right to act at all except as the license permits.[61]

However, the CC-BY 3.0 license does more than simply grant permission subject to certain restrictions. The license takes away rights and it imposes obligations. We can think of restrictions as being negative in nature. That is, a restriction requires that the licensee not do something. In contrast an obligation to do something, such as to place an attribution statement on any derivative work, is positive in nature. Of course, where the doctrine of consideration is concerned the distinction between positive and negative obligations is meaningless as consideration can manifest itself in the form of either a benefit or a detriment.[62] However, the argument that CC and open source software licences, and other free content licences for that matter, are simply restrictive in nature does not hold true if the actual terms of the license impose upon the licensee some obligation to do some positive act.

The fact that the CC-BY-3.0 license contains terms in Items 5 and 6 that are effectively exclusion clauses also undermines any argument

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59 See above n 19 and accompanying text.
60 See Moglen (n 33). See also Patterson (n 37).
61 Moglen (n 33).
62 *Currie v Misa* (1875) LR 10 Ex 153, 162 (Lush LJ); *Hamer v Sidway* 124 NY 538 (1891).

that the license is a mere restriction.[63] Item 5 of the license disclaims any representations as to fitness for purpose, merchantability, warranty as to title and the absence of latent or other defects. As is well known, the Sale of Goods legislation in various States and Territories and the Australian Consumer Law ('ACL') imply these terms into all consumer contracts. These implied terms are ordinarily applied to contracts relating to goods. Item 5 has its basis in open software licences, at least insofar as it has been adapted by the CC movement, and it is quite unclear how any of these terms would apply to software much less to copyright protected works.[64] That said, the fact that the license attempts, where possible as some jurisdictions prohibit contractual derogation from these terms, to take away rights that would exist but for the terms of Item 5 demonstrates that the license is more than a mere restriction. The license comes closer to the 'sword and shield' terms that invariably make up much of most consumer contracts. Item 6 also limits liability by declaiming any liability for special, incidental, consequential, punitive or exemplary damages except where required by the law.

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[63] For discussion see above n 20 and accompanying text. Similar terms are housed in the CC-BY-4.0 licence. See above n 19 and accompanying text. It is quite possible that the licences have been drafted in the manner that they were out of an abundance of caution. That is, the drafters may well have feared that a court might interpret the licences as contracts. I am grateful to the anonymous reviewer for this suggestion. However, this then becomes something of a self-fulfilling prophecy. By averting to the possibility that the licences might be seen as being contracts, and drafting them as such, this of itself evinces an intention to enter into legal relations if not an intention to contract. See, eg, *Modahl v British Athletics Federation* [2002] 1 WLR 1192 where the proliferation of a set of rules for competition was enough to find an implied contract.

[64] Very few cases have considered whether software can in fact be classed as goods. The one case that is on point is *St Albans City and District Council v International Computers* [1996] 4 All ER 48 ('*St Albans*'). In *St Albans*, it was held that software, upon which depended the operation of an entire computer system, was in fact 'goods' for the purposes of the applicable Sale of Goods Act. In essence, the workability of the computers depended upon the workability of the software, so even though the software was not 'goods' a defect in the software meant that there was a defect in the computers thereby causing the Sale of Goods legislation to apply. The decision in *St Albans* does not make sense on a technical level. Computer programs are protected as personal property in the sense that they are protected by copyright law. As such, they are a form of *chose in action*. To copy a computer program without a licence from the copyright owner will give rise to a suit for copyright infringement. It may well be the case that the interaction between the computer program and the computers is required to make the overall computer system work, as was the case in *St Albans*, but the inter-relationship between the two does not necessarily render the software itself 'goods' for the purpose of the Goods Act. Notably, in *Telstra Corporation v Hurstville City Council* (2000) 105 FCR 322 ('*Telstra*'), the Federal Court found that electro-magnetic signals that passed through cables were not goods. That said, in *Telstra* the distinction that the Court drew was that Telstra was providing information as a service and the electro-magnetic signals, which were ancillary to this service, were not goods.

### C. *Dual characterisation*

There is in reality no real impediment to a CC licence being both a conditional permission to access and use property and also a contract between two parties.[65]

Much of the jurisprudence on licences, most notably in land law, has focused upon the question of whether a licence creates an interest in property or whether it is simply a permission to use the property.[66] It is central to the idea of a bare licence that it does not confer an interest in property.[67]

In *AG Securities v Vaughan* ('*Vaughan*')[68] a dispute arose as to whether a series of agreements allowing four people to jointly occupy a property created a tenancy interest for each of them or if instead they were mere licencees. In *Vaughan* in the UK Court of Appeal, Fox and Mustill LJJ held that a tenancy had been created on the basis that the four individuals jointly held a right to exclusive possession. In *Vaughan* in the UK Court of Appeal, Fox and Mustill LJJ held that a tenancy had been created on the basis that the four individuals jointly held a right to exclusive possession. In effect, they had not only a property interest, but a joint contractual right enforceable against the owner of the property. The presence of consideration and the intent to create a legal relationship rendered the dealings contractual. The substantial monies that were paid for exclusive possession sufficed to be both rent in the context of property and consideration with regard to the contracts.[69]

*Vaughan* at least illustrates the possibility that a legal instrument which purports to create one set of rights and obligations is capable of dual characterisation under the law. For example, a lease is an instrument which serves to create rights and obligations in relation to property, but it is also a contract.[70] In *Leitz Leeholme Stud Pty Ltd v Robinson*, Glass JA stated:

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65 For example, it is well accepted that a lease agreement may be a contract in addition to being an instrument that creates a property interest: *AG Securities v Vaughan* (1988) 3 WLR 1205 ('*Vaughan*'); *R (Beresford) v Sunderland CC* (2004) 1 AC 889 ('*Sunderland CC*'); *Griffiths v Civil Aviation Authority* [1996] FCA 1502 ('*Griffiths*'). In *Griffiths* the Federal Court held that a pilot's licence was not property. See also *Jack v Smail* (1905) 2 CLR 684, 705 (Griffith CJ); Greg Taylor, 'Implied Terms in Licences over Land' (2001) 21(2) *University of Queensland Law Journal* 178; Peter Butt, 'Lease and Licence – Yet Again' (1999) 73 *Australian Law Journal* 787.

66 See *Vaughan* (n 65); *Sunderland CC* (n 65); *Griffiths* (n 65).

67 *Vaughan v Shire of Benalla* (1891) 17 VLR 129. See also *Commissioner of Stamp Duties (NSW) v Yeend* (1929) 43 CLR 235; *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605 ('*Cowell*').

68 (1988) 3 WLR 1205.

69 This is again a clear example of a lease effectively serving as an instrument in both property and contract.

70 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675; *Shevill v Builders Licensing Board* (1982) 149 CLR 620; *Progressive Mailing House v Tabali Pty Ltd* (1985) 157 CLR 17; *Leitz v Leeholme Stud Pty Ltd v Robinson* (1977) 2 NSWLR 544.

> The agreement and the tenancy at will are independent sources of rights. At no stage do they merge, so that the termination of the estate automatically terminates the agreement … The unregistered memorandum of lease operates merely as agreement specifically enforceable in equity, but not in itself creating a legal term in the land … Entry into possession and payment of rent bring into existence a common law tenancy upon such terms of the memorandum as are applicable to the tenancy at will. But, in so far as the memorandum operates as an agreement, it retains a separate identity as the repository of the substantial rights of the parties.[71]

If a contract and a lease (an interest in property) can both be drawn from the same instrument, albeit with separate existences, then it is not altogether outside the realms of possibility that a bare licence and a contractual licence may coexist with both having their textual basis in the same document.[72] In effect, should the contract fail, for want of completeness, absence of consideration or lack of intent, then the bare permission right would remain.

### D. *Does the irrevocable nature of a CC licence create an 'interest' in property?*

Creative Commons licences are intended to be irrevocable.[73] The Creative Commons website states:

> The CC licenses are irrevocable. This means that once you receive material under a CC license, you will always have the right to use it under those license terms, even if the licensor changes his or her mind and stops distributing under the CC license terms. Of course, you may choose to respect the licensor's wishes and stop using the work.[74]

The CC-BY-3.0 AU states that the licence grant is perpetual.[75] Similarly, the CC-BY-4.0 licences contain a statement saying that the licence grant is irrevocable.[76]

In other contexts, particularly in relation to licences coupled with an interest,[77] the courts have differentiated between contracts and bare licences by considering whether an instrument is revocable.[78] This is particularly relevant in light of the stipulation in CC licences that they

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71 (1977) 2 NSWLR 544, 547.

72 On the basis that should the contract fail for any reason then the bare licence would remain.

73 See Wikimedia Commons, 'Commons: License Revocation', *Wikimedia Commons* (Web Page, 24 May 2019) <https://commons.wikimedia.org/wiki/Commons:License_revocation>.

74 See Creative Commons, 'Frequently Asked Questions', *Creative Commons* (Web Page, 28 August 2020) <https://creativecommons.org/faq>.

75 See above n 20.

76 See above n 19.

77 *Clos Farming Estates Pty Ltd (Rec and Managers Appointed) v Easton* (2001) 10 BPR 18, 845.

78 *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* (2006) 231 ALR 663, [75] (Kirby and Crennan JJ). See also *Hart v Hayman, Christy & Lilly Ltd* [1911-1916] MacG Cop Cas 301; *Katz v Cytrynbaum* (1983) 2 DLR (4th) 52, 56–7.

are irrevocable.[79] Notably, in *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd*,[80] Viscount Simon described a gratuitous license as being one in which the licensor "gets nothing at all".[81] Viscount Simon then went further to state that, "a gratuitous licence would plainly be revocable by notice."[82]

However, it is an exaggeration to say that a contractual licence cannot be revoked. Contract law contains important doctrines such as repudiation and termination for breach which clearly contemplate the deliberate dishonouring of a contractual promise.[83] The CC licences themselves have a term relating to the suspension of the licence. Item 7 of the CC-BY-3.0 AU licence deals with automatic termination in the event of breach. The CC-BY-4.0 licence deals with the same terms, but sets out steps for the reinstatement of the licence.

It would appear that the idea that a bare licence is revocable has its basis in the distinction between licences and property, and not in the differentiation between the former and contracts.[84] The idea does not translate perfectly into contract law. As a dealing in property transfers some type of ownership interest from one party to another, it is clearly different from a mere permission. Consequently, once the ownership right has been transferred to the other party it cannot be revoked. This distinction is not one that must necessarily be drawn between licences and contracts. In *Di Napoli v New Beach Apartments Pty Ltd*,[85] Young CJ stated:

> There are situations, though they are very few and far between, where a licence which is a bare licence becomes irrevocable. The usual example is where the woman consents to intercourse and then says "no" after intercourse is completed. But short of that sort of example, there are few examples in the books where the mere acting on the consent makes a bare licence, or even a contractual licence, which is a licence at will, irrevocable and a fortiori where there is no consideration.[86]

However, in *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd*,[87] Kirby and Crennan JJ appeared to suggest that

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79 See, eg, Creative Commons, 'Attribution 4.0 International' (Web Page, 2020) 2(a)(1) <https://creativecommons.org/licenses/by/4.0/legalcode>. Notably, CC-BY-3.0 AU does not use the term 'irrevocable' in the licence grant. However, Item 7 of CC-BY-3.0 AU which deals with termination, strongly implies that the licence will not be withdrawn provided that the terms are complied with by the licensee.

80 [1948] AC 173.

81 Ibid 188.

82 Ibid.

83 *Carr v JA Berriman* (1953) 89 CLR 327.

84 *Cowell* (n 67).

85 [2004] NSWSC 52.

86 Ibid [21].

87 (2006) 231 ALR 663.

the absence of consideration made a bare licence revocable.[88] Their Honours also cited *Ng v Clyde Securities Ltd* ('*Ng*'),[89] as a case where the permission contained in a contractual licence could not be revoked after it had been agreed and acted upon.[90] However, though it was decided before the High Court's decision in *Legione v Hately*,[91] the decision in *Ng* appears to draw on the notion of estoppel. It follows that the remarks of Kirby and Crennan JJ might be seen in that context and the presence of detrimental reliance might play upon the question of whether a specific licence can be revoked.

In land law, it is generally accepted that a licence coupled with a property interest is irrevocable.[92] However, the property interest contemplated in such cases is obviously ascertainable and corporeal, as opposed to intangible property in the form of a chose in action. In *James Jones & Sons Ltd. v Tankerville (Earl)*,[93] Parker J stated:

> A licence to enter a man's property is prima facie revocable, but it is irrevocable even at law if coupled with or granted in aid of a legal interest conferred on the purchaser, and the interest so conferred may be a purely chattel interest or an interest in realty. If A sells to B felled timber lying on A's land on the terms that B may enter and carry it away, the licence conferred is an irrevocable licence because it is coupled with and granted in aid of the legal property in the timber which the contract for sale confers on B.[94]

Nevertheless, the fact that a licence coupled with the grant of an ascertainable property interest is irrevocable cannot be said to be the same thing as saying that a representation that a particular licence is itself irrevocable automatically confers a property interest upon the licensee.[95] What then are we to make of representations in a licence to the effect that the permission granted is irrevocable? If a licence coupled with an interest is irrevocable in land law, does it necessarily follow that a copyright licence that is proffered as being irrevocable also confers an interest?

If the licence is contractual in nature then it is logical that damages for breach may follow if the licence is in fact revoked.[96] In *Cowell v Rosehill Racecourse Co Ltd*, Latham CJ stated:

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88 Ibid [75]. Kirby and Crennan JJ state: 'It can be noted that there is some authority to support the proposition that a bare licence to use drawings which are the subject of copyright, that is one given without consideration, is revocable at any time'.

89 *Ng v Clyde Securities Ltd* [1976] 1 NSWLR 443, 446.

90 See above n 87.

91 (1983) 152 CLR 406.

92 MacDonald et al (n 27) 525.

93 (1909) 2 Ch. 442.

94 Ibid 443.

95 Such a statement would be a mere representation.

96 See, eg, *Cowell* (n 67). See also *Balgra Office Enterprises Pty Ltd v Commissioner of State Taxation* [2008] SASC 50, [25] (Gray JA).

> In *Wood v. Leadbitter* it was decided that a mere licence, that is, a permission to do something which without permission would be unlawful, was revocable, whether it was under seal or not, but that a licence coupled with an interest was not revocable. *Kerrison v. Smith* shows that where a licence is revoked the actual revocation may (if there be a contract) be a breach of contract for which damages are recoverable. Thus, a person ejected from a place of entertainment could in such a case at least get back the price of admission which he had paid. It was not suggested in *Wood v. Leadbitter* that the existence of a contract not to revoke the licence made the licence irrevocable in the sense that it could not be effectually (though possibly wrongfully) revoked.[97]

In effect, the representation that the licence is irrevocable may set up a basis for a claim for damages when the licence is later revoked. There may well be an argument that the use of the term 'irrevocable' is an attempt to confer some form of interest upon the licensee. There is authority for the proposition that a licence can result in an equitable interest in the form of Lord Denning's decision in *Errington v Errington and Woods*.[98] However, this notion has been criticised by no lesser commentators than Meagher, Heydon and Leeming.[99] Accordingly, while the representation itself may not create any property right, as Chesterman JA noted in *King v King*,[100] it might act as "a negative stipulation that the licence will not be revoked and that any purported revocation may be restrained by injunction."[101] That said, while this does bear upon *how* the contract may be applied, it does not actually shed light on *whether* a contract in fact exists.

### E. *Trending towards contract*

The foregoing discussion does at least highlight two useful concepts. First, it is possible for a CC licence to serve both as a bare permission and a contract, subject to one prevailing over the other depending on the individual circumstances.[102] Second, the context of the Australian Government's use of CC licences does give rise to a valid question as to whether a contract rather than a mere permission would occur between the parties. In part, this might explain the rhetorical shift from the Government 2.0 Report to the IP Manual.[103] The user of a government website might not ordinarily expect to be in a contract just

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97 (1937) 56 CLR 605,

98 [1952] 1 KB 290, 298.

99 Roderick Meagher, Dyson Heyon, Mark Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (LexisNexis, 4th ed, 2002) 87–8. See also *King v King & Ors* [2012] QCA 39, [36] (Chesterman JA) ('*King*').

100 *King* (n 99) .

101 Ibid.

102 As discussed below, a habitual user of an Australian Government website would likely be in contract, whereas a single instance user would likely be subject only to a bare permission.

103 Department of Communications and the Arts (n 2).

so that they could access materials that are pertinent to the democratic life of the nation.[104]

## III The Australian Government's Use of CC Licences

As noted above, CC licences have been very widely adopted by Australian Government departments. For example, Treasury makes its publications freely available on the basis that users agree to abide by the terms of the CC licence. Likewise, the Australian Government's AusTender website makes materials available under a CC-BY-3.0 AU licence.[105] The Attorney-General's Department uses the new CC-BY-4.0 licence.[106] The Department of Home Affairs employs the CC-BY-3.0 AU licence.[107] In contrast, the Department of Defence does not use any form of CC licence and reserves all rights under the Copyright Act.[108]

### A. *The basic obligations*

The various copyright notices feature the CC logo as well as a further statement of terms in relation to intellectual property. The Department of Home Affairs notice states:

> Copyright and trademarks are important parts of our website. You should keep them in mind when using our website.
>
> The Commonwealth of Australia owns all the material we produce. All material presented on this website is provided under a Creative Commons Attribution 3.0 Australia licence … You should attribute material you get from this website as Australian Government Department of Home Affairs.[109]

The AusTender notice provides:

> With the exception of the Commonwealth Coat of Arms, this site is licensed under a Creative Commons Attribution 3.0 licence (CC BY 3.0

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104 This would of course require consideration. However, the stringency required to satisfy the consideration element within the common law of contracts has weakened significantly in light of the peppercorn principle: *Chappell* (n 51) and the practical benefit rule: *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1; *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723. Consideration would in fact be satisfied quite easily here given that the Crown is granting something, access to copyright protected materials, in exchange for assent from the user to abide by the terms set out by the Crown.

105 Australian Government, 'AusTender' (Web Page, 2020) <https://www.tenders.gov.au/>.

106 Attorney-General's Department, 'Copyright' (Web Page, 2020) <https://www.ag.gov.au/Pages/Copyright.aspx>.

107 Department of Home Affairs, 'Copyright and Disclaimer' (Web Page, 2020) <https://www.homeaffairs.gov.au/website/copyright-and-disclaimer>.

108 Department of Defence, 'Copyright' (Web Page, 2020) <http://www.defence.gov.au/Copyright.asp>.

109 See above n 107.

> AU). The Department of Finance is not responsible for AusTender content sourced elsewhere.[110]

Similar statements appear on the websites of the Attorney-General's Department, The Department of Foreign Affairs and Trade,[111] The Department of Prime Minister and Cabinet[112] and the Department of Education.[113] The primary concern on each of the websites appears to be to deliver a notice of copyright ownership and a requirement of attribution.

As noted above, the CC-BY-4.0 licence also imposes tangible attribution obligations on the licensee. The licensee's protection from liability is conditional upon their observance of the licence terms. Section 3 of the CC-BY-4.0 licence sets out the conditions. If the licenced materials are shared then this includes (i) identification of the creator of the licenced materials; (ii) a copyright notice; (iii) a notice that refers back to the CC-BY-4.0 licence (iv) a notice that acknowledges the disclaimers in section 5 of the CC-BY-4.0 licence and where practicable (iv) a link to the licenced material. These are not slight obligations and whether they are feasible for all users of government materials is debatable.

The one outlier of sorts in the use of CC licences is the Treasury Department. It is notable that Treasury does not simply highlight the CC-BY 3.0 licence on its webpage, but that it includes on the site what appears to be Treasury's interpretation of those rights. The copyright notice appears in the following format:

> © Commonwealth of Australia 2015
>
> Your right to use material on this website (and your obligations in using that material) will be set out in the copyright statement on the relevant material.
>
> Full copyright and creative commons details.[114]

The last sentence displayed on the Treasury webpage, and similar pages, contains a hyperlink that will take the user through to a page where the broad parameters of the CC licence are explained. This page has a further link to the Creative Commons website where the licence itself is stored. The page states that Treasury makes the material available under a CC-BY 3.0 licence.

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[110] See above n 105.

[111] Department of Foreign Affairs and Trade, 'Copyright' (Web Page, 2020) <https://dfat.gov.au/about-us/about-this-website/Pages/copyright.aspx>.

[112] Department of the Prime Minister and Cabinet, 'Copyright and Disclaimer' (Web Page, 2020) <https://www.pmc.gov.au/copyright-disclaimer>.

[113] Department of Education, Skills and Employment, 'Copyright' (Web Page, 2020) <https://www.education.gov.au/copyright>.

[114] The Treasury, 'Copyright' (Web Page, 2020) <https://treasury.gov.au/copyright>.

The site also makes it clear that any attribution under the CC-BY-3.0 AU licence should be done in a way that does not suggest that Treasury endorses the content produced by the user. The Treasury site further states:

> **Treasury material used 'as supplied'**
>
> Provided you have not modified or transformed Treasury material in any way including, for example, by changing the Treasury text; calculating percentage changes; graphing or charting data; or deriving new statistics from published Treasury statistics – then Treasury prefers the following attribution:
>
> Source: The Treasury
>
> **Derivative material**
>
> If you have modified or transformed Treasury material, or derived new material from those of the Treasury in any way, then Treasury prefers the following attribution:
>
> Based on Treasury data[115]

There are in effect three primary obligations that the user must observe in order to remain within the permission set out by the licence. The terms of this licence require; (i) attribution of authorship to Treasury (in right of the Crown); (ii) a requirement that the material should be 'used as supplied' by Treasury but that where it is not (iii) that any such derivative work will contain an attribution statement acknowledging that the new work is based on Treasury data.[116] The last two requirements, hereinafter respectively 'the terms as used requirement' and 'the contingent attribution requirement' quite arguably present some difficulties with respect to the Copyright Act and the CC-BY-3.0 AU licence.

These two requirements are clearly inter-linked in that the 'use as supplied requirement' is a primary rule, whereas the contingent attribution requirement is a default rule that operates only when the primary rule is inapplicable. The inter-relationship between these obligations and the CC-BY-3.0 AU licence is not immediately clear. It might well be that the two requirements are an interpretation of the rights created under the CC-BY-3.0 AU licence. The licence itself is ostensibly a 'browse-wrap' licence because it presents its terms to the user as he or she browses the website.[117] There is no particular box that

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115 Ibid.

116 Ibid.

117 See Michelle Garcia, 'Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum' (2013) 36 *Campbell Law Review* 31, 32 where Garcia writes: 'Imagine entering into a contract where you have no knowledge of the terms, no way to decline acceptance, and no knowledge you have entered into an agreement. This is not some dystopian fantasy; it is the world of Browsewrap'. In some respects, Garcia's characterisation of browsewrap

the user needs to click on to demonstrate acknowledgement of the terms. Nonetheless, knowledge of the terms can be deduced from the prominence of the copyright notice. That is, any visitor to the website would see the notice with its reference to the CC licence. The inference that should logically follow is that the reader should know that the use of the site is subject to certain terms.

Whether the users of Treasury's site will fully understand those terms is debatable. It might be inferred that the general populace is now quite aware of Creative Commons. However, it would be too much to think that a reasonable user of the Treasury website would be legally savvy enough to comprehend the actual language of the CC-BY-3.0 AU licence.

## IV Should the Crown use CC licences?

Whether the Crown should use CC licences can be resolved by examining two issues. Namely, the question of interpretation and the more troubling matter of form. I argue here that the CC licences and the terms used around them by various Australian Government entities give rise to interpretive difficulties. This may truncate the value that they offer in this context, at least to the extent that the parties can be taken to genuinely know the boundaries of their rights and obligations. Indeed, it is one thing to establish that a contract exists, but quite another to understand what the terms of that contract actually means. Whether a contract is needed is also very questionable. Admittedly, Part II of this article has suggested that acting in a contractual manner is hard to avoid in an online licensing environment, but there must conceivably be other options to simply disseminate and distribute content. Ultimately, my view is that the CC licences offer needless complication. A statutory waiver would achieve much the same desired effect and with greater clarity.

### A. *Problems of Interpretation*

Using Treasury as an example, it is possible to highlight some of the interpretive difficulties around CC licences and the ancillary terms used by the Department to around them. For example, even some of the terms that Treasury uses to explain the license are not capable of easy interpretation.

agreements is unduly alarmist. A contract cannot really form unless the user of a website knows that the site has terms, regardless of whether they read them or not, and manifests assent to be bound by the terms presumably by continuing the browse the site. See also *Sgouros v TransUnion Corp,* No 14 C 1850, 2015 WL 507584, 4 (ND Ill, 2015); *Himber v Live Nation Worldwide Inc*, 2018 WL 2304770, 4 (ED NY, 2018); *Meyer v Uber Techs Inc*, 868 F 3d 66, 73-4 (2d Cir, 2017); *Nicosia v Amazon.com Inc*, 834 F 3d 220, 229 (2d Cir, 2016).

### 1 *The meaning of the term 'used as supplied' is unclear*

The term 'used as supplied' is itself somewhat ambiguous. In copyright parlance use might well be understood as referring simply to the perception of the materials presented by the copyright user. However, the requirement needs to be read in its entirety and the restriction pertaining to 'modified or transformed' clearly indicate that Treasury contemplates that the materials can be reproduced in another form and not simply read by the user. Even so, the obligation that reproductions comply with the 'used as supplied' requirement is also capable of at least two different interpretations.

The first interpretation would be that the restriction on the uses permitted via reproductions should be wholly coextensive with the rights and limitations that exist under the Copyright Act. The second interpretation could be that 'used as supplied' means that any reproductions of the materials in new publications or writings should preserve their integrity and that this requirement might not necessarily be limited by the Copyright Act. A contextual interpretation would favour the first interpretation as Treasury has not expressly stated any desire to expand the Crown's rights beyond the Copyright Act.[118]

Unless it is confined to moral rights, the requirement imposed by Treasury that the materials should be used as supplied has no direct counterpart in the Copyright Act. It may well be argued that the Crown, through Treasury, is asserting rights that are in effect broader than those conferred upon it by the statute. The CC-BY 4.0 license contains a clear statement in Section 8 to the effect that:

> a. For the avoidance of doubt, this Public License does not, and shall not be interpreted to, reduce, limit, restrict, or impose conditions on any use of the Licensed Material that could lawfully be made without permission under this Public License.

However, the CC-BY 3.0 license does not contain a similar provision.[119] As Easterbrook has noted, the statutory monopoly does

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[118] The precise meaning of the 'used as supplied' requirement will depend upon the surrounding circumstances of the licence or contract. However, the issue of surrounding circumstances in contract construction is far from settled. See *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; *IATA v Ansett Australia Holdings* (2008) 233 CLR 279; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603; *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604; *MBF Investments Pty Ltd v Nolan* [2011] VSCA 114; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 ('*Woodside*'). The construction debate has been a highly controversial feature of Australian contract law. See James Spigelman, 'Contractual Interpretation: A Comparative Perspective' (2011) 85 *Australian Law Journal* 412. The matter seemed settled in *Woodside*. However, in *Wright Prospecting Pty Limited v Mount Bruce Mining Pty Limited* [2015] HCA 37 the Court again stated that the matter was unsettled.

[119] Apart from Item 2 which states that the CC-BY 3.0 licence does not oust fair dealing rights.

not constrain the contracting rights of IP owners.[120] Accordingly, it is possible that the basis for asserting those rights that go beyond the Act is via a private agreement. In turn, this is why the status of the CC license on the Treasury webpage as a browsewrap agreement is quite important. If a license is a mere permission to use property then it cannot create a positive obligation that is incumbent upon the user without eventually become something more than a simple permission.

### 2 *Government departments may not actually have copyright in the materials they make available*

A lot of the material that Treasury presents in its publications are data. Similar Crown agencies are likely to be in the same position as Treasury. Accordingly, it is relevant to consider whether Treasury and like agencies are presenting materials under a CC license when those materials are not in fact covered by copyright. It is a longstanding and well-established proposition that copyright protection does not extend to facts. Copyright is concerned with the expression of ideas.[121] A factual compilation may not necessarily meet the threshold level of originality that is required for copyright to subsist in the materials.[122] It is a point of some contention as to whether the industrious collection of data will result in copyright protection. In *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (‘*IceTV*’),[123] French CJ, Crennan and Kiefel JJ stated:

> Not every piece of printing or writing which conveys information will be subject to copyright. For a long time, and precisely because compilations often contain facts, it has been commonplace to enquire what skill and labour was required in the preparation of a compilation.[124]

Whether copyright subsists wholly or in part in a set of materials will depend upon the specific set or compilation itself. As Treasury reports often present data together with detailed analysis, there will at least be copyright in the analysis itself.

A further point of complication arises from the fact that the Australian Government is presently licensing datasets through its agencies, the Digital Transformation Agency (DTA), which runs the

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120 Frank Easterbrook, ‘Contract and Copyright’ (2005) 42(4) *Houston Law Review* 953, 955. See also *Aronson v Quick Point Pencil Co*, 440 US 257 (1979).

121 *Victoria v Pacific Technologies (Australia) Pty Ltd (No 2)* [2009] FCA 737; *Autodesk Inc v Dyason* (1992) 173 CLR 330.

122 *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 119 FCR 491 (‘*Desktop*’). In *Desktop*, the Full Court of the Federal Court appeared to endorse the ‘sweat of the brow’ doctrine which the United States Supreme Court had rejected in *Feist Publications Inc v Rural Telephone Services Co,* 499 US 340 (1991). However, the decision of the High Court in *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 (‘*IceTV*’) subsequently put this position in doubt.

123 (2009) 239 CLR 458.

124 Ibid [45]–[47].

data.gov.au website, and the Public Sector Mapping Agency (PSMA) under CC licences.[125] Most, if not all, of these materials will have been produced by non-human authors.[126] The Department of Communication and Arts' 'Guidelines on licensing public sector information for Australian Government entities' instructs government organisations to use CC licences or some other form of open access licence. The Department's Guidelines extend this instruction to 'forms of data'.[127] Likewise, the PSMA's copyright notice asserts copyright in various datasets and source data.[128] Yet, under the law as set out in *IceTV*[129] and *Telstra Corporation Limited v Phone Directories Company Pty Ltd*[130] this assertion of copyright ownership is clearly untenable. Taken together, *IceTV* and *Phone Directories* have established a position where works of non-human authorship are beyond the parameters of Australian copyright law. It follows that any such 'contracts' that might arise here due to the use of CC licences would be void for illusory consideration.[131]

### B. *The Problem of Form*

This article does not explore in detail the question of whether a contract can actually form between a government department and a user of its website, though it does suggest that it is likely. However, in this section of the article, I consider whether contract is actually a useful vehicle for performing the functions sought by the government. As Section III of this article has set out, all that the government departments seek to achieve is to deliver a notice of copyright ownership and a requirement of attribution.

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125 'About', *Australian Government data.gov.au* (Web Page, 2020) <https://data.gov.au/about>. On the website of data.gov.au, the copyright notice states that the "material presented on data.gov.au is provided under a Creative Commons Attribution 3.0 Australia licence.".

126 'Search', *Australian Government data.gov.au*, (Web Page, 2 December 2020) <https://data.gov.au/dataset>. The data.gov.au website currently has 92,046 datasets available. Some of these datasets would have been put together by human authors. However, it is common practice for databases and datasets to be compiled using software.

127 IP Guidelines (n 2) 8.

128 Albeit with the custodianship of that copyright attributed to various governments and departments. See 'Copyright Notices', *Geoscape Australia* (Web Page, 7 March 2021) <https://www.psma.com.au/psma-data-copyright-and-disclaimer>.

129 *IceTV* (n 122). French CJ, Crennan and Keifel JJ stated at 474 that originality 'requires that the literary work in question originated with the author and that it was not merely copied from another work. … originality means that the creation (ie the production) of the work required some independent intellectual effort'.

130 [2010] FCAFC 149.Yates J stated at [134] that '[i]n relation to works, an author is, under Australian law, a human author.'

131 See *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353. Further, the assertion of copyright over materials in which it cannot exist is self-evidently a concerning development.

### 1 *Notice clearly visible, but not the terms*

One of the problems with the use of CC licences, and copyright notices in general, is that often the notice is not immediately visible to a user of the site. Technically, the placement of the notice of CC logo at the bottom of a website does mean that it is visible. However, that does not necessarily translate into a user of the site or reader of a document being aware of the exact terms of usage. The Treasury Department again provides a useful example of the display of terms. On the webpage where an individual document may be downloaded the Treasury site includes a copyright statement at the bottom of the page. The statement is not obscured. It is clearly visible, though a user could download the document via a link at the top of the page without scrolling down to see the copyright notice. Whether this is problematic would be dependent upon the view a court takes of contract law's formation doctrines. Nonetheless, even when a user downloads a Treasury document, the copyright statement, which includes the Creative Commons license, is included before any of the substantive content of the document. It is therefore very difficult for a user of the Treasury site to access and use materials from that site and to say that they were unaware that there were terms that applied to the use. Yet, the terms themselves are not immediately accessible and, as discussed above, they can be confusing.

### 2 *Is contract the correct vehicle?*

Even if there is a reasonable argument that the Australian Government's use of CC licences is contractual, there is still the question of whether a contract is the correct instrument to use. For example, the prerogative clearly vests a form of copyright in the Crown, here the executive government by virtue of s 61 of the Australian Constitution, but it imposes no reciprocal obligation on the citizen. Indeed, under the prerogative, a statute is free for a citizen to read and copy. However, where CC licences are concerned the same citizen can still access a government report about a statute, but he or she must do it on the basis that a contract binds them.

This seems an altogether unusual way to run a democracy. Copyright already imposes a set of obligations. Those obligations can serve the ends of attribution and integrity. However, whether another set of complex terms needs to be imposed on top of copyright law is questionable. It is arguable that all the contract law does here is to restate much of the basic rules of copyright in a different form. Even were that not to be the case, and if attribution, integrity and a permission to use, needed to come from some private law instrument, it could all be done much more succinctly. Indeed, given the modesty of the government's goals in this area it is difficult to understand why the

needs of open access and reuse cannot simply be met by simple and brief statement.

It is plausible that the Australian Government underestimated the complexity and nature of contract law. Even if the entire theory of CC licences as contracts is flawed, it still does not make a great deal of sense to use a complex licence instrument. I would suggest here that the use of CC licences by government should be reviewed. Instead, alternative instruments should be explored.

## V Conclusion

This article has raised some serious questions about the Australian Government's use of CC licences. It does seem likely that the use is contractual in nature. The essential difficulty is that licence and contract are not necessarily distinct concepts. Their boundaries are all too often merged. Moreover, neither the Government 2.0 Report or any other more recent government report or statement has really considered the question of contract in any depth. Its emergence now seems assumed and there is a viable case that this is so. Yet, rather than to meet the needs of both parties, government and user, the CC licences seem to complicate matters. There is a basic argument that making materials freely available on a website gives rise to an implied licence to read and use. Together with a basic copyright notice it is likely that the government could achieve its ends much more simply.