The Australian Government's Use of Creative Commons Licences: Pushing the Boundaries of Contract?

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The internet era has spawned a novel form of agreements known as browsewrap contracts. These contracts operate without any explicit act of assent, but generate agreement from the notice of terms and the purported acquiescence to those terms. While browsewrap contracts have been controversial in the United States there is yet to be a case in Australia. However, the Australian Government has emerged as an unlikely actor in the browsewrap contract space through its prolific use of Creative Commons licences. The Australian Government makes content available under CC licences and users knowingly take these materials on that basis. This article considers whether browsewrap contracts could legitimately arise in this context.

I Introduction

Contract and copyright law house both share the burden of having their roots within trade and commerce, but having expanded so successfully that they each now cater to a disparate group of actors. Notably, commercial contractual disputes have pushed the boundaries of assent within contract law.[1] This has happened through the rise of acceptance by conduct cases and the emergence of novel forms of contract such as browsewrap.[2] While the cases are commercial in nature, the rules articulated by the courts must be set at a level of abstraction that would allow them to apply in many other contexts. It is here that the Australian Government might find itself an unwitting passenger with a rising tide of contract law doctrine. The one area where this will likely play itself out is in the assertion that CC licences are contracts. After the report of the Government 2.0 Taskforce's report, 'Engage: Getting on with Government 2.0'[3] the Australian Government began the widespread use of Creative Commons (CC) licences so as to to facilitate access to public sector information (PSI).[4]

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[1] See for example *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195 and *Brambles Ltd v Wail; Brambles Ltd v Andar Transport Pty Ltd* [2002] VSCA 150. See also *Modahl v British Athletics Federation* [2002] 1 WLR 1192. *Modahl* was cited with approval in *CSR Limited v Adecco (Australia) Pty Limited* [2017] NSWCA 121. *Modahl* is something of an outlier in the implied contracts cases and is symbolic of the expansionary effect of the commercial disputes vis-à-vis contractual assent. In *Modahl* an athlete was found to be in an implied contract with the British Athletics Federation due to the widespread promulgation of the Federation's rules at all relevant athletic event. In contrast, in cases such as *Adecco* and *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666, an implied contract was found to exist after commercial parties continued to deal with each other on terms referable to a contract after an initial contract had expired.

[2] In the context of acceptance by conduct cases, see *Empirnall Holdings Pty Ltd v Machon Paull Partners* (1988) 14 NSWLR 523. With regard to browsewrap contract cases see below nn 38-49.

[3] See Government 2.0 Report. Available at: https://www.finance.gov.au/sites/default/files/Government20TaskforceReport.pdf?v=1

[4] See Australian Government, 'Government Response to the Report of the Government 2.0 Taskforce,' May 2010. Available at:

The recently released IP Manual declares that CC licences are 'in effect ready-made contracts for the use of copyright material.'[5] The assertion of CC licences as contracts is a puzzling development. This article explores the question of *how* the use of CC licences by the Australian Government might give rise to contracts over the use of PSI. There is an explanatory gap that lies between the Government 2.0 Report's failure to address the question of contracts and the IP Manual's assertion that they exist. This article seeks to address that gap. Given the size and complexity of the Australian Government, not to mention the audience for its materials, the issue of CC licences as contracts is potentially a major issue. The *Public Governance Performance and Accountability Act 2013* (Cth) lists 186 Commonwealth entities and companies.[6] All of these entities would be subject to the IP Manual and the IP Guidelines.

The consequences of creating contractual obligations via CC licences are mixed. On the one hand a contractual obligation can be enforced. Consequently, the Crown would be able to protect its copyright and related interests via contract. While copyright law does provide a suite of remedies, including injunctive relief, contract law supplements the available causes of action and provides similar remedies. Yet, on the other hand, if CC licences do create contractual obligations then they must run both ways. Further, a contractual obligation is a chose in action and in turn the latter is technically a property right.[7] It follows then that by using CC licences the Crown might have unwittingly bound itself in contract and in turn vested small property rights in certain users. Needless to say, this was not the stated aim of the Government 2.0 Report nor of the Crown in its endorsement of CC licences.

Browsewrap Contracts

The internet era has provided modern commerce with three different forms of online contracts of which browsewrap has been the third category to emerge. These categories effectively track the movement from the sale of chattel goods in the store to online commerce.

For example, a shrinkwrap contract broadly refers to a 'licence agreement' that is included within a box containing a software disk or similar item.[8] A clickwrap

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https://www.finance.gov.au/publications/govresponse20report/doc/Government-Response-to-Gov-2-0-Report.pdf

See also the Department of Communications and the Arts, *Australian Government intellectual property manual*, (June, 2018), p173-174 (the Manual) defines PSI. Available at: https://www.communications.gov.au/policy/policy-listing/australian-government-intellectual-property-rules

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.

[5] See also the Department of Communications and the Arts, IP Manual, op cit 175.

[6] See: https://www.finance.gov.au/resource-management/governance/#flipchart

[7] See *Torkington v Magee* [1902] 2 KB 427.

[8] See Nancy Kim, 'Contract's adaptation and the online bargain,' (2011) 79(4) University of Cincinnati Law Review 1327. See also *Bowers v Baystate Techs Inc*, 320 F.3d 1317 (Fed. Cir. 2003). Also *Adobe Systems Inc v One Stop Micro Inc*, 84 F. Supp.2d 1086 (N.D. Cal. 2000). Where a shrinkwrap agreement is concerned, the box is shrink-wrapped so that the consumer does not actually see the detailed terms of the licence contract until he or she has purchased the software and opened the box. However, there should be a label on the box stating that use of the discs indicates assent to the terms of the contract contained within the box. In *ProCD*, Easterbrook J noted, "The "shrinkwrap licence" gets its name from the fact that retail software packages are covered in plastic or cellophane "shrinkwrap," and some vendors, though not ProCD, have written licences that become." See *Step-Saver Data Systems Inc v Wyse Technology* 939 F.2d 91 (3rd Circuit, 1991). With the development of the internet shrinkwrap contracts have all but disappeared. Nevertheless, the early jurisprudence on shrinkwrap agreements demonstrated the ability of the courts to adapt the rules of contract law to new

agreement involves a web user click on a box on a webpage in order to indicate assent to the terms and conditions that accompany the online purchase of some goods or services.[9] Where clickwrap contracts are concerned it would seem that on a prima facie basis it would be easier to argue that the user has assented to the relevant contract.

Where browsewrap agreements are concerned the user is taken to have manifested assent to the terms and conditions of the website by using that site with the knowledge that there are applicable terms.[10] In *TopstepTrader, LLC v. OneUp Trader, LLC*, Judge Leinenweber stated:

> A "browsewrap" agreement, on the other hand, is an agreement where users are bound to the website's terms by merely navigating or using the website; the user is not required to sign an electronic document or explicitly click an "accept" or "I agree" button. ... Courts enforce browsewrap agreements only when there is actual or constructive knowledge of terms.[11]

Browsewrap agreements are not without controversy.[12] In the United States there has been some disquiet about the employment of choice of forum clauses in browsewrap agreements.[13] While the imposition of such terms by stealth should be a genuine source of concern, in Australia such terms in a consumer transaction would be mediated by the Unfair Contract Terms scheme in the *Australian Consumer Law*. Moreover, despite the controversy over forum selection clause, courts in the United States have shown a willingness to accept the principle that a contract can form via a browsewrap agreement.[14]

In the immediate context, there are three reasons as to why CC licences might serve as browsewrap contracts. First, the global model of contract formation does not require a precise moment of formation. Second, the ticket cases serve as a viable formation model. Third, there is a nascent body of jurisprudence in the United States on browsewrap contracts that could influence courts in Australia. Fourth, consideration might be easier to find under the common law of Australia.

A. A precise moment of formation does not need to be identified

Contract law offers two models of formation. The first is the classical model which requires the existence of offer, acceptance and the other associated formation

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forms of commerce. See Mark Lemley, 'Intellectual Property and the Shrinkwrap Licence,' (1995) 68 *Southern California Law Review* 1239.

[9] See *CompuServe Inc v Patterson* 89 F.3d 1257 (6th Circuit, 1996).

[10] *TopstepTrader, LLC v. OneUp Trader, LLC*, 2018 WL 1859040, (N.D. Ill. Apr. 18, 2018).

[11] Ibid, at *3. See also, *Sgouros v. TransUnion Corp.,* No. 14 C 1850, 2015 WL 507584, at *4 (N.D. Ill. Feb. 5, 2015). Also *Himber v. Live Nation Worldwide, Inc*. 2018 WL 2304770 (E.D. N.Y. May 21, 2018) at *4. Also, *Meyer v. Uber Techs., Inc*., 868 F.3d 66, 73-74 (2d Cir. 2017); *Nicosia v. Amazon.com, Inc*., 834 F.3d 220, 229 (2d Cir. 2016).

[12] See Michelle Garcia, 'Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum,' (2013) 36 *Campbell Law Review* 31, 32. 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 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.

[13] See Kaustav Das, 'Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the 'reasonably Communicated' Test,' (2002) 77 *Washington Law Review* 481.

[14] See *Productive People, LLC v. Ives Design*, No. CV 09 1080, 2009 WL 1749751, at *1 (D. Ariz. June 18, 2009). See also *Nguyen v. Barnes & Noble*, 763 F.3d 1171, 1175-76 (9th Cir. 2014)). See also, *Van Tassell v. United Mktg. Grp., LLC*, 795 F.Supp.2d 770, 790 (N.D. Ill. 2011). See also below nn 28-39.

doctrines.[15] The second is the global model which assesses contract formation on the basis of a holistic assessment of the dealings between the parties.[16] In *Mushroom Composters Pty Ltd v IS & DE Robertson Pty Ltd*,[17] Sackville AJA stated:

> [I]t is not necessary, in determining whether a contract has been formed, to identify a precise offer or acceptance; nor is it necessary to identify a precise time at which an offer or acceptance can be identified.[18]

However, those scholars who hold to the view that open access licences are not contractual in nature have seized on this requirement to suggest that their absence defeats the contract argument.[19] Sapna Kumar has pointed to the lack of a clear act of acceptance as a barrier to the argument that a contract has formed.[20] Kumar states:

> It is worth noting that mere users may use GPL-licenced software without accepting the licence. The licence is not signed, nor does the offeree click an "I accept" button before obtaining the software. Thus, as long as the user does not modify or distribute the program, no acceptance has occurred. It is also possible that a user would receive a copy of the software without receiving the terms of the licence. In either case, no contract is formed.[21]

Kumar's argument appears predicated on the requirements of offer and acceptance, which in turn is roughly reflected in the processes around clickwrap agreements. Yet, as aptly demonstrated by the global model, contract law has regularly evinced a degree of flexibility in order to circumvent the need for a clear offer and acceptance.

This is reflected in the global model contract formation, which has found favour in the intermediate appellate courts of Australia, and also in the ticket cases. Justice McHugh's statement in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd*,[22] neatly encapsulates the global view of formation:

> It is often difficult to fit a commercial arrangement into the common lawyers' analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of 'offer', 'acceptance', 'consideration' and 'intention to create a legal relationship' which are the benchmarks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship … it is an error 'to suppose that merely because something has been done then there is therefore some contract in existence which has thereby been executed'. Nevertheless, a contract may be inferred from the acts and conduct of parties as well as or in the absence of their words. The question in this class of case is whether the conduct of the parties viewed in the light of the surrounding circumstances shows a tacit

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[15] *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

[16] In *Gibson v Manchester City Council* [1978] 1 WLR 520, 523, Lord Denning MR stated, "to my mind it is a mistake to think that all contracts can be analysed in the form of offer and acceptance … You should look at the correspondence as a whole and at the conduct of the parties." While Lord Denning's argument was rejected on appeal by the House of Lords in *Gibson v Manchester City Council* [1979] 1 All ER 972, his views have attracted support in Australia. See Ormwave Pty Ltd v Smith [2007] NSWCA 210. See also *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11; *Universal Music Australia Pty Ltd v Pavlovic* [2015] NSWSC 791 and *Mushroom Composters Pty Ltd v IS & DE Robertson Pty Ltd* [2015] NSWCA 1.

[17] Op cit.

[18] [2015] NSWCA 1, [60].

[19] See Sapna Kumar, 'Enforcing the GNU GPL,' (2006) *University of Illinois Journal of Law, Technology and Policy* 1, 19. See also 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.

[20] Ibid.

[21] Kumar, op cit.

[22] (1988) 5 BPR 11,110.

> understanding or agreement. The conduct of the parties, however, must be capable of proving all the essential elements of an express contract.[23]

While it would be difficult to rely upon the global view of formation to suggest that the Crown's use of CC licences gives rise to contractual obligation it does at least establish the fact that formation can be achieved in a number of ways. Moreover, binding legal obligations can be imposed simply because one party presents a work or subject matter with accompanying terms, as happens with copyright and C licences, and the other party takes the work or subject matter knowing that there are terms, but not necessarily having read them. The ticket cases, discussed below, suggest that contract formation can occur in this manner.

B. **The ticket cases support formation in the context of browsewrap contracts**

In the present context, the ticket cases are relevant because they offer a pathway into contract formation by virtue of the presentation of materials with conditions attached. The ticket cases that emerged in the late 19th and early 20th centuries set out the fundamental rules by which a party might come to be bound in contract by terms offered to them as conditions of carriage. [24] The principles developed therein subsequently expanded to cover car parks,[25] sale of goods contracts,[26] lottery tickets,[27] dry cleaning receipts[28] and the like. For the most part these cases have concerned themselves with the question of whether the acceptor has assented to unusual terms.[29]

However, the core principle underpinning these cases, which is that of reasonable notice, is relevant in the context of browsewrap contracts.[30] In this context, notice serves a dual function of evidencing incorporation and formation. In effect, the ticket cases demonstrate that the issues of contract formation and the incorporation of terms are intertwined. The ticket cases have established that those terms that a party wishes to impose upon others must be incorporated into the contract by notice. There are three requirements that must be satisfied in order for the terms to be incorporated into the contract. First, the other party must be able to view the terms before the contract is formed.[31] Second, the terms must be contained in a document that is intended to have contractual effect.[32] Third, the party who seeks to rely on the terms must have taken reasonable steps to bring them to the attention of the other party.[33] That is, the party that seeks to rely upon the terms must have given the other party reasonably sufficient notice of the terms.[34] Moreover, clear evidence that proper and adequate notice has been given is required to justify the incorporation of particularly onerous or unusual terms.[35] In *Oceanic Sun Line Special Shipping* Brennan J held that the test for whether

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[23] Ibid, 11-117-11,118. Also, *Ormwave Pty Ltd v Smith* [2007] NSWCA 210.
[24] See *Parker v South Eastern Railway Co* (1877) 2 CPD 416.
[25] *Thornton v Shoe Lane Parking* [1971] 2 QB 163.
[26] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394. Also, *D J Hill Co Pty Ltd v Walter H Wright Pty Ltd* [1971] VR 749.
[27] *New South Wales Lotteries Corp Pty Ltd v Kuzmanovski* (2011) 195 234.
[28] *Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 KB 805. Also, *Causer v Browne* [1952] VLR 1.
[29] Ibid.
[30] See above n 28.
[31] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *Olley v Marlborough Court Ltd* [1949] 1 KB 532.
[32] See *Oceanic Sun Line Special Shipping*. See also *Chapleton v Barry UDC* [1940] 1 KB 532.
[33] *Parker v South Eastern Railway Co* (1877) LR 2 CPD 416.
[34] *Balmain New Ferry Co Ltd v Robertson* (1905) 4 CLR 379, 386 (Griffith CJ).
[35] *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

'reasonable steps' were taken was whether the party who sought to rely on the terms, 'had done all that was necessary to bring it to notice.'[36]

It is notable that there is no obiter comment contained in any of the ticket cases that would prevent the application of the relevant principles to browsewrap contracts. Indeed, in *ProCD* Easterbook J relied upon the ticket cases to find an enforceable agreement in relation to shrinkwrap licences. In relation to shrinkwrap agreements Easterbrook J in *ProCD* stated:

> … consider the purchase of an airline ticket. The traveller calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveller can reject by cancelling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. … Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theatre that detects a violation will confiscate the tape and escort the violator to the exit. One could arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.[37]

It follows then that the principles in the ticket cases might also be extended to browsewrap agreements. As has been noted, a browsewrap licence is in essence a written agreement which does not require signature. Whether these agreements, and CC licences attached to Crown materials, will be enforceable depends upon three factors.

C. **Browsewrap**

The emerging jurisprudence on browsewrap contracts in the United States may well provide some guidance on how Australian courts will address these issues.

Three important propositions emerge from the various US cases that have dealt with browsewrap contracts. First, assent must manifest itself in some manner in order for a contract to form. In *Nguyen v Barnes v Noble Inc*,[38] Noonan J stated that the, 'mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract.'[39] It is notable that Noonan J refers to *conduct* as a means of establishing intent. In effect, this preserves the application of the ticket cases with regard to browsewrap agreements. Noonan J further stated:

> Unlike a clickwrap agreement, a browsewrap agreement does not require the user to manifest assent to terms and conditions expressly … [a] party instead gives his assent simply by using the website.[40]

That is not to say that use of the website alone manifests assent. Noonan J qualified his statement by observing that the user of the website must have either 'actual or constructive notice of a website's terms or conditions.'[41] It follows then that the taking of copyright materials from a website in the knowledge that some terms apply should make a contract about the use of that material binding between the parties.

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[36] 165 CLR 197, 229.
[37] 86 F.3d (7th Circuit, 1996), [13].
[38] 763 F.3d 1171 (9th Cir. 2014). See *also Berkson v Gogo, LLC*, 97 F. Supp 3d 359 (E.D.N.Y. 2015). See also *Long v. Provide Commerce, Inc.*, B257910 (Cal. Ct. App. Mar. 17, 2016).
[39] Ibid, 1175.
[40] Ibid, 1176. See also *Hines v Overstock.com Inc*, 668 F.Supp 2d 362 (E.D.N.Y. 2009).
[41] Ibid. See also *Van Tassell v United Marketing Group, LLC*, 795 F. Supp 2d 770, 790 (N.D. Illinois 2011). See also Mark Lemley, 'Terms of Use,' (2006) 91 *Minnesota Law Review* 459, 477.

The second proposition, which follows logically from the requirement of assent, is that the user of the website must be given a reasonable opportunity to see the link to the terms. That is, it must be clear that the use of the website involves contractual terms. In *Nguyen v Barnes & Noble*, the attempt to enforce a browsewrap contract failed because a hyperlink at the bottom left-hand side of a web page failed to provide constructive notice of the terms and conditions of the site. Notably, in *Nguyen* the hyperlink was not accompanied by a clear instruction that purchases made on the website was governed by the terms included in the hyperlink. Where the terms are hidden or obscured the user has not been afforded a reasonable opportunity to inspect the terms.[42] While a failure to read the terms will not protect the user from being bound in contract,[43] they must at least be aware that terms apply and be afforded the opportunity to study those terms.[44] Where there has been actual notice of terms in a browsewrap agreement the courts in the United States have found a binding contract to exist.[45]

Third, in the absence of actual notice, 'the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry' as to the terms of the contract.[46] It might be surmised that a prominent notice would be sufficient to put the reasonable user on inquiry.[47]

It is notable that despite these concerns there has been no great reluctance on the part of the courts of the United States to find that browsewrap agreements are enforceable contracts.[48] Where the US courts have expressed reluctance has been in relation to the enforcement of harsh dispute resolution clauses.[49] Notwithstanding different results as to enforcement of the actual contract itself, degree of uniformity of principle has emerged in the browsewrap cases. However, whether an Australian court would find in the same way depends largely upon their application of the formation doctrines. Indeed, its notable that all of the browsewrap cases in the United States pertains to commercial and consumer transactions. It is possible that an Australian court would view the receipt of PSI by a member of the Australian public as a non-commercial service, but one inclusive of contractual terms.

D. Consideration

Consideration exists as a requirement within the formation doctrines of contracts only to ensure that a bargain is enforceable.[50] Those scholars who suggest that open access licences are not contractual the argument suggest that consideration is lacking in the context of CC licences.[51] In the context of the GNU Public Licence, Kumar has written:

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[42] *Specht v Netscape Communications Corp*, 306 F.3d 17 (2d Cir. 2002).
[43] *Gillman v Chase Manhattan Bank*, NA, 73 N.Y. 2d 1, (1988).
[44] See *Specht* 306 F.3d 17 (2d Cir. 2002).
[45] *Register.com, Inc, v Verio Inc*, 356 F.3d 393 (2d Cir. 2004). Also, *Zaltz v JDATE*, 952 F. Supp. 2d 439 (E.D.N.Y. 2013). See also, *Ticketmaster Corp, v Tickets.com, Inc*, 2003 U.S. Dist. LEXIS 6483.
[46] *Nguyen v Barnes & Noble*, 1177 (Noonan J).
[47] *Long v Provide Commerce Inc*, 245 Cal. App 4th 855 (2016).
[48] For example, in *Plazza v Airbnb Inc*, 289 F.Supp 3d 537, 548 (SDNY. 2018), Broderick J noted that it was easier to identify assent in clickwrap cases, but nonetheless noted that, "browsewrap agreements are not presumptively unenforceable."
[49] Ibid.
[50] *Gay Choon Ing v Loh Sze Ti Terence Peter & Another* [2009] 2 SLR 332, [98] (Phang JA).
[51] 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, 312-313. See also Stephanie Woods, "Creative Commons – A Useful Development in the New Zealand Copyright Sphere (2008) 14 *Canterbury Law Review* 31, 45-46.

> The Bargain Theory does not support the GPL being a contract. … the public, is not offering anything back as consideration to the licensor.[52]

The objection raised by Kumar is heavily dependent upon the role that the bargain theory plays within the doctrine of consideration in the United States. However, the Australian concept of consideration differs from the North American version. The role of the bargain theory in the latter version of consideration is less flexible than it is in Australia. As Atiyah noted:

> The American Restatement (§4) defines a bargain as 'an agreement of two or more persons to exchange promises or to exchange a promise for a performance', but Corbin adopts a narrower definition for the purposes of his great work. He regards a bargain as involving not merely an exchange, but an exchange of equivalents.[53]

This version of consideration requires a more explicit exchange between the parties.[54] In contrast, in *Waltons Stores (Interstate) Ltd v Maher*,[55] Mason CJ and Wilson J stated:

> … we may be willing to imply consideration in situations where the bargain theory as implemented in the United States would deny the existence of consideration.[56]

Similarly, in commenting upon the reasoning of the High Court in *Australian Woollen Mills Pty Ltd v The Commonwealth*,[57] McHugh JA stated in *Beaton v McDivitt*:[58]

> The reasoning of the High Court may not amount to an adoption of the extremes of the bargain theory of contract as understood in the United States.[59]

In Australia, the doctrine itself says nothing about the value of the bargain, or, more pointedly, the value of the actual consideration. In *Chappell & Co Ltd v Nestle Co Ltd* the House of Lords held that consideration could be satisfied by a mere peppercorn.[60] Likewise, in *Woolworths Pty Ltd v Kelly*,[61] Kirby P, then in the New South Wales Court of Appeal, pointed out that courts are ill-placed to ascertain or assess the value of a given bargain.[62]

It follows then that the concept of consideration is somewhat easier to manipulate in Australia than it is in the United States. This is important in the context of browsewrap because it means that consideration can be more easily identified.

Moreover, as the formation doctrines now countenance the creation of an agreement in ways that stretch far beyond a classical negotiated contract an automated agreement derived via a browsewrap process might well be enforceable. Further, if a peppercorn is sufficient consideration because it may have value in the eyes of the promisor, then the dissemination of materials on terms, which clearly is a benefit to the Australian Government, can also be sufficient consideration.

Kumar also states:

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[52] Kumar, above n 19, 22.
[53] PS Atiyah, Essays on Contract, (Clarendon Press: 1988), 207.
[54] Yet, American courts have been willing to recognise browsewrap contracts.
[55] (1988) 164 CLR 387.
[56] (1988) 164 CLR 387, 402.
[57] (1954) 92 CLR 424.
[58] (1988) 13 NSWLR 162, 182.
[59] Ibid.
[60] [1960] AC 87.
[61] (1991) 22 NSWLR 189.
[62] Ibid, 193.

> A nonexclusive licence that is supported by consideration constitutes a contract. For the contract to be valid, however, the buyer must "accept and pay in accordance with the contract." But what burden does the licencee of GPL software undertake that benefits the licencee? Contract proponents argue that the licencee's obligation to make modified source code available to the community constitutes sufficient payment or consideration. For several reasons, however, this argument ultimately fails. Though the licence restricts how a licencee can use the licensor's work, there is no clear benefit to the licensor. Second, the GPL is not likely valid as a third-party beneficiary contract. Finally, there is no meeting of minds with regard to consideration.[63]

The first argument put forward by Kumar suggests that the licensor receives no benefit. Yet, why then would the Australian Government seek to use CC licences? Why have other parties sought to use CC licences or GNU licences? There must be some benefit that the licensor perceives in employing these terms. Were it to be otherwise then then the licensor would refrain from using them. Kumar's argument might well be that a user who agrees to use a GNU licence,[64] and by extension then a CC licence, is really not agreeing to do anything more than to abide by the existing rules of copyright law. However, ratio in *ProCD* has demonstrated that a party can validly agree to abide by copyright law under a private contractual agreement notwithstanding the fact that it essentially restates the law that exists under the Copyright Act. The benefit to the licensor or copyright owner may well be the extra level of assurance with respect to the observance of copyright rights.

This proposition can be restated along the lines that there is a lack of a positive obligation on the part of the licensee. Pallas-Loren has written:

> … the Creative Commons licences permit uses far beyond those permitted under the Copyright Act and therefore clearly provide consideration on the part of the copyright owner. As for the consideration offered by the user, the licence purports to identify the consideration: "The licensor grants you the rights contained here in consideration of your acceptance of such terms and conditions." The promise to abide by the restrictions contained in the licence could suffice to be consideration on the part of the user of the work. However, it is also possible to view those promises as lacking any value, because they are merely promises to not engage in actions that are otherwise prohibited by law.[65]

By providing access to his or her copyright protected materials the licensor provides consideration. The issue as Pallas Loren and Woods note is whether the licensee also provides consideration. The crux of the argument put forward by Pallas Loren is that the licensee is only agreeing to refrain from what they would otherwise be prohibited from doing under the Copyright Act. However, this ignores the 'share and share-alike' obligation in the CC-BY-3.0 AU Share Alike licences. The share-alike obligation effectively requires that adaptations, which include the licensor's original content and the licensee's original content, must be made available under the same CC licence. This imposes an obligation on the licensee that goes beyond the Copyright Act. Even the ordinary CC-BY 3.0 Attribution licence has terms that may in effect amount to a de facto share-alike obligation.

The CC-BY-3.0 AU Attribution licence provides:

> 4. Restrictions
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> The licence granted above is limited by the following restrictions.
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> 4A Restrictions on Distribution and Public Performance of the Work

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[63] Kumar above n 19, 20.

[64] It should be noted that Kumar's arguments specifically address the GNU GPL licence. However, the arguments employed by Kumar can be extrapolated to Creative Commons licences.

[65] See above n 51.

> (a) You may Distribute and publicly perform the Work only under the terms of this Licence.
> ....
> 4B Attribution and Notice Requirements
> (b) When You Distribute or publicly perform the Work or any Derivative Work or Collection You must keep intact all copyright notices for the Work.[66]

Where the licensee mixes his or her work with that of the licensor to create a 'derivative work'. [67] A 'derivative work' is defined under the CC-BY 3.0 licence to mean:

> … material in any form that is created by editing, modifying or adapting the Work, a substantial part of the Work, or the Work and other pre-existing works. Derivative Works may, for example, include a translation, adaptation, musical arrangement, dramatisation, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which the Work may be transformed or adapted, except that a Collection will not be considered a Derivative Work for the purpose of this Licence. For the avoidance of doubt, where the Work is a musical composition or sound recording, the synchronization of the Work in timed-relation with a moving image ("synching") will be considered a Derivative Work for the purpose of this Licence.[68]

Item 4A(a) still applies and unless the licensee can meaningfully disengage the content of the licensor from that of their own, they are more or less required to redistribute their own content and that of the licensor on the original terms of the CC licence. In effect, there is a implied 'share-alike' obligation contained within the CC-BY-3.0 AU Attribution licence.

Distributing the licensor's work under the terms of the CC-BY-3.0 AU licensors imposes an obligation to act on behalf of the licensor in distributing the materials. It is true that distribution of the licensor's materials on terms other than the CC licence would likely amount to copyright infringement. Nevertheless, the act of distributing the original licensor's materials on the terms of the CC licence is capable of dual characterisation as both an act within the terms of the licence and act done on behalf of the licensor. Unless the act of distributing the original content under the terms of the licence is seen as an act done on behalf of the licensor a privity of contract problem will arise. However, distributing the materials under the CC licence terms is clearly beneficial for the original licensor. Moreover, abiding by the terms of the licence is not simply a negative act in the sense that the licensee is refraining from breaching the Copyright Act. It is also positive action in the sense that the licensee must take steps to distribute copies of the licensor's materials on the terms of the CC licence.

I. Does the Australian Government's use of CC licences give rise to contractual relationships with users?

On balance, it does appear likely that the Australian Government's use of CC licences can and will lead it into contractual relationships with the users of its materials. Taking together all of the doctrinal analysis in Part II of this article, the bare bones of that argument is set out below. It leads to a disconcerting conclusion that for the simple act of sharing and disseminating government materials, the Crown is engaging users in contracts by stealth. To put it mildly, this is not the sort of thing envisaged by the duty to disseminate under the copyright prerogative. As government reports and the like are not of a radically different genus to prerogative materials it is odd that a contract must be pressed into service to facilitate access and sharing.

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[66] The CC-BY-3.0 AU licence is available here: https://creativecommons.org/licenses/by/3.0/au/legalcode.
[67] Ibid.
[68] Ibid.

A. The Contract Argument

First, the fact that Australian Government copyright materials are offered on the terms of a CC licence is prominently displayed on most of the relevant webpages. Accordingly, the display of the notice ought to put the reasonable internet user on notice that there are terms that apply to the usage. Whether these terms are simply a restatement of existing copyright rules or whether they constitute something further or more detailed is in actual fact irrelevant. The fact that property rules apply under the Copyright Act is no barrier to private parties relying upon the same substantive terms in a contractual agreement.

Second, the user has the opportunity to fully explore the terms. It does not actually matter whether the user reads the terms or not, but rather that they have had the opportunity to read the terms. The complete terms of the browsewrap licence are available in full by following the links on the relevant website. In the context of the Crown's use of CC-BY-3.0 AU licences or the CC-BY-4.0 licences, the full terms are available on the copyright notice page. That said, it is clear on the webpage where the PSI materials are available that the materials are made available subject to a CC licence.

Third, at this point CC licences have been well publicized in the broader community. These have ben promulgated on the internet. It follows then that the reasonable internet user, despite not having any specific knowledge of either copyright law or Creative Commons, would be aware that there are terms that are contained in the CC licence. To read the webpage is to read that notice. In this sense, the browsewrap licence scenario is not dissimilar to the ticket cases. For example, a train ticket or entry into a parking lot, may well be governed by a contract whose terms are not going to be presented to the customer in written form for signature.

Fourth, the case law has established that a precise moment of formation need not be identified.[69] Nevertheless, neutral actions, to which no discernible assent can be attributed, will not reach the threshold of acceptance by conduct. Formation must occur at some point if there is to be a binding agreement. It could be said that formation occurs when in a single instance of usage an internet user takes copyright materials from an Australian Government website knowing that CC licence terms apply.[70] This might have been so in the ticket and browsewrap cases, though these cases were largely consumer transactions, and the accessing of government PSI by a member of the public is substantively different.

Alternatively, many of those who use the Australian Government's websites to download copyright protected materials might be regular or intermittent visitors. In *Balmain New Ferry Co Ltd v Robertson*, it was established that the repeated use of a service, knowing that there were terms, amounted to an assent to those terms. By extrapolation the repeated use of CC licenced materials, regardless of whether they are re-worked and shared, will eventually amount to an assent to a contract. Whether this occurs immediately or on later uses is open to debate. For the most part, we are concerned with a multitude of users most likely making repeated use of CC licenced materials on the Crown's websites. This is more analogous to the *Balmain Ferry* scenario, thereby making it more likely that the acceptance scenario has been satisfied. Fifth, the action of taking copyright protected materials in the knowledge that terms apply to them is not an act without context. That is, the user is not acting in a neutral matter and the assent to terms is not being derived from what might be regarded as a colourless silence. It is a fundamental principle of contract law that silence and nothing

[69] *P'Auer AG & Anor v Polybuild Technologies International Pty Ltd* [2015] VSCA 42.
[70] Though this would be difficult to prove.

more cannot amount to acceptance.[71] In *Felthouse v Bindley*,[72] an express attempt to cast an offeree's silence as acceptance was rejected by the House of Lords. This principle is well-established, but its application has been conditioned by later cases which have held that the overall context of dealings between the parties might signal assent.[73] To take copyright material in the knowledge that some terms do apply to their use is not the same as merely being silent to a contractual offer. It is instead a conscious choice to run the risk of being bound by those terms.[74]

B. The Contract Flaw?

A crucial matter in the present context is just how a user might come across the terms on a website. It has to be conceded that knowledge of the existence of terms and knowledge of those terms are not the same thing. Moreover, it is not guaranteed that either of those things will actually occur. Yet, the browsewrap and ticket cases, birthed in commercial and consumer contexts, almost assume knowledge on the part of the user. Whether this is appropriate for the user of a government website is very debatable.

It is understandable that a passenger on a train or a concertgoer would understand that their use of a service is subject to some contractual terms. Their ignorance of those terms most likely constitutes a risk that they are willing to run. Much the same can be said of consumers who operate in a browsewrap context. Even here, the case law is very mixed in the United States due to the preponderance of problematic arbitration clauses.

The user of a government website would not necessarily expect to encounter contract terms. In fact, it is highly unlikely that this would occur to most users. The imposition of terms then proceeds almost on the basis of stealth. It seems contrary to the principles of open government and open access to ensnare an unwitting user of a government website in contract. In copyright terms, the needs of the government are rather modest. A simpler tool will suffice. In all, the Australian Government, in seeking to address issues around copyright, has entirely ignored the very malleable nature of formation under Australian contract law. Having perhaps then conceded in recent times that CC licences are contracts, there would appear to have been no review as to whether this is a useful development. In sum, a reconsideration is required for the reasons set out above.

II. Conclusion

This article has explored the question of whether the Australian Government's use of Creative Commons licences in relation to public sector information can in fact give rise to contractual obligations. The Government 2.0 Taskforce's report, 'Engage: Getting on with Government 2.0,' which recommended the use of CC licences, did not address the issue of contracts. Likewise, the Creative Commons Attribution 3.0 Australia licence, which the Australian Government initially used, and still uses in some instances, does not contemplate that it might form the basis of a contract. Yet, there was a discernible shift in language in the Creative Commons Attribution 4.0 licence where this possibility

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[71] See *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao S.A. (The Leonidas D)* [1985] 1 WLR 925. See also *Westpac Banking Corporation v ZH International Pty Ltd; Bronte Properties Pty Ltd v ZH International Pty Ltd* [2015] NSWSC 607.

[72] (1862) 142 ER 1037. See also *Westpac Banking Corporation v ZH International Pty Ltd; Bronte Properties Pty Ltd v ZH International Pty Ltd* [2015] NSWSC 607. Also *Taste of Tuscany Restaurant Pty Limited v Papantoniou* [2017] NSWSC 932.

[73] See *Empirnall Holdings* (1988) 14 NSWLR 523. See also *Kovan Engineering (Aust) Pty Ltd v Gold Peg International Pty Ltd* [2006] FCAFC 117.

[74] Though contract law does of course have a number of rules that would alleviate the harshness of unfair terms.

was considered. There is a colourable argument that a contract can exist, though it does push at the boundaries of contractual assent. Whether this is the case in Australia is an open question. Nonetheless, it has significant ramifications for the sharing of Australian Government copyright materials.

On the basis of the foregoing discussion, it does seem likely that the analysis in the ticket cases may influence Australian courts to find that browsewrap agreements are binding. In turn, this would have to be the basis upon which the Australian Government's use of CC licences in relation to PSI would give rise to contracts. However, both browsewrap agreements and CC licences remain largely untested by Australian courts. If the Australian Government has found itself in contract with a multitude of users in relation to copyright in PSI then this has occurred without much public debate or discussion. Nevertheless, the individual liability to each user would likely be very small, though in total the quantum of contractual liability now being run by the Australian Government would not be insubstantial. Lastly, whether it is suitable for the Australian Government to require its citizens and others to enter into a contract in order to access PSI is open to debate.

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University of Canberra
Student Contributions