

# 'Consideration' and the open source agreement

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## 1 Introduction

Under the well established contract doctrine of consideration, a promise is only enforceable when it is given in exchange for another promise or for executed consideration. The operation of this rule in relation to the internet to date has been severely underestimated and is almost always dismissed as offering no new challenge in the online world.<sup>1</sup> Despite such statements, the consideration question is a live issue given that many services (for example, email, websites, "shareware", open-source software etc.) are provided free on the internet and yet purport to impose serious terms and conditions on the consumer under the guise of a 'contract'.

Of course, consideration need not be money. For example, the Hotmail terms and conditions of use state that the user's consideration is providing and maintaining their personal details. However, there are still unanswered questions in relation to free email<sup>2</sup>, none of which were discussed in *Hotmail Corporation v Van \$ Money Pie Inc*<sup>3</sup>, in which Ware J failed even to mention consideration. In other situations consideration is definitely absent.<sup>4</sup>

The case of open source agreements is another where consideration is problematic. This article seeks to explore the 'consideration question' for open source by applying traditional common law rules. It also looks at the operation of promissory estoppel as a way of avoiding the doctrine of consideration. In conclusion, the article will examine the impact of consideration on the open source movement and ways in which it might avoid the difficulties presented by consideration.

## 2 What is open source?

Open source is an arrangement whereby software developers distribute their program to others and give each recipient a licence to copy,

modify and/or re-distribute the program. The purpose of this arrangement is to encourage the development of software by many people. As each open source agreement is made and a licence is bestowed, a long 'viral' chain of contracts is formed whereby each contract depends on its predecessors for validity. As a result, consideration is particularly vital to the operation of the open source chain, since one void contract could destroy the entire chain.

There are three essential points to understand the following discussion:

- (a) This article will discuss the branch of the open source movement whereby software is provided *at no cost* to the licensee. The other branch of the open source movement gives the software provider a choice whether or not to impose a price/fee. Of course, in any such agreement where a fee is imposed, the licensee is giving good consideration in the form of money.
- (b) The GNU system is a Unix-like operating system which is free and widely distributed software. Unless otherwise specified, this article will use the example of the GNU General Public Licence (GPL)<sup>5</sup>, which is probably the most prevalent form of open source agreement. Other forms of open source agreements are quite similar to the GPL.
- (c) This paper will only discuss the consideration moving from the licensee. It is obvious at first glance that a licensor will always be providing consideration since they are giving the rights to use the software. Since consideration must move from the promisee, the licensor will have no problem in enforcing the open source agreement. The licensee on the other hand, will need to prove that they are giving good consideration in order to enforce

the contract. So, for example, if the licensor seeks to revoke the agreement and sue for copyright infringement, then the licensee must show that they are giving good consideration.

## 3 The licensee's promises

A licensee has the following possible obligations under the GPL:

### 3.1 Limits on distribution

- (a) to put appropriate notices and terms on distributed copies of the program (GPL clause 1);
- (b) to place prominent notices on modified files stating the existence and date of any modifications (GPL clause 2(a));
- (c) to license derivative works as a whole with no charge to any licensees (GPL clause 2(b));
- (d) to display a notice of terms on derivative interactive programs when distributed (GPL clause 2c);
- (e) to include the source code in any distributed copies (GPL clause 3);
- (f) not to distribute except as provided (GPL clause 4);

### 3.2 Legal rights abandoned

- (a) to give up rights to sue for implied warranties (GPL clause 11); and
- (b) to give up rights to sue for tortious claims (GPL clause 12).

## 4 What consideration?

### 4.1 Illusory consideration

The main object of the GPL is to confer upon the licensee the permission to use and distribute the software. To this end, clauses 1, 2 and 3 give the licensee the right to make

and distribute copies (and derivative works (in accordance with the licence). These clauses are framed as follows:

- (a) Clause 1: "**You may** copy and distribute verbatim copies..."
- (b) Clause 2: "**You may** modify your copy or copies of the Program or any portion of it..."
- (c) Clause 3: "**You may** copy and distribute the Program..." (emphasis added).

This is common wording for a licence. The licensor gives the licensee the right to do certain acts as specified. Of course the licence does not *force* the licensee to do those acts, it merely gives them a discretion to do them. In effect it gives the licensee a chose in action (ie a legally enforceable right).

Each of these clauses then defines how the licensee may exercise their rights by stating that "you may copy/modify/distribute the Program... provided that you also do act X". As noted in 3.1 above, these are possibly the licensee's promises. So, for example, clause (2)(a) states that the licensee may modify a copy of the program, provided that they also place prominent notices on the modified files declaring that there has been a modification and its date.

When trying to show that it has given good consideration, the licensee will argue that it has promised to place prominent notices on the modified files when modifying the program. This raises the issue of illusory consideration.

One of the established rules of consideration is that a discretionary promise is bad consideration: "Promissory expressions reserving an option as to the performance do not create a contract".<sup>6</sup> So in the case of the GPL, the licensee has a mere discretion to modify the program in accordance with the licence (ie by including prominent notices).

In *Placer Development Ltd v Commonwealth*,<sup>7</sup> Kitto J stated that:

"wherever words which by themselves constitute a promise are accompanied by words showing that the promisor is to have a discretion or option as to whether he will carry out that

which purports to be the promise, the result is that there is no contract on which an action can be brought at all" (emphasis added).

McHugh JA stated the rule more clearly in *Biotechnology Australia Pty Ltd v Pace*:

"A consideration is illusory if its payment or fulfilment depends upon an unfettered discretion vested in the promisor".<sup>8</sup>

It is clear in the GPL that the words "you may" copy/modify/distribute show that the licensee has a discretion or option as to whether it will carry out that which purports to be the promise.

An unconvinced reader may argue that while the licensee has a discretion whether or not to copy/modify/distribute, the GPL provides that when such copying/modification/distribution occurs, the licensee "must" do those acts such as attaching a prominent notice on the modified file. One case deals explicitly with this point. In *British Empire Films Pty Ltd v Oxford Theatres Pty Ltd*<sup>9</sup>, the plaintiff (BEF, a film distributor) had an agreement with the defendant (OT, a cinema) that BEF would have the exclusive right for five years to supply OT with such films as BEF might nominate and be able to make available. OT argued that the contract could not be enforced because BEF's promise was illusory consideration. At trial, BEF put forward six possible promises in which good consideration could be found. O'Bryan J rejected the following promises as being illusory:

- (1) The plaintiff promises that if films are supplied by it to the defendant, they will be charged for in the manner provided for in the agreement.
- (2) The plaintiff promises not to supply for exhibition in any theatre within a radius of 30 miles of the GPO at Melbourne any feature film forming part of the programmes supplied under the agreement until 4 weeks after the defendant has discontinued showing that film.

In respect of the first promise O'Bryan J said:

"It is common ground that the plaintiff is obliged to supply nothing, and a supposed consideration which is entirely dependent upon the will of the plaintiff whether it will ever become operative is illusory."<sup>10</sup>

Regarding the second promise he said:

"The operation of this clause likewise depends for its operation entirely upon the will of the plaintiff. The plaintiff suffers no detriment by it, and the defendant receives no benefit from it unless the plaintiff chooses to supply film...[The promise] does not afford real or valuable consideration because it is illusory inasmuch as it binds the plaintiff to nothing, but is dependent entirely upon the plaintiff's will whether it ever has any operative effect."<sup>11</sup>

Similarly, the limitations which the GPL places on the licensee's copying/modification/distribution are illusory consideration. They have no "operative effect" unless and until the licensee chooses to actually copy, modify or distribute the program. Thus a licensee under the GPL who wants to download the program for personal use would have no obligation to do anything under these clauses.

#### **4.2 Consideration may not be an existing legal duty**

Clause 4 of the GPL states "you may not copy, modify, sublicense or distribute the Program except as expressly provided under this Licence". A party trying to show that consideration exists in this contract may argue that this clause reveals a promise by the licensee not to copy (etc) except as expressly provided under the licence.

Before we go any further, it should be noted that under the Copyright Act 1968 (Cth) (**Copyright Act**), the copyright in a work (including software<sup>12</sup>) subsists in the author of the work (or other associated persons/groups) to the exclusion of all others<sup>13</sup>. Without a licence agreement, the licensee would have no rights to copy, distribute etc. It is a civil wrong<sup>14</sup> and possibly a criminal offence<sup>15</sup> to act beyond the scope of a

licence. So clause 4 of the GPL is effectively stating the obvious.

A further rule of consideration is that it is bad consideration to promise to perform a pre-existing legal duty. Often this rule is applied to promises to perform a duty which is already owed to the promisee by reason of a prior contract between the two parties. The rule extends to other public duties.<sup>16</sup>

This rule was applied in NSW as recently as 1995 in *Crymble & Handel v Health Insurance Commission*<sup>17</sup> (**Crymble & Handel**). In that case, the plaintiffs C & H were employees of the defendant HIC, and they were called to give evidence before the Independent Commission Against Corruption (ICAC). C & H had made an agreement with HIC whereby HIC promised that no disciplinary action would be brought against them and in return they promised to co-operate with the ICAC. However, under section 37 of the ICAC Act 1988 (NSW), a witness summoned before the ICAC is not entitled to refuse to co-operate with the ICAC. Master Greenwood stated that the contract was unenforceable for lack of consideration since "the plaintiffs were doing no more than they were required to do by law".

This is a clear statement of the law as it currently stands. Similarly, a licensee under the GPL cannot be said to be giving good consideration by promising not to copy/modify/distribute beyond the terms of the licence. This is because the licensee is promising to do no more than they are required to do by law (under the Copyright Act).

It is necessary, before concluding this point, to address two qualifications to the general rule. The first is that a promise to *exceed* a pre-existing legal duty is good consideration.<sup>18</sup> However, this exception does not affect the GPL situation since the licensee has a statutory duty not to infringe the owner's copyright by doing any act beyond the terms of the licence, and the contractual promise is that the licensee will not infringe the copyright beyond the terms of the licence. The duty that the GPL imposes on the licensee is no greater than the statutory duty.

The second qualification to the general rule is the rule in *Popiw v Popiw*<sup>19</sup>. In that case, Ms Popiw, the plaintiff, left her defendant husband. Mr Popiw promised that if she returned to him, then he would transfer title to his home into their joint names. However, under the legislation of the time, Ms Popiw had a statutory duty to return to live with her husband. Despite this, Hudson J held that there was good consideration in the circumstances because either:

- (a) Ms Popiw went beyond her statutory duty because she may have had a right of 'constructive desertion' under the legislative scheme; or
- (b) even though Ms Popiw was doing no more than her legal duty, Mr Popiw gained a practical benefit under the contract.

This case has not yet been considered by the High Court and it was not considered in *Crymble & Handel*. However, even if *Popiw v Popiw* was correctly decided, it can be distinguished from the GPL situation on an important ground. Carter and Harland note that under the legislative scheme Mr Popiw had no actual remedy to force his wife to return.<sup>20</sup> So Ms Popiw's promise, in a practical sense if not in a legal sense, went beyond what she might be required to do by law. Even on this basis, the GPL licensee's promise is not good consideration because under the Copyright Act there are clear civil and criminal remedies for a breach of copyright, and so the licensor is getting no legal or practical benefit. Whatever way we look at the licensee's obligation under GPL clause 4, it does not go beyond the licensee's obligations under the Copyright Act.<sup>21</sup>

### 4.3 Forbearance to sue

The final basis upon which a party might show the existence of consideration in the GPL is under clauses 11 and 12. Clause 11 states that no warranties shall be implied into the contract, "including, but not limited to, the implied warranties of merchantability and fitness for a particular purpose". Clause 12 states

that neither the copyright holder nor any other party who has modified or distributed the program shall be liable to the licensee for tortious damages arising out of the use of, or the inability to use, the program. A party attempting to find good consideration in the GPL may argue that these clauses constitute a promise by the licensee to forbear to sue for (a) implied warranties and (b) tortious damages.

Both a promise to forbear to sue and/or a promise to give up a claim entirely can be good consideration.<sup>22</sup> However, various statements from cases and academic texts make it clear that a claim which is promised to be relinquished must "be honestly held" and that the claimant has a *bona fide* belief that the liability is real. Isaacs J in *Butler v Fairclough*<sup>23</sup> put it thus:

- (a) A promise not to sue for a limited period, definite or indefinite, is a valuable consideration where the substantive claim is one for which the other party is liable.
- (b) A promise not to sue at all, that is, *an abandonment of a substantive claim*, is a valuable consideration, if there be either liability or a *bona fide* belief of liability.
- (c) A promise to abandon a suit in whole or in part *already commenced* is a valuable consideration where there is a *bona fide* claim.
- (d) Mere temporary forbearance to sue where there is no liability is no consideration.

At the time of agreement there must be either liability, a *bona fide* belief of liability or a *bona fide* claim, regardless of whether the promise is characterised as an abandonment of a claim, a promise not to sue, a promise to abandon a suit or a forbearance to sue.

If the GPL licensee's promises under clauses 11 and 12 are to count as good consideration, then there must be some existing liability or a *bona fide* belief or claim. The point was put succinctly by Ipp J in *Boothey v Boothey*<sup>24</sup> where he said that "It is no consideration to refrain from a course of action which it was never intended

to pursue”, and “where one party never had a reasonable claim which he intended to pursue, no enforceable agreement of compromise of such a claim could be arrived at”. The GPL licensee does not have, at the time of contracting, a *bona fide* claim or an honestly held belief that such a claim exists. As such, this promise is not good consideration.

## 5 Estoppel

It has been argued above that the licensee's promises under the GPL are not good consideration. As a result, common law dictates that the licensee is unable to enforce the agreement and in fact no contract can be held to exist. However, recent developments in the doctrine of estoppel may still give the licence some relevance. As Carter and Harland have said, “it is nevertheless clear that all the rules on consideration must be taken with a very large grain of estoppel flavoured salt”<sup>25</sup>.

It is only since the notorious case of *Waltons Stores (Interstate) Ltd v Maher*<sup>26</sup> that the doctrine of estoppel has been available in Australia to support a promise outside an enforceable contract. In that case, Brennan J listed the following six factors necessary to establish such an equitable estoppel:

- (a) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship;
- (b) the defendant has induced the plaintiff to adopt that assumption or expectation;
- (c) the plaintiff acts or abstains from acting in reliance on the assumption or expectation;
- (d) the defendant knew or intended him to do so;
- (e) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and
- (f) the defendant has failed to act to

avoid that detriment whether by fulfilling the assumption or expectation or otherwise.<sup>27</sup>

As noted in section 2 above, the rule that consideration must move from the promisee means that the licensee, not the licensor, will be unable to enforce the contract. As a result, the legal scenario involving consideration will be where the licensor attempts to revoke the license, and the licensee seeks to enforce it.

In relation to the GPL, factors (a) and (b) are easily fulfilled. The fact that the parties agreed to the licence allows the plaintiff licensee to assume that the legal relationship existed, and the defendant licensor's agreement is an inducement to adopt that assumption. The plaintiff's act in reliance (factor c) is its copying, modification or distribution of the software. The licensor knew that this would happen (factor d). Factor (f) is fulfilled since the defendant has failed to act to avoid the detriment as it has not fulfilled the plaintiff licensee's expectation that the contractual license would stay in force. However factor (e) is more difficult to prove.

The licensee must show that the licensor's revocation of the license causes detriment to the licensor. The legal definition of detriment in estoppel is currently in debate. Commentators and the judiciary cannot agree whether the plaintiff can recover the detriment which they suffered when acting in *reliance* on the contract or rather, in *expectation* of the fulfillment of the contract. The difference between the two views was summarised by Mason CJ in *Commonwealth v Verwayen*:

“In a broad sense, there is detriment which would result from the denial of the correctness of the assumption upon which the person has relied. In a narrower sense, there is the detriment which the person has suffered as a result of his reliance upon the correctness of the assumption”.<sup>28</sup>

There must in fact be some real detriment beyond the loss of the contractual rights. As Mason CJ said, “the breaking of a promise, without more, is morally reprehensible but not unconscionable... with estoppel some-

thing more than a broken promise is required”.<sup>29</sup> The most obvious damage that will be suffered is that the plaintiff licensee will become liable to actions from the copyright holder (or the licensor) if the licence is ineffective. However, it will be demonstrated in section 6 below that the licensee retains a *nudum pactum* (bare licence) even if the GPL is held ineffective, and that the bare licence is sufficient to defend the copyright claim. So no detriment is suffered on that account. A more successful claim might be based on an argument that the licensee is using a GPL program (such as Linux) on a large scale and to deprive them of that program would cause significant expense such as the cost of shifting to a new operating system. This detriment should be sufficient under either the narrow or the broad tests for detriment outlined above, however the remedy is likely to be equitable damages only. A court would be unwilling to enforce the contract with specific performance because the contract constitutes an ongoing agreement.<sup>30</sup> Furthermore, only a party who uses a large-scale operating system such as Linux will be able to make this argument.

In addition, when awarding damages (or some other remedy) the court will not take into account the effect on third parties to whom the licensee has re-distributed the licence. Once a court holds that a contract is void for lack of consideration, the status of the re-distributed licences is in doubt – it is possible that they too will be found void. Estoppel may not be enough to save the status of these other licences, and any damages given under estoppel will not recompense the third party licensees.

So even though there is an argument that estoppel will uphold the contract, the courts are still unlikely to enforce the continuing agreement. The likely result is a break in the chain of viral contracts. This is an unsatisfactory result for the open source movement.

## 6 The status of the licence

We are faced with a situation in which

unenforceable as a contract because it does not contain consideration. This exact situation occurred in *Trumpet Software Pty Ltd v OzEmail Pty Ltd*<sup>31</sup>. Trumpet was the supplier of a computer program which it made available for download at no cost. The download site stated that the program was available for the user to trial for 30 days.

Heerey J held that Trumpet's download licence agreement was not an enforceable contract since no consideration moved from the licensee. As a result he held that the relationship between the parties was only a bare licence. This type of licence (most common in real property) is a licence not supported by a contract and revocable at any time by the licensor with reasonable notice without rendering the licensor liable for damages.<sup>32</sup>

Heerey J clarified the content of this bare licence, saying that "it must have *some* terms and conditions", and that those terms and conditions are to be determined by implication using the criteria in *BP Refinery (Westernport) Pty. Ltd. v Shire of Hastings*<sup>33</sup>. He referred in particular to two of those criteria, that the terms must be:

- (a) necessary to give business efficacy to the contract "so that no term will be implied if the contract is effective without it"; and
- (b) so obvious that it goes without saying.

In applying the first criterion, Heerey J looked at the purpose of the contract, which was to provide a 30-day trial of the software for the purpose of evaluation. In doing so, he acknowledged the commercial nature of the licence. That commercial purpose was particularly important in determining the terms of the contract since he looked at what each party stood to gain from the licence.

There are a number of problems with applying this test to the GPL situation. Most importantly, it is very difficult to give "business efficacy" to a licence that has been shown to be purely gratuitous through no good consideration. In *Trumpet v OzEmail*, Heerey J justified his use of the BP Refinery criteria by analogy with

contract, saying "the contractual analogy is a close one because the shareware licence would mature into a contract if a user were to effect registration". But with the GPL, the contractual analogy is inappropriate because only one party stands to make commercial gain from the contract, and there is no likelihood that the licence will develop into a commercial contractual relationship.

Certainly, as Heerey J stated, there must be *some* terms, but the nature and source of those terms is in doubt for the GPL. Such a position is dangerous, if not fatal to the open source software movement, and GNU should act to avoid it. What, for example, would be the situation if one person in the open-source chain revoked their licence to the licensee(s) below them in the chain, as seems to be possible under a bare licence. Would this revoke the licences that had in turn been given to all other licensees below in the open source chain?

One other case, *Computermate Products v Ozi-Soft*<sup>34</sup>, is relevant to the status of an open source licence that is void for bad consideration. In that case the court held that a bare licence which is not supported by consideration and non-exclusive in character will be sufficient to defend against a claim for copyright infringement under section 37 of the Copyright Act (importation without a licence). All that the licensee needs to show is that it had "bare consent or permission". While in *Computermate Products* the licensee was unable to prove that such permission existed, the GPL should be sufficient to show consent to use the product, and therefore to defend against a copyright claim under sections 36, 38 or 132 of the Copyright Act. It is unclear how far this argument might go.

## **7 Implications for open source**

It must be emphasised that the GPL and other open source licences depend on viral transmission. Very much like covenants attached to land, the GPL is intended to 'run with' the software as it develops, all the while maintaining unrestricted transmission and protecting modifiers/distributors from

liability. If this viral chain is broken, the consequences may be that tortious liability could be enforced against a modifier/distributor or that the transmissibility of the software is compromised. The ideal situation for the open source movement is that the contract is enforceable without question or reservation. As we have already seen, estoppel may be insufficient for this purpose since it may still jeopardise the viral chain of licences.

In light of the problems of enforcement outlined above, the two best options to ensure the validity of open source agreements are to:

- (a) modify the law to suit the arrangement; or
- (b) modify the licence to suit the law.

In the short term it is very important that the GPL is altered to introduce good consideration. The safest and surest form for that consideration is a nominal fee (\$1 will be sufficient). The detriment which this might have on transmissibility (ie downloaders' unwillingness to pay) will clearly be outweighed by the protection of the legality of viral transmission and the GPL.

In the long term, it might be surprisingly easy for the law to change to adjust to the open source phenomenon. There could be a change in the doctrine of consideration, allowing a more flexible application of "bargain". Or, more likely, there could be development in the doctrine of estoppel to bring gratuitous contract situations under its protection. This would stop both parties from avoiding the (gratuitous) promises that they have made.

## **8 Conclusion**

It should no longer be open to commentators to dismiss the impact of consideration in the internet context, particularly for open source contracts. Similarly devastating results could eventuate for other gratuitous services on the internet. It is not open to a provider of a free service (such as email, a website, etc) to bind the recipient to a complex set of terms and conditions. The law will only enforce

such terms and conditions in a bargain situation where both parties are providing consideration. The doctrine of estoppel, and its future development, may provide some protection for these gratuitous-promise terms. But 'may' is not enough when so many rights are sought to be protected and created in these terms and conditions. There must be legal certainty in these situations.

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- 1 See for example Kidd, D. L. Jr., and Daughtrey, W. H. Jr., "Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions" 2000 26 *Rutgers Computer and Technology Law Journal* 215-276 p267; and Ravicher, D. B., "Facilitating Collaborative Software Development: The Enforceability of Mass-Market Public Software Licenses", (2000) 5 *Virginia Journal of Law and Technology* 11-52, p27n177.
- 2 The two points relevant to consideration are (a) past consideration and (b) whether consideration other than that specified is valid. The Hotmail terms and conditions of use assert that the user's consideration is providing their personal information and maintaining it. Since that information is provided before the agreement is formed, there is an obvious argument that the consideration is past, and therefore not valid. Even if such consideration is valid (because it is executed rather than past, or because 'maintaining' the details is not past consideration) cases such as *Lilley v Midland Brick Co. Pty. Ltd.* (1993) 9 WAR 339 and *Rundell v Bedford* (1998) 28 ACSR 66 point out that where the consideration specified is not the true consideration, evidence may be admitted to discover the true consideration. So an email user could argue that providing and maintaining their details is not the true consideration.
- 3 47 USPQ 2d 1020 (ND Cal 1998).
- 4 So for browserwrap contracts on free non-subscriber websites there is no consideration. The applicable rule is that consideration must be referable to the contract. See Carter, J. W., and Harland, D. J., *Contract Law in Australia* (4th ed.), Butterworths, Sydney, 2002, paras. 315-318. It is necessary that the consideration was performed in response to the contract, and not of the promisor's own accord.
- 5 Available at: <http://www.gnu.org/copyleft/gpl.html> (as at June 2002).
- 6 This statement is cited judicially at least twice: *Placer Development Ltd v Cih* (1969) 121 CLR 353 at 356 per Kitto J; and *British*

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- 7 (1969) 121 CLR 353 at 356.
  - 8 (1988) 15 NSWLR 130 at 151.
  - 9 [1943] VLR 163.
  - 10 [1943] VLR 163 at 167.
  - 11 [1943] VLR 163 at 168.
  - 12 See definitions of 'literary work' and 'computer program' in s 10(1) Copyright Act.
  - 13 section 35 Copyright Act
  - 14 sections 36 & 38 Copyright Act.
  - 15 section 132 Copyright Act.
  - 16 Carter & Harland, *ibid.*, para 342.
  - 17 *Crymble v Health Insurance Commission; Handel v Health Insurance Commission* (unreported, 20th October 1995, SC (NSW), Greenwood M). The NSW Court of Appeal refused leave to appeal (unreported, 14th November 1997, CA(NSW) per Sheller JA and Sheppard AJA, Butterworths Unreported Judgements BC9707225).
  - 18 See *Ward v Byham* [1956] 2 All ER 318; *Glasbrook Bros Ltd v Glamorgan County Council* [1925] AC 270 and *Airways Corporation of NZ Ltd v Geyserland Airways Ltd* [1996] 1 NZLR 116
  - 19 [1959] VR 197.
  - 20 See Carter & Harland, *ibid.*, para 3.86 (6).
  - 21 The point I have made in this chapter was made, briefly, in Brennan, D. J., "Terms of a Copyright Licence in Shareware" (1997) 11 *Journal of Contract Law* 241-248, pp244-245. However the argument made in that article is brief and, with respect, insufficient. It fails to deal with the issue of an existing *public* legal duty, looking only at the issue of an existing contractual duty. The current discussion does not rely on that article in this chapter. Note however that the article *is* used in discussion below on the topic of what remedies are available to the contracting parties.
  - 22 See *Butler v Fairclough* (1917) 23 CLR 78 at 96.
  - 23 (1917) 23 CLR 78 at 96.
  - 24 (unreported, 13th March 1997, Full SC(WA) per Malcolm CJ, Ipp and Murray JJ).
  - 25 Carter & Harland, *ibid.*, para 365.
  - 26 (1988) 164 CLR 387.
  - 27 Per Brennan J at 428-9. It must of course be noted that this list of factors has not been given unanimous approval by the High Court. But the statement has been widely accepted as a good statement of the legal position (see Carter & Harland, *ibid.*, para 378, notes 299, 300. The only criticism has questioned whether the first factor is really necessary. However this is not an issue here since that factor *is* fulfilled.
  - 28 (1990) 170 CLR 394 at 415 per Mason CJ.
  - 29 (1990) 170 CLR 394 at 416 per Mason CJ.
  - 30 See Heydon, J. D., and Loughlan, P. L., *Cases and Materials on Equity and Trusts* (5th ed.), Butterworths, Sydney, 1997, para 38.1.1.
  - 31 (1996) 34 IPR 481.
  - 32 Megarry, R., and Wade, H. W. R., *The Law of Real Property* (5th ed.), Stevens and Sons Ltd., London, 1984, pp799-800.
  - 33 (1996) 34 IPR 481 at 499-500.
  - 34 (1988) 20 FCR 46.