Copyright, Non-educational Activities, Research and Universities

A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

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DECLARATION

I certify that except where due acknowledgement has been made, the work is that of the author alone; the work has not been submitted previously, in whole or in part, to qualify for any other academic award; the content of the thesis is the result of work which has been carried out since the official commencement date of the approved research program; any editorial work, paid or unpaid, carried out by a third party is acknowledged; and, ethics procedures and guidelines have been followed.

This thesis is up to date as at 1 July 2013.

Marita Shelly

24th of July 2013
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ABSTRACT

A key objective of universities is to generate, acquire and transfer knowledge, which can be achieved through a range of functions including research, teaching and community engagement or service. Historically, educational and research activities within universities were fully government funded. While maintaining government funded educational and research activities, universities in Australia are diversifying their activities and undertaking both educational and non-educational activities for commercial benefit to overcome the declining government funding available to the higher education sector.

As Australian universities diversify their activities, the issue of intellectual property, particularly copyright, becomes a significant factor, given that universities as educational institutions and academics as individuals are provided with a number of exceptions within the Copyright Act 1968 (Cth) that allows them to copy and reproduce third party copyright material, but only as part of educational and research activities.

The aim of this research is to explore how universities in Australia are managing copyright issues in relation to the use of third party copyright material for educational, non-educational and research activities. The main question of this research is: How are universities in Australia managing their copyright obligations under the Copyright Act 1968 (Cth) or contracts when using third party copyright material as part of non-educational activities?

The research has identified that universities and academic staff in Australia are potentially at risk of breaching their obligations under the Copyright Act and licensing agreements when using third party copyright material as part of certain types of non-educational activities. When undertaking non-educational activities, Australian universities are likely to need to rely on licensing agreements or seek permissions from copyright holders rather than copyright legislation to use third party copyright material.

The research has found a likelihood that the licensing agreements of electronic resources may not be complied with if materials from electronic resources are used as part of a non-educational activity. However, there is uncertainty in relation to whether licensing agreements would be infringed given the lack of clarity and definition regarding key concepts within the licensing agreements such as ‘individual end users’, ‘internal research’, ‘substantial portion’ and ‘unrelated third party’.
This research considers that there is a likelihood that the majority of academic staff within Australia universities will not use Ricketson and Crewell’s definition of research or only the dictionary definition of the phrase ‘research’, rather they will continue to consider the dissemination or publication of research results as part of the process of research activity.

This research has found that university staff may not be aware that there is a need to consider third party copyright material and other forms of third party intellectual property as part of non-educational activities. Only a limited number of the publicly accessible copyright policies or information guides of Australian universities examined, addressed non-educational activities. Also, the majority of the publicly accessible policies and procedures related to intellectual property and non-educational activities of Australian universities examined were silent on the need to consider the use of third party intellectual property when undertaking non-educational activities. The research also shows that the structure and responsibilities of the legal and research services within Australian universities differ and there are a number of areas within universities responsible for intellectual property including copyright such as legal services, industry engagement, library, international and research services.

In the future, as the level of non-educational activities including commercial activities within Australian universities continue to increase, it will be essential that the copyright practices and copyright policies, procedures or information guides of universities adapt to address copyright issues in respect to licensing agreements, the educational statutory licensing schemes, other educational sections, the fair dealing exceptions and non-educational activities to ensure that third party copyright is not infringed on the basis that an activity has an element of commerciality.
CHAPTER 1: INTRODUCTION

1.1 Introduction

Since the Dawkins reforms¹ of higher education in the 1980s, it has been argued that ‘contemporary Australian universities have become internationalised and commonly undertake commercial and market seeking activities’.²

As was the case with the higher education sector reforms in Europe, the United Kingdom and the United States, Australian universities ‘have been affected by the [funding and regulatory] reforms in the public sector ... and the adoption of private sector styles of management practices’.³ New funding and regulatory frameworks for the higher education sector are based on the ‘assumption that the contemporary higher education system has become too large and complex for [government] to sustain its position as sole funder’.⁴ Declining government funding has compelled universities to adopt ‘a more commercial entrepreneurial approach to university management’.⁵

With pressure on the higher education sector to diversify revenue sources to become more commercialised, and self-sufficient,⁶ the sector is evolving from comprising fully government funded educational institutions to a hybrid system where universities must find private funding in addition to the public funding received from government. In Australia, universities created by Acts of Parliament⁷ are traditionally perceived as public institutions and publicly

³ Aleksandra Pop-Vasileva, Kevin Baird and Bill Blair, ‘University Corporatisation The Effect on Academic Work-Related Attitudes’ 24 Accounting, Auditing and Accountability Journal 408, 409.
⁵ Pop-Vasileva, Baird and Blair, above n 3.
⁶ See for example Simon Marginson and Mark Considine, The Enterprise University: Power Enterprise and Reinvention in Australia (1st ed, 2001).
⁷ At a State, Federal or Territory level.

As government funding declines, a major strategic emphasis for Australian universities has been on securing other sources of operating revenue such as commercial opportunities and offshore partnerships. Also, with the Excellence in Research for Australia (ERA) initiative currently being used as an instrument by the Federal Government to determine the level of research funding available to universities in Australia, there is a growing pressure on universities, particularly those not strong in research and thus vulnerable to research funding cuts, to find other income streams. The likelihood is that universities in Australia will undertake more non-educational activities that are for a commercial benefit.

Universities emerged ‘from the European medieval *Universitas magistrorum et scholarium*’ which translates as the university of masters and scholars.\footnote{Westerhuis, above n 2, 64.} Originally created to benefit society, universities have had a tradition of educating scholars, learning and enquiry and the dissemination of knowledge.\footnote{See Westerhuis, above n 2; Benedict Sheehy, *Regulating the University: Examining the Regulatory Framework of Australian University Corporations* (2010) ch 3 to 6.} The idea of universities has developed from a liberal perspective, where universities were linked to state objectives to produce citizens for the state and to produce knowledge for educational value, to a neoliberal perspective where universities are associated with economic rationalism and commercial values which have gained ascendancy over knowledge and educational value.\footnote{See Ronald Barnett, *Beyond All Reason Living with Ideology in the University* (1\textsuperscript{st} ed, 2003); Westerhuis, above n 2.}

Universities have been perceived as knowledge organisations with a key objective being to generate, acquire and transfer knowledge, which can be achieved through a range of functions including research, teaching and community engagement or service.\footnote{Department of Education Science and Training (DEST) *Knowledge Transfer and Australian Universities and Publicly funded Research Agencies*, (2006) 5 <http://www.ict-industry-reports.com/wp-content/uploads/2009/02/2006-knowledge-transfer-australian-universities-report-philips-kpa-dest.pdf> at 3 October 2012; See Sheehy, above n 11.} Glyn Davis, the vice-chancellor of Melbourne University, was quoted saying during the release of the University’s 10 year draft plan, that ‘the university is public spirited … we can’t really call ourselves a...
public University any more, when only 23 percent of our income is directly guaranteed by the federal government’. In *University of Western Australia v Gray*, French J acknowledged that ‘the contemporary reality is that most, if not all, universities ... engage in commercial activities’.

The 1990s were a period of major transformation within the higher education system with the development of greater concentration by universities on competitive sources of institutional funding. The increased co-operation and collaboration between universities and industry has been influenced by not only the need for additional revenue but to meet the demands by state and federal governments and industry that universities be commercially or industrially relevant and accountable.

Changes to government funding models for the higher education sector have now shifted how the fundamental activities of universities such as teaching and research take place. Naidoo argues that ‘one of the consequences of market forces on higher education is that the notion of research as a process of knowledge creation has been somewhat eclipsed by the potential for knowledge to generate financial returns’.

With the need for additional revenue, the likelihood is that one avenue that universities will explore is to undertake more activities, both educational and non-educational, that provide a commercial benefit. With the main source of research funding via competitive grants such as the Australian Research Council, academics may consider engaging with industry partners and undertake contract research or consultancies rather than competing for government research funding. This potential industry engagement is supported by a recommendation in the *University of the Future* 2012 report which stated that universities will need to build significantly deeper relationships with industry in the next ten years.

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15 University of Western Australia v Gray (No 20) [2008] FCA 498, French J [1362].
18 Naidoo, above n 4, 27, 30.
19 In monetary terms.
The implications of this, is that universities are beginning to undertake more non-educational activities including commercial activities such as consultancies, contract research and certain types of non-award programs and potentially using third party copyright material as part of these activities which raises a number of issues in relation to intellectual property and in particular copyright.

1.2 Activities of Universities

As stated in Section 1.1, universities are perceived as knowledge organisations. A key objective of universities is to generate, acquire and transfer knowledge, which can be achieved through a range of functions including research, teaching and community engagement or service.21

Historically, educational and research activities within universities were fully government funded. While maintaining government funded educational and research activities, universities are diversifying their activities and undertaking both educational and non-educational activities for commercial benefit to overcome the declining government funding available to the higher education sector.

Full fee post-graduate programs are examples of educational activities conducted for a commercial benefit. At RMIT University, examples of these types of programs include the Juris Doctor and the Master of Business Administration. Examples of non-educational activities that universities are currently undertaking include industry engagement activities such as consultancies or contract research and fee-paying non-award programs such as single subject courses (also known as short courses) and industry based training such as professional development (also known as continuing professional development) programs.22

As universities diversify their activities, the issue of intellectual property, particularly copyright, becomes a significant issue, given that universities as educational institutions and academics as individuals are provided with a number of exceptions within the Copyright Act 1968 (Cth) (hereafter referred to as the Copyright Act) that allows them to copy and

21 Department of Education Science and Training (DEST), above n 13; See Sheehy, above n 11; Barnett (1990), above n 2; Barnett (2000), above n 2; Barnett (2005) above n 2 for a discussion on the role of universities.
reproduce third party copyright material, but only as part of educational and research activities.

1.2.1 Educational Provisions within the Copyright Act

The Copyright Act grants exclusive rights to copyright owners to deal with their copyright works. Generally under the Copyright Act, users of third party copyright material are required to get permission for any use of the material from a copyright owner. However, certain users such as educational institutions and uses such as educational purposes of third party copyright material without permission may not infringe copyright.

Under the Copyright Act, educational institutions such as universities are provided with statutory licensing scheme exceptions. To fall under these exceptions, the reproduction or communication of the third party copyright material must be for an educational purpose such as for use or retention in connection with a particular course of instruction provided by the institution or making or retaining for inclusion into the collection of the institution’s library.

These statutory licensing scheme exceptions allow universities to ‘provide access to and use of [third party] copyright materials to their staff and students at a reasonable cost’ and enable copyright holders to receive remuneration for use of their copyright works, via a collecting society.

University academics and students as individuals are also able to rely on the fair dealing exceptions, particularly the exception related to research and study against any claims of copyright infringement when reproducing or communicating third party copyright material.

Section 40(1) of the Copyright Act provides that copyright in a work is not infringed if the

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23 Contracts and licences can also be used to grant permission for the use of copyright material.
24 Defined under s 10, Copyright Act 1968 (Cth)
25 Copyright Act 1968 (Cth) Parts VA and VB. Refer to Chapters Two and Three for more discussion on the statutory licensing exceptions available to universities.
28 Ibid.
29 Copyright Act 1968 (Cth), ss 40 to 42; 103A to 103C.
30 Copyright Act 1968 (Cth), ss 40 and 103C.
31 The fair dealing exception available to academics for the purpose of research may be modified under publishing agreements. For example, if an academic enters into an agreement with a publisher to have their research published in a book or journal, the agreement may specify that the academic has a responsibility to seek permission for any third party copyright material included in the book or journal article.
use is for the purpose of research or study. Guidelines are provided within s 40(2) of the Copyright Act in relation to the matters a user should take into consideration when determining if a use of the third party copyright material is fair.

1.3 Australia’s International Copyright Obligations

Copyright law in Australia has developed from legislation, common law and international intellectual property conventions including the two principle international copyright conventions; the Berne Convention for the Protection of Literary and Artistic Property (hereafter referred to as the Berne Convention) and the Universal Copyright Convention (UCC).

The World Intellectual Property Organization (WIPO) as an agency of the United Nations is responsible for the administration of international intellectual property instruments including the Berne Convention. The WIPO develops ‘international intellectual property norms and standards, encourages ... new international treaties ... provides technical assistance ... and assembles and disseminates information ...’.

The principles underlying the Berne Convention are related to:

- National treatment
- Automatic protection

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32 These matters include the purpose and the character of the dealing, the nature of the work, the possibilities of obtaining the work within a reasonable time at a commercial price, the effect of the use on the potential market or value of the work and the amount and substantiality of the part copied in relation to the whole work.
33 See Copyright Act 1968 (Cth).
34 See for example University of New South Wales v Moorhouse and Angus & Robertson (Publishers) Pty Ltd 1975 133 CLR 1.
35 Other international copyright agreements that Australia has signed includes the Geneva Convention for the Protection of Producers Phonograms Against Unauthorised Duplication of Phonograms in 1974, Brussels Convention Relating to Distribution of Distribution of Programme-Carrying Signals Transmitted by Satellite in 1990 and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) in 1995.
Independence of protection.

Australia became a signatory to the Berne Convention in 1928. Under this Convention, Australia is required to recognise the copyright within works created in other signatory countries to the Convention in the same manner as it recognises copyright within works created in Australia. This means that Australian copyright law applies to anything published or performed in Australia regardless of which signatory country the work originated in.

The UCC is an international copyright convention developed by the United Nations Educational Scientific and Cultural Organization (UNESCO) in 1952. Australia became a signatory to the UCC in 1969. The UCC is an alternative to the Berne Convention. It was developed to provide countries particularly developing countries with international copyright protection. The protection granted under the UCC is considered to be lower and more flexible than the Berne Convention.\(^{40}\) Similar to the Berne Convention, signatory countries to the UCC are required to provide national treatment in relation to copyright protection for artistic, literary and scientific works. For example, Australia is required to provide the same copyright protection to artistic, literary and scientific works created in other signatory countries as artistic, literary and scientific works created in Australia.\(^{41}\)

As intellectual property rights including copyright play an important role in the flow of international trade between countries particularly within the software and entertainment industries, countries must also consider regional and bilateral trade agreements such as the 2004 Australia-US Free Trade Agreement in relation to intellectual property law including copyright law. An example in the Australian higher education sector of this flow of copyright material between countries can be seen by the level of copyright material from overseas publications\(^ {42}\) included in electronic resources such as databases used by universities and university staff and students.

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\(^{40}\) Copyright Agency, above n 38; See World Intellectual Property Organization, above 38.

\(^{41}\) Ibid.

\(^{42}\) A review of the electronic resources available via the RMIT University library website indicates that approximately 80 percent of the publishers of these resources are international companies.
1.4 Rationale for the Thesis

Following the invention of the printing press, there was a need to control and regulate the output of printers as well as to provide rights to authors.\(^{43}\) This need to provide rights to authors and book printers led to the creation of the law of copyright and specifically, the first Copyright Act, the *Statute of Anne*\(^{44}\) in 1710. Since then, the development of new technology has often led to changes in copyright law.\(^{45}\) Recent technology developments such as the photocopier, video recorder (VCRs), compact disk (CD) burner, the internet, and file sharing software has increased the accessibility to copyrighted material and has also increased the public’s ability to copy material without the copyright owner’s consent.\(^{46}\) As noted by Gerhardt and Wessel,\(^{47}\) the application of copyright law to new technologies and digital environments has become extraordinarily complex. The resulting legal uncertainties endanger the core values of public and educational access, scholarship [including research] and creativity that copyright laws were meant to protect.

Unlike other forms of intellectual property such as patents and trademarks which must be registered to be recognised as a legal right, copyright is an automatic legal right within Australia, which comes into being at the creation of the work. As copyright does not have to be registered to be recognised, statistics on the economic value of copyright are scarce. Using the WIPO framework for assessing the economic contribution of copyright, Australia classifies industries into four copyright categories, described as copyright industries, of core, interdependent, partial and non-dedicated, which when combined form the total copyright industries in Australia.\(^{48}\) On the basis of the WIPO framework for assessing the economic contribution of copyright, in the period between 1996 and 2011, the copyright industries in Australia grew on average at an annual rate of 2.2 per cent\(^{49}\) and in 2011 the value added to


\(^ {44}\) An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned, 1710, 8 Anne, c.19.

\(^ {45}\) The increasing use of digital and online technologies is expanding the use of contracts and licences, which can be used to override copyright legislation.


\(^ {49}\) Prior to the global financial crisis, copyright industries in Australia grew on average at an annual rate of 4.7 per cent between 1996 and 2007.
Australia’s gross domestic product (GDP) by the copyright industries was 93.2 billion Australian dollars or the equivalent of 6.6 per cent of GDP.50

Copyright is not a matter of marginal significance and, with the growth of digital resources accessible via the internet, it will impact a number of important activities. Industries such as education that generate and use copyright material are of considerable economic significance.51 The economic value of intellectual property, particularly the copyright of academic works, is beginning to be realised by universities, and Monotti52 highlights the rationale behind this realisation:53

> There is increasing economic pressure on tertiary institutions to be commercially productive and more self sufficient. Reductions in government funding and consequent budgetary constraints, reduced student numbers, pressure imposed by priority of growth in the sector and increasing community demands for accountability are forcing Universities to reassess their objectives and goals… The goal of exploiting intellectual property to fill revenue gaps may influence Universities to direct academic research increasingly into those areas where there is a potential for financial reward rather than in the pursuit of scholar reward.

In their endeavour to seek additional revenue, it is likely that universities will undertake more non-educational activities, particularly activities that result in a commercial gain and this raises a number of issues in relation to intellectual property, specifically copyright.

Anecdotal evidence would suggest that academic staff have a low understanding of copyright and how to manage it in relation to educational and research activities. The examples provided by Monotti and Ricketson in Universities and Intellectual Property Ownership and Exploitation54 highlight that traditionally ‘academics have operated in a copyright-free zone’ from their universities.55 But the growing use of digital and online technologies has ‘led many universities to re-evaluate their attitudes to copyright’.56

Given the complex and uncertain nature of copyright law and with the growing use of digital and online technologies leading ‘many universities [to] re-evaluate their attitudes to

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51 Ricketson and Creswell, above n 26, [3.35].
53 Ibid, 341.
55 Ibid, 10.
56 Ibid, 10.
This thesis examines how universities in Australia are managing copyright issues in relation to non-educational activities such as consultancies, contract research and certain types of non-award programs. Copying and using third party copyright material within a university when undertaking non-educational activities may lead to copyright infringement as the Copyright Act recognises and allows copying and communication of third party copyright material for activities undertaken for ‘educational purposes’ such as teaching, but not activities undertaken for commercial advantage.\(^{58}\)

### 1.5 Statement of Problem

This research explores an academic issue from an Australian perspective but it is one which is likely to have international significance due to the increasing usage of electronic material. There are currently very few Australian legal cases in this area, but it is likely that the issue may lead to a legal test case in Australia, similar to that occurring in the United States between publishers and a university in regards to the use of electronic material.\(^{59}\)

With the changing focus of universities from fully government funded organisations to ‘commercial enterprises’, it is not clear if the use of third party copyright material within non-educational activities meets the criteria of the educational sections, particularly the statutory licensing schemes\(^{60}\) or the fair dealing exceptions\(^{61}\) within the Copyright Act or whether or not the use of third party copyright material as part of non-educational activities falls under other sections, resulting in university staff infringing these copyright sections. Also given the complex and uncertain nature of copyright law, it is not clear whether universities’ copyright policies provide sufficient guidance to staff in relation to the use of third party copyright material for non-educational activities.

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57 Monotti and Ricketson, above n 54, 10.
58 While the focus of this thesis is on copyright compliance by universities and academic staff, it should also be noted that non educational breaches occur against universities’ and academic staff’s intellectual property rights.
59 See Cambridge University Press, Oxford University Press, Inc., and Sage Publications, Inc., v Mark P. Becker, in his official capacity as Georgia State University President, Risa Palm, in her official capacity as Senior Vice President for Academic Affairs and Provost of Georgia State University, J.L. Albert, in his official capacity as Georgia State University Associate Provost for Information Systems and Technology, Nancy Seamans, in her official capacity as Dean of Libraries at Georgia State University, Robert F. Hatcher, in his official capacity as Vice Chair of the Board of Regents of the University System of Georgia, Kenneth R. Bernard, Jr., Larry R. Ellis, W. Mansfield Jennings, Jr., James R. Jolly, Donald M. Leeborn, Jr., William Nesmith, Jr., Doreen Stiles Poitevint, Willis J. Potts, Jr., Wanda Yancey Rodwell, Kessel Stelling, Jr., Benjamin J. Tarbutton, III, Richard L. Tucker, Larry Walker, Rutledge A. Griffin, Jr., C. Thomas Hopkins, Jr., Neil L. Pruitt, Jr. And Philip A. Wilheit, Sr., in their official capacities as members of the Board of Regents of the University of Georgia, Civil Action No 1:08-CV-1425-ODE (N.D. Ga., May, 11, 2012).
60 Copyright Act 1968 (Cth), Parts VA or VB.
61 Copyright Act 1968 (Cth), ss 40 to 43.
1.6 Research Questions

The aim of this research is to explore how universities in Australia are managing copyright issues in relation to the use of third party copyright material for educational, non-educational and research activities.

The main question of this research is: How are universities in Australia managing their copyright obligations under the Copyright Act 1968 (Cth) or contracts when using third party copyright material as part of non-educational activities?

In addition to the main question, the research will also examine the following four questions:

- Are universities and individual academics in Australia meeting the contractual terms and conditions of electronic resources when accessing, downloading and printing articles (and other materials) for educational, non-educational and research activities?

- How have the United States, European Union, United Kingdom and Canada addressed the issue of universities and particularly university staff using third party copyright material for educational, non-educational and research activities?

- To what extent do university policies, procedures or guides relating to intellectual property, specifically copyright, provide advice [to staff] in relation to the use of third party copyright material for non-educational activities and research activities?

- What are the issues associated with the current approaches of Australian universities to the use of third party copyright material for educational, non-educational and research activities?

1.7 Methodology/Method

Legal theory (also known as jurisprudence or the philosophy of law) is the search for greater understanding about the law.\(^{62}\) In contrast to the literature on legal theory,\(^{63}\) until recently,

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\(^{63}\) See for example Crowe, above n 62; Margaret Davies, *Asking the Law Question* (3\(^{rd}\) ed, 2008); H. L. A. Hart, *The Concept of Law* (2\(^{nd}\) ed, 1994); John Finnis, *Natural Law and Natural Rights* (1\(^{st}\) ed, 1980); Hans Kelsen,
legal methodology and methods had not been well explained or classified within research frameworks.

This research has taken a legal positivism approach. It has looked at copyright law and specifically the statutory licensing schemes available to educational institutions and the fair dealing exceptions ‘as they are’ and has not investigated what these sections ‘ought to be’.

Legal positivism relates to the ideas and influences of legal systems and their origins. The basis behind it is that legal systems are ‘created by people rather than having a natural existence’. Under legal positivism, the law of legal system is made by human acts such as governments and it is imposed on citizens. Understanding the nature of the legal system is perceived as more valuable to the analytical study of law than whether the law is morally or ethically right. The difference between what the law is and what the law ought to be is generally referred to as the thesis separation. Hart described the thesis separation as laws not needing to reproduce or satisfy certain demands on morality even though laws are often morally or ethically right.

The research was undertaken through content analysis or, as referred to by Hutchinson, doctrinal research, a commonly used method in law. Doctrinal research is ‘underpinned by positivism and a view ... that the law is objective, neutral and fixed’. It is defined as research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps, predicts future developments.

While there is some criticism of doctrinal research in that it is considered too descriptive and lacking a clear methodology, it was an appropriate method for this thesis as the research
involved elements of law and legal concepts and required legislation and case law to be analysed.

The research focused on reading, analysing and interpreting primary sources such as legislation, cases and university policies, and secondary sources such as journal articles, government reviews and reports, explanatory memorandum associated with government bills and submissions by interested user groups to Senate inquiries into copyright reviews. Some of the primary and secondary sources examined as part of this research were extrinsic material that under the statutory interpretation rules can be relied for the statutory interpretation of legislation, in this instance, the Copyright Act. Precedence in copyright case law in Australia, Canada and United States are also relied on to examine the research questions.

van Hoecke defines doctrinal research as a hermeneutic discipline. Hermeneutics is defined ‘as a methodology that focuses on the interpretation and understanding of text in the context of the underlying historical and social forces’. Historically, hermeneutics has been connected to the interpretation of ancient scriptures; however, it has been applied to law research where the reasoning behind case law and legislation is sought. As stated by van Hoecke, texts and documents are the main research objects of hermeneutics and their interpretation is the main activity of the researcher which is similar to legal doctrine research.

There are different forms of doctrinal legal research ranging ‘from practical problem-solving to straightforward descriptions of (new) laws with some incidental interpretative comments to innovative theory building’. Doctrinal research is generally a two-step process involving locating the sources of law and then interpreting and analysing the text. Hutchinson states that in the first step ‘the researcher is attempting to determine an objective reality [which is] a statement of law encapsulated in legislation or entrenched [in] common law principles’. This thesis is attempting to provide practical solutions to universities in relation to managing issues associated with copyright legislation based on current copyright law in Australia.

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74 See for example s 15AB of the Acts Interpretation Act 1901 (Cth); See Catriona Cook, Robin Creyke, Robert Geddes and David Hamer, Laying Down the Law (8th ed, 2012), ch 6 to 13.
75 For a discussion on extrinsic aids and interpretation of legislation refer to Cook, Creyke, Geddes and Hamer, above n 74.
76 van Hoecke, above n 73.
78 Ibid.
79 Hutchinson and Duncan, above n 64, 106.
80 Ibid, 110.
Interviews with copyright officers\textsuperscript{81} from 16 Australian universities were also undertaken to clarify the intentions and workings of the copyright policies and guidelines within Australian universities. The interviews enabled the researcher to obtain data that otherwise would not have been available. The interviews allowed the researcher to gain an insight into the experiences and perceptions of university copyright officers in relation to the use, particularly by university staff, of third party copyright material for educational, non-educational and research activities. The research design and method for the interview phase of the research is outlined in Section 6.2 of Chapter Six.

1.8 Scope of the Research

This research will explore how universities manage copyright issues in relation to educational, non-educational and research activities and not the broader issue of intellectual property.\textsuperscript{82} More specifically, the research will identify the copyright issues related to universities and particularly academic staff\textsuperscript{83} using third party copyright material when undertaking non-educational activities.

The thesis will not examine the issue of moral rights that are available to creators of copyright works. Rather, the research focuses on the statutory licensing schemes and other relevant sections available to education institutions and the fair dealing exceptions available to individuals within the Copyright Act when using third party copyright material as part of educational, non-educational and research activities. Also with universities and in particular university libraries providing staff (and students) with resources via the internet for educational and research purposes through the expanding use of contracts\textsuperscript{84} and licences, this research examines a selection of contracts\textsuperscript{85} entered into by RMIT University with various aggregated electronic resource providers and publishers.

\textsuperscript{81} The title of the copyright officer within a university is also described as a copyright advisor or a copyright coordinator. For this thesis, the generic title of copyright officer is used to describe the role.

\textsuperscript{82} Including other forms of intellectual property such as patents or designs or how Australian universities manage patents or designs when attempting to commercialise research.

\textsuperscript{83} This research focuses on copyright issues related to universities and academic staff, rather than students. As stated in Section 5.2.1 of Chapter Five, most university staff enter into an employment contract with a university and these contracts will normally state that any IP created by employees in the course of their employment will be owned by the employer. In most cases, students and specifically research students will own any IP created by their research.

\textsuperscript{84} As discussed in Chapter Three, contracts can be used to override the Copyright Act.

\textsuperscript{85} This research does not examine other licensing options such as creative commons or open access. Open access is mentioned briefly in Section 4.3 of Chapter Four. The issue of open access to research data become a public debate in 2012 (with the call for academics to boycott commercial publishers such as Elseviers), which was after
As the research focuses specially on copyright law and the management of it by universities, university copyright officers were identified as appropriate interview subjects for the interview phrase of the research.

1.9 Limitations

Following the completion of this thesis, the following limitations have been identified:

- During the design of this research, university copyright officers as public officers of universities were identified as the most appropriate to interview in respect to providing an opinion on the issue of universities’ approaches to the use third party copyright material. However the research identified that copyright management at Australian universities is often split between the service areas of library, legal and research, and so there were instances where the interviewee did not have full knowledge of how their university managed copyright issues across all university activities including non-educational and research activities.

- Of the 38 copyright officers invited to participate in the research, only 16 copyright officers agreed to be interviewed. Of the six who declined by reply email, it was generally due to work commitments but in one case it was due to the fact that the thesis was exploring ‘ideas that copyright officers often only discuss behind closed doors’.  

- A limitation of conducting the majority of the interviews via telephone was that the copyright officers interviewed via the telephone were not as forthcoming in their opinions during the interviews as were the copyright officers interviewed face to face.

- The University Librarian of RMIT University provided the researcher with a selection of 12 contracts that RMIT University has entered into with various aggregated electronic resource providers and publishers. Given that online

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86 A direct quote from an email written by a University copyright officer that declined to participate.
87 The request to the University Librarian of RMIT University for copies of the contracts was from the senior supervisor.
subscriptions can now represent 75 per cent of university collections,\textsuperscript{88} it is likely that universities enter into numerous contracts with a range of providers of online material. While only 12 examples of contracts were reviewed, it should be noted that the contracts were between RMIT University and some of the major providers of online material such as ProQuest, EBSCO and Thomson Reuters (Professional) Australia. The contracts also related to electronic resources that covered a range of disciplines such as the arts, business, law and science and various material types such as electronic books, electronic articles, reports, legislation and case law.

1.10 Outline of the Thesis

This thesis is divided into eight chapters.

Chapter One provides the rationale for the thesis and a statement of the research problem, introduces the research questions, discusses the methodology and methods used for the research, outlines the thesis, defines key terms used and discusses the limitation of the research.

Chapter Two charts the historical development of the educational provisions within the Australian Copyright Act for the period between 1958 and 2013. It discusses only the copyright law reviews that have led to the introduction of educational specific provisions within the Act. The chapter will examine the relevant copyright review committee reports and the applicable copyright amendment bills to identify and explain the changes in the applicable amending bill from the original recommendations made by the relevant copyright review committee in relation to educational use and copyright law.

Chapter Three explores the interaction between copyright law and contract law in relation to the use of electronic resources for educational and research purposes. The chapter discusses the educational statutory licensing schemes within the Copyright Act 1968 (Cth) (the Copyright Act), particularly in relation to the reproduction and/or communication of copyright material in electronic form, the fair dealing exceptions for the purpose of study and

research within the Copyright Act and the 2001 Copyright Law Review Committee’s review of contracts and copyright.

Chapter Four examines, from an international perspective, the research problem and question, of how universities are managing their copyright obligations when using third party copyright material as part of educational, non-educational and research activities. The purpose of the chapter is to examine how the United States (US), European Union (EU), United Kingdom (UK) and Canada have addressed these issues.

Chapter Five examines the publicly accessible intellectual property (including copyright) and non-educational activities policies, procedures and guides of all universities in Australia. The purpose of examining university policies, procedures or guides relating to copyright is to develop an understanding of the approaches of each Australian university to managing copyright issues relevant to activities undertaken by university staff and in particular to the use of third party copyright material for non-educational activities.

Chapter Six discusses the finding and overarching themes obtained from the interviews conducted with copyright officers from Australian universities. It outlines the research design and method used for the interviews. From the analysis of the interview data, issues associated with the approaches of Australian universities to the use of third party copyright material for educational, non-educational and research activities by staff are discussed.

Chapter Seven uses four hypothetical practical examples of non-educational activities undertaken by university staff as part of their role at an Australian university to discuss whether the use (such as reproduction) of the third party copyright material as part of non-educational activities could fall under the educational provisions\(^89\) or the fair dealing exceptions within the Copyright Act 1968 (Cth) or under the contractual terms and conditions of electronic resources.

Chapter Eight discusses the conclusions in relation to the research questions. It addresses the implications of the research findings for universities as well as directions for future research.

\(^89\) Including s 200AB which was introduced into the Act under the 2006 amendments.
1.11 Definition of Terms

The key terms used within this thesis are defined below.

**Commercial Activities:** are types of non-educational activities undertaken by universities. An activity can be commercial even with no expectation of profit. The collection of fees or charges for goods, services or access to facilities is generally an indication that an activity is commercial. However, activities which accrue non-financial benefits such as the potential to enhance to the reputation of the University may also be classified as commercial.  

Examples of commercial activities include consultancies, contract research and non-award programs and are defined below:

**Consultancy** means the provision of professional services to an external party for a fee or other consideration. University based consultancy includes:

- All professional activities requiring the use of the University’s name, services, space, facilities, equipment and paid work-time, excepting any activity that may be classified as research and development and activities related to award courses.

**Contract research** is the activity of undertaking an investigation on behalf of an external party for a fee, with the outcomes being new knowledge, with a specific practical application, or improved or new materials, products, devices, processes or services.

**A non-award program** ‘refers to a teaching or instructional program or activity, other than the university’s award courses, for which an attendee pays a fee’. Examples of a fee-paying non-award programs are single subject courses (also known as short courses) and professional development (also known as continuing professional development) programs.

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93 Curtin University of Technology, above n 90, 1.

94 Ibid.
Copyright: A form of intellectual property. It provides an exclusive right given by law for a period of some years to creators\(^95\) or the assignee to reproduce or perform the original work.\(^96\) Common forms of copyright include ‘writing, visual images, music and moving images. Copyright protects the form or way an idea or information is expressed, not the idea or information itself.’\(^97\)

Educational Purpose: Under s 10A of the Copyright Act 1968 (Cth), educational purposes relate to a use in connection with a particular course of instruction provided by the institution or making or retaining for inclusion into the collection of the institution’s library.

Intellectual Property: ‘Is a broad term for the various rights which the law gives for the protection of creative effort and in particular for the protection of economic investment in creative effort’.\(^98\) Common examples of intellectual property are confidential information including trade secrets, copyright, designs, trademarks and inventions.

Non-educational Activities: Are activities undertaken by universities that are not defined as educational. Examples of non-educational activities include commercial activities, hiring of venues and marketing and promotion.

Policy: ‘Is a concise formal statement of principles which indicate how the University will act in a particular area of operation’ for example in relation to academic promotions’.\(^99\) A policy provides members of the University such as staff with the approved way of operating in relation to a particular matter such as intellectual property or copyright.\(^100\)

Procedures: ‘Describe the methods and responsibility for the implementation of a policy, statute or regulation’.\(^101\) Procedures provide members of the University such as staff or students with information on how to implement a particular policy.

\(^95\) Such as artists, authors, designers or inventors.
\(^100\) Ibid.
**Third Party Copyright Material:** Third party copyright material refers to any material such as literary, artistic, dramatic and musical works and other subject matters not created or owned by the user such as an academic staff member or where the university is not the copyright holder of the work.

**University:** In Australia, a university is a higher education provider that was established under an Act of Parliament at a State, Federal or Territory level.

### 1.12 Context of this Research

This thesis has been completed as part of a business research program. It is not a legal thesis; however, it has taken a legal approach to the research. The researcher has an educational background in business and information management and extensive research assistance experience in relation to the legal issues associated with electronic information.
CHAPTER 2: THE HISTORICAL DEVELOPMENT OF THE EDUCATIONAL PROVISIONS WITHIN THE AUSTRALIAN COPYRIGHT ACT

2.1 Introduction

This chapter charts the historical development of the educational provisions within the Australian Copyright Act commencing from their introduction in 1958 to 2012. It discusses only the copyright law reviews\(^1\) that have led to the introduction of educational specific provisions within the Act. As discussed in Section 1.3.1 of Chapter One, educational institutions such as universities are provided with exemptions\(^2\) within the Australian Copyright Act to enable them to copy and communicate third party copyright material for educational purposes.

Given the complex and uncertain nature of copyright law and with the growing use of digital and online technologies leading to ‘many universities re-evaluating their attitudes to copyright’,\(^3\) charting the historical development of the education provisions within the Australian Copyright Act will show the changes made to copyright legislation in an attempt to address changing activities of educational institutions, specifically universities and changing technologies.

During the period of the copyright law reviews discussed in this chapter, the number of Australian universities increased from ten in 1958 to 39 in 2012. A policy focus by Government on science and technology resulted in a number of ‘new universities specialising in research and training of scientists, technicians and engineers’.\(^4\) The 1960’s saw a sustained period of new universities with a focus on interdisciplinary study.\(^5\) Then the 1970’s saw a change in funding models for Australian universities, with the Federal Government assuming sole responsibility for funding higher education.\(^6\) However, as discussed in Section 1.1 of Chapter One, following the Dawkins reforms of higher education in the 1980’s Australian...

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\(^1\) These reviews have all taken a normative approach, examining what the copyright law ‘should be’ or ‘ought to be’.

\(^2\) These exemptions were first introduction into legislation under the Copyright Act 1968 (Cth).


\(^4\) Glyn Davis, ‘The Australian Idea of a University’ (2013) 72 *Meanjin* 3, 41; For example Monash University

\(^5\) For example, La Trobe University, Macquarie University and The University of Newcastle; Davis, above n 4.

\(^6\) Davis, above n 4;
universities have diversified their activities and funding sources and increased their student numbers, specifically in relation to international students.\(^7\) All these changes in the higher education environment have been occurring to the same time that technology is evolving, which is changing the way copyright material is reproduce and communicated.

The chapter will examine the relevant copyright review committee reports and the applicable copyright amendment bills to identify and potentially explain the changes in the applicable amending bill from the original recommendations made by the relevant copyright review committee in relation to educational use and copyright law.

The first Commonwealth Copyright Act was passed in 1905\(^8\) and operated in concurrence with the existing state and imperial copyright legislation.\(^9\) In 1912, Parliament passed a new Copyright Act, Copyright Act 1912 (Cth), deeming that the British Copyright Act of 1911 should apply from July 1, 1912.\(^10\) It was necessary for Australia to adopt UK copyright legislation to enable the Australian copyright legislation to fulfil the requirements of the Berne Convention,\(^11\) which requires signatories to the convention to recognise copyright works from the other signatory member countries in the same manner as copyright works are recognised under the signatories national laws,\(^12\) and to ensure that the UK would recognise Australian copyright.\(^13\)

The Copyright Act 1912 (Cth) repealed the state Acts\(^14\) and transferred the administration of these Acts to the Commonwealth.\(^15\) The Copyright Act 1912 contained several provisions that were not found in the British Copyright Act of 1911, however, these provisions were


\(^8\) For a discussion on the Copyright Act 1905 (Cth) see Benedict Atkinson, The True History of Copyright The Australian Experience 1905-2005 (1\(^{st}\) ed, 2005).

\(^9\) Staniforth Ricketson, Megan Richardson and Mark Davison, Intellectual Property Cases: Material and Commentary (4\(^{th}\) ed, 2009) 49; See Sam [Staniforth] Ricketson, ‘The Imperial Copyright Act 1911 in Australia’ in Uma Suthersanen and Ysolde Gendreau (eds), Shifting Empire: 100 Years of the Copyright Act 1911 (2012), 52.

\(^10\) Copyright Act 1912, s 8.

\(^11\) The 1886 Berne Convention was amended in 1908.


\(^13\) Atkinson, above n 8, 95.

\(^14\) See Copyright Act 1869 (Vic); Copyright Act 1878 (SA); Copyright Act 1879 (NSW); Copyright Act 1890 (Vic); Copyright Act 1895 (WA); See Ricketson, above n 9, 52.

\(^15\) Copyright Act 1912, s 6.
considered so minor in nature they did not affect the operation of the Act.\textsuperscript{16} The \textit{Copyright Act 1912} (Cth) introduced ‘a generic class of ‘works’ ... and the compulsory licensing of literary and musical works’.\textsuperscript{17} The Act also increased the scope of copyright to include reproduction in any material form whatsoever, including the right to make a record or cinematograph film'.\textsuperscript{18} The British Copyright Act 1911 contained a section related to fair dealing with any works for purposes including private study and research\textsuperscript{19} and a section\textsuperscript{20} related to copyright held by universities and colleges, however, the \textit{Copyright Act 1912} (Cth)\textsuperscript{21} did not contain any sections specifically related to copying by educational institutions.

Since 1912, the \textit{Copyright Act} has been amended a number of times. Relatively insignificant amendments to the Act occurred in 1933, 1935 and 1950.\textsuperscript{22} However, legislative reviews announced in 1958 and 1974 and amendments to the \textit{Copyright Act 1968} (Cth) in 1989, 2000 and 2006 have all led to significant changes in relation to education related activities within the Act and are discussed in the following sections. The \textit{Copyright and the Digital Economy} issue paper released by the Australian Law Reform Commission (ALRC) in August 2012 as part of the current copyright review will also be discussed in relation to educational institutions.

\subsection*{2.2 Spicer Report and the Copyright Act 1968 (Cth)}

The first major review of the Act occurred in 1958 when the then Attorney-General, Mr O’Sullivan, formed the Spicer Committee\textsuperscript{23} chaired by Sir John Spicer, Chief Judge of the Commonwealth Industrial Court. The purpose of the Spicer Committee was to examine the copyright law of Australia and recommend if any of the amendments introduced in 1956 into the United Kingdom’s copyright law\textsuperscript{24} should also be introduced into Australia’s copyright law. These amendments included extending the ‘special protection against liability for infringement to certain libraries in their copying of copyright material,’\textsuperscript{25} introducing sections

\begin{itemize}
  \item \textsuperscript{16}Commonwealth Law Review Committee, \textit{Report to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth} (1959) \{19\}.
  \item \textsuperscript{17}Atkinson, above n 8, 108.
  \item \textsuperscript{18}Ibid.
  \item \textsuperscript{19}\textit{Copyright Act 1911} (UK) c 46, s 2(1)(i).
  \item \textsuperscript{20}Ibid, s 33.
  \item \textsuperscript{21}For more of a discussion of the \textit{Copyright Act, 1905} (Cth) refer to Atkinson, above n 8.
  \item \textsuperscript{22}Commonwealth Law Review Committee, above n 11, [18].
  \item \textsuperscript{23}Ibid, [18].
  \item \textsuperscript{24}The Gregory Report published in 1952 was the basis for the changes introduced into the UK copyright legislation via the \textit{Copyright Act 1956} (UK).
  \item \textsuperscript{25}Commonwealth Law Review Committee, above n 16, [27].
\end{itemize}
covering public broadcasting of sound and television recording, creating a dispute tribunal, amending the provisions related to the works of joint authors and altering the term of copyright protection. The Committee also made recommendations about other changes needed to Australia’s copyright laws. The Committee essentially saw its task as ‘one of balancing the interests of the copyright owner with those of the copyright user and the general public’.  

The Committee recommended the acceptance of the majority of the amendments introduced into the Copyright Act 1956 (UK) particularly in relation to the following provisions: copyright ownership; copyright infringement by importation or sale; fair dealing; copying by libraries; compulsory license to manufacture records; the meaning of artistic, literacy, dramatic and musical works, works by joint authors; copyright in sound and television broadcasts; offences and remedies and a tribunal to deal with issues between organisations authorised to grant licences for public performances and individuals requesting the use of licences.

Given that the United Kingdom was considered a main user of Australia’s copyright material, the Committee also recommended that Australia adhere to the 1948 Brussels revision of the Berne Convention, to provide Australian copyright authors with a similar level of copyright protection in the United Kingdom as British authors. The Berne Convention gives authors ‘certain exclusive rights, including making or authorising translations, reproductions and protection of moral rights’. As a signatory to the Convention, Australia may permit certain uses of copyright works such as the statutory licensing schemes within the Copyright Act 1968 (Cth) which allows educational institutions to reproduce and communicate copyright work. However the Berne Convention limits the impact of such uses on the ‘copyright owner’s exclusive rights by providing that the normal exploitation of the work and the legitimate interests of the author’ will not be impaired.

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26 Ibid, [24-28].
27 Ibid, [13].
28 Ibid, [504].
30 Ibid; See World Intellectual Property Organization, above n 12.
A further recommendation was to ratify the 1952 Universal Copyright Convention.\textsuperscript{31} Ratifying the Universal Copyright Convention would ‘enable Australian copyright owners to receive copyright protection in the United States for published works with a minimum of formality’.\textsuperscript{32} Some commentaries have criticised the Spicer Committee, arguing that it ‘relied heavily on precedent to determine its conclusions’\textsuperscript{33} and that the Committee’s ‘unwillingness to consider the consequences [such as benefits and costs of maintaining] treaty norms showed a deficiency of imagination [about the economic and social dimension of copyright] that continues to infect copyright policy makers’.\textsuperscript{34} However, as stated in the Spicer Report and noted by Atkinson,\textsuperscript{35} the Committee had to ensure that the international copyright community would continue to accept Australian copyright legislation.\textsuperscript{36}

In respect to educational provisions, the Spicer Committee recommended that s 41 of the United Kingdom’s \textit{Copyright Act 1956} relating to the use of copyright material for education be included in Australia’s copyright laws. Section 41 allowed for the reproduction of copyrighted material including written, musical and artistic work if the reproduction was used as part of an educational course or an examination. However, the reproduction could not be undertaken using a reprographic process such as a photocopier. The copying or performance, which could also include showing a sound recording, film or television broadcast, could be undertaken by teachers or students for the benefit of teachers or students within or connected with the school but did not include parents. It provided:\textsuperscript{37}

\begin{enumerate}
\item Where copyright subsists in a literary, dramatic, musical or artistic work, the copyright shall not be taken to be infringed by reason only that the work is reproduced, or an adaptation of the work is made or reproduced,—
\begin{enumerate}
\item In the course of instructions, whether at a school or elsewhere, where the reproduction or adaptation is made by a teacher or pupil otherwise than by the use of a duplicating process, or
\end{enumerate}
\end{enumerate}

\begin{footnotes}
\footnote{31 The Universal Copyright Convention (UCC) is an international copyright convention developed by the United Nations Educational Scientific and Cultural Organization (UNESCO) in 1952. The UCC is an alternative to the Berne Convention. For more information on the \textit{Universal Copyright Convention} see United Nations Educational Scientific and Cultural Organization, \textit{Universal Copyright Convention} <http://www.unesco.org/new/en/culture/themes/creativity/creative-industries/copyright/universal-copyright-convention/> at 31 March 2013.}
\footnote{32 Commonwealth Law Review Committee, above n 16, [52].}
\footnote{33 Atkinson, above n 8, 286.}
\footnote{34 Ibid, 287.}
\footnote{35 See Commonwealth Law Review Committee, above n 16; Atkinson, above n 8.}
\footnote{36 Atkinson, above n 8.}
\footnote{37 \textit{Copyright Act 1956} (UK), s 41.}
\end{footnotes}
(b) As part of the questions to be answered in an examination, or in an answer to such a question.

(2) Nothing in the preceding subsection shall apply to the publication of a work or of an adaptation of a work; and, for the purposes of section five of this Act, the fact that to a person’s knowledge the making of an article would have constituted an infringement of copyright but for the preceding subsection shall have the like effect as if, to his knowledge, the making of it had constituted such an infringement.

(3) For the avoidance of doubt it is hereby declared that, where a literary, dramatic or musical work—

(A) is performed in class, or otherwise in the presence of an audience, and

(b) is so performed in the course of the activities of a school, by a person who is a teacher in, or a pupil in attendance at, the school, the performance shall not be taken for the purposes of this Act to be a performance in public if the audience is limited to persons who are teachers in, or pupils in attendance at, the school, or are otherwise directly connected with the activities of the school.

(4) For the purposes of the last preceding subsection a person shall not be taken to be directly connected with the activities of a school by reason only that he is a parent or guardian of a pupil in attendance at the school.

(5) The two last preceding subsections shall apply in relation to sound recordings, cinematography films and television broadcasts as they apply in relation to literary, dramatic and musical works, as if any reference to performance were a reference to the act of causing the sounds or visual images in question to be heard or seen…

Another recommendation of the Spicer Committee was to expand the definition of the term ‘school’ within s 41(7) of the Copyright Act 1956 to include all not for profit educational institutions, including universities. The basis of this recommendation was s 52(1)(i) of the Indian Copyright Act, 1957, which used the phrase ‘educational institution’ rather than the term ‘school’.

The final education-related recommendation made by the Committee was in respect to schools’ recording Australian Broadcasting Commission (ABC) programs. It recommended

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38 Commonwealth Law Review Committee, above n 16, [419].
39 Section 52(1)(i) of the Indian Copyright Act, 1957 was similar to s 41 of the Copyright Act 1956.
40 From 1932 until 1983 the ABC was known as the Australian Broadcasting Commission. In 1983, the ABC became known as the Australian Broadcasting Corporation.
that the recording of school broadcasts of the ABC should not constitute a breach of any copyright in the works’ broadcast if the recordings were made by the school authorities and were not used outside the school.

Interestingly, while the Government was\textsuperscript{41} aware of the pressing need for an up to date copyright law in Australia which will take in account modern developments in entertainment, communications and publishing and which is adapted to Australian needs,

it was several years from the time the Committee presented its report in December 1959 before the amending bill was introduced into Federal parliament in May 1967. It is difficult to understand the reason for this delay, however Atkinson has argued that it may have been due to the Government’s ‘laggard approach to [the introduction of] legislation’\textsuperscript{42} in the 1960s.

Following the public release of the Spicer Report in February 1961, there was no discussion or debate in the newspapers or the Parliament about its recommendations. In April 1961 the then Attorney General, Mr Barwick, informed the House of Representatives that he intended to call for public submissions on the findings of the Spicer Committee.\textsuperscript{43}

It has been suggested by Atkinson\textsuperscript{44} that the delay between the publication of the Spicer Report and the introduction of legislation was due to the size and ‘the unimportance of the Australian broadcasting and recording markets compared to those in Britain’\textsuperscript{45} during the 1950s. Following the introduction of the Copyright Act 1956 (UK), copyright industries related to the UK entertainment industry (such as the music, sport and television sectors) started to became economically significant and lobby for copyright reform.\textsuperscript{46} In contrast, Australia’s broadcasters and record and film companies were relying on using foreign content and appeared satisfied with the ‘commercial arrangements despite the deficiencies they perceived in the copyright law’\textsuperscript{47}.

\textsuperscript{41} Commonwealth, \textit{Parliamentary Debates}, Chamber, 20 April 1966, 971 (Mr Snedden, Attorney General).
\textsuperscript{42} Atkinson, above n 8, 299.
\textsuperscript{43} Ibid, 297.
\textsuperscript{44} Ibid.
\textsuperscript{45} Ibid, 298.
\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid, 299.
No educational institutions or representatives from the higher education sector made a submission to the Spicer Committee and there appears to have been no public call for or comments in other forums or the media about the Committee’s recommendation to introduce s 41 or a similar section into the Act to allow not for profit educational institutions to copy or perform copyrighted material for the purposes of an educational course or an examination. The submissions to the Spicer Committee were from copyright users such as the ABC and other Australian representatives of copyright users such as the formerly named Australian Federation of Commercial Broadcasting Stations and from representatives of copyright owners such as the Australasian Performing Right Association and the Copyright Owners Reproduction Society. These submissions related to the rights to broadcast sound and television recording including performance rights and the creation of the Copyright Tribunal. The concerns raised in these submissions were taken into account by the then Attorney General, Mr Bowen, when preparing the new copyright legislation.

The Spicer Committee noted that the history of Australian copyright legislation had closely followed the developments in the UK and ‘for all practical purposes it can be said that since 1912 Australia [copyright] law ... has been the same as that of [the UK]’. Also prior to the Franki Committee copyright review, which is discussed in section 2.3 below, the higher education sector ‘was not active in the process of the copyright law reform’. For these reasons and given that the purpose of the Spicer Committee was to consider the introduction of amendments, which included an educational provision, to the Copyright Act 1956 (UK), s 41 was recommended by the Committee for inclusion into Australian copyright legislation.

Except for a short editorial in the Sydney Morning Herald in 1967 which welcomed the 1967 Copyright Bill but ‘reproached the Government for taking so long to implement the recommendations’, there was no public debate over the recommendations of the Spicer Report nor the content of the 1967 and 1968 Copyright Bills.

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49 Now known as the Federation of Australian Commercial Television Stations.
50 Now known as the Australasian Mechanical Copyright Owners Reproduction Society Limited.
51 See Atkinson, above n 8, 302-5.
52 Ibid, 305.
53 Commonwealth Law Review Committee, above n 16, [19].
54 Wyburn, above n 48, 184.
55 Atkinson, above n 8, 328.
In May 1967, the then Attorney General, Mr Bowen, introduced the 1967 Copyright Bill into the House of Representatives. The 1967 Bill had ‘a number of provisions related to the use of copyrighted material for educational purposes’. The provisions allowed for copyrighted material to be used for educational instruction without requiring permission from the copyright owners. Section 27 permitted copyright work to be performed in the classroom and s 196 permitted the ‘reproduction of a work by a teacher or student otherwise than by the production of multiple copies’. Section 196 also permitted the recording of an ABC program to be used at a more convenient time.

The 1967 Bill lapsed when the Parliament was prorogued. The 1968 Copyright Bill was introduced into the House of Representatives in May 1968, with substantial changes to the 1967 Bill. These changes were not in relation to the educational provisions but related to the copyright of sound recordings, cinematograph films, broadcasts and published editions and the creation of the Copyright Tribunal.

The 1968 Bill, as a consequence of accepting the 1967 Bill’s provisions in relation to the use of copyright material for educational purposes, also accepted the Spicer Committee’s recommendation that s 41 of the United Kingdom’s Copyright Act 1956 should be inserted into the new Copyright Act. There were changes made to the wording of s 41 but these did not affect the core concepts.

Subsections one, two and four of s 41 were included into the new Act as s 200. Within s 200, a new subsection two was added which expanded on the recommendation of the Spicer Committee regarding the copying of ABC’s television broadcasts for educational purposes. Under s 200, copyrighted material including written, musical and artistic work could be reproduced by a teacher or student for educational instruction or as part of an examination. However, a photocopying machine could not be used to reproduce copyrighted material nor could multiple copies of works be made. The section also allowed for the recording of a sound or television broadcast, if the purpose of the recording was intended for educational use,

56 Prior to the 1967 Bill, the Copyright Act 1912 (Cth) was amended in 1963.
57 Commonwealth, Parliamentary Debates (Second Reading of the Copyright Bill 1967), House of Representatives, May 1967, 2330 (Mr Bowen, Attorney General).
58 Ibid.
59 Ibid.
60 Commonwealth, Parliamentary Debates (Second Reading of the Copyright Bill 1968), House of Representatives, May 1968, 1527 (Mr Bowen, Attorney General).
61 Copyright Act 1968 (Cth).
62 Use of works and broadcasts for educational purposes.
however, the phase ‘educational purposes’ was not defined in the Act. Section 200 stated that: 63

(1) The copyright in a literary, dramatic, musical or artistic work is not infringed by reason only that the work is reproduced or, in the case of a literary, dramatic or musical work, an adaptation of the work is made or reproduced,—

(a) In the course of education instructions, where the reproduction or adaptation is made by a teacher or student otherwise than by the use of an appliance adapted for the production of multiple copies; or

(b) As part of the questions to be answered in an examination, or in an answer to such a question.

(2) The making of a record of a sound broadcast or of a television broadcast, being a broadcast that was intended to be used for educational purposes, does not constitute an infringement of the copyright in a work or sound recording included in the broadcast, or an infringement of copyright in the broadcast, if—

(a) The record is made by, or on behalf of, the person or authority in charge of a place of education that is not conducted for profit; and

(b) The record is not used except in the course of instruction at the place…

The recommendation relating to the performance of works or other subject-matter in the course of educational instruction 64 was incorporated into the Act in s 28 following s 27, which defined what constitutes a performance under the Act. Section 28 stated that the performance of works or other subject matter by can be undertaken by a teacher or a student for the benefit of teachers or students within or connected with the activities of the school.

The recommendation of the Spicer Committee that a definition of ‘education institution’ should be included in the Act was not acted upon until the 1980 Copyright Amendment Act.

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63 Copyright Act 1968 (Cth).
64 Subsection 3 of s 41.
2.3 Franki Report and the Copyright Amendment Act 1980 (Cth)

The next major review of the Copyright Act occurred in 1974 when the then Attorney General, Mr Murphy, appointed Justice Franki, a Judge of the Australian Industrial Court, to chair the review committee. This review was as a consequence of the decision in University of New South Wales v Moorhouse and Angus & Robertson (Publishers) Pty Ltd and the increasing use of photocopying technology. The role of the Franki Committee was to make recommendations for any amendments to Australian copyright law in relation to the use of photocopiers by individuals, libraries and educational institutions. This review invited submissions from interested parties and led to the introduction of the 1980 Copyright Amendment Act.

The Franki Committee was concerned about meeting the balance between ‘ensuring a free flow of information in education and research and the interest of individual copyright owners’. Based on a proposal in the Australian Vice Chancellor’s Committee submission, the Franki Committee recommended that the fair dealing exceptions should be widened to include research or study rather than research or private study. The Franki Committee was of the opinion that the purpose of the term private study was to distinguish the use of copyright material for private study from classroom instruction but it also considered that the distinction was artificial. Also as well, in regards to the fair dealing exceptions for research and study, the Franki Committee recommended the introduction of a list of factors to be considered in determining whether a reproduction amounted to a fair dealing for research [or] study ... [and] the introduction of particular quantitative measures deemed to be fair dealing for research or study.

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66 (1975) 133 CLR 1; This was a test case to determine if the University had authorised copyright infringement by providing photocopiers to library users. The issue was whether the University authorised the act of Mr Brennan’s infringement of copyright. The Supreme Court of NSW held the University had not authorised Mr Brennan’s copyright infringement. On appeal, the High Court held that the University had authorised Mr Brennan’s copyright infringement.
67 Wyburn, above n 48.
69 Commonwealth Law Review Committee, above n 65, [1.02].
70 Wyburn, above n 48.
71 Ibid.
72 Ibid, 186.
Each of these recommendations relating to the fair dealing exceptions for research and study were accepted and implemented in the *Copyright Amendment Act 1980* (Cth).\(^{73}\)

Following inspections of university libraries by the Committee members, the Committee recommended that librarians be allowed to make a maximum of six copies of a single article from a journal for use in libraries of non-profit educational institutions without infringement or payment to the copyright owner. In relation to copying by libraries of non-profit educational institutions of an insubstantial part of a copyrighted work (other than an article), the Committee also recommended that a maximum of six copies could be made without infringement or payment to the copyright owner, if the work had not been published separately or if the work had been published separately but could not be obtained within a reasonable time at a normal commercial price. These two recommendations were made on the basis that the copies were intended to be used in a library and would ultimately be destroyed. The Committee also recommended that self-service photocopy machines in libraries should display notices informing users of relevant provisions of the Act. Another recommendation allowed for ‘limited copying of published or unpublished works for preservation purposes’.\(^{74}\)

The Committee considered that s 200 was unsatisfactory in respect to the reprographic reproduction of copyright works. It stated:\(^{75}\)

> The prohibition on [the] use of ‘an appliance adapted for the production of multiple copies’ imposes a test as to what is authorised which depends upon the type of machine used to make reproductions. In our view technical changes in photocopying machines have made quite unsatisfactory a distinction between infringement and non-infringement based on the kind of machine used to make a reproduction.

The Committee considered that s 200, ‘when it was first enacted, was most likely a compromise between the need for some reproduction of copyrighted material in a classroom situation and the interest of copyright owners’.\(^{76}\) The Committee argued that the wording of the section could lead to an infringement if a copy of a single page was made for an educational purpose on a modern photocopying machine.\(^{77}\)

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\(^{73}\) Wyburn, above n 48.

\(^{74}\) Commonwealth Law Review Committee, above n 65, [1.45–1.57].

\(^{75}\) Ibid, [6.07].

\(^{76}\) Ibid, [6.08].

\(^{77}\) Ibid.
The Franki Committee recognised that with the amount of multiple copying occurring in educational institutions, a portion of the copying was likely to be an infringement of copyright.\textsuperscript{78} It recommended that multiple copying should not be carried out without copyright owners receiving remuneration if the copying represented substantial use of the copyright owner’s work. However, with the potential amount of material available for photocopying in educational institutions and the potential number of authors affected, the Committee did not believe it was practical to collect royalties on a per page basis and to distribute royalties to individual copyright owners. The administration costs involved may exceed the royalties payable.\textsuperscript{79}

In determining the type of scheme to recommend, the Committee examined available information relating to other countries, such as Germany, the Netherlands and Sweden, that had schemes operating in which payments were being made in respect of particular photocopying. It was the Committee’s understanding that in these schemes, payments were not made directly to authors but instead authors received a share of funds distributed by authors’ societies.\textsuperscript{80}

The Committee also examined a proposal from the Australian Copyright Council for the introduction of a scheme that would require payment to copyright owners for all copies made on a per page per copy basis\textsuperscript{81} and the creation of a collecting agency known as the Copyright Agency Ltd.\textsuperscript{82} The Committee doubted whether a high percentage of authors whose works would most likely be copied would join such a scheme, however, the Committee believed, based on the submissions from educational institutions, that the needs of education should not be ignored until a viable voluntary licensing agency that is broadly representative of relevant copyright owners was established.

While the Committee was aware that the concept of a statutory licence for the multiple copying of copyrighted material for educational purposes would not appeal to all copyright owners, it considered ‘the public interest in education together with the difficulties that teachers and others face in Australia in obtaining copies of works needed for educational instruction’\textsuperscript{83} justified the introduction of statutory licensing schemes into non-profit

\textsuperscript{78} Ibid, [1.52].  
\textsuperscript{79} Ibid, [6.38].  
\textsuperscript{80} Ibid, [6.36].  
\textsuperscript{81} Ibid, [1.36].  
\textsuperscript{82} Ibid, [1.38].  
\textsuperscript{83} Ibid, [6.36].
 educational institutions. It recommended that s 200 be superseded by a statutory licensing scheme.

The Committee considered two options for the statutory licensing scheme. The first option assigned a fixed rate of royalty similar to the method used in the Copyright Act\(^84\) for the recording by a manufacturer of a musical work. The rate would be based on the actual amount of work copied and could potentially be weighted in favour of certain works such as poems or music.\(^85\) Two members of the Committee recommended that the royalty rate be fixed after an inquiry into an appropriate royalty rate by the Copyright Tribunal. These members were in favour of statutory regulation, by incorporating the obligations of educational institutions using the scheme into the Act, thus reducing potential disagreement over obligations between copyright owners or agent and educational institutions.\(^86\) The second option would allow parties such as the Copyright Agency Limited,\(^87\) or the copyright owner and the educational institution to negotiate an appropriate royalty rate for their particular agreement.\(^88\) Members of the Committee recommending the second option did not consider it appropriate or practicable to include into legislation ‘all the details involved in the collection and distribution of royalties payable by educational institutions using the proposed statutory licence’.\(^89\) These members, however, conceded that if it was deemed necessary for a ‘scheme of collection and distribution’ to be incorporated into the Act, then the details should first be approved by the Copyright Tribunal.\(^90\)

The Committee received feedback from interested parties in respect to the details of the proposed scheme for multiple copying of limited portions of works in educational institutions. The major criticism of the scheme was the perceived cost in producing accurate records, as the records would be produced by the educational institutions and the original copy of the records would be sent to a central authority, which would bill the educational institution once a claim was made by the copyright owner or agent within a reasonable time. Taking into account the feedback received from primary, secondary and tertiary educational institutions, the Committee recommended that an educational institution using the statutory licence would

\(^{84}\) \textit{Copyright Act 1968} (Cth), div 6 pt iv.
\(^{85}\) Commonwealth Law Review Committee, above n 65, [6.43].
\(^{86}\) Commonwealth Law Review Committee, above n 65, [6.46].
\(^{87}\) A company set up by the Australian Copyright Council to act as a collecting agency on behalf of authors and creators, to enter into agreements for the copying of works and to receive and distribute royalties.
\(^{88}\) If no agreement is reached the Copyright Tribunal (which was created by the 1968 amendments) should arbitrate.
\(^{89}\) Commonwealth Law Review Committee, above n 65, [6.47].
\(^{90}\) Ibid.
be required to make an appropriate royalty payment to a copyright owner or agent of work reproduced if a claim was made within a specified time.\textsuperscript{91}

Under the licensing scheme proposed by the Committee, ‘not for profit educational institutions would be allowed to make multiple copies of parts of works or in some cases whole works for classroom use or for distribution to students’.\textsuperscript{92} It required that any copying be recorded and there was an obligation to pay an appropriate royalty if demanded by the copyright owner or their agent within a three year period.\textsuperscript{93} In relation to an appropriate royalty, the Committee did not recommend a preferred option for the calculation of the rate. It did recommend however, that while the keeping of records or making payments should not be a statutory requirement, nevertheless, it would provide a means by which an educational institution could make multiple copies of up to the specified amount of a copyrighted work without fear of an infringement.\textsuperscript{94} At a minimum, the records to be held should show the title of the work copied, the number of pages copied, the number of copies made, the author (if known) and the publisher of the work.\textsuperscript{95}

Under the statutory licensing proposal, a whole work could be reproduced if the work in question had not been published separately, or, if it had been published separately, it could not be obtained within a reasonable time at a normal commercial price. In relation to journal articles, no more than one article could be copied from the same periodical volume, unless the articles to be copied were on the same subject matter. In all other circumstances, no more than ten percent of the complete work or one chapter of the work could be reproduced. The Franki Report stated that\textsuperscript{96}

\begin{quote}
the statutory licensing scheme should extend to the making of copies of published literary, dramatic or musical works in the following circumstances:

(a) Where the work concerned is not separately published – the whole of that work may be copied;

(b) Where the work concerned has been separately published, but copies cannot be obtained within a reasonable time at a normal commercial price – the whole of that work may be copied;
\end{quote}
(c) Not more than one article in the same periodical publication may be copied unless the articles relate to the same subject matter;

(d) In any other case, not more than a reasonable portion of the work may be copied.

The legislation should provide that up to 10 per cent of the number of pages in an edition of a work or one chapter, whichever is the greater, should always be regarded as a reasonable portion.\textsuperscript{97}

Further, the Committee recommended that copyright laws should be amended to permit, without remuneration to the copyright owner, ‘a teacher or lecturer to use a photocopying machine to make up to three copies of a copyrighted work or part of a work for the purpose of classroom instruction’\textsuperscript{98} within the reasonable portion limitation of ten percent or one chapter of the copied work. Also, three members of the Committee recommended that an exception be made in respect to multiple copies of insubstantial amounts of works. Copying of ‘up to two pages or one per cent of the number of pages (whichever is greater) in an edition of work or of two or more works’ in a 14 day period should be permitted without infringement or remuneration.\textsuperscript{99} This exception was considered by the three members to be important ‘for the benefit of education and would involve an amount of copying in respect of which any royalty would be very small and uneconomic to collect’.\textsuperscript{100}

As discussed in Section 1.3 in Chapter One, as Australia is a party to a number of international treaties that protect copyright material such as the Berne Convention and the Universal Copyright Convention, the Committee was aware that amendments to Australia’s copyright laws should not breach international obligations. By recommending a licensing scheme for multiple copying within education, the Committee needed to be satisfied that the international provision relating to a copyright owners’ having an exclusive right to authorise the reproduction of their work in any matter or form would not be infringed. The Committee stated that it was satisfied that the scheme proposed would not breach Article 9 of the Berne Convention.\textsuperscript{101} Article 9 provides that authors of literary or artistic works as well as sound or visual recording have an exclusive right to authorise the reproduction of their work in any matter or form. Under Article 9, legislation is permissible that allows the reproduction of such works in special cases as long as the reproduction of the work does not prevent the normal

\textsuperscript{97} Ibid, [6.60].
\textsuperscript{98} Ibid, [6.68].
\textsuperscript{99} Ibid, [6.67].
\textsuperscript{100} Ibid.
\textsuperscript{101} As revised in Paris, 1971.
exploitation of the work nor affects the legitimate interests of the author.\textsuperscript{102} Article 9 can be used to justify a wide range of exceptions to the reproduction right such as those contained in the fair dealing exceptions and under the statutory licensing scheme for the reproduction of works for educational purposes within Australia’s copyright laws.\textsuperscript{103}

In response to the criticism directed at the proposed licensing scheme by primary, secondary and tertiary educational institutions and the Australian Book Publishers Association, the Committee argued that ‘the needs of education cannot await the establishment of a comprehensive voluntary licensing scheme’.\textsuperscript{104} It considered that the proposal placed reasonable limits on the amount of copying allowed and recognised the principle that the copyright owner has a right to receive compensation for the reproduction of work.

The Franki Report was published in 1976; however, a bill based on the recommendations made by the Franki Committee was not introduced into the Senate until June 1979 after ‘prolonged discussions and consultations with affected parties’.\textsuperscript{105}

The 1979 Copyright Amendment Bill (No.2) (1979 Bill) incorporated the recommendation of the Franki Report relating to the reproduction of copyright material.\textsuperscript{106} Other major amendments proposed by the 1979 Bill related to the extension and clarification of provision relating to fair dealing, crown copyright, copying by libraries and archives for users and other libraries and archives, copying for preservation purposes and increases in penalties for offences relating to infringement by importation.\textsuperscript{107}

Under the 1979 Bill, s 200(1)(a) was narrowed by the inclusion of specific copying provisions for educational institutions to permit the ‘reproduction of a work in the course of educational instruction other than by an appliance’\textsuperscript{108} such as a photocopying machine that can produce multiple copies or an appliance such as a facsimile machine that can produce a copy by reprographic reproduction.\textsuperscript{109}

\begin{itemize}
\item[\textsuperscript{102}] World Intellectual Property Organization (WIPO), above n 12.
\item[\textsuperscript{103}] Staniforth Ricketson and Christopher Creswell, \textit{The Law of Intellectual Property: Copyright, Designs & Confidential Information} (2\textsuperscript{nd} revised ed, 2002) [16.100].
\item[\textsuperscript{104}] Commonwealth Law Review Committee, above n 65, [6.63].
\item[\textsuperscript{105}] Department of the Attorney General, above n 68, 1.
\item[\textsuperscript{106}] Explanatory Memorandum, Copyright Amendment Bill (No. 2) 1979 (Cth), [2].
\item[\textsuperscript{107}] Ibid, 1.
\item[\textsuperscript{108}] Ibid, [53].
\item[\textsuperscript{109}] Ibid.
\end{itemize}
The 1979 Bill also introduced Division 5A into the Act, which related to the reproduction of copyright material in educational institutions. Under Division 5A, as recommended by the Franki Committee, s 53A which related to multiple copying of insubstantial amounts of copyright material and s 53B which covered multiple copying under statutory licence by educational institutions were included.

Section 53A allowed an individual to copy up to two pages or one per cent (whichever is the greater amount) of a literary or dramatic work on the premises of an educational institution without the copyright owner being compensated for the use. The provision allowed a literary or dramatic work to be copied only once in a 14 day period.\textsuperscript{110} Section 53B, in accordance with the Committee’s recommendation, indicated that copying undertaken within or on behalf of an educational institution of an article from a journal or the whole work or a part of a work would not be an infringement if the intended use was for teaching purposes (as defined in the Act) and remuneration was paid for usage of the copyright material.

Section 53 also stated that if an article had been copied from a journal, no more than two articles could be copied from the one journal unless the articles were on the same subject matter. Where a work has been published separately, no more than a reasonable portion of the copyright material can be reproduced unless the material cannot be obtained within a reasonable time for a normal commercial price.\textsuperscript{111} It was also a requirement of s 53B that a record of the copying be made. As well, the 1979 Bill had a clause providing that if an educational institution was twice convicted of failing to keeping copying records, the Attorney General could apply to the Copyright Tribunal for an order to suspend the institution’s right to rely on the statutory requirement under s 53B.

The Australian Copyright Council criticised s 53A in the 1979 Bill, and argued that all copying should be recorded, that adjusted royalty payments should be made for the copying of insubstantial portions of work and that the section should be deleted from the Act. It argued that:\textsuperscript{112}

\begin{quote}
Section 53A allowed libraries in educational institutions to make up to six copies of articles or reasonable portions of works. Section 53C permitted teachers to make up to three copies of part of a work or the whole work that had not been separately published for classroom use in any one year.
\end{quote}

\begin{flushright}
110 Ibid, [29].
111 Ibid, [30].
\end{flushright}
While some amendments relating to the copying for teaching purposes and library use were removed from the original 1979 Amendment Bill, s 53A remained unchanged. The clauses deleted from the first 1979 Bill allowed for a considerable amount of unremunerated copying, which could have been argued as a bias towards educational institutions and students rather than seeking a balance between education and copyright owners.\textsuperscript{113} Following criticism that an educational statutory licensing scheme may favour the interests of the education sector rather than copyright owners, it has been identified that the ‘criticism of these schemes are more often made by educational institutions’\textsuperscript{114}

The 1980 Copyright Amendment Act received assent in September 1980. It included ss 53A and 53B. Ricketson noted that\textsuperscript{115}

section 53A allowed an educational institution to make multiple copies of insubstantial portions of literary or dramatic works without infringing copyright or placing a limit on the number of copies that can be made.

Under s 53A, the definition of an insubstantial amount was broader than what is allowed under s 14 of the Act. Under s 14, copying two pages or less could amount to a substantial portion of a copyrighted work, as under s 14 substantiality is ‘more a question of quality rather than quantity.’\textsuperscript{116} Under s 53A, whole works were not allowed to be copied and the section did not apply to artistic or musical works. Whether the section was intended to apply to periodical articles is debatable as the section did not specifically refer to periodical articles. Nevertheless periodical articles are a form of literary works.

Section 53B, perceived by Ricketson as the most significant amendment made, established a statutory licensing scheme based on the recommendations of the Franki Committee.\textsuperscript{117} It allowed educational institutions to make multiple copies of copyrighted work for educational courses without the consent of the copyright owner. This was allowable upon the conditions that records were made and kept to enable the copyright owner to claim an equitable

\textsuperscript{113} Ibid, 46.
\textsuperscript{115} Ricketson, above n 112, 43.
\textsuperscript{116} Ibid, 44.
\textsuperscript{117} Ibid, 46.
payment. Under s 53B(3), a copy is considered to be made for the teaching purposes of an institution if (but not limited to):

(a) It is made in connection with a particular course of education provided by that institution or

(b) It is made for the purpose on inclusion in the collection of a library of that institution.

The provision also allowed for copyrighted work to be reproduced for other purposes than those stated within s 53B(3)(a) and (b) and these reproductions could still be considered as being made for educational purposes.

The 1980 amendments also introduced into s10 of the Act a comprehensive definition of ‘education institutions’. It included primary and secondary schools, universities and institutions providing technical and further education but did not include institutions that are conducted for a profit such as the Avondale College, the Holmes Institute and the Macleay College.

2.4 1989 Amendments

In between 1980 and 1989, the Act was amended in 1983, 1984 and 1986, but the educational provisions discussed above were not affected by these amendments. An amendment was made in 1989 to streamline the existing licences for educational institutions to photocopy and to enable educational institutions to copy television programs off air.

In 1981, the then Attorney General, Mr Durack, announced a review of the audio-visual copying provisions of the Copyright Act. He stated that ‘recent technological changes had introduced faster, cheaper and simpler methods for audio-visual copying and these developments had highlighted difficult and important issues in copyright’. Due to concern over the difficulty of protecting the rights of copyright owners of audio-visual material, the review focused on private and domestic copying of off-air broadcasts and other audio-visual

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118 Australian Vice-Chancellors’ Committee and Australian Committee of Directors and Principles Limited, Copyright A Guide for Higher Education Institutions to the Copyright Act 1968, as Amended, Including 1989 Amendments (1990), intro.
119 Ricketson, above n 112, 43-4
120 Ibid; Department of Industry, Innovation Science, Research and Tertiary Education, Approved Higher Education Providers.
121 Commonwealth, Parliamentary Debates (Second Reading of the Copyright Bill 1988), Senate, 28 November 1988, 3005 (Mr Reynolds).
material, educational institutions recording broadcasts, copying other audio visual material and performing and using broadcasts of works, sound recording and films. The review also considered types of copying permitted by libraries and a number of schemes proposed by interested parties such as the Australian Copyright Council, educational institutions and the Motion Picture Distributors Association of Australia in respect to the application of audio-visual materials and copyright.

After considering submissions from some 193 interested parties, the Department of the Attorney General released an issues paper that covered three main areas, namely, copying of audio-visual material for private use, copying of audio-visual material by educational institutions and libraries on behalf of intellectually disabled individuals and copying of material by libraries. A 1986 Copyright Amendment Bill attempted to address the issues raised by the Department of the Attorney General’s 1981 review, however the then Attorney General, Mr Bowen foreshadowed the need for further amendments due to technological changes. However changes to the Act in relation to changing technologies such as the use of the home video recorder, the digital versatile disc (DVD) player, iPod and other related technologies for domestic use were not introduced until the Copyright Amendment Act 2006 (Cth).

During the debate on the 1986 Bill, the Senate referred a proposed amendment in connection to the use of certain broadcasts by educational institutions and other related issues arising from the enquiry to the Standing Committee on Education and the Arts. In its 1986 report Audio-Visual Copying by Educational Institutions, the Senate Committee expressed concern over the fact five years had passed since the review of the audio-visual copying provisions within the Act began and that the issue of educational copying had remained unsolved. It recommended that the proposed amendment not proceed but that instead the Attorney General’s Department should develop a statutory licence for educational copying of audio-visual material. The Committee concluded that the proposed amendment would diminish the amount of educational copying that was allowable under the then current provisions

124 Ibid, 2.
125 See Copyright Amendment Act 2006 (Cth), s 111.
126 Copyright Amendment Bill 1986 (Cth), s 112A.
within the Act. Based on their interpretation of the amendment, the Committee assumed that the provision’s intention was to allow schools to copy school broadcasts. The Committee was also of the view that the intended purpose of the proposed amendment could be achieved by amending sub-sections 10(1) and 200(2) of the current Act. Section 10(1) would require the definition of record to be expanded to include visual images and s 200(2) could be amended by including the words ‘cinematograph film’. However the Senate Committee was also of the opinion that amending ss 10(1) and 200(2) was not the most effective approach to solving the problems relating to educational copying. The Committee recommended that the Department of the Attorney General develop a statutory licensing scheme for educational copying of audio-visual material and related legislation for the scheme be introduced into Parliament for consideration in 1987.

After the release of the Senate Report into audio-visual copying, the Government spent two years undertaking extensive consultations with consumers, educators and industry participants before introducing the 1988 Copyright Amendment Bill. By introducing the 1988 Copyright Amendment Bill, the Government’s aim was to provide a fair, certain and effective copyright law which would properly reward innovators and reflect modern consumer practice, while taking into account the legitimate practical considerations that affect particular groups such as educational institutions and institutions working for the handicapped.

The Government considered access to a wide range of copyright material as fundamental to the role of the educator and that it was essential that any material of educational value available in both print and audio visual format be accessible to educators, while ensuring that copyright owners are compensated for the use of their work. The proposed amendments were an attempt by the Government to recognise the needs of both the educators to have easy access to copyright material for teaching purposes and the copyright owners to be renumerated for the use of the material. The statutory licensing schemes were perceived as providing the balance between the interests of copyright owners and the interests of education

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129 Ibid, [5.2].
130 Ibid, [5.3].
131 Ibid, [5.4].
132 Ibid, [5.5].
133 Ibid, [5.9].
134 Commonwealth, above n 121, 3005.
135 Ibid.
136 Ibid.
137 Ibid.
as well as maintaining consistency with international copyright conventions. However, since the introduction of the statutory licensing schemes for educational institutions, there has been ‘lengthy periods of negotiation and litigations between copyright owners and education interests’ regarding payment rates and the relationship between the fair dealing exceptions and the statutory licensing schemes.

Both parties accepted that the original licensing scheme for copying by educational institution introduced in the 1980 amendments was cumbersome, complex and costly, and so the Opposition supported the amendments related to the audio-visual copying and the changes to the photocopying scheme as the revised scheme would ‘be much simpler to comply with and it will substantially improve the means of remunerating copyright owners for the use of their copyrighted material.’ The Act received Royal Assent on 24 May 1989.

Under the Copyright Amendment Act 1989, Parts VA (ss 135A to 135ZA) and VB (ss 135ZB to 135ZZH), allowed educational institutions such as universities to copy broadcasts and works without obtaining prior consent from the copyright owner, through a licensing scheme. The new Part VA basically implemented the recommendations made in the report by the Senate Standing Committee on Education and the Arts in 1986. The scheme ‘represented the results from extensive discussions between copyright owners, educational interests and the Government’. The new Part VA permits copying from radio and television for educational purposes provided that the educational institution has a current remuneration notice in force with a declared collecting agency.

Similarly, the new Part VB which replaced several sections of the Act including ss 53A and 53B allows multiple copies to be made on behalf of educational institutions for educational purposes if a remuneration notice is in place with a declared collecting agency such as the

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138 Ibid.
139 Wyburn, above n 48, 186, fn 41.
140 In circumstances where the parties do not agree on a payment rate, the Copyright Tribunal will set the rate.
141 Wyburn, above n 48.
142 Commonwealth, Parliamentary Debates (Second Reading of the Copyright Bill 1988), Senate, 12 April 1989, 1402 (Mr Hill).
143 Explanatory Memorandum, Copyright Amendment Bill 1988 (Cth), [28].
144 Commonwealth, above n 121, 3005.
145 Education purposes is defined under Copyright Act 1968 (Cth), s10(1A).
146 Australian Vice-Chancellors’ Committee and Australian Committee of Directors and Principles Limited, above n 118.
147 Explanatory Memorandum, Copyright Amendment Bill 1988 (Cth), [99].
Copyright Agency Limited.\textsuperscript{148} Institutions can elect to copy using a recording system and pay per copy or on a sampling system and pay per student.\textsuperscript{149} Any copying undertaken by individual staff and for the purpose of research or study which could be deemed ‘fair dealing’ under s 40 of the Act is not included under the licensing scheme.

In addition to including a new Part VA and VB into the Act, the 1989 \textit{Copyright Amendment Act} led to the inclusion of a new Part VC. Part VC provided for ‘a blank audio tape royalty to be paid to copyright owners in return for allowing domestic copying of published sound recordings’\textsuperscript{150} Similar to the Part VA and VB licences, a broadcaster is allowed to rely on Part VC, if a remuneration notice is provided to a relevant collecting society, records of transmissions, which can be inspected, are maintained and remuneration payments are paid to the collecting society as requested.\textsuperscript{151} Other amendments related to the statutory licence for the manufacturing or recording of musical works, the prevention of an unauthorised copy or use of a sound or film recording of a performer’s performance and the extension of Australian archives rights.\textsuperscript{152}

The 1989 amendments in respect to the educational provisions led to several noteworthy changes in the Act as summarised below.

First, the amendments introduced a statutory licensing scheme which would enable education institutions and institutions assisting handicapped people to make off-air copies of television programs in return for payment to copyright owners.\textsuperscript{153} Prior to this amendment, educational institution wanting to reproduce off-air copies of television programs had to seek permission from copyright owners otherwise it would be an infringement of copyright. The Government considered that with television programs being widely used for educational purposes, it would be more practical if educational institutions did not have to contact the various copyright owners connected with a television program before reproducing a program for viewing at a more convenient time as well as being retained in the institution’s library for future use.\textsuperscript{154}

Under the scheme, education institutions could make off-air copies for educational purposes

\textsuperscript{148} Australian Vice-Chancellors’ Committee and Australian Committee of Directors and Principles Limited, above n 118, 7.
\textsuperscript{149} Ibid, 8.
\textsuperscript{150} Explanatory Memorandum, Copyright Amendment Bill 1988 (Cth), 1.
\textsuperscript{151} Ricketson and Creswell, above n 103, [12.220]; See [12.219] to [12.230] of Ricketson and Creswell, above n 103 for more of a discussion on the transmission of broadcasts.
\textsuperscript{152} Explanatory Memorandum, Copyright Amendment Bill 1988 (Cth), 1.
\textsuperscript{153} Commonwealth, above n 121, 3005.
\textsuperscript{154} Ibid.
of all television programs regardless of whether or not the programs were made for educational purposes. Copyright owners would be able to claim payment for the use of their material through a single collecting agency and the amount payable to copyright owners would be agreed on between the parties or as determined by the Copyright Tribunal. Each education institution would elect to pay for copying either on an amount per student basis or on the basis of actual material copied using the full record keeping method. If the institution elected full record keeping, the records would be required to be forwarded to the relevant collecting agency for assessment.

Second, the existing photocopying licensing scheme originally introduced into the Act in 1980 was altered. The existing scheme was widely seen by education institutions and copyright owners as ‘extremely cumbersome to operate and costly to administer because of the complex record keeping requirements’. Similar to the television program copying scheme, the revised educational photocopying licensing scheme established a collecting society representative of copyright owners, which enabled educational institutions to elect to pay for copying on a per student basis or to maintain full record keeping as introduced in the 1980 amendments. If an educational institution elected to maintain the full recording system, the records would be required to be forwarded to the relevant collecting society for assessment. The Government saw the introduction of mandatory assessment of records by collecting agencies, as assisting copyright owners by removing time consuming and costly records inspections at all the educational institutions holding their work. Under the revised scheme, criminal penalties for offences in relation to record-keeping were substantially omitted. The changes made to the photocopying licensing scheme were to provide the same level of flexibility anticipated under the television program copying scheme and would assist with compliance.

Third, due to the complexity of the then current s 53B of the Act, a more streamlined educational copying scheme was introduced. While the amount of copying allowed under s 53B was not extended under the new revised scheme, it does allow for educational institutions to pay copyright owners on the basis of a per student rate per year rather than under the record

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155 Ibid.
156 Ibid.
157 Ibid.
158 Ibid.
159 Ibid.
160 Ibid.
161 Ibid.
keeping method.\textsuperscript{162} The scheme was a result of in depth consultation with educational and copyright interests and negotiations between these groups. The majority of the interested parties including schools welcomed the scheme on the basis that it would streamline and facilitate educational copying.\textsuperscript{163}

Given that the new Parts VA and VB used the expression ‘educational institution’, the phase ‘teaching purposes’ was replaced with the phase ‘educational purpose’ to provide ‘greater clarity and consistency’. Section 10(1A) was amended to include the definition of educational purposes which has the same meaning that teaching purposes did under s 53B. Educational purpose relates to copying done ‘for use in connection with a particular course of instruction provided by an educational institution or for inclusion in the collection of a library within an educational institution’.\textsuperscript{164}

Fifth, s 200(2) was amended by removing the words ‘or of a TV broadcast’ and ‘or an infringement of copyright in the broadcast’ as copying of television programs would be handled under the new Part VA. Section 200(2) ‘relates to the copying of the underlying copyrighted material by educational institutions’. The underlying material can only be copied if the sound recording was made for educational purposes and the copying is also to be used for educational purposes. The introduction of s 200(2A) ‘is similar to the treatment of television programs under the new Part VA,\textsuperscript{165} except it relates to all sound broadcasts other than television programs. Under this section, copyright will not be infringed if the reproduction of the broadcast is undertaken by or on behalf of an educational institution for educational purposes.

The 1989 Copyright Amendment Act also implemented s 248B in relation to the recording performances for educational purposes. Section 248B falls under a new part of the Act relating to performers’ protection and this provision allows a recorded performance to be considered an exempt recording as defined under s 248A(1c), if the performance was recorded for ‘either use in connection with a particular course of instruction in an educational institution or for inclusion in the collection of a library at the educational institution’.\textsuperscript{166}

\textsuperscript{162} Commonwealth, Parliamentary Debates (Second Reading of the Copyright Bill 1988), Senate, 2 May 1989, 1629 (Mr Tate).
\textsuperscript{163} Ibid.
\textsuperscript{164} Explanatory Memorandum, Copyright Amendment Bill 1988 (Cth), [5].
\textsuperscript{165} Ibid, [242].
\textsuperscript{166} Ibid, [259].
2.5 Copyright Amendment (Digital Agenda) Act 2000 (Cth)

In 2000, another significant change occurred in copyright law with the enactment of the Copyright Amendment (Digital Agenda) Act. With changing communication technology increasingly leading to deficiencies in the extent of protection for copyright material, the government considered it necessary to amend the Act to increase the protection of copyright material in the online environment. An aim of the Copyright Amendment (Digital Agenda) Act was ‘…promoting access to copyright material online, in particular for cultural and educational institutions’.  

The 2000 amendments were mainly based on the recommendations made in the Attorney General Department’s 1997 discussion paper, Copyright Reform and the Digital Agenda (1997 Discussion Paper). This discussion paper followed the recommendations made in a 1994 report of the Copyright Convergence Group. The major recommendation of the 1994 Highways to Change: Copyright in the New Communication Environment report was the introduction of a ‘broadly-based technology-neutral transmission right to authorise transmissions to the public’ into copyright law. The 1994 report did not examine the educational provisions within the Act; however, following this report, an exposure draft of the Copyright Amendment Bill 1996 was released for public comment but was not introduced into Parliament.

The 1997 Discussion Paper highlighted that the development of new technologies such as the internet, compact disk (CD) burners and file sharing software had caused a deficiency in the current level of copyright protection by not providing effective control for copyright owners in respect to their material being available online. Under the then present copyright law, when ‘copyright material was used online, it was difficult for copyright owners to obtain any remuneration for such on-line use of their creations’.

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167 Revised Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000 (Cth), 5.
168 Ibid, 19.
169 Copyright Convergence Group, Highway to Change: Copyright in the New Communications Environment (1994).
171 Ibid, 49.
172 The 1997 Discussion Paper also recommended the introduction of a broadly-based technology-neutral transmission right to authorise transmissions to the public into copyright law.
173 Department of the Attorney General, above n 170, 3.
In respect to educational institutions, the 1997 Discussion Paper raised the issue of whether the exception provisions relating to education institutions and libraries should be extended to ‘exempt them in some circumstances from liability for the exercise of the proposed new transmission right and the right of making [transmissions] available to the public’. The 1997 Discussion Paper recommended that the statutory licences relating to the reproduction of broadcasts be extended beyond radio broadcasts to include all broadcasts (for example radio and television) that would fall under a new proposed definition of broadcast.

Overall, the majority of copyright owners and users were supportive of the recommendations made in the 1997 Discussion Paper. However, copyright owners were opposed to the specific exceptions that exempt internet service providers (ISPs) from liability for copyright infringement and copyright users were concerned about the impact of the recommendation to prohibit the ‘unauthorised circumvention of technological protection measures such as computer program locks’ on the operation of the fair dealing exceptions.

The Australian Vice Chancellors Committee (AVCC) and the Ministerial Council on Education, Employment and Youth Affairs (MCEETYA) and the University of Melbourne were some of representatives of the higher education sector which made submissions to the 1997 Discussion Paper. In its submission, MCEETYA argued that, without an extension of the right to communicate broadcasts copied by educational institutions for educational purposes; this could have a negative impact on an educational institution’s ability to communicate audio visual materials. The AVCC also argued in its submission that the statutory license that permits the recording of a broadcast would be made redundant without permission to communicate the broadcast. However not all submissions supported this position.

While the centrepiece of the Copyright Amendment (Digital Agenda) Bill related to the extension of the existing technology specific broadcasting right which under the then present

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174 Ibid, 11.
175 Ibid; The 1997 Discussion Paper recommended that the definition of broadcast be expanded to be consistent with the definition of broadcasting service under the *Broadcast Act 1992* (Cth).
176 Revised Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000 (Cth), 18.
177 Ibid.
178 Ibid, 15.
180 Ibid, [3.8, 3.11].
181 See Screenrights Australia and Educational Media Australia submissions to the 1997 Discussion Paper.
law applied only to wireless broadcasts, the Bill had implications for educational institutions in respect to Part VA and VB, extending the fair dealing exceptions to the digital environment and right to communicate radio and television broadcasts. The Bill also incorporated a new definition for ‘broadcast’ which was broadened to be consistent with the definition of ‘broadcasting service’ provided under the Broadcasting Services Act 1992 and which encompassed the definition of ‘transmission’. The Bill also attempted to clarify the position of carriage service providers and ISPs in respect to their responsibilities to copyright owners and the conditions they must meet to avoid copyright infringement.

The Bill was also a step towards aligning Australia’s copyright laws with these international obligations as there had been changes to international copyright obligations occurring under two 1996 World Intellectual Property Organisation (WIPO) treaties; the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The focus of these two treaties was on the provision of improved copyright protection for material when it is ‘made available to the public via computer networks and the internet’.

The Bill extended the existing statutory licence schemes for educational institutions to allow them to make electronic copies of works and broadcasts, and enable the communication of the copies to students for educational purposes, subject to a remuneration payment to the copyright owner.

With Part VA being extended to include the communication of copies of broadcasts, ss135A to 135ZA of the Act were amended to replace any references to ‘transmission’ with the broader reference of ‘broadcast’ and, where applicable, the inclusion of the phase ‘or communication’. These amendments also allowed under s 135C ‘free downloads of online programs [such as podcasts] of Australian free to air broadcasters’. Allowing the right to communicate to the public would ‘enable educational institution to communicate broadcast that they have copied, subject to a remuneration payment to the copyright owners in the underlying material included in the broadcast’.

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182 Revised Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000 (Cth), 2.
183 Ibid.
184 Ibid, 3.
185 Ibid, 2.
186 Department of the Attorney General, above n 170, 12.
187 Revised Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000 (Cth), 2.
188 Ibid, [276].
190 Revised Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000 (Cth), [277].
For the systems that educational institutions can use to pay copyright owners, a new agreed system was introduced for the copying and communication of broadcasts, which allowed the relevant parties such as an educational institution and a collecting society to agree on the remuneration amount and the terms of the payment system. If agreement cannot be achieved, then the Copyright Tribunal would set the terms of the agreement. 191

In respect of Part VB, Division 2A was introduced to enable the reproduction and communication of copyright material in electronic format. Division 2A was designed to cover future technological developments and to allow educational institutions to electronically copy and communicate copyright material. 192 The inclusion of this section would mean that Part VB would now have two statutory licensing schemes, the original scheme introduced into the Act in the 1989 amendments which relates to copyright material in print format and a more flexible scheme which relates to copyright material in electronic format. Browne suggested a potential reason why the new Division 2A provisions replicated the print format provisions under Part VB was that ‘no study was conducted into the scope and type of electronic copying and communication being carried out by educational institutions, nor the nature and source of the material copied’. 193 Also potentially at the time of the Government’s drafting of Division 2A, consideration would have been given to then current electronic formats, for example, Compact Disc Read-Only Memory (CD-ROMs) rather than newer electronic formats such as the internet. 194

The Bill allowed for a single remuneration notice to apply for the use of both the reproduction and communication right or alternatively two remuneration notices could be used depending on the agreement reached by the relevant parties. 195 In addition to the conditions set out to protect any copyright material copied and communicated in electronic format, the Bill allowed educational institutions and collecting agencies to set the terms of their agreement as is the case under the extended Part VA. 196

Following the introduction to Parliament of the Copyright Amendment (Digital Agenda) Bill by the then Attorney General Mr Williams in September 1999, the Bill was referred to the

191 Ibid, [279].
192 Ibid, [337].
193 Browne, above n 189, 452.
194 Ibid.
195 Revised Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000 (Cth), [339].
196 Ibid, [337-8].
House of Representatives Standing Committee on Legal and Constitutional Affairs for consideration and comment. The Attorney General’s Department acknowledged that the new legislation was entering into new territory ‘particularly in relation to the provisions for the extension of the statutory licence scheme for educational institutions and the new enforcement measures’ and that the law should be reviewed within three years.\(^{197}\) The Committee was aware that the digital environment presented copyright challenges and potential opportunities for copyright breaches given the ease in which copyright material could be reproduced in this environment.\(^{198}\)

The Committee was of the opinion that the existing exceptions to copyright should apply within both the print and digital environments. In their view, copyright should not be infringed by producing a print to print reproduction or a digital to digital copy.\(^{199}\) Given that the right to reproduce a work is an exclusive right of the copyright owner, the Committee recommended only limited exception should apply to allow the copying from print to digital form.\(^{200}\) A significant recommendation of the Committee was the inclusion of right of first digitalisation with limited exceptions, in relation to the fair dealing exceptions. The Committee was of the view that digitisation of material is a form of publication and the ‘right to digitalise a work is akin to a moral right’, so creators and copyright owners should have the right to make their work available in digital form.\(^{201}\) While the Committee was aware that this recommendation might to some extent alter the ‘balance struck between the competing public interests in copyright law’,\(^{202}\) it considered the change was necessary and would not ‘significantly undermine the public interest in providing reasonable access to copyright material’.\(^{203}\)

Despite the concerns raised in submissions by MCEETYA, the AVCC and the Copyright Agency Ltd (CAL), the Committee ‘concluded that there was no need to amend the proposed’ Part VB in the Bill.\(^{204}\) However the Committee agreed with CAL and the Australian Copyright Council that the exceptions allowing educational institutions to copy insubstantial amounts should not be extended into the digital environment. The Committee recommended that s 135ZMB be omitted from the Bill. However if s 135ZMB was retained in the Bill, the

\(^{197}\) House of Representatives Standing Committee on Legal and Constitutional Affair, above 174, [1.10].
\(^{198}\) Ibid, [1.23].
\(^{199}\) Ibid, [1.25].
\(^{200}\) Ibid, [1.27].
\(^{201}\) Ibid, [1.28-1.32]
\(^{202}\) Ibid, [1.31].
\(^{203}\) Ibid.
\(^{204}\) Ibid, [3.29].
Committee supported the proposed wording of the section, given that the language used was similar to the wording s 135ZG of Part VA, which allows insubstantial amounts of copying in educational institutions in the print environment.\textsuperscript{205}

The Copyright Amendment (Digital Agenda) Bill was amended to incorporate the majority of the Committee’s recommendations. However the recommendation to omit the exception to allow educational institutions to copy insubstantial portions of copyright material in digital form was not accepted and s 135ZMB was included into the Bill.

The Copyright Amendment (Digital Agenda) Act 2000 was passed on September 2, 2000.

2.6 Copyright Amendment Act 2006 (Cth)

Since the introduction of the Copyright Amendment (Digital Agenda) Act in 2000, changing consumer behaviour, the development of new technology and digital markets and the growing concern over copyright piracy\textsuperscript{206} have created new challenges and opportunities relating to copyright.\textsuperscript{207}

In response to a 2004 election policy related to strengthening the Australian arts, the Coalition Government committed to a review of the Copyright Act, in particular examining whether a general exception similar to the fair use exception within the US Copyright Act of 1976 that ‘would facilitate the public’s access to copyright material’.\textsuperscript{208} This 2005 fair use review sought submissions from interested parties in regards to amending the Copyright Act in relation to the:

- Fair dealing or fair use exceptions
- Introduction of time-shifting and format-shifting provisions
- Introduction of a statutory licence for private copying

\textsuperscript{205} Ibid, [3.32-3.42]
\textsuperscript{206} Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth).
\textsuperscript{207} Commonwealth, Parliamentary Debates (Second Reading of the Copyright Bill 2006), House of Representatives, 19 October 2006, 1 (Mr Ruddock).
\textsuperscript{208} Department of Attorney General, Fair Use and Other Copyright Exceptions An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age Issues Paper (2005) 4.
\textsuperscript{209} Ibid, 52.
The 2005 fair use review identified a lack of provisions within copyright law relating to the use of copyright material for private or personal purposes. The review highlighted that new technologies such as portable media players (for example iPods) or DVD recorders are enabling consumers to copy and retain copyright material for use at a different time (known as time-shifting) or on a different medium (known as format-shifting). The review also considered the issue of educational institutions being allowed to format-shift copyright material for non-commercial and teaching purposes.

Following this short review, the 2006 Copyright Amendment Bill was introduced into the House of Representatives by the then Attorney General, Mr Ruddock on October 19, 2006. Many of the amendments included in the Bill arose from the 2005 fair use review, other copyright law reviews finalised in 2005/06 and the obligations concerning the technological protection measures required under the free trade agreement between Australia and the United States. The Bill was then referred directly to the Senate Legal and Constitutional Affairs Committee (Senate Inquiry) for inquiry and report.

In respect to educational provisions, the Bill amended ss 28 and 40 and introduced s 200AB. These the amendments were seen as a way of enabling educational institutions as well as libraries to assist their users in the online and digital environment by allowing educational institutions, libraries and archives to use copyright material for non-commercial purposes.

Section 28 was also extended to allow the communication of artistic, literary, dramatic and musical works, film and sound recordings and television and radio broadcasts in a classroom.

The fair dealing exception (s 40) for the purpose of research or study was amended slightly in an attempt to provide clarification in relation to what constitutes a reasonable portion

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210 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 6.
211 Format-shifting and time-shifting exceptions for personal or private use were introduced into the Copyright Amendment Act 2006 (Cth). See Copyright Act 1968 (Cth), ss 43C; 47J; 109A; 110AA; 111
212 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth).
213 Previous copyright reviews had taken three years or more between the review and passing of the legislation. However this review took less than two years from the release of the issue paper until the passing of the legislation.
215 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 1.
216 Ibid.
217 Ibid.
218 Browne, above n 189.
depending on the type and format of the work. For example, under the amended s 40(5), the reasonable portion of a literary work published in electronic format that could be reproduced or communication is 10 percent of the number of words in the work.

Section 200AB relates to using copyright material for certain purposes without prior consent from the copyright owner. The intention of s 200AB ‘was to provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia’s international obligations under copyright treaties’. The provisions in these treaties provide for a three step test for permitted exceptions to the exclusive right of the copyright owner. A permitted exception will only apply in certain special cases where there is no conflict with the normal exploitation of the work and the use would not unreasonably prejudice the legitimate interests of the copyright holders. Under this provision, a court might determine that an educational institution can continue to use a teaching resource held in an obsolete form or one that is ‘not commercially available in a form appropriate for current teaching technology’.

The Australian Libraries Copyright Committee and the Australian Digital Alliance stated that the intention of s 200AB is ‘to operate like fair use’ and the section could potentially assist cultural and educational institutions and libraries in the areas of format shifting, orphan works, digitalising and adapting works ‘to produce a more accessible copy of the work’. However s 200AB only applies where there is no statutory or voluntary licence in place, which has implications for educational institutions in relation to the blanket nature of Part VB of the Copyright Act 1968 (Cth). Also unlike other education provisions within the Copyright Act 1968 (Cth), s 200AB does not specifically identify ‘which copyright uses [would] be permitted, rather it provides guidelines’.

Under s 200AB(3), which related to educational institutions, ‘the use must be made for the purpose of giving educational instruction such as classroom or remote teaching’. Another

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219 Explanatory Memorandum Copyright Amendment Bill 2006 (Cth) 109.
220 Ibid, 110.
221 Supplementary Explanatory Memorandum Copyright Amendment Bill 2006 (Cth), 12.
223 Ibid, 5.
224 Browne, above n 189.
225 Ibid.
condition is that the use must not be partly to obtain a commercial advantage recovering costs connected with a use would ‘not constitute a purpose partly for obtaining a commercial advantage or profit’. 226

Several submissions to the Senate inquiry into the Copyright Amendment Bill 2006 expressed concern over the effect of the phase ‘the use must not be partly to obtain a commercial advantage’. While many of the issues and concerns raised related to libraries and archives, these same issues and concerns related also to educational institutions.

In their submission to the Senate inquiry, the Australian Digital Alliance argued that the introduction of new phrases or terms complicates the Act. 227 While the term ‘education instruction’ did not appear to need defining as it is a term that could be used to refer to s 10(a) of the Act, the terms ‘partly’ and ‘commercial advantage’ introduced new phrases into the Copyright Act, which have not been subject to judicial determination in the context of Australian copyright law. 228 The phrase ‘education instruction’ implies a narrower scope than the phrase ‘educational purpose’ which was already defined with the Act under s10. The Information Law and Human Right Division of the Attorney General’s Department submission highlights that some copyright user interest groups questioned the value of introducing s 200AB (2c) and (3c) into the Act as 200AB would require a permitted use to comply with the three-step test. 229

In their submissions to the senate inquiry, the Australian Libraries and Copyright Committee and the Copyright in Cultural Institutions (CICI) Group argued that the phrase ‘partly for the purpose of the body obtaining a commercial advantage’ was an additional condition beyond the requirements of the three step test under international law. The CICI Group also argued that the three step test and the additional condition of ‘not for partly commercial advantage’ imposed unnecessary complexity and confusion for institutions seeking to rely on the exception. 230

226 Supplementary Explanatory Memorandum Copyright Amendment Bill 2006 (Cth), 14.
228 Ibid, 13.
229 Information Law and Human Right Division of the Attorney General’s Department, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Provision of the Copyright Amendment Bill 2006 (2006).
The CICI Group was also in agreement with the Centre for Media and Communications Law at Melbourne University about s 200AB(2)(c) being unnecessary, given that the 2nd and 3rd step of the three step test is included in s 200AB(1). They argued that the three-step test provided all the protection for copyright owners required by international treaty obligations. User interest groups also contended that a ‘commercial advantage’ condition would be too restrictive and uncertain given that institutions may charge instructional fees or engage in money raising activities.231

The Australian Recording Industry Association (ARIA) argued that by deleting the word ‘partly’ from the phrase, ‘is not made partly for the purpose of the body obtaining a commercial advantage’, the phrase would be clearer and more straightforward. The Australian Copyright Council (ACC) were concerned about the application of s 200AB in relation to the activities of educational institutions and libraries. The ACC would have appreciated more information from the Government in respect to what sort of activities the Government regarded as not being presently allowed which should be allowed. The ACC was unsure of what issue s 200AB was intended to address.232 It was also of the view that the Government’s intention for the phrase “obtaining a commercial advantage” would have a better effect if the following was added to s 200AB(2c) and (3c):

Obtaining a commercial advantage” includes supplying a product or service containing the work and/or other subject matter for a fee which exceeds the cost of the materials and labour used to produce the product or service.233

The Standing Committee on Legal and Constitutional Affairs reported that s 200AB was attempting to ‘provide an open ended exception in line with the United States model and to enable courts to determine if other uses should be permitted as exceptions to copyright’.234

The Copyright Amendment Act 2006 was passed on December 11, 2006.

231 Information Law and Human Right Division of the Attorney General’s Department, above n 229, 2.
2.7 Current Copyright Review

In October 2011, the then Attorney General, Mr McClelland, announced that the Australian Law Reform Commission (ALRC) would review ‘whether the exceptions in the Copyright Act are adequate and appropriate in the digital environment’. The ALRC is expected to report by the end of November 2013.

As part of the terms of reference for this review, the ALRC will examine whether further exceptions should be introduced into the Act to:236

- Recognise fair use of copyright material;
- Allow transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit; and
- Allow appropriate access, use, interaction and production of copyright material online for social, private or domestic purposes.

In undertaking this review, the Government requires the ALRC to:237

- Take into account the impact of any proposed legislative solutions on other areas of law and their consistency with Australia’s international obligations;
- Take into account recommendations from related reviews, in particular the Government’s Convergence Review; and
- Not duplicate work being undertaken on: unauthorised distribution of copyright materials using peer to peer networks; the scope of the safe harbour scheme for ISPs; a review of exceptions in relation to technological protection measures; and increased access to copyright works for blind and visually impaired people.

In August 2012, the ALRC released the Copyright and Digital Economy Issue Paper 42. In relation to educational institutions, the ALRC identified that ‘the interaction between the free-use exceptions238 and the statutory licensing schemes available to enable the use of copyright material by educational institutions is complex’239 and that the relationship between the

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235 Attorney General Department, Keynote Address to the 15th Biennial Copyright Symposium (2011) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Source%3A%22ATTORNEY-GENERAL%22%20MajorSubject_Phrase%3A%22law%20reform%22;rec=0> at 15 November 2012.
237 Ibid, 3.
238 See for example ss 28, 44 and 200AB of the Copyright Act 1968 (Cth).
239 Australian Law Reform Commission, above n 236, 51.
statutory licensing provisions and the fair dealing exceptions for research and study remains unclear.\textsuperscript{240}

The issue of whether the educational provisions overlapped with the fair dealing provisions, in the case that an act of copying may be protected from a copyright infringement under both sets of provisions was discussed in the 1982 \textit{Haines and Another v Copyright Agency Ltd and Others}\textsuperscript{241} case.\textsuperscript{242} In delivering the opinion of the Court, Fox \textsc{J}, identified a distinction between the two sets of provisions. He stated that\textsuperscript{243}

\begin{quote}
 it is important to the proper working of the [provisions] that a distinction be recognized between an institution making copies for teaching purposes and the activities of individuals concerned with research or study.
\end{quote}

While the educational section\textsuperscript{244} that was referred to within the \textit{Haines and Another v Copyright Agency Ltd and Others}\textsuperscript{245} case have been amended, the ALRC stated that ‘the distinction noted by the Federal Court appears to continue to be recognised’.\textsuperscript{246} Despite this distinction, in 2012, the Supreme Court of Canada held that photocopying third party copyright material for teaching purposes ‘can qualify as fair dealing under the Canadian copyright legislation ... as teachers cannot have a ‘completely separate purpose of ‘instruction’; they are there to facilitate the students’ research and private study’.’\textsuperscript{247}

Given the criticism,\textsuperscript{248} contentious issues\textsuperscript{249} and complexity of the education statutory licensing scheme and the relationship between the licensing schemes and other provisions available to the education sector, the ALRC is seeking submissions on the operations of statutory licensing schemes and other provisions such as the fair dealing provisions available to educational institutions within the \textit{Copyright Act 1968 (Cth)} and whether these statutory licensing schemes should be simplified and if so, how these schemes could change. The ALRC is also interested in views on ‘whether uses of copyright material by educational institutions [currently] covered by the statutory licensing schemes should instead be covered

\textsuperscript{241} (1982) 64 FLR 185.
\textsuperscript{242} See Australian Law Reform Commission, above n 236, 52.
\textsuperscript{243} \textit{Haines and Another v Copyright Agency Ltd and Others} (1982) 64 FLR 185, 191.
\textsuperscript{244} s 53.
\textsuperscript{245} (1982) 64 FLR 185.
\textsuperscript{246} Australian Law Reform Commission, above n 236, fn 216.
\textsuperscript{247} \textit{Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)} (2012) 37 SCC (Canada), [23] quoted in Australian Law Reform Commission, above n 236, 52.
\textsuperscript{248} See Browne, above n 189.
\textsuperscript{249} See Wyburn, above n 48, 186.
by a free-use exception’. The ALRC suggests that the free use exception could be an existing provision such as a fair dealing for research or study or a new broad and flexible exception based on a fair or reasonable use.

It should be noted that a proposal to introduce a personal use was considered by the Franki Committee during the 1974 copyright review, discussed above in section 2.3. The Committee examined the United States fair use provisions in considering whether to extend the terms of the fair dealing provisions to a ‘more open-ended model that would include purposes such as research, study, private or personal use’. However the ‘Committee was unable to agree on its introduction’. It also has been argued by Burell that the introduction of the fair dealing provisions in the Copyright Act 1912 (Cth) ‘were not intended to result in less flexibility’ rather the ‘provisions were intended to codify the existing common law – that is, ‘general fair use defence’.

In June 2013, the ALRC released the Copyright and Digital Economy Discussion Paper 79. Submissions and comments on this discussion paper are due to the ALRC by the 31 July 2013. In relation to educational institutions, the ALRC has recommended that the educational statutory licensing schemes (Part VA and VB) within the Act be repealed. In response to the criticism of the statutory licensing schemes raised in submissions to the Copyright and Digital Economy Issue Paper 42, the ALRC has proposed that educational institutions, governments and institutions assisting persons with a print disability should negotiate licences on a voluntary basis for the use of third party copyright material rather than relying on the statutory licensing schemes under the Copyright Act. The ALRC argues that repealing these sections would enable Australian educational institutions and governments to ‘take better advantage of digital technologies and services. [Also] new licensing models may facilitate more efficient remuneration [for copyright] holders’.

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250 Australian Law Reform Commission, above n 236, 53.
251 Ibid.
252 Wyburn, above n 48, 185.
255 Ibid.
257 See submissions from ADA and ALCC (Submission 213), Copyright Advisory Group—Schools (Submission 231), Copyright Advisory Group—TAFE (Submission 230), Matthew Rimmer (Submission 161), Universities Australia (Submission 246).
259 Ibid, 110.
The ALRC also proposes the introduction of a fair use exception into the Copyright Act, with ‘education as an illustrative purpose in the fair use exception’. If introduced, the ALRC recommends that a fair use test ‘should be applied when determining whether an educational use infringes copyright’. However if a fair use exception is not introduced into the Act, the ALRC then proposes that a new fair dealing exception for education be introduced.

2.8 Conclusion

This chapter has charted the historical developments of educational provisions within Australia’s copyright laws from the period between the 1958 Spicer review and the enactment of the Copyright Amendment Act 2006. It also discussed the 2012 Copyright and the Digital Economy issue and discussion papers in relation to educational institutions.

The Copyright Act 1968 first introduced copyright laws specifically relating to schools. In terms of the educational provisions, the recommendation made by the Spicer Committee to allow teachers and students to reproduce copyrighted material such as written, musical and artistic works for educational instruction or as part of an examination was incorporated into the Act under s 200. This section also allowed for the recording of sound or television broadcasts if the purpose of recording was for educational use.

The 1980 amendments were based on the recommendations of the Franki Committee. The purpose of the Franki Committee was to consider the photocopying needs of individuals, libraries and educational institutions and recommend any necessary changes to the copyright law. The 1980 Copyright Amendment Act introduced an exemption that allowed educational institutions to reproduce multiple copies of copyright material for educational purposes without the consent of the copyright owner. This exemption was conditional on the basis that records of all copying were maintained and that copyright owners could claim an equitable payment. A related section also allowed educational institutions to make copies of an insubstantial amount of a work or part of a work, without requiring approval or payment to the copyright owner.

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260 Ibid, 269.
261 Ibid.
262 Ibid.
Due to technological changes that introduced faster and simpler methods for audio-visual copying, a review of the audio-visual copying provision within the Act began in 1981. However it was not until a review by a Senate Standing Committee on Education and the Arts in 1986 that amendments to the Act were made in 1989. Given that the licensing scheme introduced into the Act in the 1980 Act was perceived as complex and costly, the scheme was revised to enable educational institutions to pay for copying either on a per student basis or to maintain full record keeping. The 1989 amendments also introduced a new licensing scheme to permit educational institutions to make off-air copies of television programs in return for payment to the copyright owner.

The 2000 amendments extended Parts VA and VB of the educational statutory licensing schemes of the Act to enable the communication of copies of television and radio broadcasts (Part VA) and the reproduction and communication of copyright material in electronic format (Part VB). The amendments also extended the fair dealing provisions to cover the use of copyright material for the purpose of parody or satire and amended s 40 in an attempt to improve the clarity and certainty in relation to the quantitative test.

The final copyright amendments discussed in this chapter were the 2006 amendments which related to the use of copyright material in the online and digital environment. In relation to educational institutions, the 2006 amendments introduced free use exceptions, s 28 and s 200AB. Section 200AB is of particular interest for this research as the provision requires that the use of copyright material is for a non-commercial purpose. As will be discussed in later chapters, with no judicial or statutory interpretation of the definition of ‘commercial’, it may potentially be difficult for educational institutions to rely on this free use provision.

Charting the historical development of the education provisions within the Copyright Act 1968 (Cth) showed the modification of copyright legislation to address changing technologies and the effect of the activities of educational institutions related to the copying or the reproduction of third party copyright material commencing with a duplication process such as a photocopier and leading to copying and communicating third party copyright material via digital technology such as electronic databases.

With educational institutions and particularly academic libraries increasing the use of electronic resources, this chapter shows the complexity of copyright law and the difficulty associated with the introduction of online and digital technologies. The next chapter, Chapter
Three, will discuss the interaction between copyright law and contract law in relation to the use of electronic resources for educational and research purposes.
CHAPTER 3: COPYRIGHT AND CONTRACT: THE USE OF ELECTRONIC RESOURCES

3.1 Introduction

As highlighted in Chapter Two, copyright legislation in Australia has been amended a number of times to address changing technologies including digital and online technologies such as electronic databases. Nevertheless, the increasing use of digital and online technologies is expanding the use of contracts and licences, which can be used to override the Copyright Act 1968 (Cth) (hereafter referred to as the Copyright Act).

In the higher education sector, universities and in particular university libraries are now providing staff and students with resources via the internet for educational and research purposes. Online subscriptions can now represent more than 75 per cent of university library collections.\(^1\) Universities enter into contracts with publishers or providers of aggregated resources on behalf of university libraries to provide staff and students with access to material such as academic journals, books, legal cases and opinions, research papers and theses in electronic format.

As contracts can be used to override the Copyright Act, this chapter examines the interaction between copyright law and contract law in relation to the use of electronic resources for educational and research activities.\(^2\) It discusses the educational statutory licensing schemes within the Copyright Act, particularly in relation to the reproduction or communication of copyright material in electronic form, the fair dealing exceptions for the purpose of study and research within the Copyright Act and the 2001 Copyright Law Review Committee’s review of contracts and copyright. Using a doctrinal research approach,\(^3\) the chapter examines twelve contracts or terms and conditions for electronic resources provided to staff and students to ascertain if there is a difference between what is allowed under the Copyright Act compared to under a contract for the provision of electronic resources. This analysis of the contracts or terms and conditions provided, will determine, firstly, if Australian academics could potentially be breaching the contractual terms and conditions of electronic resources when

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\(^2\) A version of this chapter has been published as an article. See Marita Shelly and Margaret Jackson ‘Copyright and Contracts: The Use of Electronic Resources in Universities’ (2012) 12 *Legal Information Management*, 124.

\(^3\) For a discussion on doctrinal research refer to Section 1.6 in Chapter One.
accessing, downloading and printing articles (and other materials) and, secondly, whether they are covered for educational and/or research activities.

Generally, in Australia, access to and reproduction of copyright material is governed by the Copyright Act. Under copyright law, copyright owners of literary, dramatic or musical works are provided with exclusive rights to reproduce the work in material form, publish the work, perform the work in public, communicate the work to the public, make an adaption of the work and, for computer programs or sound recordings, commercially rent the computer program or sound recording. However, there are also provisions in the Act that allow users of copyright material to reproduce and communicate copyright works without infringing the rights of copyright owners. The most applicable provisions for individual users and educational institutions are the fair dealing exceptions and the educational statutory licensing schemes, respectively. It also should be noted that access to and use of electronic resources is also dealt with under contract law.

Anecdotal evidence suggests that generally, to protect themselves from copyright infringements, Australian university academics rely on the fair dealing exception of research and study or the educational statutory licensing schemes within the Act when using electronic resources. Academics would usually access material in electronic form without giving any consideration to the terms and conditions governing the provision of each electronic resource. However, as the Copyright Act does not explicitly exclude the use of contract law, these contracts can override the operation of the Copyright Act in respect of the use of electronic resources, particularly in the area of fair dealing and multiple reproduction and/or communication.

3.2 Statutory Licences for Educational Institutions

As stated in Chapters One and Two, educational institutions such as universities are provided with licensing scheme exceptions (Part VA and VB) within the Act. These licensing scheme exceptions allow universities to ‘provide access to and use of copyright materials to their staff.

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5 Examples of electronic resources include aggregated journal/periodical repositories and publisher websites.

6 Except for s 47H.
and students at a reasonable cost\(^7\) and enable copyright holders to receive remuneration for use of their copyright works, via a collecting society.\(^8\)

Part VB enables multiple copies to be made by or on behalf of an educational institution for educational purposes\(^9\) provided that the institution has a current remuneration notice in force with a declared collecting agency such as the Copyright Agency Limited (CAL).\(^10\) Similarly Part VA allows educational institutions to copy from radio and television for educational purposes as long as a remuneration notice is in place with a declared collecting agency.\(^11\) ‘Educational purpose’ is defined under the Act as\(^12\)

\[
\text{[when a copy is] made or retained for use, or is used, in connection with a particular course of instruction provided by the institution or [a copy] made or retained for inclusion, or is included, in the collection of the institution’s library.}
\]

As a result of the *Copyright Amendment (Digital Agenda) Act 2000* (Cth),\(^13\) a new Division 2A was introduced into Part VB of the Act. Sections 135ZMA to 135ZME relate to the reproduction and/or communication of works in *electronic* form by educational institutions. These sections of the Act can be relied on if the reproduction or communication of a work, including an article from a periodical publication, is made from an electronic form of the work.\(^14\)

Under s 135ZMB of the Act, multiple reproductions and communications can be made from an electronic form of the work without infringing copyright, if the amount of copying is no more than two pages or one percent of the total number of pages of the work and the copying ‘or communication is carried out on the premises of an educational institution for purpose of a course of study provided by’ the institution.\(^15\) Under s 135ZMB, an insubstantial part is no more than two pages or one per cent of the total number of pages of the work.

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8 Ibid.
9 Educational purpose is defined under s 10(1A) of the *Copyright Act 1968* (Cth).
11 Ibid.
12 *Copyright Act 1968* (Cth), s 10(1A).
13 As noted in Chapter 2, the *Copyright Amendment (Digital Agenda) Act 2000* was enacted to overcome the Copyright Act’s inability to deal with the digital environment. For a discussion on the provisions within this Act see Maree Sainbury, ‘The Copyright Act in the Digital Age’ (2000/2001) 11 *Journal of Law and Information Science* 182.
14 *Copyright Act 1968* (Cth), s 135ZMA.
15 Ibid, s 135ZMB.
Section 135ZMC allows multiple copies and/or communication of periodical articles in electronic form of one article in a periodical publication.\(^{16}\) Similar to s 135ZMB, the copying or communication must be undertaken by an educational institution, or on behalf of one, solely for the educational purposes of the educational institution, and a remuneration notice must be in force between a relevant collecting agency and the educational institution.\(^{17}\)

Multiple reproductions and communications of whole or a part of a work (not including periodical articles) is allowed under s 135ZMD if the copying or communication is undertaken by an educational institution, or on behalf of one, solely for the educational purposes of the educational institution, and a remuneration notice must be in force between a relevant collecting agency and the educational institution.\(^{18}\) However, s 135ZMD states that if the work has been published separately, only a reasonable portion of work can be copied or communicated. Under s 10(2A) of the Act, a ‘reasonable portion’ for electronic forms of works means that no more than 10 percent of the number of words in the work can be copied or, if the work being copied is divided into chapters, the number of words copied may exceed 10 per cent of the total number of words, provided only one chapter is copied.\(^{19}\)

Section 135ZMDA covers the reproduction and communication by educational institutions of works within electronic anthologies such as a collection of poems.\(^{20}\) One copy or communication of all or part of a work in an electronic anthology is allowed, if the page content within the anthology cannot be changed and the work comprises 15 or less pages. The copying or communication must be undertaken by an educational institution or on behalf of one, solely for the educational purposes of the educational institution and a remuneration notice must be in force between a relevant collecting agency and educational institution.\(^{21}\)

If the copying by academics and students does not fit into one of s 135ZMB, s 135ZMC, s 135ZMD or s 135ZMDA, then it may be considered copyright infringement unless a defence of fair dealing can be claimed or if the access to the electronic resources is governed by a contract and that contract permits the copying or reproduction. The terms of such contracts are discussed in sections 3.7 and 3.8 below.

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\(^{16}\) Two or more articles in the periodical may be copied if the articles relate to the same subject matter.

\(^{17}\) Copyright Act 1968 (Cth), s 135ZMC.

\(^{18}\) Ibid, s 135ZMC.

\(^{19}\) Ibid, s 10(2A).

\(^{20}\) An anthology is a collection of literary, dramatic or musical works, such as poems, short stories or plays. This section does not apply to articles within periodical publications.

\(^{21}\) Copyright Act 1968 (Cth), s 135ZMDA.
For a tabulated summary of what is allowed under ss 135ZMB to 135ZMDA of the Act, refer to Table One: Reproduction or Communication of Works in Electronic Form by Educational Institutions in Appendix A.

### 3.3 Fair Dealing and Articles

Individuals can use the fair dealing exceptions within the Copyright Act as a defence against a claim of copyright infringement. Sections 40 to 43\(^{22}\) of the Act state that the use must be for the purpose of research or study, criticism or review, parody or satire, reporting news, judicial proceedings or professional advice by a lawyer, patent attorney or trademark attorney.\(^{23}\)

For universities and university staff, the exception for research or study are the most relevant. Unlike the phase ‘educational purpose’, neither research nor study is defined within the Act. In the 1990 Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Ltd\(^{24}\) case, as allowed under statutory interpretation rules, Beaumont J referred to the Macquarie Dictionary for the meaning of research and study. Research is defined as a diligent and systematic enquiry or investigation into a subject in order to discover facts or principles.\(^{25}\) Study is defined as including ‘the application of the mind [in] the acquisition of knowledge, as by reading, investigation or reflection’.\(^{26}\)

Anecdotal evidence suggests that generally an academic writing a scholarly work for the purpose of publishing such as a journal article or presenting a conference paper is considered to be undertaking research and the activity is believed to fall under the fair dealing exception of research and study. However Ricketson and Creswell\(^{27}\) would argue that a researcher can only rely on the fair dealing exceptions during the actual process of conducting research as the activity of research should fall within the scope of the dictionary meaning of the term. This would mean that the publication or presentation of the work falls outside the meaning of research or study. Similar to the interpretation of Ricketson and Creswell, academic analysis

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\(^{22}\) Refer to ss 103A - 103C for fair dealing exceptions related to subject matters other than works, for example, audio-visual items.

\(^{23}\) Copyright Act 1968 (Cth), ss 40 – 43.


\(^{26}\) Ibid, [32].

by Burrell and Coleman\textsuperscript{28} concluded that research relates to the process of undertaking the research and not the publication of the research results.\textsuperscript{29} However in the \textit{Joint Guidelines on Copyright and Academic Research,}\textsuperscript{30} the British Academy and the Publishers Association noted that by limiting research to ‘the process of actually carrying out research, it is difficult to see how it is to be distinguished from private study’.\textsuperscript{31} The British Academy and the Publishers Association concluded that the activity of research can include the publication of research results. Similarly in the US, research and the dissemination of research but not necessarily in the written form has been defined as an educational purpose.\textsuperscript{32}

Some Australian universities have taken the same approach as Ricketson and Creswell in defining research. For example, in the section on copyright and research activity in the Monash University copyright guide, it states that ‘a researcher can rely on … ‘fair dealing’ for the use of third party content during the actual process of conducting research’.\textsuperscript{33} However ‘any publication or broad distribution of third party content embedded within research output may not be considered a ‘fair dealing’’.\textsuperscript{34} The section then states that ‘in most cases researchers will need to secure copyright permissions for any third-party content included within research destined for publication or broad dissemination’.\textsuperscript{35}

Based on the definition of research used by Beaumont J in the \textit{De Garis v Neville Jeffress Pidler Pty Ltd}\textsuperscript{36} case and the interpretation of research by Ricketson and Creswell, it is arguable that in Australia, research purpose relates to the activity of conducting a research enquiry or investigating a topic area, but not the dissemination of the research findings. This would mean then, that an academic may not able to rely on the fair dealing provisions when writing a research publication such as a conference paper or journal article as the writing process or the publication of the research would not be considered research. It may also have

\begin{footnotesize}
  \textsuperscript{30} Ibid.
  \textsuperscript{31} Ibid, 18.
  \textsuperscript{34} Ibid.
  \textsuperscript{35} Ibid.
  \textsuperscript{36} 95 ALR 625.
\end{footnotesize}
implications for the use of electronic resources as some of the contracts governing their use do not allow research.

3.3.1 Section 40

The Copyright Amendment (Digital Agenda) Act 2000 extended the fair dealing exceptions to works in electronic form and clarified what constitutes a reasonable portion in relation to the amount of a work that can be copied or communicated for the purpose of research or study.

Section 40(2) provides guidance about what matters should be taken into consideration in determining whether a use of a work for research or study is a fair dealing. These matters include the purpose and the character of the dealing, the nature of the work, the possibilities of obtaining the work within a reasonable time at a commercial price, the effect of the use on the potential market or value of the work and the amount and substantiality of the part copied in relation to the whole work. Australian courts will examine how the reproduction was used, the type of work involved, whether the work is available at a reasonable price, whether the economic interests of the copyright holder has been damaged and the amount of work that was reproduced.

In circumstances where the work being reproduced is an article in a periodical publication, s 40(3) of the Act states that the reproduction of a whole article is taken to be a fair dealing if the article is reproduced for the purpose of research or study. In relation to s 40, the terms ‘article’ and ‘periodical publication’ are undefined. As noted by Ricketson and Creswell, the CLRC, in its 1994 Report on Journalists’ Copyright, used both the Oxford Dictionary and Macquarie Dictionary to interpret the phrase ‘periodicals’ as being ‘a magazine, journal or miscellany the successive issues of which are published at regularly recurring intervals but longer than a day such as a weekly or monthly’. While excluding daily newspapers, this would mean that popular and cultural magazines, academic and scientific reviews, professional and trade journals and most likely law and accountancy loose leaf services.

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37 Refer to Sections 3.7 and 3.8 for more of a discussion on the use of electronic resources.
39 Under s 40(5) of the Act, these matters will not need to considered, if the literary work is not part of electronic compilation such as a database and the amount of work copied for the purpose of research or study is a reasonable portion, which means equal to or less than 10 per cent of the whole work.
40 Copyright Act 1968 (Cth), s 40(2).
41 Shelly, above n 10, 183 para-phrasing Ricketson and Creswell, above n 27.
42 Copyright Act 1968 (Cth), s 40(3).
43 Ricketson and Creswell, above n 27, [11.41].
books published in parts, yearbooks and annual reports would be defined as periodicals. Using the *Shorter Oxford English Dictionary* and *Macquarie Dictionary* and the wording of s 40(3) of the Act, Ricketson and Creswell concluded that the phrase ‘article’ can cover works of widely differing lengths and kinds, from the brief magazine editorial note to the lengthy law review article … as well as poems and stories that may be quite short in length but which are nonetheless complete and independent creations.

For the purpose of s 40(3), an article must be a literary work or a dramatic or musical work and it must be a work in its own right as well as part of a larger compilation or collection (for example, as part of a periodical). But as discussed below in the section on what is a database (see Section 3.4), a whole article from an aggregated periodical/journal repository or a publisher’s website may not be allowed to be reproduced under the fair dealing exceptions. Rather only a reasonable portion (for example no more than 10 percent of the total number of words in the work) would be allowed under the Act. However, the terms and conditions of the aggregated journal/periodical repository or the publisher’s website may enable reproduction of whole articles for specific uses.

So this means that university staff can reproduce or communicate works exist in electronic form without infringing copyright if the amount copied or communicated is no more than two pages or one percent of the total number of the pages or if it is a periodical article, the whole article, and the copying or communication is carried out on the premises of the university for educational purposes such as teaching. If the staff member is undertaking research, then the individual can reproduce a reasonable portion of works that exist in electronic form.

For a tabulated summary of what is allowed under s 40 of the Act, refer to Table Two: Reproduction of Works for the Purpose of Research or Study in Appendix A.

However if university staff are using material held within electronic resources provided by publishers, rather than relying on the educational statutory licensing schemes for copying or communicating for educational purposes and the fair dealing exceptions for research, staff should refer to the term and conditions of each resource to ensure that their use of the material

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44 Ibid.
45 Ibid.
46 Ibid.
47 Refer to the work, adaption and reasonable portion table under s 40 (5), *Copyright Act 1968* (Cth).
48 If the work has no pages, then no more than one percent of the total number of words can be reproduced or communicated.
49 One periodical article is considered a reasonable portion as is 10 percent of the total number of words in the work.
is allowable and not a breach of the contract entered into by the university with the electronic resource provider. It is also necessary to consider what a database is and which electronic resources are considered databases.

3.4 What is a Database?

Electronic resources have changed the way that publishers provide materials to libraries and users and the way that researchers, students and academics locate and access these materials. Section 40 of the Copyright Act 1968 (Cth) allows an individual to copy a reasonable portion\(^{50}\) of a published literary work in electronic form except if it is part of an electronic compilation such as a database.\(^{51}\) This exclusion implies that no copying of materials held in a database is allowed. Educational institutions, on the other hand, are able to reproduce or communicate a work within an electronic anthology if the work occupies 15 or less pages of the anthology, the reproduction or communication is made by or on behalf of the institution, a remuneration notice is in place with a relevant collecting agency such as the Copyright Agency Limited (CAL) and the reproduction or communication is made solely for the educational purposes of the institution.\(^{52}\)

As noted above, the Copyright Act does not define the terms ‘electronic anthology’ ‘electronic compilation’ or ‘database’. Section 10 of the Act defines a literary work as follows:\(^{53}\)

(a) A table, or compilation, expressed in words, figures or symbols; and

(b) A computer program or compilation of computer programs.

It is necessary, then, to examine both the dictionary meaning of ‘compilation’ and also the statutory interpretation of the term. In \textit{IceTV Pty Limited v Nine Network Australia Pty Limited},\(^{54}\) French CJ, Crennan and Keifel JJ explored the meaning of the term and its interpretation in the context of the Copyright Act. Based on the word ‘compile’, meaning to draw up and collect ‘the materials from other books’,\(^{55}\) ‘compilation’ ‘means ‘a literary work made by gathering the material from various authors’,\(^{56}\) namely, a collection of works.

\(^{50}\) For literary works in electronic form, a reasonable portion is 10 percent of the number of words in the work.

\(^{51}\) Copyright Act 1968 (Cth), s 40.

\(^{52}\) Ibid, s 135ZMDA.

\(^{53}\) Ibid, s 10.

\(^{54}\) [2009] HCA 14 (22 April 2009).


\(^{56}\) Ibid.
French CJ, Crennan and Keifel JJ in *IceTV Pty Limited v Nine Network Australia Pty Limited,* also examined the international developments in copyright law, particularly the Berne Convention for the Protection of Literary and Artistic Works of 1886 and collections of works. The Berne Convention for the Protection of Literary and Artistic Works of 1886 was revised in 1908 to provide protection *inter alia* to ‘collections of different works’ (Art 2(2)) and was further revised in 1948 as follows:58

[C]ollections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations.

The Australian Copyright Act had adopted the Berne Convention approach to the protection of compilations in 1959. As the High Court noted in *IceTV Pty Limited v Nine Network Australia Pty Limited,* a literary work that is a compilation, must demonstrate originality before copyright protection can be provided. In *IceTV Pty Limited v Nine Network Australia Pty Limited,* the High Court concluded that the necessary level of originality and creativity had not been demonstrated in respect of the television program and as a consequence no copyright protection was available.

The issue of originality of a compilation was also a key issue in *Telstra Corporation Limited v Phone Directories Company Pty Ltd.* In this case, Gordon J noted that ‘particular challenges are created by the use of information technology, and particularly databases, in the creation of compilations which may or may not be protected as literary works’. Again, ‘database’ is not defined in the Copyright Act. The Macquarie Dictionary defines a database ‘as a large volume of information stored in a computer and organised in categories to facilitate retrieval’. This definition does not attempt to categorise or group the information contained in the database.

In the US, the same situation occurs in that a database will only be protected under US copyright law if it classified as a compilation. Section 101 of the US Copyright Act 1976 defines a compilation as 63

58 *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14 (22 April 2009), [73].
60 Ibid.
62 Ibid, [27].
a collection and assembling of pre-existing materials or of data that are selected in such a way that the resulting work as a whole constitutes an original work of authorship.

Prior to 1991, an interpretation of § 5 of the US 1909 Copyright Act, which specifically mentioned factual compilations, ‘led some court to infer erroneously that directories and alike were copyrightable per se’, without the requirement of originality within the work. In *Feist Publications Inc. v Rural Telephone Services Co*, the Court held that the selection, coordination and arrangement of the Rural Telephone Services Co’s white pages (telephone directory) was not original as it was a standard or typical telephone directory in that it contained basic subscriber information (such as name, address and telephone number) arranged alphabetically. The Court noted that § 101 of the US Copyright Act ‘does not afford [copyright] protection to a collection of facts that are selected, coordinated and arranged in a way that lacks originality’ and if Rural Telephone Services Co’s telephone directory was provided with copyright protection then all compilations would be afforded with protection under the Act.

However the definition of a compilation requires three distinct elements; a collection of pre-existing facts or data, the selection, coordination or arrangement of the pre-existing facts or data and by virtue of the second element (selection, coordination or arrangement) a creation of original work by the author. The second element instructs courts to ‘focus on the manner in which the facts have been selected, coordinated and arranged’ in determining whether a fact based work is an original work and merits protection.

To address the issue of how to protect an electronic compilation or database which could not be protected under copyright law due to a lack of originality, the European Union introduced the Directive of the European Parliament and of the Council on the Legal Protection of Databases in 1996. This Directive introduces a ‘sui generis’ right to a creator of a database if he or she can demonstrate that there has been substantial investment associated with that creation. This Directive defines a database as ‘a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by

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64 *Feist Publications Inc. v Rural Telephone Services Co*, 499 US 340, [26].
65 499 US 340.
67 Ibid, [54].
68 Ibid, [36].
69 Ibid, [39].
The use of the word ‘independent’ in this definition, it could be argued, narrows what can be considered to be a database for this sui generis right.

While Australia does not have similar legislation to the Directive, it provides a useful guide to how to identify a database, as specified in s 40 of the Copyright Act. As well, access to many of the electronic resources used in university libraries are provided under terms and conditions that are not governed by Australian law and so it is necessary to understand how other jurisdictions deal with database protection.

For a detailed discussion about how other jurisdictions have addressed the issue of universities and particularly university staff using third party copyright material for educational non-educational and research activities, refer to Chapter Four.

Under the definition provided in the European Union Database Directive (The Directive) at article 1 §2 of the Directive,72 for a collection73 to be a classified as a database it must have three characteristics:74

- Comprise independent works, data or other material
- Must be arranged in a systematic or methodical way, and
- The works, data or other material must be individually accessible by electronic or other means.

A European Court of Justice judgement75 concerning the interpretation of the Directive discussed and interpreted these three characteristics required to classify a collection of works, data or other material as a database.

In relation to the first characteristic of independent works, the European Court of Justice held that for works, data or other material to be independent, they must be ‘separable from one another without their informative, literary, artistic, musical or other value being affected’.76

On this understanding of independent works and according to the 17th recital of the preamble to the Directive, ‘a recording of an audio-visual, cinematographic, literary or musical work as

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70 Directive 96/9/EC, article 1, § 2.
71 The issue of sui generis rights are beyond the scope of this research.
73 The Directive does not distinguish between the terms collection or compilation.
74 Beunen, above n 70; European Court of Justice, above n 70.
75 European Court of Justice, above n 70.
76 Ibid, [29].
such would not fall within the scope of the Directive.

Works such as ‘a novel made up of chapters, a video game composed of images and sounds’ or a film consisting of sounds and pictures are not independent works, rather they are interdependent, each component only valuable within the context of the work as a whole.

For the second and third characteristics of the collection being arranged in a systematic or methodical way and the works, data or other material being individually accessible, the European Court of Justice referred to the 13th and 21st recitals of the preamble to the Directive for an interpretation. While recital 21 does not require the systematic or methodical arrangement of independent works, data or other material to be physically stored, it is implied:

That the collection should be contained in a fixed base, of some sort, and include technical means such as electronic, electromagnetic or electro-optical processes [and] in the terms of the 13th recital … or other means, such as an index, a table of contents, or a particular plan or method of classification, to allow the retrieval of any independent material contained within it.

It has been argued that for a collection to be considered arranged in a systematic or methodical way, the collection ‘needs to be arranged in such a way that [its works, data or other material] can be adequately accessed as information’. Others have argued that a systematic or methodical arrangement is a minimum threshold and the works, data or other material in the collection must be arranged in a non-haphazard way. However the main purpose of a systematic or methodical arrangement is to enable users to access each work individually within the collection.

The European Court of Justice concluded that under the definition of article 1 §2 of the Directive, a database is ‘any collection of works, data or other materials [that can be separated] from one another without the value of their contents being affected’. The collection must also be arranged in a manner that allows for the retrieval of each individual work.

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77 Ibid.
78 Beunen, above n 70, 53.
79 European Court of Justice, above n 70, [29].
80 Beunen, above n 70, 53.
81 Ibid.
82 European Court of Justice, above n 70, [32].
The classification of electronic resources as databases or not is essential to the application of the Copyright Act for reproducing and communicating works in electronic form. Sections 10(2A) and 40(5) allow for reasonable portions of published literary and dramatic works in electronic form to be reproduced as long as the works are not computer programs or an electronic compilation such as a database.

Based on the interpretation of the EU Directive definition of a database, academic articles can be classified as independent works as they are capable of being separated from a periodical or a collection and maintaining their informative content or value. Electronic resources such as a periodical/journal repository or a publisher’s website are arranged systematically and the search functions provided enable users to retrieve each item within the collection individually. However the issue is whether all works within each electronic resource would be classified as independent works.

If some works, data or other material within a particular electronic resources are interdependent then the electronic resource would not be classified as a database and the fair dealing exception for the purpose of study or research could be relied on if the terms and conditions of the electronic resource allowed.

This section has shown that the fair dealing exceptions in s 40 in respect of research and study will only apply if the electronic resources are not considered to be a database. Section 40 does allow an individual to copy a reasonable portion of a non-database electronic resource and ss 10(2A) to (2C) clarify what constitutes a ‘reasonable portion’ in the electronic environment’. As noted earlier, under s 10(2A), an individual can make a reproduction of a part of a published literary or dramatic work (other than a computer program or electronic compilation such as a database) that is in electronic form, if the number of words copied does not exceed 10 percent of the number of words in the work or, if the work is divided into chapters, the reproduction is of the whole or part of one chapter. If the resource is considered a database, then, s 40 will not be available as a defence to an alleged breach of copyright.

Because the types of electronic resources provided by publishers differ, it is important to clarify the nature of the resource before deciding whether the Copyright Act applies or not.

84 Copyright Act 1968 (Cth), s 10(2A).
This is clearly an unsatisfactory situation for all parties so the use of contracts to cover the terms of use for electronic resources can be seen as a possible solution to the uncertainty caused by the different treatment of electronic databases and other compilations.

### 3.5 What is Allowed by the Copyright Act 1968 (Cth)?

The two most relevant areas of the Copyright Act for this research are the statutory educational licensing scheme and the fair dealing provisions. The former indicates that university staff can reproduce or communicate multiple copies of works existing in electronic form without infringing copyright, as long as the amount copied or communicated is an insubstantial part of a work or a reasonable portion of a work, or, if it is a periodical article, the whole article, and the copying or communication is carried out on the premises of the university for educational purposes such as teaching. The latter indicates that, if the staff member is undertaking research or study, then the individual can reproduce a reasonable portion of works that exist in electronic form, but this does not include multiple copies.

If the electronic resource is considered a database, then a whole article from an aggregated periodical/journal repository or a publisher’s website is not allowed to be reproduced under the fair dealing exceptions. Rather, only a reasonable portion (for example, no more than 10 percent of the total number of words in the article) would be allowed under the Act; if the work is divided into chapters, the reproduction can be the whole or part of one chapter.

However if university staff are using material held within electronic resources provided by publishers, staff may need to refer to the terms and conditions of each resource to ensure that their use of the material is allowable and not a breach of the contract entered into by the university and the electronic resource provider. These contracts, and their impact on the Copyright Act, are examined in Sections 3.7 and 3.8 below.

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85 No more than two pages or one per cent of the total number of the pages. If the work has no pages, then no more than one percent of the total number of words can be reproduced or communicated.

86 If the work is has been published separately.

87 One periodical article is considered a reasonable portion as is 10 percent of the total number of words in the work.
The next section will discuss the 2001 Copyright Law Review Committee (CLRC) review of the relationship between contract and copyright exceptions which examined whether contracts were modifying or excluding the exclusive rights of copyright owners.  

3.6 2001 CLRC Review of the Relationship Between Copyright and Contracts

With the growth of digital resources such as the internet, protection of copyright material is an even more crucial part of a number of important activities and industries. In the education sector, universities (and university libraries in particular) are providing staff and students with resources via the internet for educational and research purposes. Digital technologies create new revenue streams for copyright owners by allowing protected material to be sold, licensed and distributed via new mediums. However, a change in the way information is being accessed may be leading to changes in the balance between the rights of copyright owners and those of users.

The creation of new digital technologies has increased the use of contracts and licences rather than the Copyright Act to regulate copyright. The Copyright Act permits this as the Act does not necessarily overrule the common law. While common law can be replaced or extinguished by statute, normally, this intent should be specifically stated in the relevant legislation. Only in s 47H does the Act exclude the operation of contract law. Section 47H states that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of subsection 47B(3), or section 47C, 47D, 47E or 47F has no effect.

92 Copyright Law Review Committee, above n 86, 3.
93 Copyright Act 1968 (Cth), s 47H.
94 Sections 47B to 47F relate to computer programs and include making a copy of a program for the purpose of studying the ideas and functions of the program, making a backup copy of a program or making a reproduction of a program to correct errors or for security testing.
It would appear therefore that traditional contract law principles apply to all other sections of the Act.

In response to the development of electronic commerce and related concern over whether this growing area was ‘facilitating the use of contracts to set terms and conditions for access to and use of the copyright material’, the Copyright Law Review Committee (CLRC) undertook a detailed review of the relationship between contract and copyright exceptions to determine whether contracts were modifying or excluding the exclusive rights of copyright owners.

The CLRC inquiry examined, among other terms of reference, the extent that contracts were being used to exclude or modify copyright exceptions such as fair dealing and educational statutory licences and whether contracts which exclude or modify exceptions provided under the Act should be enforceable under the Act. The review also examined whether there were any differences between what occurs offline, for example, with print versions of journals and books compared to what was happening online with electronic versions of journals and books.

The 36 submissions to the inquiry presented polarised views according to whether the organisation or individual was a copyright owner or user. Submissions by copyright owners such as the Australian Publishers Association (APA) and the Australian Recording Industry Association (ARIA) argued that there was ‘no conflict between the operation of licenses and copyright exceptions’. The Copyright Agency Limited indicated that they were not aware of any Australian licences that excluded or modified any exception within the Act. The Australian Information Industry Association (AIIA) and the Ministerial Council on Education, Employment Training Youth Affairs (MCEETYA) taskforce copyright submissions also indicated that they were ‘not aware of widespread use of such agreements’ in the information, communication and technology (ICT) industry.

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95 Shelly, above n 11, 183.
96 Copyright Law Review Committee, above n 86, [6.01].
97 Ibid, [2.02].
98 Ibid.
99 Ibid, [4.53-4.54].
100 Ibid.
101 Ibid, [4.55].
Submissions from copyright users such as the Australian Consumers’ Association (ACA), the Council of Australian University Librarians (CAUL), Deakin University, the Department of Communications, Information Technology and the Arts (DCITA) and the Law Council of Australia, argued, to differing degrees, that the access and use of electronic copyright material was subject to agreements that excluded or modified exceptions within the Act. Deakin University and the then Australian Vice-Chancellors’ Committee (AVCC) argued in their submissions that agreements were ‘being used to modify their statutory licences as “educational institutions” under Part VB of the Copyright Act’.

In contrast to the experience and views of other copyright users, Monash University’s submission stated that a review of the licences for electronic resources entered into by the University revealed no examples of clauses that specifically excluded or modified exceptions within the Act. Monash University ‘stated that it was reasonably satisfied with licences for electronic resources negotiated on behalf of its library’. Their submission, along with the Australian Digital Alliance (ADA) submission, argued that since the Copyright Amendment (Digital Agenda) Act 2000 (Cth), ‘some of the sections within the Act relating to libraries are now more restrictive than most of the licences with which the University is familiar’. Monash University highlighted that even prior to the Copyright Amendment (Digital Agenda) Act 2000 (Cth) extending the educational statutory licences to incorporate copyright works in electronic forms, ‘vendors [were] beginning to include clauses within contracts that permit the use of materials in course packs or for electronic reserves’.

On the basis of an academic literature review, evidence provided by submissions and a survey of online contracts, the CLRC concluded that agreements were being used to exclude or modify copyright exceptions. The CLRC found that many of the contracts explicitly or implicitly attempted to exclude or modify exceptions within the Act and in particular the fair dealing exceptions. The CLRC recommended that contracts should not be able to exclude, among other items, the fair dealing exceptions. While Deakin University, the AVCC and others indicated that there were few examples of print materials being subjected to licences

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102 Ibid, [4.57].
103 Now known as Universities Australia
104 Copyright Law Review Committee, above n 86, [4.57].
105 Ibid, [4.59].
106 Ibid.
107 Ibid, [4.72].
108 Ibid.
109 Ibid, [4.93-4.106].
110 The Australian Digital Alliance (ADA), the Federal Libraries Information Network (FLIN) and the National Library of Australia (NLA) submissions.
that excluded or modified copyright exceptions, the CLRC’s ‘survey of offline licences found that copyright notices that [claim] to exclude or modify copyright exceptions commonly appear’ in books and journals.\footnote{111} These copyright notices ‘commonly prohibited the reproduction, storage in a retrieval system or transmission in any form or by any means of materials without the prior permission of the publisher’.\footnote{112}

Although the government announced it intended to respond to the CLRC report in the first half of 2003, there has been no government action to date. Since 2001, changes in Australian copyright law have focused on updating the Act to deal with technology developments, changes in consumers’ behaviour, concern about increasing instances of piracy, and the value of copyright industries as well as meeting obligations under the 2005 Australian-United States Free Trade Agreement (AUSFTA).

The CLRC 2005 \textit{Fair Use and Other Copyright Exception} issue paper\footnote{113} noted that the use of contracts considered in the 2002 CLRC report were ‘relevant to the issue of possible new exceptions to meet the concerns about maintaining reasonable public access to copyright material in electronic form’.\footnote{114}

While the issue of copyright and contracts has not re-surfaced as a major issue for users, universities and the government since the 2001 Copyright Law Review Committee review on the relationship between contract and copyright exceptions,\footnote{115} the issue of ‘whether the fair [dealing] exceptions [and the educational statutory licences] survive contractual restrictions remains a point of contention’.\footnote{116} The 2011 Hargreaves Review of intellectual property law in the UK\footnote{117} recommended that ‘the Government should change the law to make it clear that no exception to copyright can be overridden by contract’.\footnote{118}

The British Library in particular has argued strongly against contract law being used to override copyright law, stating in a press release that ‘contract must not undermine copyright and without addressing this issue many existing and new exceptions will simply be over-

\begin{footnotes}
\footnotetext[111]{Copyright Law Review Committee, above n 86, [4.107-4.117].}
\footnotetext[112]{Ibid, [4.114].}
\footnotetext[113]{Attorney General Department, above n 87.}
\footnotetext[114]{Ricketson and Creswell, above n 27, [11.41].}
\footnotetext[115]{Copyright Law Review Committee, above n 86, [6.01].}
\footnotetext[116]{Strategic Advisory Board for Intellectual Property Policy, above n 89, 16.}
\footnotetext[118]{Ibid, 51; The Strategic Advisory Board for Intellectual Property Policy addressed the issue of contracts and copyright law in 2010, see Strategic Advisory Board for Intellectual Property Policy, above n 89.}
\end{footnotes}
ridden by contract law’. To overcome this issue, the British Library, using the EU Database Directive and the Irish, Belgian and Portuguese Copyright Acts as reference, recommended the following draft legislation.

Permitted Acts in Relation to Contracts

Where an act which would otherwise infringe copyright is permitted under this Act it is irrelevant whether or not there exists any term or condition in any agreement which purports to prohibit or restrict the act.

The British Library also undertook an analysis of 100 randomly selected contracts offered to it to determine the impact of the terms on copyright law. It examined seven specific areas which are displayed in Table One.

<table>
<thead>
<tr>
<th>Activity</th>
<th>Printing</th>
<th>Downloading and Electronic copying</th>
<th>Fair Dealing</th>
<th>Visually Impaired</th>
<th>Inter Library Loans</th>
<th>Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the licence permit archiving</td>
<td>Is printing of the content allowed and if so how much?</td>
<td>Does the licence allow permanent downloading by the end user</td>
<td>Does the licence allow fair dealing as allowed for under the copyright Act?</td>
<td>Does the licence contain any provisions relating to the visually impaired</td>
<td>Can paper or electronic copies of resources be sent to other libraries?</td>
<td>Are any exceptions in UK or any other jurisdiction referred to?</td>
</tr>
<tr>
<td>Yes = 23</td>
<td>Yes = 81</td>
<td>Yes = 65</td>
<td>Yes = 53</td>
<td>Yes = 2</td>
<td>Yes = 14</td>
<td>Yes = 25</td>
</tr>
<tr>
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<td>No = 47</td>
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<tr>
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<td>Unclear = 2</td>
<td>Silent = 25</td>
<td>Silent = 82</td>
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<td>Silent = 21</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table One: The British Library’s Review of 100 Contracts

Two of the areas examined by the British Library in relation to contracts that are relevant to this chapter are fair dealing and the exceptions to the Copyright Act.

As shown in Table One, in relation to fair dealing, just under half the contracts studied removed the right, in different ways, to rely on the defence of fair dealing under the Copyright Designs and Patents Act 1988. In relation to exceptions within UK copyright law or

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copyright law in other jurisdictions, of the 25 contracts that referred to copyright law, 13 only referred to US law, eight referred to both US and UK law, and four referred to both US and applicable international law. Also in relation to other activities, 15 did not make any reference to a right to print, and a third did not allow or were silent on downloading or copying material.\textsuperscript{122}

While the purpose of the British Library’s review was to illustrate the type of contracts available rather than analyse or publicly comment on the findings, the next section will examine 12 examples of contracts or terms of use and comment on their impact on both the educational statutory licensing scheme and fair dealing within the Copyright Act.

3.7 Terms and Conditions

This section examines 12 examples of the types of terms and conditions that Australian university libraries accept when providing staff and students access to electronic resources. In most cases, contracts are not publicly accessible and electronic resource providers rely on universities to ensure that the terms are not breached by users. After a request for a selection of electronic resource provider contracts, the RMIT Librarian provided 12 examples of contracts or terms and conditions that RMIT University has entered into with various aggregated electronic resource providers and publishers.\textsuperscript{123} Using a doctrinal research approach,\textsuperscript{124} each contract or terms and conditions was examined for authorised users, permitted uses, and whether the following activities; printing, downloading, research and multiple reproduction or communication were allowed as well as the governing jurisdiction.\textsuperscript{125}

The discussion below on the 12 electronic resources providers focuses on two areas that link back to the earlier examination of the rights of academics:

1. Under the contracts, are academics still able to rely on the defence of fair dealing in their research activities?

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{122} Strategic Advisory Board for Intellectual Property Policy, above n 89; See <http://www.bl.uk/ip/pdf/ipmatrix.pdf>
  \item \textsuperscript{123} The request to the University Librarian of RMIT University for copies of the contracts was from the senior supervisor.
  \item \textsuperscript{124} For a discussion on doctrinal research refer to Section 1.6 in Chapter One.
  \item \textsuperscript{125} For a tabulated summary of the document analysis of the 12 contracts or terms of use refer to Table Two on Page 106.
\end{itemize}
\end{footnotesize}
2. Are they able to undertake multiple copying for teaching purposes?

3.7.1 Provider A

Description of Provider

Provider A is a US aggregated electronic resource provider. It provides subscribers with access to articles from trade magazines and academic journals, reports and theses in multiple disciplines and subject areas.

Who can use the product?

Under the terms and conditions of Provider A, fair use or fair dealing as defined under the US and UK Copyright Acts can be relied on, but only by authorised users of the product. Authorised users for an academic institution under Provider A’s terms and conditions include enrolled students, staff, visiting scholars and walk-in patrons. At RMIT University, the library uses a guest login to allow walk-in patrons to use the electronic resources.

Permitted Uses

Authorised users can view and use the product for ‘educational, scientific, or research purposes, including illustration, explanation, example, comment, criticism, teaching, research or analysis’.

Authorised users can download or create printouts of a reasonable portion of the articles in the Product as long as the system registers each download and copy made. The word ‘reasonable’ is not defined. Any copying or distribution of the permitted printouts must be for ‘internal or personal use as allowed under the doctrines of ‘fair use’ or ‘fair dealing’.

Articles can be included in electronic reserves as long as there is a link that records a ‘hit’ when the article is viewed.

The terms and conditions state that ‘nothing in this agreement restricts your use of materials contained within the products under the doctrines of ‘fair use’ or ‘fair dealing’ as defined under the copyright laws of the United States or England respectively’. However, there is no mention of the Copyright Act 1968 (Cth) within the terms and conditions. While the Australian copyright law has its origin in the UK Copyright Act, the fair dealing exceptions

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126 Provider A, Terms and Conditions, s 2.
127 Ibid, s 5.
do differ. This clause is an example of what occurs in many cases where licences entered into by university libraries are not with Australia-based vendors. Rather, there is a tendency for licenses to be governed by foreign law and US law in particular.128

3.7.2 Provider B

Description of Provider

Provider B is a publisher of Australian law material including cases, commentaries, journal articles, and legislation.

Who can use the product?

Under the general terms and conditions for the use of Provider B’s service, only employees and students of the educational institution and support personnel authorised by either Provider B or the educational institution are considered authorised users.129 The use is restricted to the country in which the licence has been issued (except for ‘occasional, short-term travel’).130

Provider B’s general terms and conditions appear to exclude ‘walk-in patrons’ from the meaning of authorised users and this would prevent a student or staff member from another university from using this resource. This exclusion is inconsistent with the purpose of the CAVAL system,131 which encourages students and staff to use the resources of other universities.

Permitted uses

An authorised user is allowed to access and use the online services and materials for the ‘internal purposes only of ‘(i) research or study, … (iii) providing academic services to students’132 Electronic display of materials retrieved by the service is restricted to one user at a time. As well, users can only print out a reasonable proportion of the materials and it can only be a single copy. Retrieving and storing materials is also limited to a reasonable portion and storage is for no more than 90 days for one person’s exclusive use.133

128 Copyright Law Review Committee, above n 86, [4.139].
129 Provider B, General Terms and Conditions, s 2.1.
130 Ibid, s 2.2.
131 CAVAL Ltd is owned by several Australian Universities and provides shared library services to educational institutions and other clients in the information and library sectors.
132 Provider B, above n 127, s 1.1.
133 Ibid, s 1.1 (a, b, c).
Clause 1.2 states that a user can make copies of authorised printout and distribute them within their organisation as permitted by Copyright Law, so multiple copies appear possible. The governing law of the General Terms and Conditions is New South Wales (NSW).

3.7.3 Provider C

*Description of Provider*

Provider C is a publisher of Australian law material including cases, commentaries, journal articles and legislation.

*Who can use the product?*

Provider C’s online terms of use do not apply only to educational institutions but to all users. Users of the product are those with a user name and password provided by one’s employing organisation.

*Permitted Uses*

Provider C’s online terms of use allows a user to use material provided on the service expressly for:

(a) … The purposes of research, study, supplying educational services … or
(b) Inclusion in essays, theses, … papers, submissions, communications to and publications for students … the preparation of tenders, reports, submissions and other like documents (work product).\(^{134}\) (emphasis in original)

There is no definition of ‘supplying educational services’.

Clause 4.1 states that users must comply with copyright law when using the publications in the electronic resource. The governing law is NSW. This would seem to imply that it allows the operation of ss 135ZMB, 135ZMC and 135ZMD.

3.7.4 Provider D

*Description of Provider*

Provider D is an aggregated electronic resource provider. It provides subscribers with access to articles in trade magazines and academic journals in multiple disciplines and subject areas.

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\(^{134}\) Provider C, *Online Terms of Use*, s 3.2(a) and (b).
**Who can use the Product?**

Authorised users are ‘employees, students, registered patrons, walk-in patrons or other people affiliated with the Licensee’, but exclude alumni. The institution is not permitted to allow remote access to the database by institutions, employees at other institutions or other individuals not a party to the agreement. Remote access can be allowed for patrons of subscribing institutions for personal, non-commercial use.

**Permitted Uses**

The contract is governed by the US Copyright Act. Users can ‘download or print limited copies, abstract, full text or portions thereof’ in accordance with that Act. The material cannot be used ‘as a component of or the basis of any other publication prepared for sale’. All copying and downloading is for ‘internal or personal use’. These conditions are not intended ‘to restrict the use of materials under the doctrine of ‘fair use’’.

### 3.7.5 Provider E

**Description of Provider**

Provider E is a publisher of books and journals in multiple disciplines and subject areas.

**Who can use the product?**

Authorised users include all teaching and research staff, all students, members of the public registered to use the library, and other people with authority to use the library. Non-scientific staff and students are excluded.

**Permitted Users**

Users can access the material by means of workstations located at the University or remotely for research, teaching and private study purposes. They can print and/or download articles to the limit of one chapter, per title, per authorised user using the provided workstations. They can reproduce one copy of individual articles in print form (but not electronic form) for distribution without charge to other libraries for non-commercial purposes, and create a hyperlink to any part of the material for the personal use of the user. Finally, with the prior

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136 Ibid, clause 1, Licence B.
138 Ibid, clauses 2.1 (a), (b).
139 Ibid, clauses 2.1 (a), (c).
140 Ibid, clauses 2.1 (a), (e).
141 Ibid, clauses 2.1 (a), (f).
written consent of Provider E for each use, a user can reproduce up to one chapter per title per course in printed hard copy and electronic course packs and study packs.142

The contract is governed by English law.

3.7.6 Provider F
Description of Provider
Provider F is a publisher of books and journals in multiple disciplines and subject areas.

Who can use the product?
The contract states that ‘students, faculty, staff, researchers, and independent contractors’ are authorised users, plus ‘individuals using computer terminals within the library facilities’. For a one year term, alumni were also considered to be users.143

Permitted uses
Users can ‘access, search, browse and view’ the products and ‘print and download a reasonable portion’ thereof. They can also provide links in their websites to the products and incorporate links ‘in electronic course packs, reserves and course management systems’.144 They are not able to ‘substantially or systematically reproduce, retain or redistribute’ the products.145

The governing law of the contract was not stated on the copy of the document sighted.

3.7.7 Provider G
Description of Provider
Provider G is a publisher of books and journals in the field of chemistry and related science fields.

142 Ibid, clauses 2.1 (a), (g).
143 Ibid, Subscription Agreement 2009-2013, s 1.2.
144 Ibid, s 1.3.
145 Ibid, s 1.4.
Who can use the product?

Employees, contractors, teaching staff and students are authorized users as long as they are located at an authorized RMIT site and are using an authorized terminal. Connections from locations outside the authorized sites are not permitted. RMIT is required to ensure that only authorized users can access Provider G’s site.

Permitted Uses

Users ‘may view, download, or print individual articles, individual chapters, individual book chapters, proceeding, …monographs or other individual items from [Provider G’s] products for their personal scholarly, research, and educational use’. They can also print a copy of the above for the ‘internal or personal use of other authorized users and can provide links to [Provider G’s] products as part of a course pack or in an email. RMIT can also provide copies of articles, etc, for inter-library library requests and the borrower may make up to five free copies of documents’. Provision of copies to other third parties, apart from the inter-library loans, is prohibited, as is the provision of copies for commercial use. Multiple copies do not appear to be permitted.

The contract is governed by the laws of the District of Columbia, US.

3.7.8 Provider H

Description of Provider

Provider H is an aggregated electronic resource provider. It provides subscribers with access to images for the arts, architecture, humanities, and sciences disciplines.

Who can use it?

Authorised users include staff and students, visiting researchers and lecturers, and walk-in users, which may include alumni.

Permitted Uses

The resources can only be used for educational or scholarly uses that are non-commercial. These uses can include reproducing, distributing, displaying and performing for classroom

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146 Provider G, Attachment D: Terms and Conditions of Use, s 2.e.
147 Ibid, s 4.
148 Ibid, s 5.
activities, assignments and student research, staff research, non-commercial presentations in conferences, seminars and workshops, student portfolios, and for inclusion in theses.\textsuperscript{150}

Printing is only permitted if it is reasonably necessary for the permitted purposes outlined above and printing can only be done using the print functions in the resource, which automatically places a non-commercial use statement at the bottom of each page.\textsuperscript{151} Downloading of material must follow the same steps.\textsuperscript{152}

The contract is governed by the laws of New York State, US.

\section*{3.7.9 Provider I}

\textit{Description of Provider}

Provider I is a publisher of US law material including cases, commentaries, journal articles and legislation.

\textit{Who can Use it?}

Authorised users are students, faculty and academic library walk-in users. Only students and faculty are able to access the resources from off-site.\textsuperscript{153} Only three users can access the site concurrently.

\textit{Permitted Uses}

Insufficient extracts from the resources can be distributed. However, it must be for educational or research purposes, be incidental to some other purpose,\textsuperscript{154} also acknowledge the resource and not exceed three extracts from a single work.\textsuperscript{155} Academic institutions are given special permission to ‘download, display, view and print off single copies of excerpts for the internal educational purposes of the Client and for the Authorised User’s personal non-commercial use’.\textsuperscript{156} As well, lecturers can provide links to the online resources in their

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{150} Ibid, clause 3.3.
  \item \textsuperscript{151} Ibid, clause 3.4.
  \item \textsuperscript{152} Ibid, clause 3.5.
  \item \textsuperscript{153} Provider I, Agreement, sch 2.
  \item \textsuperscript{154} For example for inclusion in an exam paper.
  \item \textsuperscript{155} Provider I, above n 151, clause 3.2.3.
  \item \textsuperscript{156} Ibid, clause 3.2.3.1.
\end{itemize}
\end{footnotesize}
teaching materials. Multiple copies of works cannot be made and the material must not be used for commercial purposes.

The contract is governed by the law of Victoria.

3.7.10 Provider J  
*Description of Provider*

Provider J is an aggregated electronic resource provider. It provides subscribers with access to reviews, abstracts and bibliographic information for literature in the field of mathematical science.

**Who can use it?**

Authorised users must be employees, faculty, staff or students of the subscriber, or authorised on-site clients of the subscriber’s library facilities. Different campuses within the same city are considered to be different sites.

**Permitted Uses**

A user can search the database and make one or more hard copies of the search for personal use only and not for distribution to a third party. They can also download search results to their computer, CD Rom or any other storage device; again, this is only for personal use. Personal use includes scholarly research, but not commercial purposes.

Users are not permitted to download substantial portions of the database, conduct automated searches of the database or to make the database available to a third party. Recompiling, copying, publication or republication of any part of the data in any way and in any form is not permitted without prior consent. The contract is governed by the law of the State of Rhode Island, US.

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157 Ibid, clause 3.2.3.2.  
158 Ibid, clause 3.2.2.  
159 Ibid, clause 3.2.1.  
160 Ibid, clause 4.3.  
162 Ibid, clause 1.  
163 Ibid, clause 2.  
164 Ibid, clause 5.
3.7.11 Provider K

Description of Provider

Provider K is a publisher of books, conference proceedings, and journals in the field of computing and related information technology fields.

Who can use it?

The subscriber’s students, faculty, registered users or employees, and authorised users physically present in the library.\(^{165}\)

Permitted Uses

Users can share materials with each other, put materials on e-reserve (subject to an appropriate authentication process being in place), use them as course materials (as long as no fee is charged), and make hard copies available through inter-library loan. Sharing of material with people outside the organisation is not permitted, nor is automated searching of the database, nor posting of materials on third part servers.\(^{166}\) The terms and conditions do not state the governing law.

3.7.12 Provider L

Description of Provider

Provider L is a publisher of books and journals in multiple disciplines and subject areas.

Who can use it?

Authorised users are either individuals who have paid for a personal subscription or those persons covered by their institution’s subscription.\(^{167}\)

Permitted Uses

Users can browse the database for personal use, but unreasonable use (such as systematic downloading) is not permitted without a licence. No commercial use is permitted. Printing and saving of single copies of pages, but not individual articles, is permitted for personal use or for distribution to others. Electronic distribution is not permitted without prior consent. The contract is governed by the law of England and Wales, UK.\(^{168}\)

\(^{165}\) Provider K, *Digital Library Agreement*.

\(^{166}\) Ibid.

\(^{167}\) Provider L, *Terms and Conditions*.

\(^{168}\) Ibid.
3.8 Discussion of Terms and Conditions

The analysis of the twelve electronic resource provider contracts or terms and conditions found that the governing laws vary, with only three being Australian, five US law, two UK law, and two not stating the applicable law. Only two of the contracts or terms and conditions specifically referred to the US fair use exception. The majority allowed the use of the electronic resources for personal, educational and research purposes. This means that there is no need for academics to argue fair dealing or fair use in relation to browsing, copying or reproducing material from the databases for research or personal internal use.

With none of the contracts or terms and conditions defined what was meant by research, this raises the question of what activities would fall under the definition of ‘research’. Should services provided by electronic resource providers not be used when undertaken activities related to ‘contract research’ or consultancies or ‘external research’? As discussed in Section 3.3, in contrast to other commentaries, the British Academy and the Publishers Association concluded that the activity of research can include the publication of research results. Research is a key function of many universities’ objective to ‘generate, acquire and transfer knowledge’ and as a consequence, research cannot be internal as it must be disseminated in academic journals, books and reports.

However, even if Australian academics rely on the dictionary definition of research as a systematic enquiry or investigation into a subject in order to discover facts or principles, then it is unlikely that they would not potentially be at risk of breaching the terms and conditions of the electronic resources.

Less than half of the contracts and terms and conditions specifically allowed for multiple copying for educational purposes, or allowed for electronic linking for e-reserves. This prohibition is the case with one contract governed by Australian law; four governed by US law, and two terms and conditions not stating the governing law (but is presumed to be US law). In Australia, this means that the educational statutory licensing schemes in the Copyright Act cannot be relied upon. United States copyright law does not have a similar

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169 See Ricketson and Creswell, above n 27; Burrell and Coleman, above 28.
statutory licence scheme as multiple copying is considered fair use. Again, the contract or terms and conditions would apply to override fair use.

An example of how the contracts and terms of use of electronic database providers are overriding copyright law for educational purpose is that of Provider C. Depending on Provider C’s meaning of the phase ‘substantial proportion’, which is not defined within the online terms of use, c 3.2 (i) may be limiting the operation of ss 135ZMB, 135ZMC and 135ZMD within the Copyright Act. While s 135ZMB allows multiple reproduction and communication of no more than two pages or one percent of the total number of pages of the work for electronic forms of work on the provision that the copying ‘or communication is carried out on the premises of an educational institution for purpose of a course of study provided by’ the institution,\(^{171}\) s 135ZMC allows multiple copies and/or communication of one article in a periodical publication in electronic form. Similar to the provision in s 135ZMB, the copying or communication of one periodical article in electronic form is not a copyright infringement if the copying and/or communication is by an educational institution or on behalf of one, solely for the educational purposes of the educational institution and a remuneration notice is in force between a relevant collecting agencies and educational institution.\(^{172}\)

University staff may not be aware that material provided from Provider C’s service may not be included in any course packs that will be on sold to students. Clause 3.2(iii) of the online terms of use states that a work product\(^ {173}\) must not be made available for sale and as a consequence could limit the operation of ss 135ZMB(1), 135ZMC(1) and 135ZMD(1). Under s 135ZZH, selling or supplying course material at a financial profit would void the operation of ss 135ZMB(1), 135ZMC(1) and 135ZMD(1) but following the conclusion of the 1994 Copyright Agency Limited and Others v Victoria University of Technology,\(^ {174}\) using a user pay system would not be inconsistent with the sole educational purpose as required by ss 135ZMC(1)(d) and 135ZMD(1)(d). However while Gummow J found that there is a difference between something sold for a financial profit and something sold at a financial profit, Provider C’s online terms of use do not distinguish between selling the material and making a financial profit on the sale of the material.

\(^{171}\) Copyright Act 1968 (Cth), s 135ZMB.
\(^{172}\) Ibid, s 135ZMC.
\(^{173}\) Under c 3.2(b) may include a publication for students.
\(^{174}\) 125 ALR 278.
The final analysis is that, while the categories of who are authorised users were very similar for all of the twelve contracts or terms and conditions examined, the permitted uses differed greatly and it was necessary to read each contract to determine what was permitted. It is not safe to assume that all contracts have the same terms and conditions.

3.9 Conclusion

This chapter has examined whether university staff could potentially be at risk of breaching the terms and conditions of electronic resources when undertaking teaching and research activities if they assume they are protected under the educational statutory licence provisions or the fair dealing exceptions in the Act. These activities include multiple copying or communication for teaching purposes, and downloading and printing articles for conducting a research enquiry or investigating a topic area.

This chapter has highlighted that Australian academics could potentially be at risk of breaching the contractual terms and conditions of electronic resources when accessing, downloading and printing articles (and other materials). They are covered for research purposes, but not for educational purposes.

As US and UK companies are major providers of educational resources, particularly in electronic format, in Australia,175 the next chapter, Chapter Four, explores from an international perspective the issue of how universities are managing their copyright obligations when using third party copyright material as part of educational, non-educational and research activities.

175 A review of the electronic resources available via the RMIT University library website indicates that approximately 85 percent of the publishers of these resources are Australian, United Kingdom and United States based companies.
<table>
<thead>
<tr>
<th>Provider</th>
<th>Provider Type</th>
<th>Authorised Users</th>
<th>Permitted Uses</th>
<th>Activity</th>
<th>Governing Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>US Aggregated Electronic Resource Provider of articles, reports and theses</td>
<td>• Enrolled Students • Staff • Visiting Scholars • Walk-in users</td>
<td>• Educational • Scientific • Research • Copying or distribution must be for internal or personal use as allowed under fair use or fair dealing</td>
<td>Printing √ (reasonable portion) Downloading √ (reasonable portion) Fair Dealing under the Copyright Act 1968 (Cth) × Multiple reproduction or communication under Part VB ×</td>
<td>US UK</td>
</tr>
<tr>
<td>B</td>
<td>Publisher of Australian law material including cases, commentaries, journal</td>
<td>• Employees • Students • Support Personnel of the provider or institution</td>
<td>Internal purpose of: • Research or Study • Providing academic services to students</td>
<td>Printing √ (reasonable portion of a single copy) Downloading √ (reasonable portion of a single copy) Fair Dealing under the Copyright Act 1968 (Cth) √ Multiple reproduction or communication under Part VB √</td>
<td>Australia – NSW</td>
</tr>
<tr>
<td>C</td>
<td>Publisher of Australian law material including cases, commentaries, journal</td>
<td>• Individuals with a user name and password provided by the institution</td>
<td>• Research • Study • Supplying educational services</td>
<td>Printing √ (insubstantial amount) Downloading √ (insubstantial amount) Fair Dealing under the Copyright Act 1968 (Cth) √ Multiple reproduction or communication under Part VB √</td>
<td>Australia – NSW</td>
</tr>
<tr>
<td>D</td>
<td>Aggregated Electronic Resource Provider of articles, reports and theses from multiple disciplines and subject areas</td>
<td>• Employees • Students • Registered patron • Walk-in Patrons • Other people affiliated with the institution • Excludes alumni</td>
<td>• Internal use • Personal use • Non-commercial use • Uses allowed under the fair use doctrine</td>
<td>Printing √ Downloading √ Fair Dealing under the Copyright Act 1968 (Cth) × Multiple reproduction or communication under Part VB ×</td>
<td>US</td>
</tr>
<tr>
<td>E</td>
<td>Publisher of books and journals in multiple disciplines and subject areas.</td>
<td>• Teaching and research staff • Students • Members of the Public registered to use the library • Other individuals authorised to use the library • Excludes non-scientific staff and students</td>
<td>• Research • Teaching • Private Study</td>
<td>Printing √ (1 chapter or 1 article) Downloading √ (1 chapter or 1 article) Fair Dealing under the Copyright Act 1968 (Cth) × Multiple reproduction or communication under Part VB ×</td>
<td>England</td>
</tr>
<tr>
<td>Letter</td>
<td>Description</td>
<td>User Groups</td>
<td>Personal Use</td>
<td>Internal Use</td>
<td>No Governing Law</td>
</tr>
<tr>
<td>--------</td>
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</tr>
<tr>
<td>F</td>
<td>Publisher of books and journals in multiple disciplines and subject areas.</td>
<td>Faculty, Staff, Researchers, Independent contractors, Walk-in users</td>
<td>✓ (reasonable portion)</td>
<td>✓ (reasonable portion)</td>
<td>✗</td>
</tr>
<tr>
<td>G</td>
<td>Publisher of books and journals in the field of chemistry and related science fields.</td>
<td>Employees, Contractors, Teaching staff, Students</td>
<td>✓ (individual items such as articles or book chapters)</td>
<td>✓ (individual items such as articles or book chapters)</td>
<td>✗</td>
</tr>
<tr>
<td>H</td>
<td>Aggregated Electronic Resource Provider of images for the arts, architecture, humanities, and sciences disciplines.</td>
<td>Staff, Students, Visiting researchers, Visiting lecturers, Walk-in users, Alumni</td>
<td>✓</td>
<td>✓</td>
<td>✗</td>
</tr>
<tr>
<td>I</td>
<td>Publisher of US law material including cases, commentaries, journal articles, and legislation.</td>
<td>Students, Faculty, Walk-in users</td>
<td>✓ (single copies of excerpts)</td>
<td>✓ (single copies of excerpts)</td>
<td>✗</td>
</tr>
<tr>
<td>J</td>
<td>Aggregated Electronic Resource Provider of reviews, abstracts and bibliographic information for literature in the field of mathematical science.</td>
<td>Employees, Faculty, Staff, Students, Authorised walk-in users</td>
<td>✓</td>
<td>✓</td>
<td>✗</td>
</tr>
<tr>
<td>K</td>
<td>Publisher of books, conference proceedings, and journals in the field of computing and related information technology fields.</td>
<td>Students, Faculty, Registered users, Employees, Authorised walk-in users</td>
<td>✓</td>
<td>✓</td>
<td>✗</td>
</tr>
<tr>
<td>L</td>
<td>Publisher of books and journals in multiple disciplines and subject areas.</td>
<td>Faculty members, Students, Researchers, Staff members, Librarians, Employees, Contactors, Walk-in users</td>
<td>✓ (single copies of individual articles or items)</td>
<td>✓ (single copies of individual articles or items)</td>
<td>✗</td>
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</table>
CHAPTER 4: AN INTERNATIONAL PERSPECTIVE - A REVIEW OF THE UNITED STATES, THE EUROPEAN UNION, UNITED KINGDOM AND CANADA

4.1 Introduction

This chapter examines the research problem and question from an international perspective, namely how are universities managing their copyright obligations when using third party copyright material as part of educational, non-educational and research activities.

The purpose of the chapter is to examine how the United States (US), European Union (EU), United Kingdom (UK) and Canada have addressed the issue of using third party copyright material for educational and research activities. This chapter will focus on the educational and fair dealing provisions within the copyright legislation of the US, EU, UK and Canada. It will also discuss how research is defined within each of the jurisdictions and how the issue of non-educational activities within the higher education sector is managed.

The US and the UK were selected for this review because US and UK companies are major providers in Australia of educational resources, particularly in electronic format,\(^1\) and so the contracts for databases and other electronic resources entered into by Australian universities are often governed by their laws. The EU is included in the review because the UK is a member of the EU and as a member is required to comply with EU directives. Canada was also selected as it takes a similar approach to copyright law as Australia.

Until 2008, there had been no cases in Australia or the above mentioned jurisdictions in which the issue of copying of third party copyright material by universities or academic staff for teaching or research purposes was considered apart from cases dealing with the sale of course packs.\(^2\) However, in 2008, three publishers, Cambridge University Press, Oxford University

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1. A review of the electronic resources available via the RMIT University library website indicates that approximately 85 percent of the publishers of these resources are Australian, United Kingdom and United States companies.
Press and SAGE Publications commenced legal action against Georgia State University (GSU) for breach of copyright. This case is discussed in section 4.2.3.1.

*American Geophysical Union v Texaco Inc* (hereafter referred to as the Texaco case) will also be discussed in this chapter. The Texaco case, while not related to a university, directly relates to the issue around using third party copyright material for the purpose of research within a commercial context. In the section covering Canada, *CCH Canadian Ltd v Law Society of Upper Canada* (hereafter referred to as the CCH Canada case) will be discussed because, unlike the Texaco case, the CCH Canadian case provides a definition of what constitutes ‘research’. This case, in contrast to *Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Ltd* [Australia], found that the Law Society of Upper Canada when reproducing single copies of copyrighted material could rely on the research activities of a third party and claim the purpose of research as a right under the fair dealing provision within s 29 of the *Copyright Act*, RSC 1985, c. C-42.

## 4.2 United States

Within the US, educational institutions and academic staff generally rely on the fair use section within the *US Copyright Act of 1976* (hereafter referred to as the US Copyright Act) to avoid claims of copyright infringement for educational and research activities. This section, §107, will be discussed below together with the two cases relevant to the issue of educational use and research.

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3 Cambridge University Press, Oxford University Press, Inc., and Sage Publications, Inc., v Mark P. Becker, in his official capacity as Georgia State University President, Risa Palm, in her official capacity as Senior Vice President for Academic Affairs and Provost of Georgia State University, J.L. Albert, in his official capacity as Georgia State University Associate Provost for Information Systems and Technology, Nancy Seamans, in her official capacity as Dean of Libraries at Georgia State University, Robert F. Hatcher, in his official capacity as Vice Chair of the Board of Regents of the University System of Georgia, Kenneth R. Bernard, Jr., Larry R. Ellis, W. Mansfield Jennings, Jr., James R. Jolly, Donald M. Leebern, Jr., William Nesmith, Jr., Doreen Stiles Poitevint, Willis J. Potts, Jr., Wanda Yancey Rodwell, Kessel Stelling, Jr., Benjamin J. Tarbutton, III, Richard L. Tucker, Larry Walker, Rutledge A. Griffin, Jr., C. Thomas Hopkins, Jr., Neil L. Pruitt, Jr. And Philip A. Wilheit, Sr., in their official capacities as members of the Board of Regents of the University of Georgia, Civil Action No 1:08-CV-1425-ODE (N.D. Ga., May, 11, 2012) (Hereafter referred to as the Georgia State University case).

4 802 F Supp 1 (SDNY 1992); 60 F.3d 913 (2nd Cir. 1994).


4.2.1 Educational Provisions

Unlike Australia, Canada, and the UK, the US does not have educational exceptions in its Copyright Act. As is the case for individuals, educational institutions within the US must rely on the fair use provisions\(^7\) within the Act.

While there are specific provisions\(^8\) within the US Copyright Act for non-profit educational institutions, which allow for copying by libraries for archiving and preservation purposes and for electronic copying for distance education programs, these sections however, are very narrow and restricted in application.\(^9\) For example, § 110(1) applies only to the ‘perform[ance] or display [of] a copyrighted work “in the course of face to face teaching activities ... in a classroom or similar place devoted to instruction”’.\(^10\) The section does not authorise the reproduction of copies or allow material to be placed on a course or learning management system because ‘websites would not be considered face-to-face teaching’.\(^11\) However the use of voice over internet protocol (VoIP) and other digital technologies for distance education activities may be allowed under the Technology, Education and Copyright Harmonization Act of 2001 (hereafter referred to the TEACH Act).

The TEACH Act amended §§ 110(2) and 112(f) of the Copyright Act of 1976. The purpose of the TEACH Act is to ‘facilitate and enable the performance and display of copyrighted materials for distance education by accredited, non-profit educational institutions’.\(^12\) Section 110(2) ‘provides a special exemption for such distance learning activities’\(^13\) and allows the transmission of materials over digital mediums such as web sites ‘to supplement the "live" classroom’.\(^14\)

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\(^7\) See Copyright Act 1976, § 107.
\(^8\) 17 U.S.C. §§ 108 and 110 (1) and (2).
\(^11\) Ibid.
\(^12\) Copyright Clearance Center, The TEACH Act New roles, and responsibilities for academic institutions (2011) http://www.copyright.com/content/dam/cc/3/marketing/documents/pdfs/CR-Teach-Act.pdf> at 18 October 2012. Also refer to The Distance Education and the TEACH Act webpage on American Library Association website at <http://www.ala.org/advocacy/copyright/teachact> for more information about the TEACH Act.
\(^13\) Harvard University Office of the General Counsel, above n 10.
\(^14\) American Library Association, The Distance Education and the TEACH Act (n.d.) <http://www.ala.org/advocacy/copyright/teachact> at 21 October 2012.
As the US Copyright Act does not contain educational statutory exceptions, the key defence to an allegation of copyright infringement under US law therefore is fair use. Multiple copying for classroom use is specifically mentioned as an example of fair use, depending on the circumstances mentioned below in Section 4.2.2.

The US Copyright Office currently recognises a set of educational fair use Classroom Guidelines first prepared by publishers and the academic community in 1976 and last revised in 2009. These Classroom Guidelines deal with photocopying and apply *inter alia* to the reproduction of copyrighted works for teaching in educational institutions and by libraries for the purposes of research and study.

Unlike the Australian Copyright Act, the US Act does not define the meaning of ‘educational purpose’. However, some educational institutions and non-profit organisations use the definition of ‘educational purposes’ provided in the proposed (but not adopted) educational fair use guidelines developed by the Conference of Fair Use (CONFU) in 1998. The proposed (but not adopted) educational fair use guidelines for digital images defined ‘educational purposes’ as including:

- Non-commercial instruction or curriculum-based teaching by educators to students at non-profit educational institutions
- Planned non-commercial study or investigation directed towards making a contribution to a field of knowledge, or
- Presentation of research findings at non-commercial peer conferences workshops or seminars.

This definition clearly indicates that educational purposes cover both research and study, including the dissemination of research findings but this dissemination need not necessarily be in a written form.

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16 Ibid, 1.
17 For example Stanford University, University of Florida, University of Texas and Public Counsel Law Centre.
The Classroom Guidelines state that it is reasonable for a teacher to copy a chapter from a book or an article from a periodical if it is less than 2,500 words or represents less than 10 per cent of the work whichever is the lesser. While teachers can photocopy articles to hand out in class, the guidelines make clear that such copying cannot be an attempt to replace textbooks used in a course.20

Universities in the US ‘see the Classroom Guidelines as a tangible device for evaluating legal compliance’.21 The ‘broad following of the Classroom Guidelines as part of [US universities’ policies has led] to the Classroom Guidelines becoming the de facto interpretation of fair use by academic institutions’.22 There has been commentary on and criticism of the Classroom Guidelines.23 Recently in the 2012 District Court decision in the Georgia State University case, which will be discussed in Section 4.2.3.1 below, Evans J rejected the publishers’ claim that the Classroom Guidelines should provide the maximum amount of copying allowed under fair use. Rather, Evans J stated that the purpose of the Classroom Guidelines is to state the minimum and not the maximum standards of educational fair use.24 Evans J stated that the Classroom Guidelines are not compatible with the language and intention of § 107.25

Since the introduction of the Classroom Guidelines in 1976, libraries, educational institutions and publishers have attempted to develop supplementary voluntary guidelines to assist libraries and educators in using copyrighted works for fair uses particularly in the digital environment.26 An example of these voluntary guidelines as those developed as part of the CONFU. The CONFU27 developed sets of guidelines related to digital images, distance learning, educational multimedia, electronic reserve systems, interlibrary loans and document delivery and the use of computer software in libraries. However the proposed guidelines did not receive consensus approval from the participants28 of the CONFU. As stated in the CONFU Final Report ‘attempts to draft widely supported [voluntary] guidelines will be

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20 United States Copyright Office, above n 15, 6.
25 Georgia State University case, above n 3, 66.
26 Lehman, above n 18.
27 For more detail on the process of the Conference of Fair Use (CONFU), see Lehman, above n 18, section 1.
28 Included organisations representing copyright owners, copyright users, education institutions, and libraries; See Appendix 1 of Lehman, above n 18 for a list of participants of the CONFU.
complicated by the often competing interests of copyright owners and users’. D’Agostino suggested that following the failure of a blanket approach by CONFU, it may be necessary for ‘tailor-made and culturally specific solutions to conflicts’ of fair use be developed. For example, within the education sector, stakeholders such as copyright agencies including collecting societies, educational institutions including universities, libraries, and publishers including providers of electronic resources could collaborate to clarify fair dealing or use issues for creators, users and right holders. Similarly, Fisher and McGeeveran recommended that it is ‘not advisable to develop a sweeping statement that encompasses all the various obstacles confronting digital learning. Rather more narrowly-tailored statements of best practices should be developed’. An example of a best practice statement is the Code of Best Practice for Fair Use for Academic and Research Libraries, developed by the Association of Research Libraries (ARL) in 2012 which will be discussed below in Section 4.2.4.

4.2.2 Fair Use

As noted above in Section 4.2.1, without educational exceptions in the Act and only general guidelines developed by industry, the key defence for an educational institution to an allegation of copyright infringement under the US Copyright Act of 1976 is fair use.

The US Copyright Act contains a range of specific fair use exceptions, similar to those in the Australian Act. However, the US ‘fair use’ exceptions in §107 of the Copyright Act is broader than ‘fair dealing’ under the Australian Copyright Act. Section 107 provides as follows:

… the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

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29 Lehman, above n 18.
31 Fisher and McGeeveran, above n 9.
(1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(2) The nature of the copyrighted work;

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) The effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

While this definition covers the four fair dealing uses contained in the Australian Act, the inclusion of the words ‘such as’ means that the four fair uses are provided as examples and are not the only uses accepted. What constitutes ‘fair use’ is left to the courts to assess and the courts have accepted that activities such as home taping of videos, the photocopying of scientific articles, and reverse engineering of computer programs can be fair use.  

The section clearly identifies certain educational activities such as ‘criticism, comment, … teaching (including multiple copies for classroom use), scholarship, or research’ as being fair use but whether all educational activities are covered has not been examined in a case. The Georgia State University case which discussed the fair use defence for educational activities is discussed below.

4.2.3 Relevant Cases

4.2.3.1 The Georgia State University Case

In April 2008, Cambridge University Press, Oxford University Press Inc. and Sage Publications Inc. filed a copyright infringement claim against Georgia State University. The Publishers claimed that Georgia State University had infringed the publishers’ copyright by

36 Georgia State University case, above n 3.
allowing unlicensed portions of the publishers’ copyrighted books to be ‘posted electronically and made available electronically to students’.  

The case focused on 75 excerpts from 64 books published by the three publishers which were used as supplementary readings in graduate level or upper level undergraduate courses at Georgia State University. All but nine cases of the alleged infringements involved readings that were distributed to students through the University’s electronic course content service (ECCS).  

In relation to the issue of whether Georgia State University’s use of the 75 excerpts was a fair use, the District Court examined each of the four factors associated with the fair use defence: 

1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for or value of the copyrighted work.

Based on the language of § 107 of the US Copyright Act of 1976 and the Supreme Court’s opinion in Luther R. Campbell aka Luke Skyywalker, et al., Petitioners v Acuff-Rose Music Inc., Evans J concluded that the first factor, related to the purpose and character of the use, favoured Georgia State University. As ‘Georgia State University is a purely non-profit educational institution and the excerpts at issue were used for purely non-profit educational purposes’, Evan J held that this case is distinguishable from cases which involved copying by a commercial organisation.

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37 Ibid, 1.
38 Originally the publishers presented 126 claims of infringement to the Court. Then in a joint submission, the publishers and Georgia State University agreed on 99 excerpts. However as there were issues regarding whether the publishers held the copyright in relation to some of the works, the publishers withdrew a number of the excerpts and the Court ruled on 75 excerpts.
39 Georgia State University case, above n 3, 36.
40 Ibid, 42.
42 510 US 569, L Ed 2d 500, 114 S Ct 1164.
43 Georgia State University case, above n 3, 49.
In relation to the nature of the 64 books at issue in this case, ‘all were intended to inform and educate’. As the books are classified as ‘informational in nature’, Evans J found that the second factor also favoured the Georgia State University.

When assessing the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, Evans J examined all the books at issue in this case. She held that all pages within a book including introductory remarks and indexes should be included in the page count and as each chapter of the books at issue in this case addressed a single topic or subtopic, ‘chapters within an edited book do not have greater value than the chapters within a book authored by a single author’. On this basis, Evans J found that the ‘majority of the excerpts used in this case were a chapter or less from a multi-chapter book’ and ‘almost none [of the excerpts] have notable qualitative significance or value “in relation to the work as a whole”’. Evans J concluded that the third factor ‘may favour either the publishers or Georgia State University depending on the amount taken from each book’.

In relation to whether the use by Georgia State University of the excerpts affected the value or market use of the works, the publishers argued that the Georgia State University should have accessed the excerpts via available licences. However, Evans J found that in the case of ‘46 excerpts from Cambridge University Press and Oxford University Press Inc., licences to make digital copies were shown to be available for only 13 excerpts’. She held that unpaid ‘uses of excerpts where digital permissions were not shown to be available, caused no actual or potential damage to the value of the book’s copyrights’. For the excerpts where licences were available for their digital use, she held that the unpaid uses by Georgia State University ‘caused extremely small though actual damage to the value of the books’ copyrights’.

Evans J also considered in relation to determining the effect on the potential market, the copyright owners’ rights to collect fees for the use of their work, that is, the publishers’ right ‘to collect fees for the use of excerpts from their books’. She was of the belief that ‘this

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45 Georgia State University case, above n 3, 52.  
46 Ibid.  
48 Ibid, 67.  
49 Ibid.  
50 Ibid, 71.  
51 Ibid, 78.  
52 Ibid, 79.  
53 Ibid.  
54 Ibid, 80.
consideration could be a separate fair use factor and include[d] it as part of the factor four analyses because it pertains to non-payment of permission fees’. 55

As permissions for the digital use of the majority of the excerpts were not readily available Evan J held that the fourth factor favoured Georgia State University. However, if permissions were readily available for the majority of the excerpts then the publishers would have prevailed under the fourth factor. 56

Given that the ‘overall resolution of the fair use issue is close or inconclusive’, Evans J undertook additional analysis in relation to whether: 57

- Limited unpaid copying of excerpts will deter academic authors from creating new academic work
- Slight limitation of permission income ... diminish the publishers’ ability to publish scholarly works and promote the spread of knowledge

In relation to the first additional factor, Evans J held that ‘there is no reason to believe that allowing unpaid, non-profit academic use of small excerpts in controlled circumstances would diminish [the] creation of academic works’. 58 For the second additional factor, Evans J considered on one hand that allowing unpaid use of small excerpts within the education sector, particularly to students, spreads knowledge and ‘broadening the availability of education,’ 59 however, on the other hand, diminishing permission income could reduce publishers’ ability to publish, which could reduce the spread of knowledge. 60 Evans J held that there was no evidence that the publishers’ ability to publish high quality scholarly books would be diminished by a slight reduction in permission payments. 61

Evans J assessed each of the 75 excerpts to determine whether each use was fair and ‘conclude[d] that the unlicensed use of five excerpts [from] four different books infringed the publishers’ copyrights’. 62 Evans J also concluded that Georgia State University’s 2009 copyright policy caused the infringements as the ‘policy did not limit copying in those [five] instances to decidedly small excerpts ..., nor did it proscribe the use of multiple chapters from

55 Ibid, Evans J, 80.
56 Ibid.
57 Ibid, Evans J, 81-82.
58 Ibid, 82.
59 Ibid, 83.
60 Ibid.
61 Ibid.
62 Ibid, 337.
the same book'. 63 She also found that the University’s fair use policy did not provide sufficient guidance in assessing the fourth factor of § 107, namely, the effect of a use on the potential market for or value of the original copyrighted work. Evans J was of the opinion that Georgia State University, by implementing their 2009 copyright policy, had attempted to comply with the Copyright Act 64 and acknowledged that the ‘fair use principles are notoriously difficult to apply,’ 65 however; intention is not relevant in determining whether a copyright infringement had occurred. 66

The Georgia State University case held that if third party copyrighted material is being used for a non-profit scholarly activity such as teaching and the material being used is non-fiction and educational in nature and the amount is less than 10 percent of a work with 10 or less chapters or a single chapter of the work with 11 chapters or more, then the use will most likely be fair. 67 However ‘if a licence for the appropriate format is readily available at a reasonable price’, then this factor would not favour a fair use. 68

As Evans J concluded that Georgia State University was the prevailing party in this case, the Court ruled that the publishers pay the University’s attorney fees and court costs of $2,947,085.10. 69 On October 2, 2012, the publishers filed a notice of appeal against the costs and the final judgment with the Court of Appeals for the Eleventh Circuit 11th Circuit Court of Appeal. 70 As part of the appeal process, a number of parties have filed amicus curiae briefs to the Court. 71 Depending on the side of the argument the party is supporting, the briefs either supported the finding of fair use or argued that Evan J erred in her finding of fair use. For example, the brief by Georgia State University argued that all four factors of fair use weighed in favour of fair use in relation to the use of short excerpts within course readings. The brief also supported Evans J approach to undertake fair use analysis on each of the 75 excerpts that

63 Ibid.
64 Ibid, 338.
65 Ibid.
66 Ibid.
68 Ibid.
71 Refer to http://dockets.justia.com/docket/circuit-courts/ca11/12-14676/> (at 25 May 2013) for the amicus curiae briefs filed as part of the Georgia State University case.
are the focus of this case. These arguments were supported in briefs submitted by the American Council Education and other university associations such as the Association of American Universities and the American Association of University Professors. In contract, publishing associations such as the American Association of University Presses argued in their briefs that by undertaking fair use analysis on each excerpt, Evans J erred by not examining more broadly the overall practice of e-reserves and the importance of permission income for publishers.

This case does provide some guidance in relation to educational activities such as allowing 10 percent or a single chapter of a work to be uploaded onto a course or learning management system or e-reserve. As stated above, Evans J held that the purpose of the Classroom Guidelines is to state the minimum and not the maximum standards of educational fair use. In relation to whether a particular use is fair under § 107, this decision clearly illustrates that the determination will be made on a case by case basis. It shows that each of the four factors in §107 needs to be considered on the basis of the facts of each case.

While the decision does not appear to provide guidance relating to non-educational activities of universities, it does highlight that if a licence is available for a work in the appropriate format and at a reasonable price it is likely that the user should pay for the use. In relation to non-educational activities including commercial activities such as contract research or non-award teaching programs, given the discussion around factor one in § 107, the purpose and character of a use and the decision in the Texaco case, which will be discussed below, it is unlikely that the use of third party copyright material as part of a non-educational activity would be considered fair. However, similar to Australian copyright law, a factor to consider is whether a substantial percentage or amount of the third party copyright material is used as part of the non-educational activity. It is likely that universities and academic staff will need licences and permissions to use third party copyright material as part of non-educational activities in the US.

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4.2.3.2 American Geophysical Union v Texaco Inc.\textsuperscript{75}

In 1992, an action for authorisation of copyright infringement in relation to copyright in print media was taken against Texaco Inc., a company involved in the petroleum industry. Texaco Inc. employed between 400 and 500 scientists nationwide to undertake research to develop new products and technology primarily to improve its commercial performance. To assist in the research activities, Texaco subscribed to various technical and scientific journals and maintained a library to hold this material. At its Beacon research facility, Texaco subscribed to the \textit{Journal of Catalysis}, a monthly publication produced by Academic Press Inc.

A class action was brought against Texaco by the American Geophysical Union and 82 other publishers of scientific and technical journals, claiming that the photocopying of articles by Texaco’s research scientists was an infringement of copyright.\textsuperscript{76} Given the large number of research scientists employed by Texaco and assuming that the majority photocopied articles from scientific journals to support their research, it was agreed that the actions of one scientist would be selected at random for the case. The publishers then selected eight articles photocopied by Dr Donald H. Chickering (the randomly selected scientist from Texaco’s research centre in Beacon, NY) from the \textit{Journal of Catalysis}. The eight articles were considered representative of the photocopying occurring at Texaco and were used to determine whether the photocopying by Texaco was fair use.

Texaco’s defence to the action of authorisation of copyright infringement was that the photocopying by Dr Chickering was fair use as it occurred for the purpose of research as listed in the preamble of § 107. Texaco held that it was inappropriate to focus on the character of the user rather than the nature of the use.\textsuperscript{77} It was argued that the copying was to facilitate Dr Chickering’s research which in turn might have led to the development of new products and technology which in time could improve Texaco’s commercial performance.\textsuperscript{78}

The District Court applied the approach from \textit{Sony Corporation of American v Universal City Studios Inc.}\textsuperscript{79} (hereafter referred to as the Sony case) to Texaco’s photocopying. The Supreme Court in the Sony case\textsuperscript{80} held that every commercial use was presumptively unfair, and that

\textsuperscript{75} 60 F.3d 913 (2nd Cir. 1994).
\textsuperscript{76} American Geophysical Union v. Texaco Inc., 802 F Supp 1 (SDNY 1992).
\textsuperscript{77} American Geophysical Union v Texaco Inc., 60 F.3d 913 (2nd Cir. 1994), 920.
\textsuperscript{78} Ibid, 921.
\textsuperscript{80} Ibid.
the commercial nature of a secondary use ‘tends to weigh against a finding of fair use’.\textsuperscript{81} The District Court, therefore, found in the first instance that Texaco’s photocopying did not constitute fair use. Texaco appealed this decision.

In 1994, the Court of Appeal upheld the District Court’s decision but relied on different grounds due the Supreme Court case, \textit{Luther R. Campbell aka Luke Skyywalker, et al., Petitioners v Acuff-Rose Music Inc.}\textsuperscript{82} (hereafter referred to as the Campbell case), which had been decided after the 1992 District Court decision in the Sony case. Prior to the Campbell case,\textsuperscript{83} the Supreme Court had characterised the fourth factor within § 107 of the Copyright Act, namely, the ‘effect upon potential market or value’ as the single most important element of fair use. The discussion of the fourth factor under § 107 within the Campbell case omits this phrasing, apparently abandoning the idea that any factor enjoys primacy\textsuperscript{84} and as a consequence all four factors under § 107 should be considered equally.

The Court of Appeal in Texaco’s case stated that the commercial or non-profit educational purpose of a work was only one element of the first factor regarding fair use and should not be considered in isolation from the rest of the first factor or from the other three factors.\textsuperscript{85} Also, it considered that there was the possibility that if the ‘commercial’ nature of a secondary use is overemphasized in the analysis, fair use would be obliterated.\textsuperscript{86}

Newman CJ, in delivering the opinion of the Appeal Court, agreed with Texaco, that the District Court placed too much emphasis on the nature of Texaco’s activities, rather than the nature of the use. Newman CJ concluded that the photocopying of eight articles did not result in commercial exploitation, since the immediate goal of Texaco’s photocopying was to facilitate research, however the commercial nature of Texaco’s activities could not be ignored and Texaco would have gained at least some indirect economic advantage from its photocopying.\textsuperscript{87}

\textsuperscript{81} \textit{American Geophysical Union v Texaco Inc.}, 60 F.3d 913 (2\textsuperscript{nd} Cir. 1994), Newman CJ, 921.
\textsuperscript{83} Ibid.
\textsuperscript{84} \textit{American Geophysical Union v Texaco Inc.}, 60 F.3d 913 (2\textsuperscript{nd} Cir. 1994), Newman CJ, 926.
\textsuperscript{85} Ibid, Newman CJ, 921.
\textsuperscript{86} \textit{Maxtone-Graham v Barthchaell}, 803 F.2d 1253 (2d Cir.1986), 1262, quoted by Newman CJ, \textit{American Geophysical Union, v Texaco Inc.}, 60 F.3d 913 (2\textsuperscript{nd} Cir. 1994), 921.
\textsuperscript{87} \textit{American Geophysical Union v Texaco Inc.}, 60 F.3d 913 (2\textsuperscript{nd} Cir. 1994), 922.
While the Texaco scientists may have photocopied articles with the intention of using them in the laboratory, ensuring that the original journals would not be damaged, in relation to the eight articles photocopied, only three were used by Dr Chickering in the laboratory indicating that the main purpose of the photocopying was for ‘future retrieval and reference’. Newman CJ held that the archival nature of the photocopying tipped the first factor against Texaco despite the benefit of a more usable format. Jacob J, the dissenting judge, disputed the characteristic of the use of archival and contended that the scientist’s use is transformative because it is an important step in the process of doing research. However the Court of Appeal held that the first factor favoured the publishers as the photocopying of the eight articles could be considered archival; done primarily so that individual scientists could have their own copies of articles, without having to purchase another copy of the journal.\(^{88}\)

While the Appeal Court agreed with the publishers that a significant amount of creativity and originality is used when writing articles, in this case the contents of the articles photocopied are predominately factual and given this factual nature, the second factor favoured Texaco.

In relation to the third factor, the amount and substantiality of the portion used in relation to the copyrighted work, Texaco cited the Sony case and Williams & Wilkins Co v United States\(^{89}\) in its argument that the copying of an entire copyrighted work, in this case a journal article can still constitute fair use. However the Appeal Court agreed with the District Court that Texaco copied entire works, as each article is a copyrighted work on its own, and the authors have transferred their copyright privileges to the publisher of the Journal of Catalysis.\(^{90}\)

In assessing the effect of the photocopying on the potential market or value of the journal article, Newman CJ acknowledged the difficulty in determining the value of individual journal articles as there is neither a traditional market nor a defined value for individual articles as there is for journal issues.

The Appeal Court concluded that it was not appropriate to consider the balance between more fair (if there is no ready market or way to pay for an unauthorized use), or less fair (where

\(^{88}\) Ibid, 924.

\(^{89}\) 487 F.2d 1345, 1353.

\(^{90}\) American Geophysical Union v Texaco Inc., 60 F.3d 913 (2\(^{nd}\) Cir. 1994), 926.
there is a ready market or means to pay for a use), given that a photocopying license is available for the *Journal of Catalysis*.\(^91\)

In assessing the effect of the photocopying on the potential market or value, the impact on potential licensing revenue needs to be considered. Given the loss of licensing revenue, and to a minor extent, the loss of subscription revenue, Newman CJ agreed with the District Court that the publishers showed substantial harm to the value of their copyright.\(^92\)

The Court of Appeal agreed with the ‘District Court’s conclusion that Texaco’s photocopying of eight particular articles from the *Journal of Catalysis* was not fair use.’\(^93\)

While this case focused on the use of third party copyright material for research in a commercial context, it did not define either ‘research’ or ‘commercial use’. Neither the District Court nor the Court of Appeal specified whether there is ‘a difference for researchers funded on grants from government agencies [and non-profit organisations] and those funded by grants from commercial [organisations]’.\(^94\)

Beyond requiring that the determination of whether each particular use of third party copyright material is fair under § 107 is made on a case by case basis, an apparent lack of judicial and legislative interpretation on what constitutes research and non-educational activities provides no guidance to universities in developing copyright policies or best practice, particularly in relation to fair use.

### 4.2.4 Copyright Policies and Code of Best Practice

A review of copyright policies and webpages from a random selection of the following US universities – Brandeis University, Columbia University, Harvard University, Stanford University Washington State University, University of Illinois and the University System of Georgia – found that each generally provided an introduction to copyright and information on the Classroom Guidelines, the TEACH Act and fair use, particularly in relation to the four factors and copyright resources. As part of the copyright resources, fair use charts and

\(^91\) Ibid, 927-928.
\(^92\) Ibid, 931.
\(^93\) Ibid.
checklists and other tools are provided to assist in conducting analysis of whether an activity would be considered a fair use.

As noted on the Columbia University copyright webpage:95

The Fair Use Checklist has been widely used to help educators, librarians, lawyers, and many other users of copyrighted works to determine whether their activities are within the limits of fair use under U.S. copyright law.

Following a study involving surveys and interviews with 65 librarians from an array of academic and research institutions in the US, the ARL developed a Code of Best Practices in Fair Use for Academic and Research Libraries (hereafter referred to as the Code of Best Practices).96 The Code of Best Practices relate to the issue being examined as educational institutions and academic staff rely on libraries for access to third party copyright material particularly via electronic databases for teaching and research purposes.

The Code of Best Practices identifies the following eight currently used practices in ‘which the doctrine of fair use can be applied’97 in the academic and research library environment:98

- Supporting Teaching and Learning with Access to Library Materials via Digital Technologies
- Using Selections from Collection Materials to Publicize a Library’s Activities, or to Create Physical and Virtual Exhibitions
- Digitizing at Preserve At-Risk Items
- Creating Digital Collections of Archival and Special Collections Materials
- Reproducing Material for Use by Disabled Students, Faculty, Staff and Other Appropriate Users
- Maintaining the Integrity of Works Deposited in Institutional Repositories
- Creating Databases to Facilitate Non-Consumptive Research99 Uses (Including Searches)

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96 Association of Research Libraries, above n 32.
97 Ibid, 11.
99 Under the amended settlement agreement in Authors Guild Inc., Association of American Publishers Inc., et al. v Google Inc., Case No. 05 CV 8136-DC, US District Court, Southern District of New York, as part of the Google book digitization project, non-consumptive research is defined as the computerised analysis performed on one or more books. It does not include reading or displaying substantial portions of books to understand the intellectual content. Examples of computerised analysis are image, textual or linguistic analysis and information or text extraction.
The two practices that may be the most beneficial to education institutions and academic staff for research purposes relate to the facilitating of non-consuming research uses and accessing material posted on the internet.

The ARL considers the creation of databases to assist with searching and analyses for scholarly and reference purposes and preserving material posted on the internet as highly transformative, which is a factor for determining fair use.

The ARL states that ‘Courts have found search engines, which copy millions of web pages into their indexed databases in order to help users find relevant sites to be fair uses for precisely this reason’. It argues that the case for fair use in relation to the database use will be ‘particularly when libraries cooperate with other institutions to build collective databases that enable more extensive scholarship or reference searching’.

The ARL notes that libraries collate material for a wide range of scholarly purposes including education and research as well as for unanticipated uses by future researcher. It argues that these ‘collections represent a unique contribution to knowledge … and in the absence of such collections important information is likely to be lost to scholarship’.

The determination of whether a particular use of third party copyright material is fair under § 107 is made on a case by case basis. However with an apparent lack of judicial and legislative interpretation in the US on what constitutes non-commercial or research, for example ‘is there a difference between research funded on grants from government agencies [or non-profit organisations] and those funded by grants from commercial [organisations]?’, it is likely that educational institutions and academic staff in the US will need to rely on licences or permissions for the use of third party copyright material for non-educational activities rather than the fair use provisions within the US Copyright Act of 1976.

On the issue of research for commercial or non-commercial purposes, the EU and the UK, which will be discussed in the next two sections, may provide more legal certainty as

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100 Ibid.
101 Association of Research Libraries, above n 32, 25; The safe harbour provisions (§ 512) of the Digital Millennium Copyright Act (US) offer search engines the possibility of limiting any liability for infringement.
103 Ibid.
104 Association of Research Libraries, above n 94.
educational and research activities under EU and UK copyright law must only be for non-commercial purpose.

4.3 European Union


A purpose of the Information Society Directive was ‘to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching’. According to the Commission of the European Communities, the ‘public interest exception for ... teaching and research was designed to reconcile the legitimate interests of the copyright holders and the wider goal of access to knowledge’.

Similar to the Australia fair dealing exceptions, Article 5 of the Information Society Directive contains an exhaustive list of permissible exceptions for member states to implement under national copyright laws, rather than providing a more flexible court interpreted “fair use” test as exists, for example, in the United States.

Article 5 sets out the exceptions and limitations that may be applied to the rights provided in Articles 2 to 4. These exceptions and limitations include uses for news reporting, criticism, review, parody, and uses for the purposes of public security, in administrative, parliamentary or judicial proceedings, as well as uses during religious and official celebrations.

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106 Ibid.


108 research and study, criticism or review, parody, news reporting and professional advice by a legal practitioner, patent attorney or trademark attorney

109 Margaret Jackson and Marita Shelly, Electronic Information and the Law (1st ed, 2012), 182.

The Information Society Directive makes it clear that member states of the EU are allowed to provide:

- Certain exceptions or limitations for cases such as educational purposes
- For an exception or limitation for the benefit of non-profit making establishments.

Generally, the exceptions and limitations are available as a defence to copyright infringement if the use in question relates to a non-commercial purpose. For example, under s 2(c) of Article 5, educational institutions are able to undertake specific acts of reproduction if there is no ‘direct or indirect economic or commercial advantage’. However, the structure of the organisation and the means of funding are not decisive factors when determining the non-commercial activity ‘when applying the exception or limitation for non-commercial educational and scientific research purposes’. This means that the purpose of the activity rather than how a university is funded will determine whether the exceptions that fall within Article 5 of the Information Society Directive are available for universities and academic staff to rely on when using third party copyright material.

Also to provide guidance in how the exceptions under Article 5 should be implemented within national copyright laws and how copyright users (including universities and academic staff) should apply the exceptions, an implementation guide, prepared to assist European Union member states to implement the Information Society Directive, recommends that to reduce legal uncertainty, the three-step test should not be explicitly included in national legislation as a further court interpreted limitation on exceptions. Rather, using the United Kingdom as a model, the three-step test should be applied to exceptions as they are considered for inclusion in legislation.

Following the introduction of the Information Society Directive, the Commission of the European Communities released a Green Paper on copyright in the knowledge economy in 2008. The purpose of this Green Paper was ‘to foster a debate on how knowledge for research, science and education can best be disseminated in the online environment’.

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111 Ibid, [34].
112 Ibid, [42].
114 Jackson and Shelly, above n 109, 183.
115 European Commission, above n 106.
116 Ibid, 3.
The Green Paper identified that the Information Society Directive does not provide the ‘definitions of concepts such as teaching or scientific research’. Member states of the European Union are given ‘a large amount of freedom in implementation, allowing them to determine the boundaries of permissible use under the [teaching and research] exception’.

The Green Paper also identified that the use of works for purposes of ‘illustration of teaching’ or scientific research was dealt with differently by member states. For example, Denmark, Finland and Sweden rely on a collective licensing scheme between a collecting agency and an educational institution. Other different approaches adopted by member states include:

- Allowing the teaching and research exception for the right to communication to the public (Belgium, Luxembourg, France)
- Allowing the teaching and research exception only for the right of reproduction (Greece, Slovenia)
- Making a distinction between teaching and research activities (Germany).

As member states have used various approaches in implementing the teaching and research exceptions within national laws, the Green Paper noted that there is ‘legal uncertainty with regards to what is permitted under the [teaching and research] exception especially when teaching and research are carried within a transnational framework’. The Green Paper considered that the introduction of ‘a mandatory exception for teaching and scientific with a clearly defined scope in the [Information Society] Directive’ would be appropriate to overcome the problem of the differing approaches of member states in incorporating the teaching and research exception into their national laws.

The Green Paper received over 370 submissions and in response to it, the European Commission noted that there were two differing views according to whether the submission was from a copyright owner or from a user. Libraries and educational institutions argued for a more permissive copyright system and ‘favour a mandatory set of core “public interest” exceptions to facilitate “access to knowledge”’. In contrast, publishers and other copyright

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117 Ibid, 16.
118 Ibid.
119 Ibid.
120 European Commission, above n 107.
121 Ibid, 17.
122 Ibid.
holders argued for the use of licensing agreement, stating that contracts can be tailor made to cater for new technologies and are ‘the best way to improve the dissemination of knowledge and provide users with increased and effective access to works’. However as suggested by the Green Paper, none of the submissions recommended definitions for education, teaching or research, other than to state that the activity should be for non-commercial purposes as required by the Information Society Directive.

In relation to how the exception should apply to teaching and research, the Commission stated that ‘in order to avoid needless duplication of research, published results of publicly-funded research should be available to the entire scientific community and even to the public’. The Commission also stated that it will ‘consult relevant stakeholders on best practices available to overcome the fragmented way by which universities acquire usage rights to [journals and databases]’. In a 2012 communication released by the Commission related to content in a digital market, it was stated that over ‘the next two years the Commission will continue to work for a modern copyright framework’ and by 2014, the Commission will decide whether to table legislative reform proposals including limitations and exceptions to copyright in the digital age.

However as part of a 2012 draft document, Towards An Appropriate International Legal Instrument (In Whatever Form) on Limitations and Exceptions for Educational, Teaching and Research Institutions and Persons With Other Disabilities Containing Comments and Textual Suggestions, the Commission noted that, as far as educational and research exceptions are concerned, ‘copyright protection is required so that educational establishments in the EU have access to top-quality works …’. The Commission also went onto comment that ‘only non-commercial research activities benefit from the exception’ [under section 3(c) of Article 5 and Recital 42 of the Information Society Directive] even if the distinction between commercial and non-commercial research activities is difficult to identity. It also proposed that any

124 Ibid.
125 Ibid, 7.
126 Ibid, 7.
128 Ibid.
130 Ibid, 5.
131 Ibid, 31.
work resulting from publicly funded research should be publicly available free of charge within 12 months. In line with this proposal, as a member of the EU, the UK, which will be discussed in the following section, announced ‘a Government policy to open up access to publicly funded research which is expected to have economic and social benefits’.  

4.4 United Kingdom

As stated previously, as a member of the EU, the UK must implement the Information Society Directive\textsuperscript{133} into national copyright laws.

In the UK, when dealing with defences for copyright breaches, universities and academic staff generally rely on the \textit{Copyright Designs and Patents Act 1988 (UK)} c 48 (hereafter referred to as the UK Copyright Act), particularly the educational and fair dealing provisions\textsuperscript{134} for the use of third party copyright material for educational and research activities.

The following sections will discuss the educational and fair dealing sections and what constitutes ‘research’. The 2003 amendments of the UK Copyright Act\textsuperscript{135} and the reviews\textsuperscript{136} into intellectual property by Gowers\textsuperscript{137} and Hargreave\textsuperscript{138} in 2006 and the 2011 respectively, particularly in relation to amending the research exception within the UK Copyright Act\textsuperscript{139} will also be examined.

4.4.1 Educational Provisions

Similar to Australia, the UK has educational provisions within the UK Copyright Act.

Under ss 32 to 36 of the Act,\textsuperscript{140} educational institutions are able to copy literary, dramatic, musical or artistic works, sound recording, films and broadcasts for the purposes of

\begin{footnotesize}
\textsuperscript{132} Ibid, 35.
\textsuperscript{133} European Parliament and the Council of the European Union, above n 105.
\textsuperscript{135} \textit{Copyright Designs and Patents Act 1988 (UK)} c 48.
\textsuperscript{137} Gowers, above n 136.
\textsuperscript{138} Hargreaves, above n 136.
\textsuperscript{139} \textit{Copyright Designs and Patents Act 1988 (UK)} c 48.
\textsuperscript{140} Ibid.
\end{footnotesize}
instruction, if the copying is done for the person giving or receiving instruction, is accompanied by a sufficient acknowledgment and if the instruction is for a non-commercial purpose.\textsuperscript{141} However, under s 32 (1), the copying of the literary, dramatic, musical or artistic works must not be done using a reprographic process such as photocopying. Educational institutions are also able to perform, play or show literary, dramatic or musical works in the course of activities of the institution.\textsuperscript{142} Broadcasts can be recorded for educational purposes by or on behalf of educational institutions if accompanied by a sufficient acknowledgment and if the educational purposes are non-commercial.\textsuperscript{143} Educational institutions are able to use anthologies for educational purposes if accompanied by a sufficient acknowledgment and they can copy by reprographic means sections of published literary, dramatic or musical works for the purposes of instruction.\textsuperscript{144} They can also lend copies of works.\textsuperscript{145} Under s 36 (2), no more than one percent of any literary, dramatic or musical work can be copied by reprographic means in one quarter of a year.\textsuperscript{146} Also the reprographic copying must be accompanied by a sufficient acknowledgment and be for a non-commercial purpose.\textsuperscript{147}

However, ss 32(1) and (2A) of the UK Copyright Act excludes the copying of works for instruction or examination via a reprographic process such as photocopying. Multiple copying for educational purposes requires a licence. Under this licence, which is issued and administered by the Copyright Licensing Agency (CLA),\textsuperscript{148} an academic can copy:\textsuperscript{149}

\begin{quote}
In any work, 5 per cent or one chapter, whichever is greater; in the case of a periodical, one article from any one issue; and in the case of a short story or poem not exceeding 10 pages in length, the whole of the short story or poem.
\end{quote}

Unlike the Australian Copyright Act,\textsuperscript{150} ss 32(1), 32(2), 35(1) and 36(1) of the UK Copyright Act require that the instruction or educational purposes are non-commercial. This requirement that the instruction or educational purposes must be ‘non-commercial’ was introduced into the Act in 2003,\textsuperscript{151} together with the requirement for acknowledgement and follows the Information Society Directive. As the Directive enables educational institutions to undertake

\textsuperscript{141} Ibid, s 32.
\textsuperscript{142} Ibid, s 34.
\textsuperscript{143} Ibid, s 35.
\textsuperscript{144} Ibid, ss 33 and 36.
\textsuperscript{145} Ibid, s 36A.
\textsuperscript{146} 1 January to 31 March, 1 April to 30 June, 1 July to 30 September, 1 October to 31 December.
\textsuperscript{147} Copyright Designs and Patents Act 1988 (UK) c 48, s 36 (1).
\textsuperscript{148} Copyright Right Consultants Ltd, Copyright ToolKit, Permitted Acts <http://copyrighttoolkit.com/permitted.html#photocla> at 19 June 2011.
\textsuperscript{149} Ibid.
\textsuperscript{150} Copyright Act 1968 (Cth).
\textsuperscript{151} Copyright and Related Rights Regulation 2003 (UK).
acts of reproductions if there is no economic or commercial advantage, the UK copyright legislation only allows activities such as education and research for non-commercial purposes.

However, the Act does not define ‘non-commercial’ and until a UK Court or the European Court of Justice determines what are ‘non-commercial purposes’, it is likely that the following activities within higher education will be considered commercial:152

- Courses given by a university or other educational establishment where attendees pay a course fee intended to generate income for the university, such as university summer schools;
- University lecturers speaking at conferences or other events where they are paid a fee for speaking; and
- University research sponsored by a commercial enterprise.

The first and third activities listed above are examples of non-award teaching and contract research. It is likely that any income generated directly or indirectly as part of any activity undertaken by a university or an academic in the UK will be considered commercial.153

Therefore, to enable academics within the UK to undertake commercial activities such as contract research or non-award teaching programs for which they propose to use third party copyright material, they may need to seek permissions and licences from the copyright owners. Another possibility, discussed below, is to rely on the fair dealing provisions within the UK Copyright Act.

4.4.2 Fair Dealing

The UK has similar fair dealing provisions to Australia. Sections 29 to 30 of the UK Copyright Act provide that fair dealing for the purposes of non-commercial research and private study and for criticism, review and news reporting will not infringe copyright provided that it is accompanied by a sufficient acknowledgement. Legal advice is not included, nor is parody and satire.154

153 Ibid.
Unlike courts in Australia, UK courts have not found it necessary to discuss the meaning of research or study. Research is therefore defined by its dictionary meaning. The British Academy and the Publishers Association (BAPA) in their *Joint Guidelines on Copyright and Academic Research* stated that:

The *Oxford English Dictionary* defines research as a process of search or investigation undertaken to discover facts and reach new conclusions by the critical study of a subject or by a course of scientific inquiry; or as a systematic investigation into and study of materials, sources and so on, to establish facts or collate information.

As discussed in Section 3.3 of Chapter Three, similar to the interpretation of Ricketson and Creswell, academic analysis by Burrell and Coleman concluded that research relates to the process of undertaking the research and not the publication of the research results. However, in their *Joint Guidelines on Copyright and Academic Research*, the BAPA questioned this interpretation, arguing that by limiting research to ‘the process of actually carrying out research, it is difficult to see how it is to be distinguished from private study’. The BAPA concluded that the activity of research should include the publication of research results. They relied on the use of the phrase ‘sufficient acknowledgement’ in s 29 of the UK Copyright Act to support their conclusion as they considered it implies that:

Quotation from research materials when publishing one’s results (provided this is done for non-commercial purpose) can be covered by the research exemption because only then [through the publication of the research] is it possible to make the acknowledgement meaningfully.

The BAPA view therefore is that using copyrighted work for research can be considered a fair dealing, as long as the research is for a non-commercial purpose and the material is accompanied by sufficient acknowledgement. However, the BAPA conceded that the use of

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158 The British Academy and the Publishers Association, above n 156.

159 This position is supported by the European Commission. See European Commission, Communication from the Commission Copyright in the Knowledge Economy (2009) 7 <http://ec.europa.eu/internal_market/copyright/docs/copyright-infos/20091019_532_en.pdf> at 22 October 2012.

160 The British Academy and the Publishers Association, above n 155, 18-19.

161 Unlike the Canadian Act, which states criticism or review and news reporting will not infringe copyright if certain information is provided for example the source, author name, the *Copyright Designs and Patents Act 1988* (UK) does not provide any guidance on what constitutes sufficient acknowledgement.
a fair dealing defence for non-commercial research remains a grey area and that judicial guidance would be useful for academics.\textsuperscript{162} 

Academic research may begin with a non-commercial purpose such as a quest for knowledge but could turn into a commercial endeavour such as the research results being commercially published and the academic receiving royalties from the publisher’s sales revenue.\textsuperscript{163} 

The BAPA provided two examples provided in their \textit{Joint Guidelines on Copyright and Academic Research}. In one of the examples, a PhD thesis, which is clearly research for non-commercial purposes, is published as a monograph by a commercial publisher. The question raised is whether ‘the research material should now be regarded as having a commercial purpose’.\textsuperscript{164} The BAPA recommends that the primary purpose ‘for which the research is undertaken at the time of carrying out the research’ needs to be considered in conjunction with an element of the Berne Convention 3-step test which requires that ‘no limitation or exception must not conflict with a normal exploitation of the work’.\textsuperscript{165} It was noted that generally academic research which has a primary purpose of placing ‘material into the public domain for the public benefit would ordinarily be seen as non-commercial and as distinct from commercial research’.\textsuperscript{166} However, the treatment of a subsequent commercial publication of academic research remains uncertain.\textsuperscript{167} 

The other example related to a commercial research company which gained unlicensed access to a database. The company accessed the database as part of designing and developing a research tool to be used as part of the company’s business. The company argued that as the database was used as part of their own research into developing the tool, the use of the database was for non-commercial purposes. This argument was not accepted as the research tool once fully operational would be used by the company to generate income. The BAPA noted that while commercial organisations may undertake research that is not directly aimed at providing a financial advantage, it could be argued that any research done by a commercial organisation, given the profitability objective, must at least indirectly provide an` economic or commercial advantage.

\textsuperscript{162} The British Academy and the Publishers Association, above n 156.
\textsuperscript{163} Ibid.
\textsuperscript{164} Ibid, 20.
\textsuperscript{165} Ibid.
\textsuperscript{166} Ibid.
\textsuperscript{167} Ibid.
\textsuperscript{167} See Chapter Seven for a discussion of whether examples of non-educational activities such as non-award teaching or contract research within higher education in Australia are classified as educational or commercial for copyright purposes.
While a judicial clarification would be beneficial in relation to this issue, there is the likelihood that the fair dealing exceptions within the UK Copyright Act will be amended following the 2011 Hargreaves’ Review of intellectual property law in the UK. This review and the 2006 Gowers’ Review of intellectual property and their recommendations in relation to amending the research exception within the UK Copyright Act are discussed below.

4.4.3 Copyright Reviews

In 2005, the UK Government commissioned Andrew Gowers to review the UK’s intellectual property framework. One of the terms of reference for this review was to examine ‘whether the current technical and legal IP infringement framework reflects the digital environment, and whether provisions for ‘fair use’ by citizens are reasonable’. An area in which the Gowers’ Review focused ‘its recommendations to improve the UK framework for innovation’ was in ‘improving the balance and flexibility of IP rights to allow individuals, businesses and institutions to use content in ways consistent with the digital age’.

In relation to the research exception, the Gowers’ Review stated that universities ‘are increasingly conducting research in collaboration with private organisations’ and recommended ‘clarifying the research exception [as it] will create greater scope for research on protected material by universities ... expand the stock of knowledge’.

Following on from the work of the Gowers’ Review, the UK Government announced in November 2010 another review of intellectual property laws to examine whether the UK intellectual property system is appropriate for the electronic age. The review also examined

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169 Gowers, above n 136.
170 Ibid, 4.
171 Ibid, 1.
172 Ibid, 46.
173 Ibid, 5.
‘whether the UK should allow more use of copyright material without copyright holders’ permission.’\textsuperscript{174}

The review was chaired by Professor Ian Hargreaves\textsuperscript{175} and the \textit{Digital Opportunity: A Review of Intellectual Property and Growth} report was released in 2011. The report concluded that the UK’s ‘intellectual property system is falling behind what is needed’ particularly in the area of copyright, and that intellectual property law must adapt to change.\textsuperscript{176} A number of recommendations were made including:\textsuperscript{177}

\begin{itemize}
  \item [The creation of] an efficient digital copyright licensing system …
  \item An approach to exceptions in copyright [such as format shifting, parody and non-commercial research] which encourages new digital technologies …
  \item Refreshed institutional governance of the UK’s IP system which enables it to adapt organically to change in technology and markets.
\end{itemize}

The UK university sector submitted to the Hargreaves’ Review that there is an urgent need for copyright reform to enable universities to realise opportunities ‘and to make it clear what researchers and educators’ are allowed to do’.\textsuperscript{178} In response, the Report concluded that ‘technology has expanded the potential for communication, research, learning and access to resources [in UK universities] but out of date rules mean that this potential is not fully realised’.\textsuperscript{179}

In relation to the non-commercial research fair dealing provision, the Hargreaves’ Review ‘argued that research should not be unnecessarily impeded by copyright …’.\textsuperscript{180} Agreeing with the 2006 Gowers’ Review of intellectual property,\textsuperscript{181} the Hargreaves’ Review recommended that ‘the research exception needs to be modernised …’.\textsuperscript{182}

\textsuperscript{175} Hargreaves, above n 136.
\textsuperscript{176} Jackson and Shelly, above n 109, 184.
\textsuperscript{177} Hargreaves, above n 136, 7.
\textsuperscript{178} Hargreaves, above n 136, 41.
\textsuperscript{179} Ibid.
\textsuperscript{180} Ibid, 50.
\textsuperscript{181} Gowers, above n 136; The Gower Review recommended clarifying the research exception to enable greater scope for research by universities and business.
\textsuperscript{182} Hargreaves, above n 136, 50.
As part of the UK Government’s response\textsuperscript{183} to the non-commercial research fair dealing provision, the UK Government has stated that it will ‘widen the exception for non-commercial research, ... to the extent permissible under EU law’.\textsuperscript{184}

Two elements of the Government’s response to the Hargreaves’ Review were a consultation period on the Government’s proposed changes to copyright law conducted by the UK Intellectual Property Office (IPO) and a feasibility study on a digital copyright exchange (DCE).\textsuperscript{185}

The consultation period closed on March 21, 2012 and in June 2012, the Government released a summary of the submissions received during the consultation on copyright.\textsuperscript{186} The full list of the 471 submissions received (excluding confidential submissions) were published on the IPO website in 2012. In relation to amending the research exception, ‘views on how to frame this exception were mixed however many respondents accepted that expanding this exception ... would be beneficial’.\textsuperscript{187} Educational institutions and researchers that supported amending the exception ‘cited the benefits to learning, education and research’.\textsuperscript{188}

The main recommendation of the DCE feasibility study\textsuperscript{189} which was released in July 2012 is the ‘creation of a not-for-profit, industry led Copyright Hub’.\textsuperscript{190} The Copyright Hub would:\textsuperscript{191}

- Be the place where any copyright owner can choose to register works, the associated rights to those works, permitted uses and licences granted
- Be the place for potential licensees to go for easy to use, transparent, low transaction cost copyright licensing via for example digital copyright exchanges (DCEs), acting in effect as a marketplace for rights.

In relation to educational institutions, the study ‘concluded that copyright licensing in educational institutions was too complicated and was therefore not fit for purpose’.\textsuperscript{192} The study recommended that:\textsuperscript{193}

\begin{itemize}
  \item \textsuperscript{184} Ibid, 8.
  \item \textsuperscript{187} Ibid, 16.
  \item \textsuperscript{188} Ibid.
  \item \textsuperscript{189} Hooper and Lynch, above n 185.
  \item \textsuperscript{190} Ibid, 1.
  \item \textsuperscript{191} Ibid, 2.
  \item \textsuperscript{192} Ibid, 28.
Educational institutions should, if and when they require them, be able to secure the relevant licences from a single institution – an intermediary or aggregator of sorts – thus reducing the degree of bureaucracy imposed on them by the licensing process.

As part of the UK Government’s response to the consultation on copyright exceptions and clarifying copyright, it stated that it intended to ‘publish draft legislation for technical review in 2013’ and that any amendments to the Copyright Act will be in force by October 2013. In relation to education, research and fair dealing, proposed changes to be implemented into the UK Copyright Act include allowing:

- The use of all media for the purpose of teaching and education;
- Limited use of works without a license. [This means] that educational institutions will continue to require licenses for general reprographic copying
- Minor acts of copying for the purpose of teaching ... will be permitted without a license.
- Allow sound recordings, films and broadcasts to be copied for non-commercial research and private study purposes.
- Limited copying on a fair dealing basis for parody [purposes].

In June 2013, the UK Government released draft legislation changes to the UK Copyright Act. As part of the amendments, in relation to education and research, the UK Government is proposing to amend s 29 ‘so it will permit fair dealing with any type of copyright work for the purposes of non-commercial research and private study’. Section 29A is also intended to be introduced to allow an individual who already has access to a copyright work to copy the work to enable analysis of the material for non-commercial research purposes. The Government also intends to make s 32 a ‘fair dealing provision for the purpose of instruction’. This change will allow ‘teachers to make reasonable use of copyright materials without infringing copyright, as long as such use is minimal, non-commercial, and fair to

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193 Ibid, 25.
194 HM Government, above n 168.
195 Ibid, 6.
196 HM Government, above n 168.
197 Ibid, 4-5.
198 This draft legislation relates to new exceptions for private copying, parody, quotations and data analysis for non commercial research. It amends exceptions for public administration, education and research, libraries and archives.
copyright owners’. Submissions on the draft legislation related to education and research are due to the Intellectual Property Office by 2 August 2013.

In summary, even though the EU Information Society Directive allows educational institutions to undertake acts of reproduction of third party copyright material for purposes such as education and research if there is no economic or commercial advantage and the UK Copyright Act allows for the reproduction of works for non-commercial purposes and arguably allows individuals to use third party copyright material for non-commercial research there is still legal uncertainty in the UK due to the lack of judicial or legislative interpretation in relation to the research and non-commercial or economic or commercial advantage. As with Australia, Canada, which will be discussed below, is the only jurisdiction reviewed internationally that discussed the concept of research and has allowed a dealing of third party copyright material to be fair within a commercial context.

4.5 Canada

Similar to the situation in Australia and the UK, educational institutions in Canada are provided with provisions for the purposes of education and training within the Copyright Act, RSC 1985, c. C-42 (hereafter referred to as the Canadian Copyright Act). However, similar to the US, a use of third party copyright material for educational purpose also falls within the fair dealing sections of the Canadian Copyright Act.

The educational and the fair dealing provisions of the Canadian Copyright Act, the Copyright Modernization Act, SC 2012, c 20 (hereafter referred to as the Copyright Modernization Act) in relation to the education and fair dealing and the CCH Canadian case interpretation that research is not limited to non-commercial or private contexts will be discussed in the following sections.

4.5.1 Educational Provisions

The Copyright Act in Canada was last amended in 2012, following Copyright Bills being introduced into Parliament in 2005, 2008 and 2010.

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203 Ibid.
204 See Copyright Act, RSC 1985, c. C-42, ss 29.4 to 30.04.
206 Parliament of Canada, Legislative Summary of Bill C-11: An Act to Amend the Copyright Act (2012)
The Copyright Modernization Act received royal assent on 29 June 2012 and commenced on 7 November 2012. In summary, the 2012 amendments contained in the Copyright Modernization Act were introduced to ensure that Canadian copyright law:207

- Is of an international standard
- Protects the rights of copyright owners
- Is technology neutral
- Addresses the challenges and opportunities provided by the internet
- Permit certain uses of copyright by individuals
- Permits a wider use of copyright material in digital form.

In regards to educational institutions, the purpose of the Copyright Modernization Act is to:208

- Permit ... educators and libraries to make greater use of copyright material in digital form; and
- Allow educators and students to make greater use of copyright material.

Following the Copyright Modernization Act, under ss 29.4 to 30.04 of the Canadian Copyright Act, an educational institution can reproduce a work or do any other necessary act in order to display it for the purposes of education or training. Educational institutions are also able to reproduce, translate, perform in public or communicate to the public works or other subject matters for the purposes of a test or examination. Except in the case of manual reproduction, these exception are not available if the work or other subject matter is ‘commercially available’ in a format appropriate for the education, training, test or examination. Under s 2 of the Canadian Copyright Act, commercially available means:209

[The work or subject matter] is available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort or a licence to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort.

Sections 29.5 to 30.04 also allow educational institutions under certain conditions to have performances of works and other subject matters for not for profit educational or training purposes, communicate a single copy or performance a copy of a news program or

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207 Copyright Modernization Act, SC 2012, c 20, summary.
208 Ibid.
209 Copyright Act, RSC 1985, c. C-42, s 2.
commentary reproduce or communicate a single copy of a broadcast for educational or training purposes. For the purposes of royalty payments, under s 29.9, education institutions must keep records.

The Copyright Modernization Act introduced sections (30.01 to 30.04) for purposes of education or training related to the communication and reproduction of lessons, the digital reproduction or communication of works that are provided under a licence and the reproduction, communication or performance of works or other subject matters available through the internet, subject to certain condition such as requiring an educational institution to destroy a lesson within 30 days after the students enrolled in the course that the lesson relates to receive their final course marks.

An educational institution under s 2 of the Canadian Copyright Act must be a non-profit organisation and under s 29.3, educational institutions cannot rely on ss 29.4 or 29.5 if an activity is ‘carried out with motive of gain’ but similar to Australian law, cost recovery is permitted. In relation to the issue of carrying out an activity for a motive of gain, the CCH Canadian case and how it relates to the fair dealing exceptions will be discussed in the next section.

### 4.5.2 Fair Dealing

The Copyright Modernization Act introduced education into the fair dealing provisions. Section 29 now provides that fair dealing for the purposes of research, private study, education, and parody or satire will not infringe copyright. Geist has suggested that ‘until relatively recently, the Canadian fair dealing provisions were viewed as fairly restrictive’, particularly in the way that the Canadian courts interpreted the exceptions. Following the

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210 Under s 30.1 of Copyright Act, RSC 1985, c. C-42, lesson means a lesson, test or examination.
211 Copyright Act, RSC 1985, c. C-42, s 30.01.
212 Ibid, ss 30.02 to 30.03.
213 Ibid, s 30.04.
214 Ibid, s 30.01(6).
215 Ibid, s 29.3.
216 See Copyright Agency Limited and Others v Victoria University of Technology 128 ALR 482.
218 Sections 29.1 and 29.2 of the Copyright Act, SSC 1985, c. C-42 provides that fair dealing for the purpose of criticism or review and news reporting does not infringe copyright if details of the source is provided.
219 Michael Geist (ed), The Copyright Pentalogy How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law (2013), 166.
220 Ibid.
CCH Canadian\textsuperscript{221} case, the fair dealing provisions within the \textit{Copyright Act}, RSC 1985, c. C-42 (hereafter referred to as the Canadian Copyright Act) are now perceived more as a right than a defence.\textsuperscript{222} This approach now allows users (such as educational institutions) of third part copyright material ‘whose primary function is to disseminate knowledge and information for educational or research purposes to raise ‘fair dealing’ to exculpate themselves from liability for copyright infringement’.\textsuperscript{223}

\textbf{4.5.2.1 \textit{CCH Canadian Ltd v Law Society of Upper Canada}\textsuperscript{224} and Research}

Briefly this case relates to the request-based photocopy service provided by the library of the Law Society of Upper Canada to law society members, the judiciary and other authorised researchers.

The Law Society library photocopied single copies of eleven works including reported law decisions with head notes, case summaries and indexes and chapters within monographs and textbooks on behalf of law students, researchers and law society members such as lawyers working in commercial firms. The publishers of these eleven works, CCH Canada Ltd, Thomson Canada Ltd and Canada Law Book Inc., claimed that the Law Society had infringed their copyright when the library reproduced a copy of each of the works.

In determining whether the library’s request-based photocopying service was a copyright infringement, the Supreme Court held that the ‘Law Society’s dealings with the works were for the purpose and were fair dealing within s 29 of the Canadian Copyright Act’.\textsuperscript{225} McLachlin CJ, in delivering the opinion of the Supreme Court, held that the language within s 29 of the Act is general and that ‘dealing connotes not individual acts but a practice or system’.\textsuperscript{226} Relying on the Law Society’s access policy which stated ‘that single copies of library materials required for the purposes of research ... may be provided to users of the

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\textsuperscript{222} See D’Agostino, above n 30; Roger T Hughes, ‘Evolution of the Concept of Fair Dealing in Canadian Copyright Law’ (2008) 26 Copyright Reporter Journal of the Copyright Society of Australia 44.
\textsuperscript{225} \textit{CCH Canadian Ltd v Law Society of Upper Canada} [2004] 1 SCR 339, 2004 SCC 13, [6]: Other issues discussed in the case related to whether the Law Society authorised copyright infringement by providing photocopier within the library for patrons to use, whether the Law Society could qualify for an exception as a library under ss 2 and 30.2 (1) of the \textit{Copyright Act}, RSC 1985 and whether sending requested material via facsimile constituted a communication to the public under s 3 (1)(f) of the \textit{Copyright Act}, RSC 1985.
\textsuperscript{226} \textit{CCH Canadian Ltd v Law Society of Upper Canada} [2004] 1 SCR 339, 2004 SCC 13, [63].
McLachlin CJ concluded that the Law Society’s request-based photocopying service was an integral part of the legal research process, an allowable purpose under s 29 of the Canadian Copyright Act.

The Supreme Court noted that the allowable purposes under the fair dealing provisions ‘should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights’. It agreed with the interpretation of the meaning of ‘research’ by the Appeal Court.

“Research” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. I [McLachlin, CJ] agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that “[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research.” Lawyers carrying on the business of law for profit are conducting research within the meaning of s.29 of the Copyright Act.

This meaning of research is in contrast to the interpretation of ‘research’ by Beaumont J in the Australian case, Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Ltd. In this case, Neville Jeffress Pidler Pty Ltd (hereafter referred to as Jeffress) operated a media monitor service, which provided a photocopying service for relevant media stories and reports to subscribers for a fee. By way of defence, Jeffress argued that the press clipping service was fair dealing for the purposes of research or study and for criticism and review within the meaning of ss 40 and 41 of the Copyright Act 1968 (Cth).

Beaumont J decided that the operation of the press clipping service did not constitute ‘research’. As previously discussed in Section 3.3 of Chapter Three, Beaumont J referred to the Macquarie Dictionary of ‘research’. Research is defined as a ‘diligent and systematic enquiry or investigation … to discover facts or principles’ and Beaumont J equated the clipping service as being more of ‘an information audit’. The activity of Jeffress was considered commercial and was carried out ‘in the ordinary course of trade’.

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227 Ibid, [64].
228 Ibid.
229 Ibid, [54].
230 Ibid, [51].
233 Ibid.
infringer, that is, Jeffress, and not that of the customer. Even if the press clipping subscriber was engaged in research, this would not result in Jeffress being engaged in research.\textsuperscript{234}

Beaumont reached the same conclusion about the question of whether Jeffress was engaged in study.\textsuperscript{235}

So in Canada, following the CCH Canadian\textsuperscript{236} case interpretation that research is not limited to non-commercial or private contexts, contract research conducted by a Canadian academic may potentially be an allowable purpose under s 29 of the Canadian Copyright Act. However, whether it would be a fair dealing, would need to be assessed against the factors related to purpose, character, amount, alternatives, nature of the work and the effect of the dealing on the work.\textsuperscript{237}

As the Canadian Copyright Act does not provide an interpretation for the definition meaning of research or education [other than lecture and lessons], this would suggest, as recommended by the Canadian Association of University Teachers’ \textit{Guidelines for the Use of Copyrighted Material},\textsuperscript{238} that a use for the purposes of research or education be assessed against the six criteria set out in the CCH Canadian\textsuperscript{239} case, taking into account existing practices within the higher educator sector such as including attributions.\textsuperscript{240}

Similarly to the factors listed in § 107 of the US Copyright Act of 1976 and s 40 (2) of the \textit{Copyright Act 1968} (Cth), the six criteria from the CCH Canadian\textsuperscript{241} case to be used to determine fair dealing are:\textsuperscript{242}

1. The purpose of the dealing. Sections 29, 29.1 and 29.2 of the Canadian Copyright Act state that research, private study, education, parody or satire, criticism or review and news reporting are allowable purposes.

\textsuperscript{234} This finding is supported by comments made by Davies J in \textit{Sillitoe v. McGraw-Hill Book Company} (U.K.) Ltd. (1983) FSR 545; See also Hughes, above n 222.
\textsuperscript{235} \textit{Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Ltd} [2004] 1 SCR 339, 2004 SCC 13, [33] to [34]. Beaumont J also concluded that the clipping service was not engaged in criticism or review, both of which he felt implied some analysis and judgement of quality or content.
\textsuperscript{238} Canadian Association of University Teachers, above n 237.
\textsuperscript{240} Canadian Association of University Teachers, above n 237.
\textsuperscript{242} \textit{See CCH Canadian Ltd v Law Society of Upper Canada} [2004] 1 SCR 339, 2004 SCC 13; Canadian Association of University Teachers, above n 237.
2. The character of the dealing. Relates to the number and distribution of the work. A ‘single copy of a work for a specific legitimate purpose ... may be easier to conclude a fair dealing’. 243

3. The amount of the dealing. Relates to whether a substantial amount of a work has been used.

4. Alternatives to the dealing. Relates to whether there is a practical alternative to using a work for the particular purpose.

5. The nature of the work. Relates to whether a work has been published or is confidential.

6. The effect of the dealing on the work. Relates to whether the reproduced work completes with the market of the original work.

Following recent judicial decisions 244 by the Supreme Court of Canada and legislative copyright reform in 2012, which is expanding the scope of fair dealing in Canada, many educational institutions within Canada are (or are considering) opting out of licences with Access Copyright, the Canadian Copyright Licensing Agency. 245 In response, Access Copyright has filed a law suit against York University. 246 York University’s fair dealing guidelines are similar to the fair dealing guidelines used by other educational institutions in Canada. Access Copyright is not alleging copyright infringement by York University rather it has taken issue with the University’s fair dealing guidelines. 247 Access Copyright alleges that York University’s ‘fair dealing guidelines authori[s]e and encourage copying that is not supported by the law, and that there is no justification for the University to operate outside the [Access Copyright licence]’. 248 Access Copyright actions have not been supported by the broader education sector in Canada. 249 Following the Supreme Court’s rejection of Access

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245 Michael Geist, Access Copyright’s Desperate Declaration of War Against Fair Dealing by the Education Sector (Media Release, 8 April 2013) <http://www.michaelgeist.ca/content/view/6818/125/> at 25 May 2013.
247 As the matter relates to the fair dealing guidelines, it would appear that Access University has issue with all educational institutions within Canada that have fair dealing guidelines similar to York University.
248 Access Copyright, Canada’s Writers and Publishers Take a Stand Against Damaging Interpretations Off Air Dealing by the Education Sector (Media Release, 8 April 2013) <http://www.accesscopyright.ca/media/35670/2013-04-08_ac_statement.pdf> at 26 May 2013.
249 See Geist, above n 245; Canadian Library Association, CLA Statement on Access Copyright Lawsuit Against York University (Media Release, 17 May 2013).
Copyright argument, Michael Geist has suggested that Access Copyright may potentially have a claim against York University in that that the amount of copying allowed under the University’s fair dealing guidelines go beyond what is permitted by fair dealing. However based on the wording of the York University fair dealing guidelines in relation to the amount of copying allowed, Geist argues that the guidelines cannot be characterised as arbitrary and unsupported. First, the amount of the copying is only one of six factors, many of which will favour the education institutions. Second, while the amount is always context dependent, ten percent is a fairly common starting point in the United States (in Israel, educational guidelines go as high as 20 percent). Third, the amount is based on the Supreme Court’s guidance.

From the CCH Canadian case,²⁵¹ the Supreme Court stated that the purpose of the fair dealing exceptions within the Canadian Copyright Act is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. [Academic staff or educational institutions] relying on ... fair dealing exception[s] need only prove that their own dealings with copyrighted works were for the purpose of research ... and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.

Michael Geist has also argued that fair dealing guidelines must take a non-restrictive to fair dealing, as it the case with the York University’s fair dealing guidelines.²⁵³ While the CCH Canadian case generated considerable debate over the scope of fair dealing, particularly as it elevated fair dealing ‘from a limited exception that was viewed as largely ineffectual to a user right that must not be interpreted restrictively and cannot be unduly constrained’,²⁵⁴ the recent Supreme Court decisions have ‘reaffirmed that fair dealing is a user’s right that must be interpreted in a broad and liberal manner’.²⁵⁵

In summary, as shown in Tables One and Two in Appendix B, in both the UK and Canada, education institutions can use third party copyright material for instruction or educational purposes, if in the case of the UK the instruction is for a non-commercial purpose and in Canada, if the activity is not carried out for a motive of gain. Neither the UK or Canadian

²⁵⁰Geist, above n 245.
²⁵²Ibid, [63].
²⁵³Geist, above n 245.
²⁵⁴Geist, above n 220, 169.
²⁵⁵Ibid, 170; See Hughes, above n 222; Tawfik, above n 223.
Copyright Acts define the terms - ‘educational purpose’, ‘non-commercial’, ‘a motive of gain’ or ‘research’. Similarly the US Act does not define ‘educational purposes’. However educational institutions in the US generally accept that non-commercial activities such as instruction, teaching, study or investigations are examples of educational purposes.

As with Australia,\textsuperscript{256} Canada is the only jurisdiction reviewed internationally that provides a definition of ‘research’. However in contrast to Australia, the UK and the US, Canadian Courts have held that a use for research purposes can be fair within a commercial context. This conclusion may potentially enable the use by educational institutions and academic staff of third party copyright material for a non-educational activity such as contract research to be considered fair. However it would be necessary to assess the use against the six criteria as set out in the CCH Canadian\textsuperscript{257} case to determine whether a particular use would be fair.

Similarly in the US, it is necessary to consider the factors within § 107 to determine whether a use of third party copyright material would be fair. However based on the decisions in the 1995 Texaco and the 2012 Georgia State University cases, it appears unlikely that the use by educational institutions and academic staff of third party copyright material for a non-educational activity such as contract research would be a fair under § 107. Educational institutions and academic staff within the US potentially need to rely on licences and permissions to use third party copyright material for non-educational activities.

Likewise, as the EU and UK, copyright law only allows acts of reproduction of copyright material for non-commercial purposes, educational institutions and academic staff in the UK are also likely to need licences and permissions to use third party copyright material for non-educational activities including commercial activities such as contract research and non award programs.

\textbf{4.6 Conclusion}

This chapter has examined how the US, UK, Canada and EU manage the issue of educational institutions using third party copyright material for educational activities, non-educational


activities including commercial activities such as contract research and non-awarding teaching and research activities.

In relation to the question of whether universities in the US, UK, Canada and EU are potentially breaching their national copyright legislation when undertaking non-educational activities, including commercial activities such as contract research and non-award teaching, it would appear that educational institutions in the US, EU and UK may only be able to use third party copyright material for a commercial activity under a licensing agreement or if permission is granted by the copyright holder. Particularly under copyright law in the EU and UK, education and research activities can only be undertaken for non-commercial purposes. However in Canada, given the judicial interpretation by the Canadian Supreme Court of what constitutes ‘research’, the use of third party copyright material in relation to a commercial activity such as contract research may potentially be a fair dealing.

With the apparent lack of judicial and legislative guidance in relation to education and research activities and intellectual property including copyright management, there is legal uncertainty in each jurisdiction in regards to activities undertaken by educational institutions and the effect on intellectual property, including copyright responsibilities.

Given this apparent lack of judicial or legislative interpretation on what constitutes non-educational or research activities and the legal uncertainty related to activities undertaken by educational institutions, the next chapter, Chapter Five, will examine the judicial and legislative guidance provided under Australian copyright law in relation to non-educational and research activities and the approaches of Australian universities to copyright issues relevant to educational, non-educational and research activities undertaken by university staff.
CHAPTER 5: APPROACHES OF AUSTRALIAN UNIVERSITIES TO THE USE OF THIRD PARTY COPYRIGHT MATERIAL FOR EDUCATIONAL, NON-EDUCATIONAL AND RESEARCH ACTIVITIES

5.1 Introduction

This chapter examines the publicly accessible policies or procedures relating to intellectual property (hereafter referred to as IP) including copyright and non-educational activities\(^1\) of universities in Australia.\(^2\)

The purpose of this examination is to develop an understanding of the approaches of Australian universities to copyright issues relevant to educational, non-educational and research activities undertaken by university staff and in particular to the use of third party copyright material for non-educational activities.

With the need to seek additional funding sources,\(^3\) universities and academic staff are collaborating on research opportunities with industry partners which raise IP including copyright issues. Universities require clear internal policies for staff relating to IP including copyright issues, particularly in relation to ownership of any IP generated by the research.\(^4\) This chapter also discusses two recent legal cases\(^5\) involving Australian universities and the issue of IP ownership. These two cases demonstrate the difficulties faced by universities in managing IP and in particular, the importance of ensuring that university staff are aware of their obligations under IP including copyright policies.

By gaining an overview of the approaches by Australian universities to the management of IP, specifically copyright issues for educational, non-educational and research activities and

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\(^1\) Policies or procedures related to non-educational activities generally refer to as commercial activities, consultancy work, outside activities or work or professional activities.

\(^2\) At the time of the review in 2012, there were 35 publicly accessible intellectual property policies or procedures, 32 publicly accessible copyright policies or procedures and 32 publicly accessible available policies or procedures related to non-educational activities.

\(^3\) Refer to Chapter One for a discussion about universities needing to diversify revenue sources.


\(^5\) Victoria University of Technology v Wilson [2004] VSC 33; University of Western Australia v Gray (No 20) [2008] FCA 498.
particularly the use of third party copyright material for non-educational purposes will identify potential issues.

### 5.2 Statutes, Regulations, Policies and Procedures

Within a legal and regulatory framework, Australian universities are all incorporated organisations. Each Australian university (except for The Australian National University) is created as a legal corporation by State or Territory enacted legislation. The Australian National University was enacted by Commonwealth legislation.

As a statutory corporation, an Australian university has a council responsible for the management of the corporation. Membership of the corporation is not purchased rather it based on association with functions of the corporation. However unlike companies that are governed by the *Corporations Act 2001* (Cth), universities have restricted membership and objectives which restrict their activities. For example, membership in RMIT University and The University of Melbourne is limited to the following:

- (a) The Council; and
- (b) The staff, other than staff of any class that is designated from time to time by the Council not to be staff for the purposes of this section; and
- (c) The graduates; and
- (d) The students; and
- (e) Members of the staff or classes of staff of the affiliated colleges or other bodies, that are designated from time to time by the Council; and
- (f) The emeritus professors of the University.

Further, both Universities are limited in their objectives, which include the following:

- (a) To provide and maintain a teaching and learning environment of excellent quality offering higher education at an international standard;
- (b) To provide vocational education and training, further education and other forms of education determined by the University to support and complement the provision of higher education by the University;
- (c) To undertake scholarship, pure and applied research, invention, innovation, education and consultancy of international standing and to apply those matters to the advancement of knowledge and to the benefit of the well-being of the Victorian, Australian and international communities;

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7 Ibid, ch 3.
8 *Royal Melbourne Institute of Technology Act 2010* (Vic), s 4; *University of Melbourne Act 2009* (Vic), s 4.
9 *Royal Melbourne Institute of Technology Act 2010* (Vic), s 5; *University of Melbourne Act 2009* (Vic), s 5.
(d) To equip graduates of the University to excel in their chosen careers and to contribute to the life of the community;

(e) To serve the Victorian, Australian and international communities and the public interest by—

(i) Enriching cultural and community life;

(ii) Elevating public awareness of educational, scientific and artistic developments;

(iii) Promoting critical and free enquiry, informed intellectual discourse and public debate within the University and in the wider society;

... 

(h) To confer degrees and grant diplomas, certificates, licences and other awards;

(i) To utilise or exploit its expertise and resources, whether commercially or otherwise.

As a statutory corporation enacted under State or Territory legislation, Australian universities are required to report to their respective State or Territory governments. However, as publicly funded organisations, universities are also accountable to the Federal government. The Commonwealth does not have legislative power over education except in relation to funding. Nevertheless, Federal governments have exerted control over the education sector and educational institutions by government reviews and reforms and by imposing demands through funding schemes. Within the higher education sector, the Higher Education Support Act 2003 (Cth) is the instrument used to support the universities and provide financial assistance through commonwealth grants schemes.

Universities are governed by enabling and delegated legislation, policies and procedures. To be legally recognised as a statutory body within its home State or Territory, each university has its own enabling legislation, for example Deakin University Act 2009 (Vic), which sets out the objectives or functions of the university. As legal bodies, universities must comply with other Commonwealth and State or Territory enabling legislation including the Copyright Act 1968 (Cth) (hereafter referred to as the Copyright Act).

10 Due to s 51 of the Australian Constitution.
12 Sheehy, above n 6, ch 3.
The overarching approach adopted by universities in respect to governance generally results in three levels of documentation:

- Statutes and Regulations
- Policies
- Procedures.

Under each university Act, university Councils are provided with primary responsibilities that include ‘establishing policy and procedural principles for the operation of the University consistent with legal requirements’. Statutes, the primary legislative instrument used by universities, can only be enacted, amended and repealed by a university’s Council. Any statutes enacted, amended and repealed must receive approval from the relevant State minister for higher education, for example the Victorian Minister for Higher Education and Skills, before they can take effect. Subject to a university Act, a university Council may make statutes in respect to matters relating to the organisation, management and good government of the university. Regulations, also known as rules, are made in accordance with individual statutes and are generally procedural in nature.

University policies are statements of a university position that ‘mandate or constrain actions to help ensure compliance, enhance that university’s mission or reduce institutional risk’. Policies must ‘be consistent with relevant legislation, and university Statutes and Regulations’. Procedures ‘document the process or actions required to implement a university policy’. Universities may also develop instructions to give more information about a policy or procedure. Instructions may ‘take the form of a flowchart, template or form’.

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14 Royal Melbourne Institute of Technology Act 2010 (Vic), s 8(3d).
19 RMIT University, above n 17.
However, not all universities develop documentation at each level of governance. In regards to the management of IP issues all universities developed policies except for The University of Ballarat and The University of Melbourne which use statutes and Murdoch University which uses regulations. In the case of copyright management, all universities, except one, (University E)\(^\text{20}\) have a copyright policy or procedures with the majority also using web based copyright information guides to inform staff (and students) of their obligations to copyright issues.

5.2.1 Review of University Policies, Procedures or Information Guides

University policies and procedures were identified as the most appropriate type of documents to examine in regards to IP, specifically copyright, and non-educational activities as these types of documents will generally provide detailed information (such as purpose or objectives, definitions, procedures, staff responsibilities and dispute resolution) about a university’s approach to these issues. However, as previously stated, not all universities develop governance documentation at each level and in instances where there was no policy or procedures, the statute or regulations or, in the case of copyright, information guides were examined.

Using a doctrinal research approach,\(^\text{21}\) this chapter examined only publicly accessible policies, procedures and information guides of Australian universities related to IP (including copyright) and non-educational activities. Based on the information provided on the Universities Australia website,\(^\text{22}\) there are 39 universities\(^\text{23}\) in Australia; however, only 35 and 32 universities respectively, had publicly accessible policies, procedures and information guides related to IP and copyright. A further 32 universities had publicly accessible policies and procedures related to non-educational activities.

As most Australian university staff will enter into an employment contract with a university and these contracts will normally state that any IP\(^\text{24}\) created by employees in the course of their employment will be owned by the employer, all policies, procedures or information

\(^{20}\) This University cannot be named as the University’s copyright officer was interviewed as part of this research, and no universities included in the interview phrase are identified.

\(^{21}\) For a discussion on doctrinal research refer to Section 1.6 in Chapter One.

\(^{22}\) http://www.universitiesaustralia.edu.au.

\(^{23}\) See Appendix C for a list of Australian universities.

\(^{24}\) Such as confidential information and trade secrets, course material, designs or inventions.
guides have only been examined in the context of university staff, rather than students\textsuperscript{25} or visitors.

The examination of the IP (including copyright) and non-educational activities policies, procedures or information guides discussed below did not assess the validity status of each document in regards to the approval and declaration of the document by the relevant university authority such as a university council. As discussed in the 2004 case, \textit{Victoria University of Technology v Wilson},\textsuperscript{26} a contentious point between universities and academic staff in respect to IP rights concerns a university’s IP policy, in relation to its existence and whether it is part of an academic’s terms and conditions of employment.\textsuperscript{27}

For the examination, it was assumed, if it was not stated, that the approval date provided within the policy was the date of approval of the policy by the appropriate university authority such as the university Council. It is also assumed that each university undertook the appropriate steps such as publishing the full policy within a relevant staff manual as required under a university act to ensure that a policy had been declared.

5.3 Relevant Cases

Two Australian cases, \textit{Victoria University of Technology v Wilson}\textsuperscript{28} and \textit{University of Western Australia v Gray},\textsuperscript{29} indicate the importance and economic value of IP and the issues associated with managing IP. As the level of non-educational activities being undertaken by universities continues to increase, it is likely that the value of all types of IP, including copyright, will rise accordingly.

These two cases, while not specifically addressing the issue of copyright, demonstrate the difficulties faced by universities in respect to managing IP including copyright to ensure third party rights and legal obligations are not infringed. The cases also highlight the importance of maintaining up to date IP\textsuperscript{30} policies, understanding the role of academics and ensuring that staff are aware of their obligations under IP policies.\textsuperscript{31}

\textsuperscript{25} In most cases, students and specifically research students will own any IP created by their research.
\textsuperscript{26} [2004] VSC 33.
\textsuperscript{27} See \textit{Victoria University of Technology v Wilson} [2004] VSC 33; \textit{University of Western Australia v Gray} (No 20) [2008] FCA 498.
\textsuperscript{28} [2004] VSC 33.
\textsuperscript{29} (No 20) [2008] FCA 498.
\textsuperscript{30} Including copyright policies or guidelines.
\textsuperscript{31} Ibid.
5.3.1 *Victoria University of Technology v Wilson*32

*Victoria University of Technology v Wilson* relates to the issue of IP rights ownership in respect to an internet based e-commerce system developed by two academics employed within the School of Applied Economics, Victoria University of Technology (VUT).

In 1998, VUT established the Centre for International Business Research and Education (CIBRE) to develop and sell a range of internet based short courses in the area of international trade as well as provide consulting services to the university, government and private sector.

In July 1999, Professor Wilson, the head of the School of Applied Economics, met with the directors of World Trade Online Holdings Limited (World Trade Online) about the possibility of VUT developing on-line education and training courses for an internet based electronic trading exchange to be developed by World Trade Online. After the meeting, Professor Wilson wrote to World Trade Online, to express on behalf of himself and his colleagues, their interest in the online education and training component of the project. To show that VUT had expertise in the area of international trade and in the provision of online education he directed World Trade Online to the CIBRE website which at that time was not a part of the School of Applied Economics. In a further meeting attended by members of CIBRE, including Dr Feaver as the executive director of the centre, it was proposed that CIBRE would be involved in the development of the online education component of the project. In later correspondence to World Trade Online, Professor Wilson indicated, based on the expertise of VUT in international trade research and education, it could assist with the ‘WTO system design, development and implementation and education and training of target user groups…’.33 Professor Wilson and Dr Feaver then began working on the ‘schematic design for the system architecture’34 and developing the functions and tasks of the online trading system. Also during this period Professor Wilson and Dr Feaver completed the course content for the online teaching component of the project.35

After Mr Astill, who had invested in World Trade Online and was responsible for the supervision of the development of the online education programs for World Trade Online,

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33 *Victoria University of Technology v Wilson* [2004] VSC 33, Nettle J, [13].
34 Ibid [18].
35 Ibid [26].
expressed concern about his investment in September 1999, Professor Wilson, Dr Feaver and Mr Astill agreed that the three of them with a 40 percent, 40 percent, 20 percent split would own the IP in the system design.\footnote{Ibid [21]-[23].}

Although the relationship with World Trade Online disintegrated, the design and development of the system continued to evolve as the search began for a new industry partner. During presentations to interested parties, the logos of VUT and CIBRE appeared on power point slides together with description of Professor Wilson’s and Dr Feaver’s roles at VUT. Also in correspondence to interested parties, Dr Feaver signed letters as the executive director of CIBRE, School of Applied Economics, VUT.\footnote{Ibid [42]-[45]} Professor Wilson, Dr Feaver and Mr Astill also set up a company, IP3 Systems, which employed programmers and started paying expenses for travel, training and work done by Professor Wilson and Dr Feaver.

During 2000 and 2001, Dr Feaver spent a substantial amount of time working for IP3 Systems, and as a consequence the company reimbursed VUT for Dr Feaver’s time and then in the second half of 2001, he was contracted to work at VUT on a 0.5 time fraction.\footnote{Ibid [67].}

In 2000, Price Waterhouse Cooper (PWC) became involved in the project and as part of the work required two high powered computer servers. Professor Wilson in his position as head of the School of Applied Economics was able to arrange that VUT purchase two high powered computer servers, which he had delivered to PWC for use on the project for a three month period but which remained at PWC for a two year period.\footnote{Ibid [68].}

In late 2002, another academic at VUT discovered the IP3 Systems website. After reading on the website about Professor Wilson’s and Dr Feaver’s involvement with IP3 Systems, the academic broadcasted via VUT’s intranet an email that raised the issue of how Professor Wilson and Dr Feaver found the time to be consistently involved with their duties at VUT given their involvement with IP3 Systems. This email led to the university investigating the matter.\footnote{Ibid [68]-[69].}
VUT alleged that Professor Wilson and Dr Feaver breached their employment contracts on the basis that they did not meet their obligations and responsibilities under VUT’s IP policy.\textsuperscript{41} VUT contended that included in Professor Wilson’s and Dr Feaver’s terms of employment was an express or implied term that the University will own\textsuperscript{42} All inventions, resulting patents, associated copyright material and confidential information created in the course of employment, studies, scholarship or research by or at the university or to the creation of which the university has contributed substantially through funding, salary payments, resources, facilities, apparatus or supervision.

Professor Wilson and Dr Feaver argued that VUT had ‘no IP policy of the kind alleged and even if there [was] it was not part of [their] terms of employment or otherwise binding upon them’.\textsuperscript{43}

An issue for the court was whether VUT had an approved IP policy as under the terms and conditions of employment signed by Dr Feaver in 1999, it was stated that ‘conditions of service as described in awards, agreements and university policy will apply to you as relevant to a Level C academic’.\textsuperscript{44} Nettle J concluded, based on the minutes of the relevant Council meetings, that there was ‘no evidence that the 1995 IP policy was ever approved by the University Council’\textsuperscript{45} and ‘it was never published in the University’s human resource manual or any other staff manual or equivalent publication’.\textsuperscript{46} Given that VUT’s 1995 research management plan had no mention of an IP policy other than a section on IP that discussed the principles that guides the University’s approach to IP and under the \textit{Victoria University of Technology Act} 1990, the Vice-Chancellor as the chief executive officer of the University did not have the power to declare the policy, Nettle J found that the 1995 IP policy never had come into existence.\textsuperscript{47} Also before the events that lead to the proceedings, neither Professor Wilson nor Dr Feaver knew of the 1995 IP nor did they have any ‘dealings with the University in any way premised upon an understanding that the 1995 IP policy was in existence’.\textsuperscript{48}

\textsuperscript{41} The University also alleged that Professor Wilson and Dr Feaver breached their fiduciary duties as employees.
\textsuperscript{42} \textit{Victoria University of Technology v Wilson} [2004] VSC 33, Nettle J, [72].
\textsuperscript{43} Ibid, [73].
\textsuperscript{44} Ibid, [76].
\textsuperscript{45} Ibid [82].
\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid [83] – [88].
\textsuperscript{48} Ibid [95].
VUT also argued that even if the IP policy was not binding as a term of employment, given the extensive use of university resources and time during the development of the internet based e-commerce system and the fact that Professor Wilson and Dr Feaver were bound by expressed contractual provisions within the mobile telephone, email and computer policies that prevented them from using universities resources for purposes other than university purposes, the IP should be retained by the University. Nettle J found that a breach of the mobile telephone and computer policies was a breach of contract which results in damages and ‘not constructive trust or account’.49

VUT had also argued that, as a consequence of Professor Wilson and Dr Feaver being employed as researchers and the internet based e-commerce system being a product of that research, the University owned the system. Nettle J had to determine the activities of the School of Applied Economics50 and the meaning of the phrase ‘within the scope of employment’.51 Based on the evidence presented, Nettle J concluded that while other areas of VUT such as the physical science or information technology departments may be involved in the type of practical or applied research that is relevant to the development of the type of invention created by Professor Wilson and Dr Feaver, the research being conducted by the School of Applied Economics was not to develop an internet based e-commerce system. Instead, the School’s research was directed at the ‘preparation and presentation of peer reviewed learned papers’.52 However, based on the objectives of CIBRE,53 the project proposal and the evidence provided by both Professor Wilson and Dr Feaver, Nettle J concluded that the work by both academics on the internet based e-commerce system ‘was work which they were retained to perform’.54 While the project was not the sort of research envisaged at the time of employment, ‘the work that an employee is retained to perform can and often does change over the course of employment’55 and in respect to terms of ‘within the scope of employment’, the important factor is not status at the time of employment rather it is the employees’ status at the time of the invention.56 From the beginning, ‘Professor Wilson was keen to offer the services of VUT’ to the project ‘and Dr Feaver was keen for VUT to tackle the challenge’57 and until resolving with Mr Astill to take the IP for themselves’,58 the

49 Ibid [106].
51 Ibid [107].
52 Ibid [110].
53 Dr Feaver was the head of this research centre
54 *Victoria University of Technology v Wilson* [2004] VSC 33, Nettle J, [119].
55 Ibid [120].
57 *Victoria University of Technology v Wilson* [2004] VSC 33, Nettle J, [132].
research project was undertaken on behalf of VUT. Nettle J concluded that from the day (23 September 1999) that Professor Wilson and Dr Feaver resolved to keep the IP for themselves, they ceased to be retained to perform the kind of work that would create the invention, so as a matter of contract VUT would not be entitled to ownership of the internet based e-commerce system, only the work created prior to 23 September 1999.\(^{59}\)

This conclusion, however, does not influence whether there has been breach of fiduciary duties towards VUT. As employees of VUT, Professor Wilson and Dr Feaver owed ‘fiduciary and other equitable duties of loyalty and good faith and in particular, duties not to use projects undertaken or developed by VUT for their own benefit’.\(^ {60}\) VUT claimed that Professor Wilson and Dr Feaver breached these duties ‘by diverting away from CIBRE and the university to themselves and IP3 Systems the opportunity to develop and produce the electronic trading exchange and associated computer software’.\(^ {61}\) As a result of the alleged breach of duties, VUT claimed that Professor Wilson and Dr Feaver held their interest in the invention and software on trust for the University or alternatively were liable for compensation to VUT for the loss of the opportunity to develop the invention.\(^ {62}\) Nettle J found that VUT did not give approval for Professor Wilson or Dr Feaver to work on the project as a University project or in a private capacity as neither Professor Wilson or Dr Feaver provided full and true disclosure of the opportunity to VUT, other than Professor Wilson giving the impression to his supervisor that he was working on a project that would be of benefit to VUT.\(^ {63}\) The non-disclosure and non-approval of the project results in a breach of fiduciary duties by Professor Wilson and Dr Feaver, however, Nettle J did not consider that Professor Wilson and Dr Wilson held the invention in trust for VUT.\(^ {64}\) The inclusion of Mr Astill’s involvement and signing of the memorandum in September 1999 to claim ownership of the IP within the invention and the improvements made to the invention between March 2000 and 2001, led Nettle J to conclude that the breach of the fiduciary duties was in relation to seizing the opportunity to work on the project rather than affording the opportunity to VUT.\(^ {65}\) Nettle J concluded that a remedy that focused on the value of shares that were held or had been held by Professor Wilson and Dr Feaver and their respective companies in IP3

\(^{58}\) Ibid.

\(^{59}\) Ibid [137] – [140].

\(^{60}\) Ibid [72].

\(^{61}\) Ibid.

\(^{62}\) Ibid.

\(^{63}\) Ibid [175].

\(^{64}\) Ibid [176].

\(^{65}\) Ibid [199].
Systems would avoid ‘the imposition of adverse effects on innocent third parties’ such as shareholders of the public listed company, IP3 Systems.\(^{66}\)

In relation to copyright issues relevant to non-educational and research activities, this case demonstrates the importance of universities maintaining the mechanisms and procedures necessary to ensure they always have valid IP policies or procedures including copyright. This case also highlights the difficulties associated with defining the role of academics in the course of their employment, specifically in relation to research given that there is an employment contract between an academic and their university which will generally have an expressed duty to research. Traditionally, academics are given the freedom to set and pursue their own research agenda and direction.\(^{67}\) The duty to research can be fulfilled by pure research and dissemination of results or through collaboration with industry which could lead to commercial opportunities.\(^{68}\)

### 5.3.2 University of Western Australia v Gray\(^{69}\)

In *University of Western Australia v Gray*, The University of Western Australia (UWA) alleged that Dr Gray breached his employment contract by failing to comply with his obligations and responsibilities under the university’s IP regulations and its predecessor, the Patent Regulations, developed in 1971.\(^{70}\) UWA also alleged that Dr Gray breached his fiduciary duties as an employee of the university.

In 1985 Dr Gray took up a position at UWA that under his terms of employment required him to teach and to conduct research and stimulate research among staff and students.\(^{71}\) Prior to his appointment at UWA, he had been engaged with other researchers on liver cancer research for several years.\(^{72}\) He continued this research work at UWA and part of this work included applying and receiving external research funding. The majority of his research funding came from two external research groups, Cancer Research Institute (CRI) and Lions Cancer Institute (LCI). During 1987 and 1988, he notified UniScan, the commercial arm of UWA,

\[^{66}\text{Ibid [221].}\]
\[^{68}\text{Ibid; Tim Vines and Thomas Faunce, University of Western Australia v Gray: An Academic Duty to Commercialise Research (2008) 16 Journal of Law and Medicine 419.}\]
\[^{69}\text{University of Western Australia v Gray (No 20) [2008] FCA 498.}\]
\[^{70}\text{University of Western Australia v Gray (No 20) [2008] FCA 498, French J [9].}\]
\[^{71}\text{Ibid [1].}\]
\[^{72}\text{Ibid [2].}\]
about his work and together they explored the possibility of his work being patented. While UniScan did not proceed with patent registrations, Dr Gray did apply for some provisional patents. By 1994 either Dr Gray or CRI had applied for all the necessary provisional patents. In 1994, Dr Gray started exploring the possibilities of commercialising the research. In discussion with investors, Dr Gray mentioned that some of the research had been funded by CRI and LCI, however, he did not mention UWA.

During 1994, Dr Gray met with the Pro Vice-Chancellor (Research) to discuss his intention of establishing a commercial entity to raise venture capital to enable him to continue working on the technologies. Dr Gray proposed that the commercial entity form part of the affiliation between CRI, LCI and UWA. The Pro Vice-Chancellor (Research) concluded that the proposal of the commercial entity having a formal relationship with UWA was not viable and that the commercial entity should be separate from UWA. Based on evidence provided, French J was of the opinion that during a meeting with the Pro Vice-Chancellor (Research) the issue of the ‘UWA’s approach to the exploitation of IP developed by academic staff’ was discussed. During one of the meetings, the UWA’s Patents Regulations were discussed in relation to their impact on Dr Gray and the establishment of a commercial entity. The Pro Vice-Chancellor (Research) raised concerns about how the establishment of a commercial entity would affect research students and the supervision of research students. These issues were not resolved.

By 2000, Dr Gray was a director of the publicly listed company, Sirtex Medical Limited (Sitex), which was floated specifically to commercial and market the cancer technologies. Sirtex then acquired the patents for the technologies from Dr Gray and CSI. UWA was aware of Dr Gray’s involvement in Sirtex and the prospect of the commercialisation of the cancer technologies. By 1999, UWA had formed the view that it may have some claim to the IP rights being used by Sirtex and a letter was sent to Dr Gray expressing this view; however, Dr Gray did not communicate the letter to Sirtex. The Pro Vice-Chancellor (Research) then decided that an investigation into whether UWA had a claim to the IP within the cancer technologies ‘would be difficult because of its ‘messy lineage’. The Pro Vice-Chancellor (Research) concluded that the risks of legal action outweighed the likely benefits. However in

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73 Ibid [3].
74 Ibid [709].
75 Ibid, French J [705].
76 Ibid [710].
77 Ibid [5].
78 Ibid.
79 Ibid.
2004 under new senior managers UWA initiated legal proceedings against Dr Gray and Sirtex.

In terms of whether Dr Gray failed to comply with his obligations and responsibilities under the university’s IP regulations and as a consequence breached his employment contract, the issue for French J was whether UWA had valid IP regulations during the period in question.

The University’s Senate passed the IP regulations in July 1996, however, French J concluded that the regulations were not promulgated as required by the University of Western Australia Act 1911 before 30 November 1997 and as a result the UWA’s IP regulation did not come into effect before this date.\(^{80}\) Also French J found that after 1988, UWA did not maintain the patent committee mechanism as required under the patent regulations, rather UWA used a company called Uniscan and a business research centre, known as The Centre for Applied Business Centre ‘to provide a framework within which inventions could be commercialised’.\(^{81}\) Given that UWA failed to maintain the mechanism that would enable staff to meet their contractual obligations in respect to the patent regulations, French J concluded it is unlikely that UWA could claim non-compliance by staff to their obligations and responsibilities under the patent regulations.\(^{82}\)

French J concluded that the assumption that the employer, in this case, UWA, retains the rights to any IP developed by an employee, during the course of employment was not well founded.\(^{83}\) The issue was to determine what ‘are the duties of an academic’ and whether or not Dr Gray was employed to invent or to research. Under the Patent Act 1990 (Cth), the rights to an invention developed by staff during the course of employment regardless of the use of resources will originally be retained by the staff member as the inventor unless there is an expressed provision within a contract that states that there is a contractual duty to attempt to develop inventions.\(^{84}\) While the Victoria University of Technology v Wilson\(^{85}\) case was not directly concerned about the issue of whether academic staff employed to research have a duty to invent, it did leave\(^{86}\) open the question about whether academic staff of the university engaged to carry out

\(^{80}\) Ibid [9].
\(^{82}\) Ibid.
\(^{83}\) Ibid, French J [12].
\(^{84}\) Ibid.
\(^{85}\) [2004] VSC 33.
\(^{86}\) University of Western Australia v Gray (No 20) [2008] FCA 498, French J [157].
research which could result in patentable inventions as a general proposition hold the rights to such inventions or whether the university would be entitled to those rights.

When considering the role of university researchers, French J referred to Monotti and Ricketson’s 2003 work, *Universities and Intellectual Property Ownership and Exploitation*, where they observed that ‘it is not always clear … that an academic who is employed to teach, conduct research and perform administrative duties is employed to invent’.\(^87\) Monotti and Ricketson concluded that to enable a university to retain the rights to an invention developed by staff with no duty to invent, an express term within the employment contract is necessary.\(^88\) Under the express term, a university researcher would assign any invention developed ‘not only in the performance of employment duties, but also in the course of using university funding and other resources’.\(^89\)

While Monotti and Ricketson acknowledge that their observations are based upon the essential differences between universities and other organisations\(^90\), it was French J’s opinion that\(^91\)

> a person engaged to carry out research only is in a different category even when the possibility or probability exists that the research will lead to the development of an invention. Such a person has a duty to research, but no duty to invent.

Given the nature and public purposes of universities, French J concluded that there was no basis that implied terms of employment could prevent academic staff from disseminating research findings, even if such disclosure could destroy the patentability of an invention’.\(^92\) Also, without express terms of employment, it will be difficult for a university to claim the IP rights of an invention.\(^93\)

While French J considered the only way for the University to acquire the rights of IP developed by academic staff in the course of research at the University is by the incorporation of an express provision rather than an implied term within employment contracts,\(^94\) he highlighted that this case demonstrated that ‘enforcing such provisions and the uncertainty

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\(^87\) Ibid, French J [158]; Monotti and Ricketson, above n 4.
\(^88\) Monotti and Ricketson, above n 4.
\(^89\) *University of Western Australia v Gray* (No 20) [2008] FCA 498, French J [158]; Monotti and Ricketson, above n 4.
\(^90\) Monotti and Ricketson, above n 4.
\(^91\) *University of Western Australia v Gray* (No 20) [2008] FCA 498, French J [160].
\(^92\) Ibid.
\(^93\) Ibid.
\(^94\) Ibid, French J [14].
surrounding their scope and application raises a question about their utility. Similarly, difficulties may be faced by other universities that claim a right to IP that has been developed and ‘involves a team of researcher workers, external funding, collaborative arrangements and extended periods of conceptual and practical development.’ Given the difficulties associated with determining IP rights, French J pondered whether in future, universities may consider the alternative of deriving benefits from inventions developed by staff by offering highly competent and experienced commercialisation services in exchange for negotiated interest in the relevant intellectual property … that offers many benefits in terms of incentives, harmony and certainty that are not available through the enforcement of legal rights.

The University of Western Australia appealed the decision to the Full Bench of the Federal Court. The Court reaffirmed French J’s decision, confirming that despite Dr Gray having been employed [by The University of Western Australia] ‘to undertake research, to organise research and generally to stimulate research among the university’s staff and students, his terms of employment did not include a duty to invent’. The Court also confirmed that ‘on the evidence, [the] university had abandoned the patent committee mechanism and the term incorporating the patent regulations did not avail university’. The Court also observed that the outcome in this case is less than ideal, stating that:

If a less crude and more fair and reasonable result is to be achieved which balances the respective interests of a university and its academic staff members, this will need to be done by or under legislation or, if it could be devised, by an express contractual régime appropriate to the circumstances of the individual case.

As mentioned earlier, these two cases do not specifically address the issue of copyright. However, they do demonstrate the importance of maintaining the mechanisms and procedures necessary to ensure that a university always has valid IP policies and procedures. Also the cases raise the issue of ‘what is the role of an academic’. Generally the position of an academic is separated into three activities: teaching, research and administration. While it is relatively simply to define the activities of teaching and administration, what research entails,

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95 Ibid.
96 Ibid.
97 Ibid.
99 The University of Western Australia applied for special leave to appeal the Full Federal Court’s decision to the High Court which was denied by Gummow J.
100 University of Western Australia v Gray [2009] FCAFC 116, 1.
101 Ibid, 1.
102 Ibid, [211].
specifically commercial research, is more difficult to define and is an area within universities that requires clarification given the likelihood that the level of non-educational activities conducted within universities will increase.

Given these cases, the review of the publicly accessible University IP policies or procedures examines whether a policy defined the phrase ‘in the course of employment’ and the review of the copyright policies and information will examine whether universities define research activity beyond the fair dealing exceptions\(^\text{103}\) within the Copyright Act.

### 5.4 Intellectual Property

As discussed in both *Victoria University of Technology v Wilson*\(^\text{104}\) and *University of Western Australia v Gray*,\(^\text{105}\) traditionally academics have been given a freedom to pursue their own research agenda and direction and publish results of research.\(^\text{106}\) Given that academics often generate IP which is used as part of their teaching and research activities and as research is often disseminated as new knowledge through both scholarly and non-educational activities, it is important that universities have policies or procedures to manage IP issues including ownership.\(^\text{107}\)

Prior to the development of IP policies within universities, it was traditional to allow academic staff to have the benefit of any financial rewards from the creation of literary works, however, the growing cost of developing and delivering innovative courses using the latest technology has resulted in a need for universities to have unrestricted use of course material created by academic staff.\(^\text{108}\) Also, increasing collaboration between academic researchers, industry and government resulting in commercialisation of research opportunities and a need to clarify IP rights ownership has resulted in the development of IP policies or procedures.\(^\text{109}\)

\(^{103}\) *Copyright Act 1968* (Cth), ss 40–43.

\(^{104}\) [2004] VSC 33.

\(^{105}\) (No 20) [2008] FCA 498.


\(^{107}\) Intellectual Property Office, above n 106.


\(^{109}\) Intellectual Property Office, above n 104.
Table Three below provides a summary of the examination of 35\textsuperscript{110} publicly accessible Australian university IP policies or procedures. The policies or procedures were examined in relation to ownership of IP material including teaching material and scholarly works created by university staff during the course of their employment. The policies or procedures were also examined in terms of whether the phrase ‘in the course of employment’ was defined. As discussed in Section 5.3, an important issue in both \textit{Victoria University of Technology v Wilson}\textsuperscript{111} and \textit{University of Western Australia v Gray}\textsuperscript{112} was consideration about the role of the academic.

\textbf{Table Three: Summary of the University Intellectual Property Policy or Procedure\textsuperscript{113} Examined}

<table>
<thead>
<tr>
<th>University</th>
<th>Date of Review/Date of Last Amendment</th>
<th>Uni owns all IP created by staff including copyright</th>
<th>Uni owns Copyright in teaching/course material or works commissioned by the University</th>
<th>Staff owns Copyright in Scholarly Works</th>
<th>IP Policy defines in the ‘course of employment’ or an equivalent term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adelaide</td>
<td>July 2012</td>
<td>√</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Australian Catholic</td>
<td>June 2008</td>
<td>√</td>
<td>√</td>
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</tr>
<tr>
<td>Australian National</td>
<td>July 2010</td>
<td>√</td>
<td>√</td>
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<td></td>
</tr>
<tr>
<td>Canberra</td>
<td>June 2010</td>
<td>√</td>
<td>√</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Central QLD</td>
<td>Sept 2010</td>
<td>√</td>
<td>√</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charles Darwin\textsuperscript{114}</td>
<td>May 2005</td>
<td>√</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charles Sturt</td>
<td>August 2007</td>
<td>√</td>
<td>√</td>
<td></td>
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</tr>
<tr>
<td>Curtin</td>
<td>March 2011</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td></td>
</tr>
<tr>
<td>Edith Cowan</td>
<td>October 2011</td>
<td>√</td>
<td></td>
<td>√</td>
<td></td>
</tr>
<tr>
<td>Flinders</td>
<td>July 2011</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{110} An intellectual property policy or procedures were not publicly accessible for Bond University, Deakin University, University of Ballarat and University of South Australia.

\textsuperscript{111} [2004] VSC 33.

\textsuperscript{112} (No 20) [2008] FCA 498.

\textsuperscript{113} If the university did not provide an IP policy or procedures, the university’s IP statute or regulations were examined.

\textsuperscript{114} At the time of the review (November 2012), the Charles Darwin University IP policy was under review or development.
<table>
<thead>
<tr>
<th>University</th>
<th>Date of Review/Date of Last Amendment</th>
<th>Uni owns all IP created by staff including copyright</th>
<th>Uni owns Copyright in teaching/course material or works commissioned by the University</th>
<th>Staff owns Copyright in Scholarly Works</th>
<th>IP Policy defines in the ‘course of employment’ or an equivalent term</th>
</tr>
</thead>
<tbody>
<tr>
<td>James Cook</td>
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<td>√</td>
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<tr>
<td>La Trobe</td>
<td>October 2010</td>
<td>√</td>
<td>√</td>
<td>√</td>
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</tr>
<tr>
<td>Macquarie</td>
<td>October 2006</td>
<td>√</td>
<td>√</td>
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</tr>
<tr>
<td>Melbourne</td>
<td>December 2010</td>
<td>√</td>
<td>√</td>
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<tr>
<td>Monash</td>
<td>January 2012</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td></td>
</tr>
<tr>
<td>Murdoch</td>
<td>December 2007</td>
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<td>√</td>
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</tr>
<tr>
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<td>√</td>
<td>√</td>
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<tr>
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<td>May 2007</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td></td>
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<tr>
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<td>√</td>
<td>√</td>
<td>√</td>
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<tr>
<td>NSW</td>
<td>July 2010</td>
<td>√</td>
<td>√</td>
<td>√</td>
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<tr>
<td>Queensland</td>
<td>June 2011</td>
<td>√</td>
<td>√</td>
<td>√</td>
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<tr>
<td>QUT</td>
<td>June 2011</td>
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<td>RMIT</td>
<td>July 2012</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td></td>
</tr>
<tr>
<td>Southern Cross</td>
<td>August 2012</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td></td>
</tr>
<tr>
<td>Southern QLD</td>
<td>August 2011</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td></td>
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<tr>
<td>Swinburne</td>
<td>March 2012</td>
<td>√</td>
<td>√</td>
<td>√</td>
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</tr>
<tr>
<td>Sunshine Coast</td>
<td>September 2011</td>
<td>√</td>
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<td>Technology Sydney</td>
<td>June 2009</td>
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<td>√</td>
<td>√</td>
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<tr>
<td>Victoria</td>
<td>November 2010</td>
<td>√</td>
<td>√</td>
<td>√</td>
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<td>April 2012</td>
<td>√</td>
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<td>√</td>
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</tr>
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<td>Wollongong</td>
<td>June 2006</td>
<td>√</td>
<td>√</td>
<td>√</td>
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</tr>
</tbody>
</table>

115 At the time of the review (November 2012), The University of Melbourne IP policy was under review.
The focus of the 35 IP policies or procedures reviewed was on the ownership of IP developed by university staff and the potential commercial exploitation of IP developed by university staff or owned by the university. The sections relating to the commercialisation of IP generally discussed the procedures and responsibilities that university staff are required to follow in relation to notifying the university of a potential IP commercialisation opportunity and the responsibilities and obligations of the university in regards to commercialisation opportunities, income or revenue distribution and dispute resolution.

The use of IP by staff and in particular the use of third party IP was discussed by only one university, Murdoch University. Section 1.4.1 of Murdoch University’s IP Regulations states that ‘employee and students must respect and not breach any third party’s IP rights (in particular, but not exclusively, copyright)’. In addition, Murdoch University is the only university that requires employees and students to comply with copyright policies and guidelines within its IP documentation. Section 1.4.2 states that employees and students must ‘comply with any policies, regulations or similar that Murdoch has in place from time to time in respect of the use of a third party’s IP’.

Twenty five universities have reviewed their IP policies since the start of 2010. Such reviews provided the universities with an opportunity to incorporate the most recent legislative contained in the Copyright Amendment Act 2006 (Cth) and consider the implications of recent cases relating to IP issues. Ten of the 25 policies that have been reviewed since 2010 indicate that the university owns all IP created by employees of the university. This status could potentially be an attempt by these universities to clarify the issue of ownership of IP after University of Western Australia v Gray.

While all universities reviewed will claim ownership rights over IP developed by staff during the course of their employment or from undertaking their duties, as can be seen in table three above, a limited number, ten, define the phrase ‘course of employment’ or an equivalent phrase. Of the ten IP policies that provide a definition of the phrase ‘course of employment’ or an equivalent phrase, eight were reviewed since 2010. Of the ten universities that address the issue, only the University of Western Sydney and Victoria University attempt to clarify

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117 Ibid.
118 (No 20) [2008] FCA 498.
the situation by providing guidelines on what activities are considered to be in the course of employment (University of Western Sydney) and examples of what is defined as being in the course of employment (Victoria University).

In 1997, Monotti classified the allocation of IP ownership rights within universities into three approaches. Under the first approach, universities retain all IP rights except copyright, which is maintained by the creator of the work. In the second approach, universities retain all IP rights except in regards to copyright within scholarly works such as journal articles, conference papers and books. Under this approach universities will retain the copyright with teaching and course materials. In the third approach, universities extend claims to ownership on the basis of the type of IP involved and the circumstances of its creation.119

As a result of the examination of how each of the 35 universities allocates IP ownership rights, each university IP policy or procedure can be categorised into one (or in one case two) of Monotti’s three approaches.120

Three of the IP policies or procedures examined would fall within the first category of Monotti’s model. These three policies, from Swinburne University of Technology, The University of Western Australia and University of Wollongong, state that the university owns all IP except for copyright created by university staff. Under these policies, the copyright within course and teaching materials and scholarly works is retained by the staff member. These universities rely on a non-exclusive and revocable licence to use (for example, reproduce, publish, perform, broadcast) copyrighted work for teaching or research purposes.

The majority of the IP policies or procedures examined would fall within Monotti’s second category with 21 of the policies stating that the university owns all IP except for certain copyright works created by university staff. Under this category, the university will claim copyright ownership of teaching or course material, however, the copyright within scholarly works such as journal articles and conference papers will be retained by the staff member.

Twelve IP policies or procedures could fall within the third approach, with the 12 universities claiming ownership of all IP including copyright created by staff during the course of their

120 Monotti and Ricketson also identified five models in relation to ownership and allocation of rights in copyright subject matter for universities in Monotti and Sam [Staniforth] Ricketson, Universities and Intellectual Property Ownership and Exploitation (1st ed, 2003).
employment. However, The University of Melbourne and University of Tasmania will disclaim copyright in scholarly works. An exception is RMIT University which falls under both the second and third category as a result of separating IP into research and innovation IP and education and teaching IP. RMIT University will own all research and innovation IP including copyright created by staff during the course of their employment. For education and teaching IP, RMIT University will claim IP ownership of all course materials while staff will retain the IP in scholarly works such as books, journal articles, and conference papers as well as in personal notes and overheads developed by the staff member to assist with student learning.

5.5 Copyright

As stated in Chapter One, the economic value of intellectual property, specifically the copyright of academic works, is beginning to be realised by universities. Copyright is one of the most commonly generated and used forms of IP by academic staff within their educational, non-educational and research activities. The generating of and the using of IP by academics, particularly in written form, leads to copyright management issues.

University copyright policies, procedures and information guides are developed to assist staff and students in understanding and complying with their obligations in relation to the use of third party copyright materials under statutory provisions, licences and other provisions within the Copyright Act. However, as discussed in Section 1.1 of Chapter One and in the section on non-educational activities below, to overcome funding issues, Australian universities are engaging with industry and beginning to undertake more non-educational activities including commercial activities such as consultancies and contract research. With university staff being both creators and users of copyright material it is important that university copyright policies procedures and information guides recognise the use of third party copyright material beyond educational purposes.

As discussed in Section 3.2 of Chapter Three, at present, when using third party copyright material, universities and university staff are able to rely on three provisions within the Copyright Act:

122 Other university policies and procedures such as IP and non-educational activities also need to address this issue.
- Part VA and VB (referred to as the educational statutory licences)
- Fair dealing exceptions
- Section 200AB.

As a result of the present provisions within the Act for dealing with the use of third party copyright material, the examination of the publicly accessible copyright policies or information guides\(^{123}\) from 32 Australian universities focused on:

- Whether universities require staff to undertake compliance training in relation to copyright to ensure awareness and understanding of potential copyright issues;
- Whether copyright policies or copyright information guides discussed what constitutes research activity;
- The issue of using third party copyright material for non-educational purposes,
- Using electronic resources under licensing agreements;
- Whether advice is provided in relation to seeking permissions for the use of third party copyright material; and
- Section 200AB.\(^{124}\)

Table Four below provides a summary of the examination of 32\(^{125}\) Australian university copyright policies or information guides.

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\(^{123}\) These guides are web based.

\(^{124}\) A flexible dealing provision within the Copyright Act which educational institutions could potentially rely on if no other exceptions are available within the Act.

\(^{125}\) A copyright policy or equivalent document was not publicly accessible for Australian Catholic University, Bond University, Charles Sturt University, Deakin University, La Trobe University, The University of New South Wales and University of South Australia.
Table Four: Summary of the University Copyright Policy or Procedures Examined

<table>
<thead>
<tr>
<th>University</th>
<th>Date of Review/ Date of Last Amendment</th>
<th>Copyright Compliance Training</th>
<th>Discusses what constitutes research activity</th>
<th>Discusses the use of third party copyright material for non-educational purposes</th>
<th>Advice on Seeking Permissions</th>
<th>Discusses the use of commercial databases</th>
<th>s 200AB</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adelaide</td>
<td>December 2007</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Australian National</td>
<td>November 2012</td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ballarat</td>
<td>October 2011</td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Canberra</td>
<td>May 2011</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Central QLD</td>
<td>No Date</td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charles Darwin</td>
<td>May 2009</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Curtin</td>
<td>June 2012</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Edith Cowan</td>
<td>October 2010</td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
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<td></td>
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</tr>
<tr>
<td>James Cook</td>
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<td></td>
<td></td>
<td></td>
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<td>Macquarie</td>
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<td></td>
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<td></td>
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</tr>
<tr>
<td>Melbourne</td>
<td>March 2012</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Monash</td>
<td>January 2012</td>
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</tr>
<tr>
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<td></td>
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<td></td>
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<tr>
<td>Newcastle</td>
<td>No date</td>
<td></td>
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</tr>
</tbody>
</table>

126 If the university did not provide a copyright policy or procedures, the university’s web-based copyright information guides in respect to staff were examined.

127 As of April 2013, The Australian National University’s web-based copyright information guide was last updated in April 2013 and now discusses the use of commercial databases and s 200AB.

128 At the time of the review (November 2012), Curtin University’s web-based copyright information guides was last updated December 2010.

129 As of April 2013, the Edith Cowan University web-based copyright information guides were last updated in January 2013.
<table>
<thead>
<tr>
<th>University</th>
<th>Date of Review/ Date of Last Amendment</th>
<th>Copyright Compliance Training</th>
<th>Discusses what constitutes research activity</th>
<th>Discusses the use of third party copyright material for non-educational purposes</th>
<th>Advice on Seeking Permissions</th>
<th>Discusses the use of commercial databases</th>
<th>s 200AB</th>
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</thead>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
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<td></td>
<td></td>
<td></td>
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</tr>
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<td>RMIT</td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>Southern Cross</td>
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<td></td>
<td></td>
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<td></td>
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<td>§</td>
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<tr>
<td>Tasmania</td>
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<td></td>
<td>§</td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Technology Sydney</td>
<td>2010/11</td>
<td></td>
<td>§</td>
<td>§</td>
<td></td>
<td></td>
<td>✓</td>
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<tr>
<td>Victoria</td>
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<td></td>
<td>§</td>
<td></td>
<td></td>
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<td>✓</td>
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<td>§</td>
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<tr>
<td>Western Sydney</td>
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</tr>
<tr>
<td>Wollongong</td>
<td>March 2010</td>
<td>✓</td>
<td>§</td>
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<td>✓</td>
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</tbody>
</table>

The focus of the 32 copyright policies or information guides examined was on discussing and explaining how third party copyright material could be used (including reproduction limits) under the educational statutory licensing schemes, fair dealing and music licences. The majority of the copyright information guides provided an introduction into what copyright is, the types of works protected under copyright law and the duration of copyright protection provided to types of works under the Copyright Act.
Copyright Compliance Training

A key issue identified as part of this examination of universities’ copyright policies and information guides is how universities are ensuring that staff are aware of their copyright compliance responsibilities. Potentially, universities are at risk of retaining the legal liability for any copyright infringement of third party copyright material by staff if they (staff) are not aware of their responsibilities as it is the universities that enter into the agreements or contracts with third parties.

While the majority of the copyright policies and information guides examined stated that university staff (and students) are responsible for compliance with obligations under the Copyright Act and other licences only three universities, The University of Adelaide, University of the Sunshine Coast and University of Wollongong specifically refer to university staff completing copyright compliance training. The University of Adelaide requires academic staff who commenced employment at the University since December 20, 2007 (the commencement date of the copyright policy) to complete the copyright online induction course within the first month of employment. Workplace supervisors may also require existing academic staff to complete the induction course.\textsuperscript{130} The University of the Sunshine Coast encourages university staff to ‘attend at least one copyright training session and read and understand relevant information provided on the [University of the Sunshine Coast] copyright webpage’.\textsuperscript{131} The University of Wollongong’s copyright policy states that ‘all staff must attend at least one copyright training session and read and understand relevant information provided on the [University of Wollongong’s] copyright websites’.\textsuperscript{132}

Research Activities

For the 42.2 per cent\textsuperscript{133} of all full time university staff who are classified as either research only (14.7 per cent) or teaching and research (27.5 per cent), a major component of their role

\textsuperscript{133} Department of Industry, Innovation Science, Research & Tertiary Education, Staff 2012: Selected Higher Education Statistics: Table 1.3 FTE for Full-time and Fractional Full-time Staff by Function, 1996 to 2012(a) (2012)
is undertaking what is referred to as ‘research’. The Copyright Act provides no guidance in
relation to the definition of ‘research’ unlike the term ‘educational purposes’ which is defined
within the Act. The majority of the copyright policies or information guides examined only
stated that research could fall under the fair dealing exception for the purpose of research or
study within the Copyright Act. However, eight did specifically discuss what constitutes
research activity.

As stated in Section 3.3 of Chapter Three, anecdotal evidence suggests that, generally, writing
a scholarly work such as a journal article or conference paper is considered by academic staff
to be research and the activity is believed to fall under the fair dealing provisions. However,
in terms of advising whether writing a scholarly work is research under the fair dealing
provisions within the Act, four universities, Central Queensland University, Edith Cowan
University, Monash University and The University of Sydney, all interpret what constitutes
research activity in a similar way to Ricketson and Creswell\textsuperscript{134} and Burrell and Coleman.\textsuperscript{135}
These authors have argued that a researcher can only rely on the fair dealing exceptions
during the actual process of conducting research as the activity of research does not include
dissemination of the research. For example, in the section on copyright and research activity,
the Monash University copyright guide states that ‘a researcher can rely on … ‘fair dealing’
for the use of third party content during the actual process of conducting research’. However,
‘the ultimate publication or broad distribution of third party content embedded within research
output is not considered a ‘fair dealing’’.\textsuperscript{136} The section then states that ‘in most cases
researchers will need to secure copyright permissions for any third-party content included
within research destined for publication or broad dissemination’.\textsuperscript{137} Four of the eight
copyright information guides only adopted the dictionary definition of research as being the
‘diligent and systematic enquiry or investigation into a subject discover facts or principles’,\textsuperscript{138}
but none of them indicated the publishing of research results would not fall under the fair
dealing exception for research.

\textsuperscript{134} See Ricketson and Christopher Creswell, \textit{The Law of Intellectual Property: Copyright, Designs &
Confidential Information} (2nd revised ed, 2002).
\textsuperscript{135} See Robert Burrell and Allison Coleman, \textit{Copyright Exceptions: The Digital Impact} (1\textsuperscript{st ed, 2005).
\textsuperscript{136} Monash University, \textit{Copyright and Research} (n.d.)
\textsuperscript{137} Ibid.
\textsuperscript{138} \textit{Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Ltd} [1990] FCA 218; 352
Using Third Party Copyright Material as Part of Non-educational Activities

Only seven universities deal with the issue of the use of third party copyright material for non-educational purposes. Six of the seven copyright information guides only go as far as stating that staff should contact the University’s copyright office or the solicitor’s office to seek advice on using third party copyright material for non-educational purposes. However, Monash University provides a section on university business activities within its copyright information guide. While the section is not specific to non-educational activities such as contract research, it provides additional information to staff by listing six questions that a user should consider prior to using third party copyright material for non-educational purposes. It also provides tips on how to seek permission from the copyright owner to use their material for a particular purpose. Nineteen other copyright information guides also provide guidance on how to seek permission for use of third party copyright material.

Using Electronic Resources

Nineteen universities within their copyright policy or copyright information guides also highlight that the use of electronic resources are governed by terms and conditions and that these terms and conditions can override the educational statutory licensing schemes or the fair dealing exceptions available to university staff under the Copyright Act. For example, Curtin University warn staff that:139

If material you wish to copy is covered by some form of contractual or licensing agreement, it is essential you abide by the terms of that agreement rather than rely on Curtin University's copyright statutory licenses …

The terms [and conditions] of these [licensing agreements] vary but most place some restrictions on copying the material for other than personal use. Only a few databases … actually permit reproduction … Most licensing agreements do not permit their content to be "re-distributed" or "re-packaged", … Some make exceptions for including material in … course packs.

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However, at The University of Sydney, users of the University’s electronic databases ‘will be asked to accept the usage conditions for the library’s electronic resources’. It warns that the use of electronic journals and databases subscribed to by the University Library is usually governed by the terms of contracts signed by the University. These contracts often override the Copyright Act … [however] generally, you will be able to print and download the material that you need for your research or study.

Section 200AB

Nine universities have included a reference to s 200AB within their copyright policy or copyright information guides. For seven universities, the reference to s 200AB is limited to stating that s 200AB is a ‘certain special purposes’ exception within the Act which is available to educational institutions, however, before relying on it, staff should contact the university’s copyright office, By incorporating s 200AB into their copyright policies or information guide, these nine universities are indicating that they have considered how the latest amendments to the Copyright Act may impact on the activities of university personnel. A reason that some universities may not have addressed s 200AB could be that they are waiting for a judicial interpretation on how s 200AB will operate. However, the intention of s 200AB to enable educational institutions and libraries to assist their users in the online and digital environment by them to use copyright material for non-commercial purposes, does not assist universities in understanding how s 200AB would operate within a higher education environment. As a result of the section being new and having not been tested in any court, The University of Adelaide and six other universities are taking a conservative approach to its interpretation. For example, the University of Adelaide’s copyright information guide states this and recommends (as do six other universities) that the University’s copyright officer be consulted prior to relying on s 200AB. Until a test legal case occurs and a judicial interpretation is available on the operation of s 200AB, it appears that other universities maybe and should be taking a similar approach to The University of Adelaide.

141 Ibid.
142 See Australian Digital Alliance Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Provision of the Copyright Amendment Bill 2006 (2006); Australian Copyright Council, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Provision of the Copyright Amendment Bill 2006 (2006); Copyright in Cultural Institutions, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Provision of the Copyright Amendment Bill 2006 (2006).
143 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth).
5.6 Non-educational Activities

As discussed in Section 1.1 of Chapter One, with government funding for most Australian universities below 60 percent\textsuperscript{144} of total funding and falling, a major strategic emphasis for universities has been and will continue to be on securing other sources of operating revenue including commercial opportunities and partnerships. As a consequence, all Australian universities will need to have policies or procedures related to non-educational activities to assist both the university and university staff in the management of commercial opportunities and ensure that risk to the university in relation to non-educational activities is minimised.

Universities as publicly funded institutions must comply with the competitive neutrality policy of their respective State or Territory government when competing with the private sector for non-educational activities such as contract research or consultancies. The purpose of competitive neutrality is to balance the competition between publicly funded organisations and private sector to ensure that publicly funded organisations do not enjoy competitive advantages as a result of their public sector ownership.\textsuperscript{145} Universities may receive competitive advantages through exemptions from capital cost, land tax and council rates. However, as universities have compliance issues in relation to various State and Commonwealth legislation, universities may also face a competitive disadvantage.\textsuperscript{146}

Complying with the applicable competitive neutrality policy means that universities will need to apply a full cost model to certain types of non-educational activities. For example, at RMIT University, the competitive neutrality policy requires compliance with the Victorian Government’s competitive neutrality policy\textsuperscript{147} and requires a full cost model to be applied to certain types of activities, including contract research, consultancies and non-award programs.\textsuperscript{148}

\textsuperscript{146} Ibid, 13.
\textsuperscript{147} Ibid.
A full cost recovery model is described as follows: As informed by the competitive neutrality provisions of the Trade Practices Act 1974, the recovery of all direct and indirect costs associated with the activity, including overheads of central administration and the Department/Area.

Cost models can either incorporate a profit component or require cost recovery. However, for strategic purposes a full cost recovery may not be applied to a particular service activity such as contract research. For example, a university department may undertake contract research on behalf of an external company or organisation in consideration of future partnerships in respect of Australian Research Council linkage grants.

Generally, universities’ non-educational activities policies or procedures state that the purpose for and benefits of undertaking non-educational activities includes collaboration with industry and government departments, enriching the skills and knowledge of academic staff and financial benefit to the university. In their assessment of potential commercial activity, universities will assess the cost, the financial and other benefits, and the risk profile of the commercial activity. The level of risk is an influencing factor on whether an activity is approved; however, risk assessment does not consider the risk to third party IP rights other than in terms of IP ownership.

Table Five below provides a summary of the examination of 32 publicly accessible policies or procedures related to non-educational activities of Australian universities.

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150 Note the Trade Practices Act 1974 (Cth) was renamed the Competition and Consumer Act 2010 (Cth) as of 1 January 2011.


152 A copyright policy or equivalent document was not publicly accessible for Bond University, Deakin University, Monash University, The University of Notre Dame, The University of Western Australia, University of South Australia and University of Tasmania.
Table Five: Summary of the University Non-educational Activities Related Policy or Procedures Examined

<table>
<thead>
<tr>
<th>University</th>
<th>Date of Review/Date of Last Amendment</th>
<th>Defines or Provides Examples of Non-educational Activities</th>
<th>Discusses IP ownership issues</th>
<th>Discusses the use of third party IP material</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adelaide</td>
<td>January 2010</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Australian Catholic</td>
<td>October 2008</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Australian National</td>
<td>February 2012</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Ballarat</td>
<td>March 2009</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Canberra</td>
<td>August 2006</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Central Queensland</td>
<td>No Date</td>
<td>✓</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Charles Darwin</td>
<td>January 2012</td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Charles Sturt</td>
<td>October 2009</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Curtin</td>
<td>June 2009</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Edith Cowan\footnote{153}</td>
<td>June 2009</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Flinders</td>
<td>January 2011</td>
<td></td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Griffith</td>
<td>March 2011</td>
<td></td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>James Cook</td>
<td>December 2009</td>
<td></td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>La Trobe</td>
<td>August 2009</td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Macquarie</td>
<td>June 2010</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Melbourne</td>
<td>October 2012</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Murdoch</td>
<td>February 2005</td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Newcastle</td>
<td>July 2009</td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>New England</td>
<td>April 2007</td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>NSW</td>
<td>April 2011</td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Queensland</td>
<td>April 2008</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>QUT</td>
<td>February 2012</td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>RMIT</td>
<td>June 2010</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\footnote{153}{At the time of the review (November 2012), the Edith Cowan University Consultancy Policy was under review.}
Generally, the focus of the policies or procedures related to non-educational activities was on the procedures that must be followed in terms of the approval and management including risk assessment and costing of a potential commercial activity within a university. As with the IP policies examined, the policies discussed ownership of any IP developed from the non-educational activity and the potential for commercial exploitation.

As can be seen from Table Five above, all 32 policies or procedures provided either a definition of commercial activities, which was generally taken from the university act, or provided examples of commercial activities such as commercial research or non-award teaching. Nineteen of the policies or procedures raised IP issues in terms of ownership and commercial exploitation but only four of the policies or procedures raised the issue of using third party IP as part of a non-educational activity. In using third party IP, these four policies or procedures only state that all IP must be considered and compliance obligations to third party IP must be ensured.

The requirement to commercially exploit IP generated as part of non-educational activities raises a question about what component of a non-educational activity involving an external third party such as a consultancy could potentially be commercially exploited by a university. It is most likely, depending on the terms of the contract, that an external third party will own any IP developed from a project and a university only have the opportunity to publicly disseminate the findings in a scholarly work. For example, the non-educational policies of the
The University of Wollongong and The University of Newcastle state that if a research activity does not commercially exploit IP, it is not covered by the University’s commercial activity guidelines. However, the University of Wollongong policy then goes on to state that consultancies that are provided to an external third party for a fee are covered by the policy. The University of Newcastle commercial activities policy also states that ‘an activity may be commercial where there is no expectation of profit’. These types of examples demonstrate the difficulty that staff may have in complying with their obligations under a university non-educational activity policy.

Based on the findings from the examination of copyright policies and information guides, as discussed in the section above, with only seven universities discussing the issue of using third party copyright material for non-educational purposes, it is not surprising that none of the commercial activity policies discussed the issue of using of third party IP. Until universities incorporate the use of third party copyright material for non-educational purposes into their copyright policies, procedures or information guides and eventually, their IP policies, non-educational activity policies will continue to focus on the risk to the university and potentially ignore the risk to third party IP right owners.

5.7 Conclusion

This chapter has examined the publicly accessible policies, procedures and information guides of Australian universities related to IP and copyright management and non-educational activities.

The examination of the publicly available intellectual property policies and procedures of 35 universities identified only one, Murdoch University that addressed the use of third party intellectual property, specifically with reference to copyright material. Likewise, the examination of publicly available policies and procedures related to non-educational activities of 32 universities identified that all, except four, were silent on the need to consider the use of third party intellectual property when undertaking a non-educational activity and only a limited number, seven, of the copyright policies or information guides examined discussed the issue of third party use of copyright material for non-educational activities.

The examination has also identified that of the universities’ copyright policies or information guides reviewed the majority stated that university staff (and students) are responsible for compliance with obligations under the Copyright Act and other licences however only three, The University of Adelaide, University of the Sunshine Coast and University of Wollongong, specifically refer to university staff completing copyright compliance training.

Nineteen universities highlight that the use of electronic resources are subject to terms and conditions and that certain uses of the material held within an electronic database such as the distribution of multiply copies to students may not be permitted. As there is potential that users of electronic resources may be relying on the educational statutory licensing schemes or fair dealing exceptions within the Copyright Act rather than the terms of use and, as a result, may be infringing the terms and conditions of use of each resource, it needs to be explored whether universities require staff (and students) to read and agree to the terms and conditions of each electronic resources available via library websites.

The majority of Australian universities also need to clarify what is meant by the term ‘research’ Other than teaching and administrative activities all other activities undertaken by academic staff are often referred to as ‘research’. The majority of the copyright policies or information guides examined only stated that research could fall under the fair dealing exception for the purpose of research or study within the Copyright Act, however, eight did specifically discussed what activities constitutes research.

Given the findings from the examination of the publicly accessible policies, procedures and information guides of Australian universities related to IP and copyright management and non-educational activities, the next chapter, Chapter Six, will discuss the insights and findings obtained from interviews conducted with copyright officers from Australian universities.
CHAPTER 6: INTERVIEWS WITH COPYRIGHT OFFICERS OF AUSTRALIAN UNIVERSITIES

6.1 Introduction

Following the examination of the publicly accessible copyright policies or information guides of Australian universities, this chapter discusses the insights and findings obtained from interviews conducted with copyright officers\(^1\) from Australian universities.

The purpose of the interviews is to provide context or clarity to the examination of the publicly available copyright policies or information guides of Australian universities undertaken in Chapter Five. The interviews will also provide an insight into the experiences and perceptions of university copyright officers in relation to the use, particularly by university staff, of third party copyright material for educational, non-educational and research activities.

This chapter outlines the research design and method used for the interviews. From the analysis of the interview data, issues associated with the approaches of Australian universities to the use of third party copyright material for educational, non-educational and research activities by staff are discussed.

Copyright officers were identified by the researcher and senior supervisor as the most appropriate university contact to interview in relation to providing a view or opinion on the issue of universities’ approaches to the use third party copyright material for educational, non-educational and research activities. Within Australian universities, the structure and responsibilities of the legal and research areas differ and there are a number of areas within universities responsible for copyright including education, industry engagement, international, legal and research. However all universities have a copyright officer and this role is responsible for providing advice on ‘legal and technical matters related to the use of ... [copyright and are responsible for] monitoring copyright legislation as well as developing and managing administrative procedures to ensure legal compliance’.\(^2\) Universities Australia also

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\(^1\) The title of the copyright officer within a university is also described as a copyright advisor or a copyright coordinator. For this thesis, the generic title of copyright officer is used to describe the role.

states that the university copyright officers are the appropriate university contact to ‘raise concerns over alleged or potential copyright infringement’.³

By undertaking in-depth semi-structured interviews with copyright officers of Australian universities it was anticipated that the interview data would provide information to the researcher about:

- The extent of the role of the copyright office within a university;
- The activities that a copyright officer is responsible for in relation to educational, non-educational and research activities;
- The type of advice sought by staff in relation to the issue of using third party copyright material for educational, non-educational and research activities;
- Examples of where academic staff may have potentially breached their obligations under the Copyright Act 1968 (Cth) (hereafter referred to as the Copyright Act) when undertaking non-educational activities;
- How university libraries are managing the use of electronic resources such as journals and databases;
- How university staff and students are made aware that the terms and conditions which govern the use of electronic resources can override the educational and fair dealing provisions available to them under the Copyright Act, and
- Reasons behind why Australian universities’ copyright policies or guidelines rarely discuss the issue of third party use of copyright material for non-educational or research activities.

As stated in Section 5.5 of Chapter Five, university copyright policies, procedures and information guides are developed to assist staff and students in understanding and complying with their obligations in respect to the use of third party copyright materials under statutory provisions, licences and other provisions within the Copyright Act. The focus of the copyright policies or information guides examined and discussed in the previous chapter was on explaining how third party copyright material could be used (including reproduction rights) under the educational statutory licensing schemes and fair dealing exceptions within the Copyright Act.

Copyright officers are the key personnel within universities responsible for copyright information guides as well as providing advice to staff and students in regards to copyright

³ Ibid.
queries for educational, non-educational and in many cases research activities. As found in Chapter Five, all the publicly available copyright policies or information guides reviewed discussed educational activities, with only a limited number, eight and seven respectively, discussing research activities beyond the fair dealing exceptions within the Copyright Act and the issue of using third party copyright material for non-educational activities. Nineteen of the copyright policies or information guides reviewed highlighted that the use of electronic resources are governed by contractual terms and conditions and that these contractual terms and conditions can override the educational and fair dealing provisions available to university staff under the Copyright Act.

The copyright officers from 38 Australian universities were invited to participate in the research. A total of 18 face to face, telephone and written interviews were conducted with copyright officers from 16 Australian universities.

6.2 Research Method

The research design of this thesis is qualitative. The theoretical approach taken for this part of the research is interpretative and grounded in practice, focusing on understanding how universities manage the use of third party copyright material for non-educational and research activities.

6.2.1 Design

During the design of this research, it was anticipated that the copyright officers to be interviewed would be identified based on the analysis of the publicly accessible copyright policies and guidelines of 39 Australian universities. The selection criteria for interviewing was to be that if the university’s copyright policy or guideline addressed the issue of using third party copyright material for non-educational activities, then the university’s copyright officer would be invited to participate in the research. However given that an initial review of university copyright policies or information guides in 2008 identified only four universities

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4 Following one copyright officer declining the invitation to participate in the research, another university was not invited to participate, as the copyright officer worked for a university that provides copyright services for the university that declined the invitation.

5 Eighteen interviews were undertaken as the copyright officer at University A was interviewed three times. As stated in sections 6.2.1 and 6.2.2, the interview guide was piloted and modified with University A’s copyright officer and the two follow-up interviews were conducted after each interview period.
addressing the issue, it was decided to invite all copyright officers of Australian universities to participate in the research.

It was also intended that, as the analysis of the publicly accessible copyright policies or information guides would identify universities, the identity of the copyright officers interviewed would be made public. However, following requests by several of copyright officers interviewed to be anonymous, it was decided that all interviewees would be anonymous, so that universities could not be identified. Also permission was not sought from individual universities to interview their copyright officer as the purpose of the interview was for the copyright officer to provide a personal opinion and clarify publicly accessible material. Ethics approval was obtained from RMIT University on the basis that permission would not be sought from individual universities for the participation of their copyright officers in this research.

Telephone and face to face semi-structured interviews using opened-ended questions were used to collect the majority of the data. The interview process was based on ‘[a] qualitative method that involves open-ended relatively unstructured questioning in which the interviewer seeks in-depth information on the interviewee’s feelings, experiences and perceptions’. As stated in Section 1.7 of Chapter One, the interviews enabled the researcher to obtain information that is not otherwise available and to gain an insight into the experiences and perceptions of university copyright officers in relation to the use, particularly by university staff, of third party copyright material for educational, non-educational and research activities.

Following the analysis of the publicly accessible copyright policies or information guides of Australian universities and in order to ensure consistency in the interviews, an interview guide was prepared, covering the following areas:

- Awareness and communication of copyright issues
- Advice regarding copyright queries
- Compliance with the Copyright Act
- Compliance with the contractual terms of use of electronic resources.

The interview questions were used as a guide and the order and wording of the questions were flexible. A copy of the interview guide is provided in Appendix E. The interview guide was piloted and modified with University A’s copyright officer. Due to the semi-structured form

of the interview and depending on the information provided by the copyright officers, not all questions were asked, however, in most cases, the interview covered the topics or areas within the guide. Question 15 of the interview guide, Do you have any other comments that you would like to make about copyright and universities, was asked in all of the interviews.

6.2.2 Interviews

The copyright officer of University A provided the names and contact details for 28 copyright officers within Australian universities. The names and contact details of the remaining 10 university copyright officers were obtained from searching university websites.

An expression of interest for interviews was sent out in a notice from the copyright officer of University A to an email group of Australian and New Zealand university copyright officers. From this notice, three interviews were obtained. The remaining 34 copyright officers were invited via email to participate in the research. Each email that was sent provided an introduction into the purpose of the research and a plain language statement outlining the research with contact details was attached. A sample copy of the email is provided in Appendix D. If there was no response to the initial invitation, a follow-up email was sent approximately eight weeks after the original email invitation.

The interviews with university copyright officers were conducted over two periods from April 2009 to August 2009 and May 2010 to December 2010. Each copyright officer interviewed was required to sign a consent form. At the end of each interview period, a follow-up interview was conducted with the copyright officer University A. As the copyright officer at University A had disseminated the interest of expression notice for this research and the interview guide had been piloted and modified with her, she agreed to be a person (in addition to the senior supervisor) that the researcher could discuss findings and analysis of the interview data with. These follow-up interviews allowed the researcher to ask additional questions to clarify and understand some of the copyright issues raised during the interviews.

As the copyright officers were located throughout Australia, telephone interviews were used to collect the majority of the data. A limitation of conducting the majority of the interviews via telephone was that the copyright officers interviewed over the telephone were not as forthcoming in their opinions during the interviews as the copyright officers interviewed face to face.
Of the 38 copyright officers invited to participate in the research, 16 copyright officers agreed to be interviewed, 15 did not respond to the request for an interview and six declined to be interviewed. Of the six that declined, five declined due to their work commitments. As one of the copyright officers stated in their reply to the email invitation:

Apologies, but current workload dictates I concentrate on core activities for the time being. I feel your proposal to explore ideas that copyright officers often only discuss behind closed doors requires I make considerations I can't really take to time [sic] for at this time.

As stated below in Section 6.3, the 16 copyright officers interviewed were from a range of different types or categories such as dual sector (higher education and TAFE\(^7\)), regional based and group of eight universities throughout six of the seven States and Territories within Australia.

### 6.2.3 Transcription

With three exceptions, the 16 interviews were recorded using a digital recorder. Of those not recorded, two were as a consequence of the noise level in the location selected by the participant for the interview and one was at the request of the participant. In each of the three cases detailed notes were taken. Following the non-recorded interviews, the detailed notes were transcribed by the researcher into a summary of each of the interviews.

All of the recorded interviews were transcribed by a professional transcription service. Following the transcription of the interviews, each transcript was reviewed to ensure the accuracy of the transcripts and to decipher any sections that the transcription service was unable to decipher due to unclear speech or the use of acronyms and/or jargon.

### 6.2.4 Analysis

The interview transcripts were coded and analysed using the NVivo 9 software. This meant that the interview transcripts were broadly coded on the basis of the themes of the interview questions. The themes were then reviewed and the two overarching themes of risk

\(^7\) TAFE refers to Technical And Further Education.
management and focus of copyright offices were then specifically coded into sub-themes. Definitions of what each tree node and sub-node meant (as the codes or themes are referred to in NVivo) were created to ensure consistency with the coding of the interviews. Queries and matrices were created within NVivo to confirm the relationship between the data and conclusions. The data was organised into matrices to check emerging findings in a transparent manner. As noted by Morse and Richards:

> The key to rigorous qualitative inquiry is the researcher's ability … of being constantly aware and constantly asking analytic questions of data, which, in turn, constantly address the questions asked. Qualitative inquiry constantly challenges assumptions, constantly challenges the obvious, reveals the hidden and the overt, the implicit and the taken for granted, and shows these in a new light.

### 6.3 Profile of Universities and Copyright Offices Interviewed

As shown in Table Six below, the 16 copyright officers interviewed were from a range of different types or categories of universities throughout six of the seven States and Territories within Australia. Four of the copyright officers interviewed worked at regional based universities, four worked at dual sector (higher education and TAFE\(^\text{10}\)) universities, three worked at universities that are members of the Australian Technology Network (ATN), two worked at universities that are members of the Innovative Research Universities (IRU) Australia network and two worked at universities that are members of the group of eight universities.

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8 The themes identified during the NVivo analysis of the interview transcripts are discussed in Sections 6.4 and 6.5.


10 TAFE refers to Technical And Further Education.
Findings

The interviews conducted with the 16 copyright officers provided insights into the staffing levels, reporting lines and the activities or duties of copyright officers at Australian universities. They enabled the researcher to enquire about the activities that copyright officers are responsible for and the types of queries or questions that copyright officers must deal with.

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11 Staff and student numbers provided in table one were obtained from the Department of Education, Employment and Workplace Relations website. See: <http://www.deewr.gov.au/HigherEducation/Publications/HESStatistics> at 10 January 2012. Staff numbers were obtained from Table 1.6 FTE for Full-time, Fractional Full-time and Estimated Casual Staff by State, Higher Education Provider, Work Contract and Gender for the relevant year. Student numbers were obtained from Table (i)(c): Summary of Student Numbers (a) - List of Higher Education Providers, for the relevant year.
and respond to on a regular basis. Some, particularly the copyright officers interviewed face to face, provided examples of cases when academic staff within their university potentially breached their obligations under the Copyright Act. The interviews also provided information on the approaches university libraries have adopted to ensure that university staff and students are made aware that the terms and conditions which govern the use of electronic resources can override the educational and fair dealing provisions available to them under the Copyright Act.

6.4.1 Staff Levels and Reporting Lines

As shown in Table Seven, 10 of the universities interviewed had the full time equivalent of one or less staff members holding a position related to copyright within the university. Given the staff and student numbers at each of these universities (see Table One), these staffing levels within copyright offices could potentially have legal and risk management implications for the universities interviewed. It should however be noted that 10 of the copyright officers interviewed also commented that library staff are often required to answer queries from staff and students about copyright. As the copyright officer at University M noted, library staff are often required to explain the copyright policy in regards to what can be done. The copyright officer at University P has also ‘pushed to have three copyright mentees put in place. So once a week we meet and we just discuss all the queries that have come through that week …’.

Table Seven: Staffing Levels and Reporting Lines of Copyright Offices

<table>
<thead>
<tr>
<th>University</th>
<th>Number of Staff in the Copyright Office - Full Time Equivalent</th>
<th>Location of Copyright Office</th>
</tr>
</thead>
<tbody>
<tr>
<td>University A</td>
<td>3</td>
<td>Library</td>
</tr>
<tr>
<td>University B</td>
<td>2</td>
<td>Research</td>
</tr>
<tr>
<td>University C</td>
<td>1.4</td>
<td>Library</td>
</tr>
<tr>
<td>University D</td>
<td>N/A</td>
<td>Library</td>
</tr>
<tr>
<td>University E</td>
<td>1</td>
<td>Library</td>
</tr>
<tr>
<td>University F</td>
<td>1</td>
<td>Library</td>
</tr>
<tr>
<td>University G</td>
<td>0.6</td>
<td>Library</td>
</tr>
<tr>
<td>University H</td>
<td>3</td>
<td>Library</td>
</tr>
</tbody>
</table>
In terms of reporting lines, as shown in table two, of the 16 copyright officers interviewed, 13 of the copyright officers’ positions were associated with library services, two were associated with the legal services and one was part of the research services.\(^\text{12}\)

### 6.4.2 Activities of Copyright Officers

The interviews revealed that the majority of the responsibilities of copyright officers relate to educational activities. They are responsible for preparing and maintaining copyright information guides,\(^\text{13}\) answering queries related to copyright issues, providing advice and assistance in relation to seeking permissions, conducting training or seminar sessions, and in some cases, conducting compliance checks to ensure university staff are complying with their legal obligations. Table three shows the activity levels of the copyright officers interviewed in relation to permissions, training and compliance checks.

<table>
<thead>
<tr>
<th>University</th>
<th>Number of Staff in the Copyright Office - Full Time Equivalent</th>
<th>Location of Copyright Office</th>
</tr>
</thead>
<tbody>
<tr>
<td>University I</td>
<td>1</td>
<td>Library</td>
</tr>
<tr>
<td>University J</td>
<td>0.5</td>
<td>Legal</td>
</tr>
<tr>
<td>University K</td>
<td>1</td>
<td>Legal</td>
</tr>
<tr>
<td>University L</td>
<td>1</td>
<td>Library</td>
</tr>
<tr>
<td>University M</td>
<td>2</td>
<td>Library</td>
</tr>
<tr>
<td>University N</td>
<td>1</td>
<td>Library</td>
</tr>
<tr>
<td>University O</td>
<td>1</td>
<td>Library</td>
</tr>
<tr>
<td>University P</td>
<td>1</td>
<td>Library</td>
</tr>
</tbody>
</table>

---

\(^{12}\) At the time of the interview, the appointment to research services had occurred within the previous 12 month period.

\(^{13}\) University copyright policies and information guides are discussed in Chapter Five.
Table Eight: Activities of Copyright Officers

<table>
<thead>
<tr>
<th>University</th>
<th>Permissions</th>
<th>Training / Seminars</th>
<th>Compliance Checks</th>
</tr>
</thead>
<tbody>
<tr>
<td>University A</td>
<td>Y¹</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>University B</td>
<td>Y</td>
<td>Y</td>
<td>Y¹</td>
</tr>
<tr>
<td>University C</td>
<td>N</td>
<td>Y</td>
<td>Y¹</td>
</tr>
<tr>
<td>University D</td>
<td>N</td>
<td>Y</td>
<td>Y³</td>
</tr>
<tr>
<td>University E</td>
<td>Y¹</td>
<td>Y²</td>
<td>N</td>
</tr>
<tr>
<td>University F</td>
<td>N</td>
<td>Y</td>
<td>N³</td>
</tr>
<tr>
<td>University G</td>
<td>N</td>
<td>Y</td>
<td>Y²</td>
</tr>
<tr>
<td>University H</td>
<td>Y¹</td>
<td>Y</td>
<td>Y¹</td>
</tr>
<tr>
<td>University I</td>
<td>N</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>University J</td>
<td>N</td>
<td>Online⁴</td>
<td>N</td>
</tr>
<tr>
<td>University K</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>University L</td>
<td>N</td>
<td>Y</td>
<td>Y²</td>
</tr>
<tr>
<td>University M</td>
<td>Y</td>
<td>Y</td>
<td>Y¹</td>
</tr>
<tr>
<td>University N</td>
<td>N/A</td>
<td>N</td>
<td>N/A</td>
</tr>
<tr>
<td>University O</td>
<td>N</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>University P</td>
<td>N/A</td>
<td>N</td>
<td>N/A</td>
</tr>
</tbody>
</table>

N/A - Not Asked / Not Answered
1 – Teaching Material
2 – Ad-hoc Basis
3 – Not university wide however departments may undertake an audit. Each department head is also required to sign off on an annual compliance report.
4 – During Induction
5 – To ensure compliance under the statutory educational licences within the Copyright Act 1968 (Cth)

Of the six copyright officers who provide permission services to staff, three do so for the purpose of obtaining permission to use third party copyright material for any type of activity; however, the other three only provide a permission service for educational activities. For the other seven copyright officers that were asked about providing permission services, all seven stated that advice and permission letter templates are available on their university’s copyright website to assist staff in obtaining permission for use of third party copyright material.
Thirteen of the interviewees provided training or presented seminars and workshops to staff on copyright issues. The focus of these seminars and workshops are generally on copyright issues related to educational activities. The copyright officer at University B was the only copyright officer interviewed who conducts information sessions specifically focused on consultancies, contracts and research projects. While the copyright officer at University J did not provide training or present seminars and workshops, University J does require new staff to undertake an online induction program which provides a general overview of copyright. Interestingly, while the copyright officer at University P does not provide training or present seminars or workshops to staff, they do provide seminars to the University’s higher degree by research students, particularly in relation to the use of third material in theses.

Four of the seven copyright officers that have undertaken compliance checks of materials used by staff do so only in relation to teaching material. In addition, the copyright officer at University D reviews all material including both teaching and research material but only to ensure that university staff are complying with the statutory educational licences under the Copyright Act. Only one (University L) of five universities that have over 3,000 staff and 20,000 students undertake compliance checks, however, it is only in relation to teaching material. University F is the only university that required heads of department to complete and sign an annual compliance report, which has a section dedicated to copyright including third party material.

6.4.3 Queries and Questions for Copyright Officers

Eight copyright officers provided information about the type of advice sought by staff. The majority of the queries that they receive relate to educational activities and clarification about what can be done under the Copyright Act or other contractual licences. As the copyright officer at University C stated: ‘you are bound by rules and then someone phones you for advice, you are just getting technical on quantities and how substantial it is. It all comes back to rules’.

The copyright officer at University A has found that when staff contact the copyright office they generally want to ‘know about something specific (such as how can I use an artistic work) rather than a general overview of the licences (such as the statutory licences, Part VA & VB)’. In relation to using third party copyright material, the most common queries relate to ‘using a figure or diagram in a journal article or in a research paper that is to be presented at a
conference’, an author using a substantial amount of one published journal article in a second article and clauses in publishing agreements.

The copyright officer at University E stated that ‘direct enquiries from staff perform a minority of my work’ and that the majority of the advice that his office provides is in relation to teaching material. Examples of typical queries include how to protect the intellectual property (mainly copyright) in teaching material that staff have created, what material can be uploaded to the university’s online learning management system and advice about whether an audio visual resource can be transferred from an obsolete format such as video cassette to another format such as a DVD. The copyright officer at University E also receives queries about what he referred to as ‘journal spinning’, which is using material from one published article in another paper that the author intends to publish. However, unlike University A, his office will not provide advice on clauses in publishing agreements. Rather his office will direct the academic to seek ‘independent legal advice’.

For the copyright officer at University I, the majority of advice he provides to staff is in relation to what material can be included on the university’s online learning management system and about the use of audio visual material such as DVDs for educational activities. In terms of research activities, including consultancies and contract research, he often contacted at the time that a research grant is being prepared.

There can be ‘a lot of issues because the actual research project is undertaken by an organisation external to the university but including university staff. It can] require quite a lot of work because [it is] never clear whether they in fact in the particular context [of the project] ... can take advantage of being an education institution or related to an education institution.

Because the staff are not used to dealing with copyright issues or getting advice on copyright issues and that particular one and most others we get in right from the start. [It is important that staff] know what their parameters are ... it helps in putting in research grants. I mean if [you have] pay third parties for a right to use material for example, then you want to know that up front when you’re putting in the grant not afterwards.

University I

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14 The copyright officer at University I stated that the number of research projects undertaken at University I is limited.
The copyright officer at the University O will only provide advice to staff in relation to educational activities which fall under the statutory licences within the Copyright Act. Other queries related to research or non-educational activities will be directed to the university research division. As well, there is ‘almost unwritten policy that we try not to give advice to students because that's outside of the library brief’.

6.4.4 Instances of Potential Breaches of the Copyright Act

The examples provided by the copyright officers interviewed of academic staff potentially breaching their obligations under the Copyright Act when undertaking commercial, non-educational or research activities are generally in relation to staff using third party copyright material for activities that require permission from the copyright owner.

The copyright officer at University A is aware of cases where the Copyright Act has potentially been breached due to a staff member using third party copyright material for a non-educational activity. One case involved a commercial tender which required the preparation of material for the Australian Communication & Media Authority (ACMA). A casual research assistant was employed to prepare and write the material and once completed the material was sent to the copyright officer for checking. The copyright officer found that a substantial amount of the material was copied directly from the internet without acknowledgment of sources.

Most of the cases that the copyright officer at University A has become aware of are similar. Her office handles all the cases in the same way. To check the material, her office use Turnitin\(^\text{15}\) which highlights sections of concern related to plagiarism within the work. If there is a high level of copying, the office will undertake short sentence searching within Google. They will highlight in a different colour to the colour used by the Turnitin program the areas of concern within the material. The office then sends the highlighted document back to the staff member explaining the areas of concern and directing the staff member to reference sources. The material is not required to be re-submitted but generally it is sent back to the copyright office for a second review. In some instances the material has come back with more breaches than in the original material. Generally in these cases, the author for whatever reason

\(^{15}\) Turnitin is software that can be used to detect plagiarism in a work.
has decided to locate and use obscure material rather than take the time to correctly reference any third party material used.

In the ACMA example outlined earlier, the material went through two or three re-write stages. During the second re-write stage the copyright officer realised that permission for the materials used would need to be sought from the copyright owner. Normally the copyright office does not provide permission services for non-educational activities however given the circumstances of this case, in which ‘deadlines were tight and it appeared that the research assistant was brought late into the project to write materials that they did not have expertise in’, the copyright officer assisted the casual research assistant to seek and receive permission for three different works in the report. The copyright officer also assisted the research assistant to ensure that all references were cited correctly.

For the permissions that were sought and granted on behalf of the ACMA project, the copyright office retained all original copies of permissions in their permission database. At the end of project, the copyright officer provided the project officer with a permission report in excel format explaining the terms and conditions of each of the granted permissions/licences. Also, because the ACMA case was non-educational, the copyright officer provided the ACMA with copies of all the permissions files and other important communications with a cover report that summarised the terms and conditions of each permission licence. This information would allow the ACMA the opportunity to use the program in another manner and if necessary to re-seek permission.

The copyright officers at Universities B and C each spoke about a joint research project between the two universities. The research was held up for about one year while contractual obligations were negotiated and permissions for the use of third copyright material, particularly images, in the project were granted. Some of the third party material originally included in the project had to be removed as the permissions for use of the material were not granted.

When the material from there finally arrived - which was the bulk of the project – I am aware this is being recorded – the third party copyright material was not cleared. It was not acknowledged it was not referenced. There were images everywhere, and from where we do not know.

University C
The copyright officer at University C also spoke about a project within a Cooperative Research Centre at University C, where the research team ‘approached the project [being conducted in conjunction with an industry partner] expecting somehow to be covered by the Part VB licence because their fundamental push was educational’. As they were working in educational environment the researchers felt they should be covered by the statutory licences under the Copyright Act.

The copyright officer only become aware of this case once the project was under way. She was not contacted at the time that the contract was entered into but was contacted once a member of the research team ‘said we have got to think about the copyright [so] let’s talk to the copyright officer’.

After being informed by the copyright officer that the third party copyright material being used in the project would not fall under the statutory licences within the Copyright Act and permission would need to be sought and granted, the research team decided:

> That they would ask all their contributing authors to get permissions from the copyright owners of material they wanted to use. I think going in, rather natively, expecting they would get those permissions. And of course, they ran into the same troubles that we all experience, which you learn very quickly, not being able to work out who the copyright owner is, not being able to contact, not getting replies.

> And then they wanted the publications to go ahead without the permissions. Because of course, everything had been paid for and there were deadlines [to meet]. It just got rapidly complicated.

University C

Given the difficulties encountered in attempting to obtain permissions for the use of third party material in the project, the research team changed their approach to enable the research to fall back into Part VB use [statutory licences].

> So from saying we will get worldwide clearance to do everything, they moved it back to say for enrolled students we will rely on Part VB and for the commercial stuff and wider distribution, it was basically closed up. Where they got permissions they used it and where they did not, they just kept hoping that it would come. So basically it meant massive, massive cost blow outs. Lots more effort and energy and not necessarily a better end result and everyone thinking copyright is the undoing of good projects.

University C
The copyright officers at Universities D, F, G and O each spoke about cases where university staff have prepared and written teaching material for the purpose of selling the material to secondary schools or overseas higher education providers. In the case at University F, the faculty that was preparing and writing the teaching materials were relying ‘on Part VB [statutory licences]’, however material from relevant electronic resources that the university library subscribes to were also being used in the project. The copyright officer in all cases recommended that the staff member(s) seek permission for the use of any third party copyright material produced in the teaching material.

The copyright officer at University O also spoke about two cases where lecturers at the University had bypassed the university’s research repository and created their own publication webpage with access to full published journal articles. In one case, the staff member thought that because the research assistant had downloaded the published journal articles via the electronic resources available through the library:

> They were doing the right thing [under copyright] because instead of actually just being access [the published article directly from the web page] a user had to press the radio button next to each of the [listed] articles and the articles would then be emailed to the user.

> As the person was not downloading the thing directly they thought they were getting round that part of the Act and that they were only supplying it to a colleague. But as we pointed out if you actually look at the publisher agreement, they’re all different [and allow various copying or communicating limits or uses].

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University O

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Working with the repository team, the copyright officer

> went and had a meeting with all [the department’s] staff and discussed how we could get around their problem and try to deliver something close to what they wanted without breaching the Copyright Act. ... Again the website manager ... deactivated all the documents so that the published articles could not be downloaded.

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University O

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The copyright officers at Universities F and G also spoke about instances arising when a university loses access to an electronic resource, which in the cases they spoke about were due to ‘unusual activity or large amounts of downloading’.
Access to the electronic resources was suspended at the university level and it is then the responsibility of the university to suspend the access of the individual. The supplier of the suspended electronic resource requires proof that the individual’s access has been suspended before access is again granted to the university.

At University G, the large amounts of downloading, which is considered systematic copying, is often due ‘to a staff member leaving who wants a selection of articles in a research area before leaving the university’.

6.4.5 Use of Electronic Resources

All the copyright officers interviewed indicated that to ensure that the university meets the contractual obligations of the electronic resources that the library subscribes to; users (staff and students) are required to login to access the electronic resources available via university library websites. However, except at Universities E and J, users are not required to accept or agree to the terms and conditions of each electronic resource at the point of access or log-in. As the management of the contractual terms and conditions and electronic resources were not part of the responsibilities of the copyright officer, reasons why users are not required to accept or agree to the terms and conditions of each electronic resource were not given or known.

There are four differing approaches or processes adopted by university libraries in terms of how users are made aware that they need to meet the requirements of terms and conditions rather than the Copyright Act when using electronic resources available via the library website. Table Nine below provides a summary of these approaches.\(^ {16}\) Seven of the university libraries used one approach, six used two approaches and three did not use any approach or process to inform staff (and students) they need to meet the requirements of the contractual

\(^ {16}\) The information about the university libraries approaches to electronic resources is based on the knowledge of the copyright officer.
terms and conditions rather than the Copyright Act when using electronic resources available via the library website.

Table Nine: Approaches of University Libraries to Electronic Resources

<table>
<thead>
<tr>
<th>University</th>
<th>Requires Acceptance of Terms and Conditions</th>
<th>University Policy or Guideline</th>
<th>General or Generic Statement about Terms and Conditions</th>
<th>No Approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>University A</td>
<td>Y</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>University B</td>
<td>Y</td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>University C</td>
<td>Y</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>University D</td>
<td>Y</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>University E</td>
<td>Y</td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>University F</td>
<td>Y</td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>University G</td>
<td>Y</td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>University H</td>
<td></td>
<td></td>
<td>Y</td>
<td></td>
</tr>
<tr>
<td>University I</td>
<td></td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>University J</td>
<td>Y</td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>University K</td>
<td>Y</td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>University L</td>
<td></td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>University M</td>
<td></td>
<td></td>
<td>Y</td>
<td></td>
</tr>
<tr>
<td>University N</td>
<td></td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>University O</td>
<td></td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>University P</td>
<td></td>
<td></td>
<td>Y</td>
<td></td>
</tr>
</tbody>
</table>

As can be seen in Table Nine, only two universities (Universities E and J) required users to accept the terms and conditions of electronic resources at the point of log-in or access.
At the point of log-in users at University E are provided with the following information:  

**Terms and Conditions of Use**

1. Information from licenced online resources may only be used for education and research purposes and not for any commercial purpose.
2. Your access to these resources is not transferable to anyone else.
3. Systematic downloading of large amounts of data from these resources, including the use of web crawler software or other automated means of downloading, is a breach licence agreements and not permitted.
4. Please ensure that there is adequate security on your home computer and network to prevent unauthorised access.
5. Use of these resources may be further limited by specific licence conditions, as well as the University's policies on Copyright and IT Acceptable Use and Security

*By continuing to login to this resource you agree to comply with these conditions.*

```plaintext
Username: [enter]
Password: [enter]
```

University E

Users at University J are also provided with similar information as stated above at the point of log-in to access the electronic resources available via the library’s websites. Similarly, other Australian universities do require users to accept the terms and conditions of electronic resources prior to accessing the electronic resource. For example, the University of Sydney copyright guidelines state:

When you access a database from the Library’s website you will be asked to accept the usage conditions for the Library’s electronic resources. A summary of the terms of conditions of use for each database is available from the Electronic Resources – databases section of the Library website

Twelve of the universities interviewed rely on university policies or procedures to inform staff (and students) that they need to meet the requirements of contractual terms and conditions rather than the Copyright Act when using electronic resources available via the library website. These policies and procedures are accessible via the governance section of the universities’ website. Some universities, Universities D, E and J rely on the information technology acceptable use policy, University F relies on the information technology use policy.

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19 Or a similar named section such as compliance.
20 As discussed in Chapter Five, some universities policies and guidelines are not publicly accessible and require authorised users (such as staff) to login to access this information.
policy staff and other authorised users and the acceptable use of information technology facilities by students policy, University N relies on the e-resources usage policy and University O relies on the computing and information technology policy. At the time of employment (or enrolment) staff (and students) agree to abide by university policies. Similarly, Universities B, E, G and J rely on the university’s copyright policy and Universities A, C, F, I and K rely on the university’s copyright guidelines to make staff (and students) aware that they have obligations under the terms and conditions of each electronic resource.

University F provides general statements about the terms and conditions of electronic resources on the main database page on the library website. Similarly University L provides a general statement and a web link to more general information about terms and conditions for use of electronic resources on the library’s homepage. Universities B, G and K provide a generic statement about terms and conditions at the point of log-in to access the electronic resources. The copyright office at University F also provides on the university’s copyright web pages a table summarising the licensing terms of each database subscribed to by the library for educational activities.

The copyright officer at University H laughed nervously and said what a lovely question, when asked about how users are made aware that they need to meet the requirements of terms and conditions rather than rely on the Copyright Act when using electronic resources. At the time of the interview, University H did not have a process for making users aware that they need to meet the terms and conditions of electronic resources; however, the copyright officer stated that:

*We are in the process [of creating a system that when] they [staff and students] click on a resource ... they will see the general terms and conditions of the database. When we have spare moment [we want to] construct a template for a table and what we actually want to do is put the terms and conditions [of each electronic resource] in the table.*

*University H*

The copyright officers at Universities M, N and P were not aware of an approach or process by the university library to ensure that staff (and students) are aware that they need to meet the requirements of terms and conditions rather than the Copyright Act when using electronic resources. The three university libraries in question do provide links to the contractual terms and conditions when a user accesses an electronic resource however users are not required to access the link.
6.5 Discussion of Themes

The overarching themes arising from the interviews conducted with the 16 copyright officers relate to risk management and the focus of copyright offices on educational activities only.

6.5.1 Risk Management

The majority of universities in this study appear to adopt a decentralised approach to copyright management. A decentralised approach means that generally academic staff are individually responsible for compliance with the Copyright Act and the agreements or contracts with third parties providing electronic resources. This decentralised approach appears to be a strategy to minimise the legal liability of the university.

To minimise legal liability, particularly in relation to non-educational activities, University A places the responsibilities on researchers and project teams to seek permission for the use of any third party copyright material.

As noted by the copyright officer at University A:

\[ \text{It is difficult for University A’s copyright office to provide permission services in these circumstances as the office would be providing a service to a third party which adds a liability to University A.} \]

However unless staff are aware of their compliance responsibilities, universities retain the legal liability as they enter into the agreements or contracts with third parties. As identified in Chapter Five, only three of the publicly accessible copyright policies or information guides reviewed specifically referred to university staff completing copyright compliance training. It is assumed that the majority of staff would have an implied awareness of compliance responsibilities through entering into an employment contract with a university. University employment contracts generally require employees to comply with current policies of the university.

In contrast to the majority of the universities interviewed, University B had a centralised approach to copyright management. University B’s copyright office has ‘some fairly comprehensive and strict protocols in place’ and a series of checklists.
According to the copyright policy, every staff member has a legal obligation regarding use of third party copyright material but also that the University adopts a centralised management approach to copyright compliance in the first point of contact on all copyright issues is the copyright coordinator...

The centralised compliance requirement that they must come to the Copyright Coordinator for any assistance when they need to obtain permission for use of third party content in relation to any university research or project, so that covers our consultancies and contract research...

University B

However due to this centralised approach to copyright management, University B’s copyright office has a preference for staff to generate their own material and not rely on using third party copyright material. This approach could discourage researchers from participating in research or consultancy projects with Cooperative Research Centres or industry partners.

University E was the only university in the study that did not have a copyright policy; however, the copyright office does provide copyright guides. The reasoning for this is that the use of third party copyright material is ‘enshrined in law [under the Copyright Act] ... and an opinion or interpretation of the way the law operates is just going to muddy the waters’.

While University F has a decentralised approach to copyright management, in addition to the copyright office, each faculty has a copyright coordinator. Also, as part of the University’s compliance and audit procedures, all department heads must complete and sign an annual compliance report. An element of the report relates to copyright including third party material. By signing this form, the department head is claiming that all staff are legally compliant in a number of areas, including copyright. University F is one of only four universities that refer to the use of third party copyright material for research activities or non-educational activities within their copyright policy and/or guidelines.

The copyright officer at University F was the only person interviewed that discussed a copyright advisory group, which is similar to a intellectual property committee. This copyright advisory group examines strategies and policies related to copyright.

Six of the copyright offices within the universities interviewed have both an advisory and educational role rather than a compliance role. At University I, the role is about providing
advice and informing people ‘up front [about] what their responsibilities are and their rights’. If the main role of the copyright office is compliance, then an implication of this could be that the onus to be compliant under the Copyright Act or a permissions agreement or contract could be removed from individual staff and the liability placed on the University.

If you pretend that you are the one that is doing this police work, one you take the onus off the individual staff. And two if you do it poorly you might be held liable for it so we don’t pretend, we certainly don’t document that we have that sort of role.

University I

[T]hat’s what people think, it’s all a policing sort of thing and policing is not actually what it is at all. It may look like that because I’m looking at their lectures on Lectopia or trying to see what they’re doing on their LMS but it’s not actually policing, it’s trying to education.

University L

Another area within copyright that has a centralised approach is where copyright officers provide a permission service. As shown in Table Eight, five of a possible 13 copyright officers interviewed provided this service. The copyright officers within University A and E provided the permission service in relation to educational activities. Given that the copyright officers within University B and K are associated with the research and legal service respectively, it is not unexpected that these copyright officers assist with permissions in relation to education, research and non-educational activities. The responsibility for ensuring that there is a record of the permission shifts from the individual to the university. However with the focus on educational activities, copyright officers generally do not need to provide a permission service, as the use of third party copyright material for teaching purposes would fall under the statutory educational licences within the Copyright Act.

As shown in Table Eight, six of the seven universities undertaking audits or compliance checks are doing so only in relation to educational activities. The copyright officer at University L has found that using an educational approach rather than the ‘big stick’ approach results in staff using the services of the copyright office.

The copyright office does not undertake compliance checking or compliance policing as [this] approach realty drives people underground, it really turns people away from copyright.

University L
A potential issue for copyright officers associated with library services and not legal services is a perceived lack of authority. As stated by the copyright officer at University G, ‘you need a strong authority in this job and a policy base ... and if there is no line of authority [or policy] nothing happens’. Similarly, the copyright officer at University F stated ‘that [staff] need to be aware of the serious consequences of copyright infringement ... and not be complacent about procedures’. The copyright officer at University A often relies on the University’s general counsel to concur with the advice that she is providing to staff particularly in relation to notices of potential copyright breaches. Generally when there is an issue of a potential breach, the copyright officer will send the initial email communication to the relevant staff member(s) with the legal office cc’d into the email communication. The University’s ‘general counsel will then respond to all, stating that the legal office concurs with the information below and that generally moves things along’.

Copyright officers also have to deal with staff having differing views on copyright and compliance:

I do want to comply with copyright; Copyright is an impediment to me doing anything so I will not comply. I will hide, walk away and not look you in the eye until I can no longer get away with it. I will get away with it. I will put up material so students can access it and then pull it down. Avoid copyright. Use tactics to avoid copyright law.

University A

6.5.2 Priorities

With only three of the copyright officers interviewed associated with the legal or research services of the university and with the purpose of university libraries on assisting with the teaching, learning and research goals of both staff and students, it was not unexpected that the main focus of university copyright offices is on educational activities. As stated by the copyright officer at University O, ‘the brief is for the library to administer the educational licences of the institution, so it’s basically all Part VB stuff, Part VA, music licences, dealing with the digital repositories’.

The focus on educational activities also supports the finding from the previous chapter that copyright policies or guidelines are generally restricted to use of third party content in teaching resources. The seminars, training or workshops provided by the copyright officers also focus on educational activities.
In relation to research, as found in the previous chapter, copyright offices do not generally focus on what constitutes research, instead seminars or training programs relate to publishing agreements and electronic resources.

*It [is a] tricky area because you are trying to educate staff about the Copyright Act and in fact more resources these days are being made available through licence agreement and publishing agreements, so the Part VB doesn’t necessarily apply and the contract can be more or less generous than the allowances in the Part VB.*

University K

The finding that only three of the 16 copyright officers interviewed were associated with the legal or research services of the university is an explanation for the reason that many of the copyright officers could not or did not discuss copyright in relation to research and non-educational activities. As the copyright officer at University L commented ‘legal services would hear about those types of activities [contract research or consultancy]’. It could also be a reason for the general view of the copyright officer at University K, that ‘not much attention is [given] to the use of copyright material in commercial activities ... [it is] a special topic in its own right’.

### 6.5.3 Discussion

There are possibly two reasons why the majority of the universities interviewed appeared to have adopted decentralised approach to copyright management and why copyright offices had a focus on educational activities only. The first reason is an apparent lack of resources, particularly in terms of staffing levels and, the second reason is the reporting lines associated with copyright offices. The copyright officer position at University B which was associated with the research service was the only university interviewed that had a centralised role to copyright in relation to educational, commercial and research activities.

A decentralised approach to copyright management assumes that university staff have an awareness of their compliance responsibilities to copyright legislation, contractual terms and conditions and other third party agreements. However as stated above in Section 6.5.1, an implied awareness by staff of compliance responsibilities will not transfer the legal liability from the university. A university must ensure that staff have actual awareness of policies and that a policy is current before imposing it on its staff. As discussed in Section 5.3.1 of
Chapter Five, an issue in *Victoria University of Technology v Wilson*\(^{21}\) related to universities having current policies, awareness by staff of university policies and the fact that staff are bound by expressed contractual provisions within university policies. In *Victoria University of Technology v Wilson*\(^{22}\) Nettle J concluded that as Victoria University of Technology did not have a current intellectual property policy, the defendants, Wilson and Feaver, could not be bound by an intellectual property policy however they were bound by other current university policies.\(^{23}\)

As the copyright officer positions within University B, J and K were associated with either the research and legal services these copyright officers were more likely to have knowledge about the use of third party copyright material in relation to research and non-educational activities. Given that the majority of the copyright officers interviewed perceived research and non-educational activities as the domain of research and innovation or legal services groups within universities, it would appear that universities are potentially not providing the necessary resources in the relevant areas. As stated by the copyright officer at University G ‘copyright is moving more into the area of research and research is becoming a bigger and more important area for the university’,\(^{24}\) however, this does not appear to be reflected in staff levels and reporting lines of copyright officers.

As stated in Section 1.1 of Chapter One, to overcome funding issues, universities need to have a strategic emphasis on securing other sources of income. These sources could potentially be from commercialised opportunities and industry partnerships through contract research and consultancy projects. If this is the case, legal services and research services within universities will deal with more research agreements and contracts. A key component of research agreements and contracts are intellectual property (hereafter referred to as IP) issues. If this trend occurs, it is likely universities would need to change the reporting lines of copyright officers’ positions from libraries or information services to legal or research services. However, potentially the research services within universities are already managing the issue of copyright. Of the copyright officers who were asked about providing advice in relation to research and non-educational activities\(^{25}\) most were of the opinion that the research or commercial area of their university were managing the issue.

\(^{21}\) [2004] VSC 33.
\(^{22}\) Ibid.
\(^{23}\) *Victoria University of Technology v Wilson* [2004] VSC 33.
\(^{24}\) University G Copyright Officer.
\(^{25}\) Question four in the interview guide.
As found in Chapter Five, intellectual property policies or procedures at Australian universities focus on the ownership of intellectual property developed by university staff and the potential for commercial exploitation of intellectual property developed by university staff. The use of intellectual property by staff and in particular the use of third party intellectual property was addressed only by one university, Murdoch University. Unfortunately the copyright officer from Murdoch University declined the invitation to participate in the research.

### 6.6 Conclusion

This chapter discussed the findings and the overarching themes from the interviews undertaken with 16 copyright officers from Australian universities. It outlined the research design and method used for conducting the interviews.

The interviews conducted with the 16 copyright officers found that 10 of the universities interviewed had the full time equivalent of one or less staff members holding a position related to copyright within the university, 13 of the copyright officers’ positions were associated with library services, two were associated with the legal services and one was part of the research services. The interviews also found the majority of the copyright offices responsibilities relate to educational activities. The copyright officers are responsible for preparing and maintaining copyright information guides, answering queries related to copyright issues, providing advice and assistance in relation to seeking permissions, conducting training or seminar sessions and in some cases conducting compliance checks to ensure university staff are complying with their legal obligations.

The interviews also found four differing approaches of university libraries in terms of how staff and students are made aware that they need to meet the requirements of contractual terms and conditions rather than the Copyright Act when using electronic resources available via the library website. The most common approach was through university policies or guidelines with 12 universities interviewed using this approach. Only two universities interviewed required users to accept terms and conditions of the electronic resource at the point of log-in or access. Three of the universities did not have an approach or process for informing staff (and students) of their obligations when using electronic resources available via the library website.

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26 University copyright policies and guidelines are discussed in chapter five.
With an apparent lack of awareness of compliance responsibilities related to copyright issues, particularly for non-educational and research activities, the next chapter, Chapter Seven, will use practical examples of non-educational activities to discuss whether the use (such as reproduction) of the third party copyright material as part of non-educational activities could comply with the Copyright Act or contractual terms and conditions of electronic resources.
7.1 Introduction

This chapter uses hypothetical practical examples\(^1\) of non-educational activities undertaken by university staff as part of their role at a university to discuss whether the use (such as reproduction) of the third party copyright material as part of non-educational activities could fall under the educational statutory licensing schemes, s 200AB or the fair dealing exceptions within the Copyright Act 1968 (Cth) (hereafter referred to as the Copyright Act) or under the contractual terms and conditions of electronic resources.

One of the factors for a university to consider when attempting to increase non-educational activities by staff is compliance with copyright law and whether the educational provisions or the fair dealing exceptions within the Copyright Act could be relied on if third party copyright material is reproduced as part of a non-educational activity. The use of practical examples of non-educational activities will assist in identifying whether universities are potentially at risk of breaching copyright law when undertaking non-educational activities.

As previously discussed in Chapters One, Two and Three, under the Copyright Act educational institutions are permitted by the educational statutory licensing schemes under either Part VA or VB to reproduce substantial quantities of copyright material without the consent of the copyright holder if the use is for educational purposes. If however an activity within a university does not fall under the licensing schemes, a university may be able to rely on s 200AB which relates to the use of works and other subject-matter for certain purposes such as educational instruction by an educational institution that is not undertaken with the intention, wholly or partly, of obtaining a commercial advantage.\(^2\) As stated in Section 2.6 of Chapter Two, the purpose of s 200AB is to provide a flexible dealing exception to enable copyright material to be used for certain socially useful purposes and ‘is intended to operate like fair use’.\(^3\) If neither the statutory licensing scheme nor s 200AB applies, then individual

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\(^1\) These examples are based on projects that the researcher and/or their senior supervisor have been involved in.
\(^2\) Copyright Act 1968 (Cth) s 200AB(3).
\(^3\) Australian Libraries Copyright Committee and the Australian Digital Alliances, *A User’s Guide to the Flexible Dealing Provision for Libraries, Educational Institutions and Cultural Institutions Section 200AB of the*
university staff may be able to rely on the fair dealing exceptions as a defence against a claim of copyright breach if the use is considered ‘fair dealing’ such as for study, research, criticism or review.

7.2 Non-educational Activities

A university engages in non-educational activities in order to provide services and facilities for students and staff, to meet the needs of the community through teaching and research and to generate resources to enable the university to undertake its purpose and function. Definitions of what constitutes a non-educational activity are generally provided in the consultancy or commercial activity policy of universities. The definition provided below by the University of NSW encompasses the general description of how Australian universities define non-educational activities:

Activities [that commercially exploit or develop], for the university’s benefit, any facility, resource or property of the university or in which the university has a right or interest. This definition includes the exploitation of intangible property and resources including knowledge, research and intellectual property.

Contract research, consultancies and non-award and tailored professional programs are examples of non-educational activities within a university.

Generally, consultancy means the provision of professional services to an external party for a fee or other consideration.

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4 Copyright Act 1968 (Cth) (2008) 4

4 University of New South Wales, UNSW Guidelines for Commercial Activities (2010)


6 University of New South Wales, above n 4, 2.

7 Ibid.
University based consultancy includes all professional activities requiring the use of the University’s name, services, space, facilities, equipment and paid work-time, excepting any activity that may be classified as research and development and activities related to award courses.

The provision of expert advice or assistance by researchers on behalf of the University on a commercial basis to an external organisation, for an agreed cost.

Contract research is the activity of undertaking an investigation on behalf of an external party for a fee, with the outcomes being new knowledge, with a specific practical application, or improved or new materials, products, devices, processes or services.

A non-award course ‘refers to a teaching or instructional program or activity, other than the university’s award courses, for which an attendee pays a fee’. Examples of a fee-paying non-award course are single subjects (also known as short courses) and professional development (also known as continuing professional development) programs.

An activity can be commercial even with no expectation of profit. The collection of fees or charges for goods, services or access to facilities is generally an indication that an activity is commercial. However, activities which accrue non-financial benefits may also be classified as commercial. For example, Swinburne University of Technology’s stated objectives not only encompass the definition of commercial activities but encourage and value it. The University’s objectives include

- advancing of knowledge and its practical application by research,
- the dissemination by various means of the outcomes of research and the commercial exploitation of the results of such research;
- the promotion of critical enquiry, participation in commercial ventures and activities;
- the development and provision of professional services to the community;
- maintenance of close interaction with industry and the community and the

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9 Curtin University of Technology, above n 8.
10 Australian National University, above n 8.
12 Curtin University of Technology, above n 8, 1.
13 Ibid.
14 University of New South Wales, above n 4.
development of associations or agreements with any other educational, commercial, governmental or other institution.

While the current level of revenue sourced from consultancies and contract research is only 3.6 per cent or $17.746 million of Swinburne University of Technology’s total revenue,\(^\text{16}\) it is foreseeable, based on the University’s stated objectives, that the university will continue to foster commercial opportunities with governments, industry and other organisations.

Other examples of how Australian universities incorporate commercial activities into their objectives and function are set out below:\(^\text{17}\)

- Undertake scholarship, pure and applied research, invention, innovation, education and consultancy ... and to apply those matters to the advancement of knowledge ... utilise or exploit its expertise and resources, whether commercially or otherwise.\(^\text{18}\)

- ... Disseminate knowledge and promote scholarship ... to exploit commercially, for the university’s benefit, a facility or resource of the university, including, for example, study, research or knowledge ... \(^\text{19}\)

It can be seen from the above examples of stated objectives and functions that universities in Australia, regardless of their classification - Australian Technology Network (ATN), Group of Eight or Regional - will seek to foster commercial opportunities with governments, industry and other organisations.

To determine whether non-educational activities such as non-award teaching courses, consultancies or contract research can be classified as being for an educational purpose under the Copyright Act, it is necessary to consider the nature of the activity and the motivation behind the activity.

### 7.3 Educational Provisions and s 200AB

As stated in Section 1.2 of Chapter One, the issue of intellectual property and copyright is a significant factor in terms of non-educational activities, given that educational institutions are

\(^{16}\) Ibid, SFR:19.

\(^{17}\) Royal Melbourne Institute of Technology Act 2010 (Vic), s 5; University of Melbourne Act 2009 (Vic), s 5; James Cook University Act 1997 (QLD), s 5.

\(^{18}\) Ibid.

\(^{19}\) James Cook University Act 1997 (QLD), s 5.
provided with a number of exceptions within the Copyright Act that allows them to copy and reproduce copyright material for educational activities.

Educational institutions are permitted under statutory licensing schemes (Part VA and VB) to use third party copyright material without the consent of the copyright holder if the purpose of the activity is educational.

Under s 10(1A) of the Copyright Act, educational purposes relate to:20

- A use in connection with a particular course of instruction provided by the institution; or
- Making or retaining for inclusion into the collection of the institution’s library

Examples of educational purposes are included in the University of Canberra copyright guide. The guide states that:21

Educational purpose including the following uses
- To teach students of the University;
- Making the copy available to students, or communicating to students, as part of a course of study at the University;
- Retention of a copy as a University teaching resource (in office, School or library); and
- For the administration of students and courses.

As stated by the copyright officer at University A, the determination about when an activity is for educational purposes is based:22

On principles and criteria that must be met such as attendees must be enrolled students of the institution and the third party copyright material must be used for a course of study at the institution.

An educational institution is allowed to rely on the educational statutory licensing schemes if the students are enrolled at the institution.23 The requirement for the enrolment is implied in the remuneration agreement between Copyright Agency (CA)24 and Universities Australia.25

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20 Copyright Act 1968 (Cth).
22 A direct quote from the copyright officer at University A.
24 Formerly known as the Copyright Agency Limited (CAL).
The copyright officer at University A confirmed that ‘there are not many differences in how you use third party copyright material in award teaching and non-award teaching within an education institution’. However, it is clear that to enable compliance with copyright law, a non-award teaching program also requires an educational purpose and the students must be enrolled at the institution.

On this understanding of how the educational licensing schemes operate, certain categories of non-award courses such as single subjects or short courses being provided by universities may meet this obligation, while other categories such as professional development programs designed specifically for an external organisation would not meet the criteria.

However, the issue of whether a student is enrolled at an education institution when undertaking a non-award teaching program such as a single subject or a short course is unclear, particularly on the basis of the definition of ‘student’ under the Higher Education Support Act 2003 (Cth) which defines a student as being ‘a person who is enrolled in a course of study with a higher education provider’.26 A course of study under the Higher Education Support Act 2003 (Cth) is defined as an enabling course, or a single course leading to a higher education award or a course recognised by the higher education provider at which the course is undertaken as a combined or double course leading to one or more higher education awards.

Potentially, a single subject course that a person undertakes as a precursor to enrolling in an award course is an enabling course, defined as ‘a course of instruction provided to a person for the purpose of enabling the person to undertake a course’ that is part of the higher education award but does not lead to a higher education award.28

Another issue to examine in relation to the definition of ‘a student’ is the ‘higher education provider’ requirement. Depending on how a university administers and manages non-award activities such as single subjects or short courses, particularly if a university uses a commercial arm, such as RMIT University does with RMIT Training Pty Ltd, there is a possibility that an individual undertaking a non-award course is not enrolled with a higher

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25 Baker and McKenzie, Remuneration Agreement between Copyright Agency Limited and Universities Australia and The Universities Whose Names and Addresses appear in Annexure “A” (2007); Refer to the definition of higher education courses, under this remuneration agreement. The Higher Education Support Act 2003 (Cth), sch 1, defines ‘a student’ as being a person who is enrolled in a course of study with a higher education provider.
26 The Higher Education Support Act 2003 (Cth), sch 1.
27 Ibid.
28 Ibid.
education provider. The *Higher Education Support Act 2003* (Cth) defines an enrolment on a non-award basis as:

> a subject or unit that a person may undertake with a higher education provider as part of a course of study; or a course of instruction with a higher education provider; or ... training program with a higher education provider ... if the unit, course or program is not being undertaken as part of a course of study.

Under this definition, for an individual undertaking a single subject or short course to be considered a student of a university, it must be on the condition that their enrolment is with a higher education provider. If an individual is enrolled with a higher education provider, then it is likely that the higher education provider would be able to rely on the educational statutory licensing schemes within the Copyright Act when using third party copyright material as part of activities that have educational purpose.

For example, if a university administers and manages their non-award programs directly, such as the University of Melbourne with their Community Access Program, then the individual is likely to be enrolled with a higher education provider. However, if a university uses a commercial arm or third party to offer single subjects or short courses, then it is unlikely that a student will be enrolled with a higher education provider.

At RMIT University, applications for single subject courses must be submitted via RMIT Training Pty Ltd, the commercial arm of RMIT University. RMIT Training Pty Ltd is responsible for the administration, management and marketing of short and single courses for RMIT University. Individuals undertaking a single subject course are enrolled as RMIT Training single course students and provided with a client number for the duration of their single subject course. These individuals are therefore not going to be considered enrolled with a higher education provider.

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29 Ibid.
32 Current RMIT students or staff can apply to undertake a single subject course.
33 RMIT Training, above n 31.
However, the majority of Australian universities\textsuperscript{34} have overcome the issue of whether an individual undertaking a non-award program is a student enrolled with a higher education provider by entering into a remuneration agreement with the CA and Universities Australia.\textsuperscript{35} Under this agreement, commercial arms such as RMIT Training are defined as affiliated institutions and are included in the agreement ‘to calculate and pay equitable remuneration for licensed copies and licensed communications’,\textsuperscript{36} which are defined as copies or communications ‘made by or on behalf of monitored universities or their affiliated institution in reliance on the statutory licence made for or in connection with ... continuing education students’.\textsuperscript{37} This agreement defines ‘continuing education students’ as:\textsuperscript{38}

- Students undertaking ... programs of study by any monitored university or by affiliate institutions which are not higher education courses; or
- Programs of study provided by affiliated institutions which do not lead to the granting of an academic award.

Also, under this agreement, non-award courses are considered a higher education course and are defined as\textsuperscript{39}

| programs of study provided by any monitored university which do not lead to an academic award granted by the monitored university and which are units of study from an award course of the monitored university. |

As stated in s 7 of the James Cook University Copyright Policy and Procedures document:

The University is party to agreements with two Collecting Societies who represent copyright owners, under statutory licence; with the Copyright Agency Limited (CAL) for copying of print material ... Charges for print provided for non-award short courses are based on the income received by the University from those course.

However, if the conditions of the educational licensing scheme are not met by the university when accepting students into activities that involve the use of copyright material, the university may be able to rely on s 200AB to comply with copyright law. As a flexible dealing provision, s 200AB can potentially be relied on by libraries, archives and cultural or

\textsuperscript{34} 37 Australian universities have entered into this remuneration agreement with the Copyright Agency and Universities Australia and 36 Australian universities have one or more affiliated institutions which are also covered by this agreement.
\textsuperscript{35} Baker and McKenzie, above 25.
\textsuperscript{36} Ibid, 2.
\textsuperscript{37} Ibid, 6.
\textsuperscript{38} Ibid, 3.
\textsuperscript{39} Ibid, 3-4.
educational institutions if no other exceptions within the Copyright Act are available such as the fair dealing provisions or the educational provisions (Part VA or Part VB).

Under s 200AB, copyright in a work or other subject matter is not infringed if the use:

- Is for a certain purpose [by a library/archives, educational institution or a person with a disability]
- Is non-commercial
- Will not prejudice the copyright holder
- Will not compete with, or take profit from, the copyright holder
- Is a special case.

Section 200AB requires that an activity complies with the three-step test. Briefly, the three-step test is a general exception to the exclusive reproduction right that allows reproduction ‘in certain special cases provided that such reproduction does not conflict with normal exploitation of the work and does not unreasonable prejudice the legitimate interests of the author’. An example of an exception within the Copyright Act which constitutes a ‘certain special case’ under the three-step test  is the statutory licence available to education institutions within Part VB on the grounds that:

- A limited class such as educational institutions use the licence
- The rights of the licence are clearly defined and include the reproduction for hard copy material and the reproduction and communication for electronic material
- The licence relates to works and periodical articles in hard copy or electronic form, and
- The purposes for which the license may be invoked is solely for ‘educational purposes’.

As a defence against copyright infringement, s 200AB is intended as a flexible exception to enable copyright material ‘to be used for certain socially beneficial purposes while remaining consistent with Australia’s international copyright obligations’. However s 200AB places an

40 Australian Libraries Copyright Committee and the Australian Digital Alliances, above n 3.
41 Ibid, 4.
44 Ibid.
45 Attorney-General’s Department Information Law and Human Rights Division, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Provision of the Copyright Amendment Bill 2006 (2006) 2
additional restriction on the type of use that could be considered socially beneficial with the introduction of the phrase ‘not made partly for the purpose of … a commercial advantage’.

To assist in addressing the issue of whether commercial activities with universities can be classified as ‘educational’ for copyright purposes, the 1994 *Copyright Agency Limited and Others v Victoria University of Technology* case will be discussed. This case demonstrates that it was possible for a university as an educational institution to rely on the statutory licensing scheme under Part VB of the Copyright Act for an activity that results in a financial gain as long as the purpose is educational.

### 7.4 *Copyright Agency Limited and Others v Victoria University of Technology*47

In 1994, the Copyright Agency Limited (CAL) instigated a test case against Victoria University to challenge the operation of ss 135ZB to 135ZZH within Part VB of the Copyright Act.48 It was alleged that the Victorian University bookshop infringed ss 135ZL and 135ZZH of the Copyright Act when it photocopied multiple copies of material relating to a particular subject and sold them, bound in book form, to students enrolled in the subject. CAL contended that the bookshop was engaged in a business of quasi publishing as the bookshop made a gross profit on each transaction.49

For an education institution to be able to rely on s 135ZL, it is a condition that the copies are ‘made solely for the educational purposes of the institutions’.50 Under the Act, an educational purpose relates to a use or for retaining in connection with a particular course of instruction provided by the institution or for making or retaining for inclusion into the collection of the institution’s library.51 An educational institution may not rely on s 135ZL if the copies are ‘either sold or otherwise supplied for a financial profit or used for a purpose other than that specified in the section’.52 Each copy sold by the bookshop was made for use in connection with a particular course of instruction provided by the university.53

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47 *Copyright Agency Limited and Others v Victoria University of Technology*, (1994) 125 ALR 278.
48 Ibid.
49 Ibid.
50 Ibid, 278.
51 *Copyright Act 1968* (Cth), s 10(1A).
52 *Copyright Agency Limited and Others v Victoria University of Technology*, (1994) 125 ALR 278, 278.
53 Ibid, 280.
Section 135ZZH(1)(a) directs attention to the object or purpose for which the sale or supply was effected and considers whether the copy was sold ‘for’ (rather than ‘at’) a financial profit. The question for the federal court to decide was whether the photocopying was done solely for an educational purpose despite the copies being sold for a financial profit. There is a difference between something sold for a financial profit and something sold at a financial profit. Sold for a financial profit relates to purpose or intention.

Both the print room and bookshop at the Victorian University of Technology operated on a net loss or break even basis. The bookshop marked up the cost of the printed material received from the print room in accordance with the university’s administration practices to cover the running costs of the bookshop. The activities of the bookshop were not characterised by Gummow J as a business of quasi-publishing or bookselling. The sales were made in the course of a system established to enable students to acquire the materials at a price which covered the cost of operating the bookshop.

Gummow J held that the sole purpose was to make the material available to students for their courses and that introducing a user pay system was not inconsistent with the sole educational purpose required by s 135ZL(1)(b). He concluded that

the sole purpose of the University was to make the copied materials available to its students for the university’s courses. The introduction of a user pays system was not inconsistent with the University having that sole purpose.

As a result of this decision if a university undertakes activities that involve individuals that can be classified as enrolled with the university as a higher education provider or an affiliation institution it is likely for copyright purposes that the university will be able to claim that the intention of the activity is educational (and any commercial benefit coincidental) and rely on the educational statutory licensing schemes within the Act for the use of any third party copyright material as part of the activity. That this approach is taken by Australian universities was confirmed in the interviews undertaken with Australian university copyright

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54 Ibid, 279.
55 Copyright Agency Limited and Others v Victoria University of Technology, (1995) 128 ALR 482, 482.
However, a claim of educational purpose may be difficult to justify if an activity undertaken by a university does not involve individuals that are classified as ‘students’.

In any new dispute involving the educational statutory licences, the courts will need to confirm whether the activities of the education institution involved individuals that can be classified as ‘students’ and then analyse whether the educational institution’s intention was for an educational purpose or a commercial advantage, and whether a profit was coincidental or a primary purpose.

### 7.5 Applying the Law to University Activities

To determine a university’s intention when commencing an activity such as contract research or non-higher education award teaching programs, it may be necessary to focus on the cost model used to assess the viability of the activity.

As discussed in Section 5.6 of Chapter Five, cost models can either incorporate a profit component or require cost recovery. However, there are certain activities within universities that require full cost pricing. For example at RMIT University, the competitive neutrality policy requires a full cost model to be applied to certain types of activities including contract research, consultancies and non-award programs which are all examples of non-educational activities.

At RMIT University, the financial services maintains a project costing model, which when using full costing must include all direct and indirect costs that will be associated with the activity. The project costing model must also include the competitive neutral adjustment dollar figure. This competitive neutral figure is the result of taking into consideration the University’s competitive advantages and disadvantages that it receives and incurs as a publicly funded organisation. As stated in Section 5.6 of Chapter Five, universities may receive a competitive advantage through exemptions from capital cost, land tax and council...

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56 The interviews undertaken with Australian university copyright officers as part of this research are discussed in Chapter Six.

rates. However, as universities have compliance issues in relation to various State and Commonwealth legislation, universities may also face a competitive disadvantage.\textsuperscript{58}

For a university to be able to rely on the educational licensing schemes, a remuneration notice must be in force between a declared collecting agency and the education institution and the activity must be undertaken for an educational purpose, such as a use in connection with teaching or inclusion into the library’s collection. In the event that the licensing scheme does apply, for an educational institution to be able to rely on s 200AB(3c), the activity in question must be considered socially beneficial and cannot provide a ‘commercial advantage’ to the institution. Figure One outlines the steps that need to be considered to determine whether an activity can fall under s 200AB.\textsuperscript{59}

\begin{figure}[h]
\centering
\begin{tikzpicture}
  \node (start) {There are no other exceptions available};
  \node (middle1) {The third party copyright material is being used for a set purpose};
  \node (middle2) {The use of the third party copyright material is for a non commercial purpose.};
  \node (middle3) {The use of the third party copyright material does not conflict with normal exploitation};

  \node at (start.south) {
    Such as the fair dealing provisions or the educational provisions (Part VA or Part VB).
  };

  \node at (middle1.south) {
    Such as educational instruction which includes preparing to teach or compiling resources for students.
  };

  \node at (middle2.south) {
    Two questions to assist in determining whether a use is for a profit or commercial advantage:
    \begin{itemize}
      \item Is the use linked to an activity in which a commercial entity is engaged?
      \item Is the use in connection with a service sold for a price that is greater than the cost recovery price?
    \end{itemize}
  };

  \node at (middle3.south) {
    Two questions to assist in determining whether the use affects the copyright holder’s economic value of the copyright material:
    \begin{itemize}
      \item How does the copyright holder usually make money from their copyright material?
      \item Will the use deprive the copyright holder of significant commercial gains or future economic gains?
    \end{itemize}
    If a licence is available, then a use could be in conflict with the copyright holder.
  };

  \draw[->] (start) -- (middle1);
  \draw[->] (middle1) -- (middle2);
  \draw[->] (middle2) -- (middle3);
\end{tikzpicture}
\end{figure}

\textsuperscript{58} Department of Treasury and Finance, \textit{Competitive Neutrality Policy} (2012) 13

\textsuperscript{59} Refer to Australian Libraries Copyright Committee and the Australian Digital Alliances, above n 3.
In the situation where an activity is not considered educational and so neither the educational statutory licensing schemes nor s 200AB can apply, an individual academic may be able to claim a defence against copyright infringement if the activity is considered study or research and is fair dealing. Under s 40(2), the purpose of the activity, the type of the copyright material used, the ease of accessing the copyright material within a reasonable time and at a commercial price, the effect of the use on the economic value of the copyright material and the amount of copyright material used for the activity will be considered by a court to determine if an activity is fair dealing.

7.5.1 Practical Examples

To explore the issues relating to undertaking an activity for commercial gain, four practical examples\(^\text{60}\) are provided in the boxes below.

**Practical Example One: Non-Award Teaching Activity**

*Individuals who hold an academic qualification in law from a non-Australian or New Zealand university, and who are seeking admission to the Australian legal profession to be registered to practice law in Australia are required to have studied the equivalent of an Australian academic qualification in law. An approved law qualification must cover the ‘Priestley Eleven’, eleven areas of knowledge.*\(^\text{61}\)

\(^{60}\) These examples are based on projects that the researcher and/or their senior supervisor have been involved in.

\(^{61}\) For a list of the 11 areas of knowledge refer to http://www.lawadmissions.vic.gov.au/admission_requirements.
To meet this requirement, individuals with overseas law academic qualifications often undertake single subjects comprising the ‘Priestley Eleven’ at an Australian universities recognised by the Victorian Council of Legal Education or the equivalent state or territory body, responsible for determining the requirements for admission to practice, approving law courses and practical legal training providers and assessing the qualifications of overseas practitioners.

In this practical example, an Australian University (which offers a law degree recognised by the relevant admitting body) allows individuals holding overseas law academic qualifications to apply (and pay) through the commercial entity of the University to undertake one or more single subjects in the areas of the ‘Priestley Eleven’. All individuals undertaking single subjects in the areas of the ‘Priestley Eleven’ are not enrolled as students of the University but attend classes and undertake assessment with students enrolled in the accredited law degree being offered at the University.

As part of this example, the academic teaching in a subject that forms one of the ‘Priestley Eleven’ areas prepares lecture notes and power point slides for the class and this teaching material would be available online via the subject page on the University’s learning management system and also handed out in class. These lecture notes and power point slides are not considered third party copyright material as this teaching material is owned by the University. However third copyright material provided and used in class included distributing copies of sections of relevant legal cases and legislation. Australasian Legal Information Institute (AustLII) was used to access and print the relevant Australian legal cases and legislation. This database is also accessed during the class when discussing relevant Australian legislation. The usage policy of AustLII states that AustLII provides ‘free access to individual end-users of the content ... to enable them to read, print and copy materials for their personal use and any other uses permitted by copyright’.62

As the classes in this example can be attended by individuals who are not enrolled as students of the University, questions arise in relation to whether an academic can rely on the educational statutory licensing schemes or fair dealing provisions within the Copyright Act for any third party copyright material used as part of teaching these subjects or does the academic need to rely on the licensing agreement of any database used as part of the activity.

The above practical example relates to a single subject administered and managed by the commercial arm of an Australian University, with the teaching of the subject being undertaken by a University department. The purpose of the individual in undertaking the subject is to meet the accreditation requirements of a professional body. The motivation of the commercial arm to offer the single subject course is for a commercial gain. While the activity

of any academic staff involved may be classified as ‘educational’, given that the lectures may be a part of their teaching activities, the following questions need to be answered:

- Does the motivation behind the University offering single subjects prevent the Copyright Act from being relied on in relation to using third party copyright material as part of this activity?
- Is any copying or multiple reproduction of any third party copyright material allowable under the educational sections (including s 200AB) of the Act?
- Can any academic staff involved in the activity claim a defence of fair dealing?
- Do the terms and conditions of the AustLII database used as part of this activity exclude reliance on the Copyright Act for the use of third party copyright material?

**Motivation of the University**

In relation to this practical example, as seen in Table 10, although the activity of the academic staff member in preparing teaching material and undertaking the teaching would be considered educational, an issue is whether the activity is for educational purposes and the use of any third party material copyright can fall under the educational statutory licensing scheme, specifically Part VB of the Copyright Act. While the motivations of the University in offering the single subject and the individual in undertaking the subject were not ‘educational’ per se but for commercial gain and professional accreditation respectively, it is likely that the educational provisions of the Copyright Act can be relied on.

The commercial arm of the university would be defined as an affiliated institution under the remuneration agreement between CAL and Universities Australia and the universities listed in the annexure of the agreement in relation to copies or communications ‘made by or behalf of monitored universities or their affiliated institution in reliance on the statutory licence made for or in connection with ... continuing education students’. For the duration of the course, the individual would be defined as a ‘continuing education student’. With individuals undertaking single subjects at universities being able to be considered students, this practical example can be considered both an educational activity and having an educational purpose.

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63 Refer to page 247.
64 Baker and McKenzie, above n 25.
65 Ibid, 2.
As the activity has an educational purpose as defined under s 10(1A) of the Copyright Act, any multiple reproduction of third party copyright material undertaken for the activity would not appear to be in breach of the educational statutory licensing schemes, specifically Part VB.

As the activity appears to fall under the educational statutory licences within the Copyright Act, s 200AB is not available to the University. As shown in Figure One, under the first step in determining whether this activity could fall under s 200AB, there are other exceptions within the Act in which the activity can fall under, in this case, the educational statutory licences.

As the educational statutory licences are available it is unlikely that any academic staff involved in this practical example would need to claim a defence of fair dealing.

**Allowable Use of the Licensing Agreement**

Without payment to AustLII, this practical example of non-award teaching could potentially be in breach of the usage policy of AustLII, as its usage policy only allows ‘free access to individual end-users of the content ... to enable them to read, print and copy materials for their personal use and any other uses permitted by copyright law’.  

Without being defined in the usage policy, the phrase ‘individual ender users’ would likely mean that an individual person rather than an organisation could access the content on AustLII for ‘their personal use and any other uses permitted by copyright law’. So while it is likely that that the academic could claim that they are an individual end user, it is unlikely that the University could make the same claim. This means that the educational statutory licensing schemes, specifically Part VB, within the Copyright Act are unlikely to be available as these sections relate to uses by or on behalf of educational institutions.

So while the academic may potentially be able to use content from AustLII for their individual use they are unlikely to be able to make multiple copies of content for

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66 Australasian Legal Information Institute, above n 62.
dissemination to each student enrolled in a subject. While it may be difficult for the academic to claim that their activities of teaching preparation and teaching would currently fall under the uses allowed under the fair dealing exceptions, they may be to rely on another section within the Copyright Act, such as s 182A. Section 182A allows one copy of a statutory instrument (for example legislation) or a judgement to be reproduced by or on behalf of a person for a particular purpose.67

Also each student would be able to individually access AustLII to read or print relevant content as allowed under the fair dealing exception for the purpose of study or research within the Copyright Act.

Alternatively, to ensure that the academic and the University are not breaching the AustLII usage policy, the University could explore the option of payment to AustLII. If payment occurred, then it is likely that the usage policy would be complied with and the academic could use content from AustLII as part of teaching preparation and teaching activities.

Based on the facts and interpretation of this non-award teaching practical example, this is an example of an activity involving the use of third party copyright material whereby the copyright legislation is complied with but the licensing agreement, in this case AustLII, could be infringed.

**Practical Example Two: Non-Award Teaching Activity**

A federal government agency contracted a University department to provide professional development services to the agency’s staff. The professional development services include briefings relating to recent changes in relevant legislation as well as providing educational courses in relevant subjects that will meet the requirements of appropriate industry and professional bodies. The fee for the educational courses is calculated on a per student basis and the fee for the briefings on the number of attendees at the briefings.

Participants were provided with teaching material which included lecture notes. This copyright material is owned by University. The academic undertaking this activity, without permission from the commercial publisher, also copied three chapters from one textbook and one chapter from another

67 Copyright Act 1968 (Cth), s 182A; Copyright Act 1968 (Cth), s 182A; Note the phrase ‘particular purpose’ is use in this section of the Copyright Act but is not defined in the Act.
book with both books published by the same commercial publisher. These four chapters were provided to each of the participants together with two journal articles from two different legal periodicals and a copy of the relevant legislation. The journal articles were accessed from the Legal Online database and the legislation from AustLII.

The above practical example relates to a professional development program provided to an external organisation by an academic department for commercial gain. While the activity of any academic staff involved may be classified as ‘educational’ given that the lectures may be a part of their teaching activities, questions remain:

- Does the motivation behind the University department entering into the contract to provide a professional development service prevent the Copyright Act from being relied on in relation to using third party copyright material as part of this activity?
- Is any copying or multiple reproduction of any third party copyright material allowable under the educational sections (including s 200AB) of the Act?
- Can any academic staff involved in the activity claim a defence of fair dealing?
- Do the licensing agreements of AustLII and Legal Online databases used as part of this activity exclude reliance on the Copyright Act for the use of third party copyright material?

Motivation of the University

As seen in Table 11, while the activity was undertaken by an educational institution, the motivation behind the activity was not solely educational. It could be argued, depending on the cost model used, that the reason the contract was accepted by the University department was solely for financial benefit. Also as the purpose was not cost recovery as was intended under s 200AB(3) but to make a commercial gain, it difficult to establish a case for the multiple reproduction of any third party copyright material.

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68 A database owned by Thomson Reuters, Australia.
69 This type of activity could also be managed as an above load activity and, if so, the academic would be paid an additional salary (to their normal salary) to undertake the activity. The issue of above load activities potentially has implications in relational educational purpose and motivation behind an activity. However this issue is beyond the scope of this research.
70 Refer to page 248.
Allowable Use of the Copyright Act (including s 200AB and the Fair Dealing Exceptions)

While the activity of the academic staff member in preparing the teaching material may be considered educational, the University is unlikely to be able to rely on the educational statutory licensing schemes as the attendees to the program would not be classified as enrolled students with the University. As the attendees were not enrolled, it is unlikely that any use of third party copyright material as part of this activity would fall under the definition of ‘education purposes’ under s 10(1A) of the Copyright Act. Any multiple reproduction of material undertaken for the activity would appear to be in breach of the educational statutory licensing schemes, specifically Part VB.

As the educational statutory licensing schemes cannot be relied on for this activity, an option could be s 200AB. Section 200AB can be considered if there are no other exceptions available within the Copyright Act.\(^{71}\) However, as the activity is not for an educational purpose and the intention was likely a commercial gain rather than cost recovery under the third step of determining whether a use can fall under s 20AB,\(^{72}\) it is unlikely that the University can rely on the section.

Even if this practical example of a professional development program activity was considered to be for an educational purpose,\(^{73}\) an issue for the academic and the University is in relation to the reproduction of three chapters from one textbook. Without permission from the publisher, both the academic and the University could be liable for the unauthorised copying of any third party copyright material that is over the limits that is allowed under copyright law. If an activity can be claimed for educational purposes or a purpose under the fair dealing exceptions then generally under the Copyright Act, a reasonable portion such as one chapter or 10 percent of a work can be reproduced. If the publisher becomes aware of this copying and the multiple reproduction of the copying of three chapters from one textbook it is likely that the publisher may examine the option of taking legal action against both the academic and the University.

It would also be unlikely that any academic staff involved in the activity could claim a defence of fair dealing. Using Re Brian Kelvin De Garis and Matthew Moore v Neville

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\(^{71}\) Refer to the first step of determining whether a use can fall under s 200AB with Figure One on page 226-227.

\(^{72}\) Refer to Figure One on page 226-227.

\(^{73}\) Based on the facts and interpretation of this example, it is unlikely that an educational purpose can be claimed as the attendees are not classified as enrolled with the University.
Jeffress Pidler Pty Ltd\textsuperscript{74} as a reference for the definition of research, neither teaching preparation nor teaching would currently fall under the uses allowed within the fair dealing exceptions, rather, these activities would fall under educational purposes.

Allowable Use of Licensing Agreements

In respect of the electronic articles downloaded and copied, this activity would not appear to be in breach of the Legal Online terms of use. The terms of use allows a user to use material provided for ‘educational services or the giving of professional advice to clients ... and inclusion in ... communications to and publications for ... clients and potential clients’.\textsuperscript{75} Potentially, the academic and the University could claim that the briefings relating to recent changes in relevant legislation and other educational courses as part of the development programs were educational services as allowed under clause 3.2(a) of the terms of use.

However for the academic and the University to be able to use material from Legal Online as part of an education services activity, they must also comply with clauses 3.2(i) and 3.2(ii) of the terms of use. Under clause 3.2(i), the material used must not ‘represent a substantial proportion of the content of any single publication accessed via the service’\textsuperscript{76} and clause 3.2(ii) states that ‘you may not undertake these activities [listed in clause 3.2(a) and (b)] for or on behalf of a third party unrelated to your organisation’.\textsuperscript{77}

As the phrase ‘represent a substantial proportion’ is not defined within the terms of use, it is likely the phrase will have a similar limit as allowed under the Copyright Act,\textsuperscript{78} such as copying one journal article per periodical issue.\textsuperscript{79} While one copy of each journal article would not breach the terms of use, the multiple copies of each journal article could represent a substantial proportion from a single publication. Also material from Legal Online can only be used if the activity is for or on behalf of a third party related to the University. This means that without defining the phrase ‘unrelated third party’ or ‘related third party’ within the terms of use, it is unlikely that the attendees of these programs could be considered a ‘related third party’ to the University as the attendees are not enrolled with the University or an affiliated institution of the University.

\textsuperscript{74} [1990] FCA 218; 352 Copyright 18 IPR 292; (1991) 20 IPR 605 (1990) 37 FCR 99.
\textsuperscript{75} Thomson Reuter (Professional) Australia, Online Terms of Use, clause 3.2(a).
\textsuperscript{76} Ibid, clause 3.2(i).
\textsuperscript{77} Ibid, clause 3.2(i).
\textsuperscript{78} Copyright Act 1968 (Cth), s 14.
\textsuperscript{79} For the purpose of research or study; Refer to Copyright Act 1968 (Cth), ss 40 (3) and (4).
A further issue to be considered could be clause 5.4 in the contact between the Government Agency and the University which requires the University:80

[To grant or procure] the [Government] a permanent, irrevocable, royalty-free, world-wide, non-exclusive licence (including a right of sub licence) to use, reproduce, adapt any Existing Material ... in conjunction with the Contract Material.81

The University is unlikely to get ‘a permanent, irrevocable, royalty-free, world-wide, non-exclusive licence’ from Legal Online as under c 1.1 of the terms of use, subscribers are granted a ‘non-transferable limited licence’.82 However, permission for a transferable licence from Legal Online may not be necessary as the teaching material including the lecture notes have been prepared by the academic and are owned by the University and it is this material which could be provided to the government department rather than the third party copyright material from the databases.

This practical example may also not comply with the usage policy of AustLII, which only allows ‘free access to individual end-users of the content ... to enable them to read, print and copy materials for their personal use and any other uses permitted by copyright law’.83

As previously discussed, without a definition in the usage policy, the phrase ‘individual end users’ would likely mean that an individual person rather than an organisation could access the content on AustLII for ‘their personal use and any other uses permitted by copyright law’. So while it is likely that that the academic could claim that they are an individual end user, it is unlikely that the University could make the same claim. However the University could overcome this issue by exploring the option of payment to AustLII.

The academic is unlikely to be able to make multiple copies of content for dissemination to each participant attending the professional development session. While it may be difficult for the academic to claim that their activity of preparing teaching material would currently fall under the uses allowed under the fair dealing exceptions, they may be able to rely on another

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80 Australian Government, Draft Deed of Agreement Learning and Professional Development Services APCM 40.05, clause 5.4.
81 In the contract, existing material is defined as material owned by the University prior to the commencement date of the contract and contract material is defined as material created for the purposes of the contract or required to be provided as part of the contract.
82 Thomson Reuter (Professional) Australia, above n 75, clause 1.1.
83 Australasian Legal Information Institute, above n 62.
section within the Copyright Act, such as s 182A. Section 182A allows one copy of a statutory instrument (for example legislation) or a judgement to be reproduced by or on behalf of a person for a particular purpose.  

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Each participant of the professional development activity would be able to individually access AustLII to read or print relevant content as allowed under the fair dealing exception for the study or research within the Copyright Act.

Based on the facts and interpretation of this non-award teaching practical example, this is an example of an activity involving the use of third party copyright material whereby both the copyright legislation and the licensing agreements of AustLII and Legal Online could be infringed.

**Practical Example Three: Contract Research**

**An industry partner of a Research Centre located within an Australian University contracts the Research Centre to undertake research in the area of mortgage fraud in six target countries. The majority of the information and data relating to this activity was sourced via the Internet. For each target country, the web sites of the central bank, the national statistics agency and the major mortgage and bank associations were searched and relevant information was printed.**

85 Google was also searched using key terms and phrases to locate relevant information. Statistics related to mortgage loans in each target country were reproduced in the report.

**Databases including EBSCO and ProQuest to which the University subscribed were searched for relevant academic articles on the topic of mortgages and mortgage fraud. Eight articles were printed and used as background information for the project. Three of the articles were referenced in the final report.**

86 Under ProQuest’s terms and conditions, a student or staff member of a university is permitted to use the products for internal research or educational purposes such as using the information for teaching, research, comment, criticism or analysis or sharing an insubstantial amount of material for ‘personal use or scholarly, educational or scientific use’. The licensing agreement for the EBSCO database

84 *Copyright Act 1968* (Cth), s 182A; Note the phrase ‘particular purpose’ is use in this section of the Copyright Act but is not defined in the Act.

85 The issue of copyright notices placed on web sites and the terms and conditions imposed on users is beyond the scope of this research.

86 ProQuest, *Terms & Conditions*, s 5.
allows for the reproduction of material retrieved from the database for ‘internal or personal use’. The agreement also states that this limitation does ‘not restrict the use of materials under the doctrine of “fair use” as defined under the laws of the United States’.

This practical example raises the following questions:

- Is the activity considered educational either under the educational licensing statutory scheme or s 200AB?
- Could the researchers working on the project claim a defence of fair dealing if needed?
- Do the terms and conditions of the ProQuest or EBSCO databases used as part of this activity exclude reliance on the Copyright Act for the use of third party copyright material?

Motivation of the University

As can be seen from Table 12, the contract research would not be considered educational as the purpose of the activity was not teaching, educational instruction or inclusion in the university’s library collection. Rather it was to produce a report on mortgage fraud for an external third party.

Allowable Use of the Copyright Act (including s 200AB and the Fair Dealing Exceptions)

As this practical example does not involve an educational purpose, the educational statutory licensing schemes are not available to the University and the researcher for this activity. As the activity is not for an educational purpose and the intention was likely a commercial gain rather than cost recovery under the third step of determining whether a use can fall under s 20AB, it is unlikely that the University can rely on s 200AB.

Whether the researchers could claim a fair dealing defence relying on Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Ltd, the activity can be defined as research as the activity was a systematic enquiry to discover facts about mortgage fraud. While the activity used factual copyright material in the form of statistics which were publicly

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87 EBSCO, Publishing License Agreement, s I.C.
88 Ibid, s I.C.
89 See page 249.
90 Refer to Figure One on page 226-227.
available, with no effect on the economic value of the statistics and partial sections of tables reproduced (with acknowledgments) in the report, it is unlikely the research will be considered fair given that the research was undertaken for a financial gain.

Based on the findings of *Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Ltd*,92 Australian courts may place greater weight on the purpose and character factor of fair dealing and as a result this research would not be considered fair given the purpose and commercial element of the activity.

*Allowable Use of the Licensing Agreements*

As discussed in Chapter Three, academic staff and students using electronic databases available via their library’s websites may not be aware that they need to meet the terms of use of each database accessed given, that, generally, acceptance of the terms and conditions or reading of the licensing agreement of each of the databases used in this research was not a condition placed on the user.

However, based on terms and conditions of the ProQuest database, the researchers could potentially be at risk of breaching the terms and conditions. Under the permitted uses of the terms and conditions an authorised user is allowed to use content from the database ‘for internal research or educational purposes such as ... research or sharing an insubstantial amount of material for ‘personal use or scholarly, educational ... use’.* 93

While the printing of articles were not for educational purposes, the issue is whether the printing was for internal research. On face value, the research report was not an internal document as it was produced and sent to an external third party. Of the eight articles printed, only three were referenced in the final report. The majority of the articles were used by the researchers to understand the topic more clearly. On this basis, the majority of the articles were used for internal research purposes. However, there could be issues in regards to whether the material from the articles quoted in the report could be considered insubstantial amounts and whether the external third party is a third party colleague. The permitted uses within the ProQuest terms and conditions allow the sharing of insubstantial amounts of

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92 Ibid.
93 ProQuest, above n 86 s 5.
materials to third party colleagues for personal use or scholarly or educational uses.\textsuperscript{94} As the phase ‘insubstantial amounts’ is not defined within the terms and conditions, it is likely to have a similar limit as allowed under the Copyright Act. This would mean that if less than one percent of the total words of each article could be included in the report without infringing the terms and condition, however it is unlikely that the external third party could be considered a third party colleague. Without being defined within the terms and conditions and by including the word colleague in the phrase, it is likely that third party colleagues would mean other academics and researchers but not necessarily a third party organisation that had not participated in the research process. On this interpretation, it is likely that this practical example activity infringed the ProQuest terms and conditions.

Potentially, it could also be argued that the researchers breached the EBSCO licensing agreement if any material from the articles printed from EBSCO were quoted in the report as the licensing agreement only allowed material to be used for ‘personal or internal use’. As previously stated it is unlikely that the research could be considered internal or personal as the final report was produced and sent to an external third party. However, any articles used by the researchers for background information on the topic of mortgages and mortgage fraud could be argued to have been used for personal use. Also as the EBSCO licensing agreement is governed by United States (US) law rather than Australian law, the researchers could not rely on the fair dealing exceptions, specifically s 40, of the Copyright Act. The agreement specifically refers to the US Copyright Act of 1976 and the US fair use exception rather than the Copyright Act and fair dealing. However, it could be argued that this research activity falls under US copyright law. Under US copyright law, research is an example of fair use and the EBSCO licensing agreement allows material from the database to be used under the fair use doctrine.

Based on the facts and the interpretation of this contract research practical example it is unlikely that the researchers and the University could rely on the copyright legislation, specifically the educational statutory licensing scheme - Part VB, s 200AB and the fair dealing exception for the purpose of research or study or the licensing agreements of ProQuest or EBSCO when undertaking this research activity.

\textsuperscript{94} ProQuest, above n 86, s 5(f).
Practical Example Four: Contract Research

A commercial organisation agreed to financially sponsor a University Department’s research project examining whether there is a safe and accessible way for individuals to store identity documents as well as other legal documents, such as wills, online. The commercial organisation agreed to provide a fixed fee towards the cost of the research project, payable on receipt of confirmation of expenditure and preparation of a final report. The commercial organisation used the final report as part of its submission to the Victorian Bushfire Royal Commission. Under the terms of the contract, the researchers are able to write and publish academic articles using the findings arising from the project.

The project involved interviews with government agencies and insurance companies in relation to issues of privacy, security and usage, evaluated current online storage systems and identified appropriate documents to be stored online. An educational strategy for communities affected by bushfires, advising about the options, opportunities and risks in storing personal documents on the internet, was also developed as part of the project.

The majority of the third party copyright material used for this project was sourced via the internet. The Australasian Legal Information Institute (AustLII) website was searched and relevant legislation was printed. Relevant sections of the relevant legislation were reproduced in the report. Google was also searched using key terms and phrases to locate information about current online storage systems. Information about online storage systems were printed and relevant information was reproduced in the final report. As part of the literature review, databases including Legal Online and ProQuest were searched for relevant academic articles. Five articles were printed (three from Legal Online and two from ProQuest) and used as references for the report. Two articles (one from each database) were quoted in the final report.

This example of contract research raises the following questions:

- Is the activity considered educational either under the educational licensing scheme or s 200AB?
- Do the terms and conditions of the AustLII, Legal Online and ProQuest databases used as part of this activity exclude reliance on the Copyright Act for the use of third party copyright material?
- Could the researchers working on the project claim a defence of fair dealing if needed?
Motivation of the University

As shown in Table 13,\(^95\) this example of contract research would not be considered educational as defined under s 10(1A) of the Copyright Act as the purpose of the activity was not teaching, educational instruction or inclusion in the university’s library collection. Rather the purpose was to investigate whether there is a safe and accessible way for individuals to store identity documents as well as other legal documents, such as wills, online and to produce a report for an external third party.

Allowable Use of the Copyright Act (including s 200AB and the Fair Dealing Exceptions)

As this practical example does not involve an educational purpose, the educational statutory licensing schemes are not available to the University and the researcher for this activity. As the activity is not for an educational purpose and the intention was likely a commercial gain rather than cost recovery under the third step of determining whether a use can fall under s 20AB,\(^96\) it is unlikely that the University can rely on s 200AB.

It is also unlikely that the researchers could claim a defence of fair dealing for the purpose of research. While the activity can be defined as research and used factual copyright material in the form of legislation which were publicly available, with no effect on the economic value of the legislation and sections of the legislation and insubstantial amounts from published academic articles were reproduced (with acknowledgments) in the report, it is unlikely the research will be considered fair given that the research was undertaken for a financial gain by the university department and for use in any capacity by the external third party. As stated previously, based on the decision in Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Ltd,\(^97\) Australian courts may place greater weight on the purpose and character factor of fair dealing and as a result this research is still unlikely to be considered fair given the purpose and commercial element of the activity.

Also, as the research findings were allowed to be published in journal articles, the activity of preparing the publication would not be classified as a research activity on the basis of Ricketson and Creswell’s and Burrell and Coleman’s interpretations of what constitutes

\(^{95}\) Refer to page 250.
\(^{96}\) Refer to Figure One on page 226-227.
research. As stated in Section 3.3 of Chapter Three, Ricketson and Creswell\(^{98}\) and Burrell and Coleman\(^{99}\) have argued that a researcher can only rely on the fair dealing exceptions during the actual process of conducting research as the activity of research should fall within the scope of the dictionary meaning of the term but cannot rely on the exception when disseminating the research.

*Allowable Use of the Licensing Agreements*

This practical example may not comply with the usage policy of AustLII, which only allows ‘free access to individual end-users of the content ... to enable them to read, print and copy materials for their personal use and any other uses permitted by copyright’.\(^{100}\)

As previously discussed, without a definition in the usage policy, the phrase ‘individual end users’ would likely mean that an individual person rather than an organisation could access the content on AustLII for ‘their personal use and any other uses permitted by copyright’. So while it is likely that that the researcher could claim that they are an individual end user, it is unlikely that the University could make the same claim. However the University could overcome this issue by exploring the option of payment to AustLII.

So while the researchers may potentially be able to use content from AustLII for their own individual uses they are unlikely to be able to quote any material from AustLII in the final report.

Based on the Legal Online terms of use, it could be argued that the terms of use were breached by the researchers during this research activity. The terms of use allows a user to use material provided on the service expressly for\(^{101}\)

... the purposes of research, study, supplying educational services ... or inclusion in essays, theses, ... papers, submissions, communications to and publications for students ... the preparation of tenders, reports, submissions and other like documents.

However for the researcher and the University to be able to use material from Legal Online as part of a research activity, they must also comply with clauses 3.2(i) and 3.2(ii) of the terms of use. Under clause 3.2(i), the material used must not ‘represent a substantial proportion of

\(^{98}\) See Ricketson and Creswell, above n 42.


\(^{100}\) Australasian Legal Information Institute, above n 62.

\(^{101}\) Thomson Reuter (Professional) Australia, above n 75, clause 3.2(a) and (b).
the content of any single publication accessed via the service\textsuperscript{102} and clause 3.2(ii) states that ‘you may not undertake these activities [listed in clause 3.2(a) and (b)] for or on behalf of a third party unrelated to your organisation’.\textsuperscript{103}

As the phase ‘represent a substantial proportion’ is not defined within the terms of use, it is likely the phrase will have a similar limit as allowed under the Copyright Act, such as copying one journal article per periodical issue. As three articles from three differing periodicals were printed the terms of use would not have been breached. However, material from Legal Online can only be used if the activity is for or on behalf of a third party related to the University. This means that without defining the phrase ‘unrelated third party’ or ‘related third party’ within the terms of use, it is unlikely that the commercial organisation that financially sponsored the research could be considered a ‘related third party’ to the University.

However, based on terms and conditions of the ProQuest database, the researchers could potentially be at risk of breaching the terms and conditions. Under the permitted uses of the terms and conditions an authorised user is allowed to use content from the database ‘for internal research or educational purposes such as ... research or sharing an insubstantial amount of material for ‘personal use or scholarly, educational ... use’.

While the printing of articles were not for educational purposes, the issue is whether the printing was for internal research. On face value, the final report was not an internal document as it was produced and sent to an external third party. Of the five articles printed, two were from ProQuest and only one of the two was quoted in the final report. As the two articles were mostly used by the researchers to understand the topic more clearly, it could be argued that material from ProQuest was used for internal research purposes.

However, there could be issues in regards to whether the material from the article quoted in the report could be considered insubstantial amounts and whether the commercial organisation providing financial support for the activity is a third party colleague. As discussed under practical example three, the permitted uses under the ProQuest terms and conditions allow for the sharing of insubstantial amounts of materials to third party colleagues for personal use or scholarly or educational uses. As the phase ‘insubstantial amounts’ is not

\textsuperscript{102} Ibid, clause 3.2(i).
\textsuperscript{103} Ibid, clause 3.2(i).
defined within the terms and conditions, it is likely to have a similar limit as allowed under the Copyright Act.¹⁰⁴ This would mean that if less than one percent of the total words of each article could be included in the report without infringing the terms and condition, however it is unlikely that the commercial organisation could be considered a third party colleague. Without being defined within the terms and conditions and by including the word colleague in the phrase, it is likely that third party colleagues would mean other academics and researchers but not necessary a third party organisation that had not participated in undertaking the actual research. On this interpretation, it is likely that this practical example does not comply with the terms and conditions of ProQuest.

Based on the facts and interpretation of this contract research practical example, this is an example of an activity involving the use of third party copyright material whereby both the copyright legislation and the licensing agreements of AustLII, Legal Online and ProQuest could be infringed.

7.5.2 Discussion

The four practical examples discussed clearly demonstrate the difficulty and uncertainty that arises from activities that in the past may have been considered educational under the Act but, with the growing need for additional funding sources, now have elements of commerciality. The inclusion of a commercial component may now lead to unintentional copyright infringement by educational institutions while relying on the copyright legislation or the licensing agreements of electronic resources when undertaking a non-educational activity.

In only one of the practical examples were the educational licensing schemes, specifically Part VB, available for the University and academic staff member to rely on when using third party copyright material as part of an activity which involved students enrolled with an affiliated institution of the university, which meant that the activity had an educational purpose. As this activity appears to fall under the educational statutory licences within the Copyright Act, s 200AB is not available to the University.

Of the two practical examples that involved research activities, based the facts and interpretation of each example, the activity would meet the dictionary definition of research

¹⁰⁴ Copyright Act 1968 (Cth), ss 135ZG and 135ZMB.
but is unlikely that any use of third party copyright material as part of these activity would be considered a ‘fair dealing’ as both examples were undertaken for a financial gain.

In each of the practical examples which did not have an educational purpose, the contracts and the terms and conditions associated with the specific databases used as part of each activity would need to be relied on rather than the copyright legislation. However, based on the facts and interpretation of each example, it would appear that the terms and conditions of the specific databases used as part of each activity may not be complied with and potentially the use of any third party copyright material as part of the activity could result in a copyright infringement.

If there was any uncertainty about whether the terms and conditions of the specific electronic resources used as part of these practical examples were complied with, an option for the University and the academic staff could have been to seek permission from the copyright holders for the use of any third party copyright material from the electronic resources as part of each activity.

The interpretation of these practical examples may change if the proposal of the ALRC to repeal the educational statutory licensing schemes and introduce a fair use exception, or at a minimum, a fair dealing for education exception is introduced into the Act.

### 7.6 Conclusion

This chapter has discussed through the use of practical examples whether the educational licensing schemes, s 200AB or the fair dealing exceptions within the Copyright Act or the contracts and terms and conditions of electronic resources could be relied if third party copyright material is used as part of non-educational activities.

The analysis of the four practical examples highlights how universities and university staff are potentially managing their obligations under copyright legislation and contracts when using third party copyright material as part of educational, non-educational and research activities. The analysis also demonstrates the complexity of the issue of using third party copyright material as part of a non-educational activity within a university environment. Depending on the facts and interpretation of the non-educational activity it is unlikely that a university or university staff could rely on the licensing schemes, s 200AB or the fair dealing exceptions
within the Copyright Act when undertaking a non-educational activity such as contract research, consultancy or a professional development program. If the activities of academics results in copyright infringements or breaches of terms of use then academics and universities are potentially at risk of legal action from copyright owners such as publishers. However licensing agreements or permissions may enable universities and university staff to use third party copyright material as part of a non-educational activity.

The interpretation of these four practical examples support the findings of the research questions examined as part of this thesis, and, which are discussed in the next chapter, Chapter Eight, which outlines the conclusions and implications of this research.
Table Ten: Application of Copyright Law and a Non-Award Teaching Practical Example

<table>
<thead>
<tr>
<th>Example</th>
<th>Educational Purposes</th>
<th>Fair Dealing Exception</th>
<th>Licensing Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Licensing Scheme • Educational licence is in place between the university and the</td>
<td>• Preparation of teaching and reading material would be considered under teaching purposes rather than research or study</td>
<td>• This agreement overrides copyright law in regards to the material sourced from the database and provided to students</td>
</tr>
<tr>
<td></td>
<td>Copyright Agency Limited • Attendees would be classified as enrolled with the University or an affiliated institution • The activity is classified as an educational purpose</td>
<td>• Not applicable as another exception (Part VB) within the Copyright Act appears to be available.</td>
<td>• Material sourced from the AustLII database used for educational purposes</td>
</tr>
<tr>
<td>Non-Award Teaching</td>
<td>s 200AB(3)</td>
<td></td>
<td>• The usage policy of AustLII only allows free access to individual end-users ... for their personal use &amp; other uses permitted by copyright law.</td>
</tr>
</tbody>
</table>
Table Eleven: Application of Copyright Law and a Non-Award Teaching Practical Example

<table>
<thead>
<tr>
<th>Example</th>
<th>Educational Purposes</th>
<th>Fair Dealing Exceptions</th>
<th>Licensing Agreements</th>
</tr>
</thead>
</table>
| Non-Award Teaching    | • Remuneration Notice in place between the university and an authorised collecting agency  
  • Attendees would not be classified as enrolled with the University  
  • More than 10 per cent or one chapter of textbook material were provided to attendees  
  • The activity is teaching but is not an educational purpose under s 10 (1A) of the Copyright Act | • Preparation of teaching and reading material would be considered under teaching purposes rather than research or study | • These agreements overrides copyright law in regards to the material sourced from the databases  
  • Material sourced from the Legal Online and AustLII databases are used as part of a teaching activity  
  • The Legal Online terms of use allows material to be used for educational services if the material is not a substantial portion from a single publication and the educational service is not on behalf of a third party unrelated to the University  
  • The usage policy of AustLII only allows free access to individual end-users ... for their personal use & other uses permitted by copyright law |
Table Twelve: Application of Copyright Law and a Contract Research Practical Example

<table>
<thead>
<tr>
<th>Example</th>
<th>Educational Purposes</th>
<th>Fair Dealing Exceptions</th>
<th>Licensing Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Licensing Scheme</td>
<td>s 200AB(3)</td>
<td></td>
</tr>
<tr>
<td>Contract</td>
<td>Remuneration notice</td>
<td>The research project</td>
<td>These agreements</td>
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<td>Research</td>
<td>in place between the</td>
<td>was undertaken on behalf</td>
<td>overrides copyright</td>
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<td>of the a third party and</td>
<td>law in regards to</td>
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<td></td>
<td>authorised collecting</td>
<td>not a university</td>
<td>the material sourced</td>
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<td></td>
<td>agency</td>
<td>The research project</td>
<td>from the databases</td>
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<td></td>
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<td>was not undertaken for</td>
<td>Material sourced from</td>
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<td>educational instruction</td>
<td>ProQuest and EBSCO</td>
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<td>A financial benefit was</td>
<td>databases are used</td>
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<td>gained from undertaking</td>
<td>as part of research</td>
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<td>the research project.</td>
<td>activity. Of the</td>
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<td>eight articles printed,</td>
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<td>report.</td>
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<td>The final report was</td>
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<td>an external third party</td>
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<td>The ProQuest terms and</td>
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<td>conditions allow</td>
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<td>materials to be used</td>
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<td>for internal research</td>
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<td>or educational purposes</td>
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<td>such as using the</td>
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<td>information for …</td>
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<td>research, … or sharing</td>
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<td>an insubstantial</td>
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<td>amount of material for</td>
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<td>‘personal use or</td>
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<td>scholarly, educational</td>
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<td>or scientific use.</td>
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<td>The EBSCO licensing</td>
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<td>agreement allow</td>
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<td></td>
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<td></td>
<td>materials to be used</td>
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<td></td>
<td></td>
<td></td>
<td>for ‘internal or personal use’</td>
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</tbody>
</table>
**Table Thirteen: Application of Copyright Law and the Contract Research Practical Example**

<table>
<thead>
<tr>
<th>Example</th>
<th>Educational Purposes</th>
<th>Fair Dealing Exceptions</th>
<th>Licensing Agreements</th>
</tr>
</thead>
</table>
| **Contract Research** | • Remuneration Notice in place between the university and an authorised collecting agency  
• The Research project was not undertaken for teaching or educational purposes or for inclusion in the library collection | • A systematic enquiry to discover facts about virtual safes it is defined as research  
• The research project was undertaken by the individual academic staff members  
• The reasoning behind undertaking the research project was a financial benefit. | • These agreements overrides copyright law in regards to the material sourced from the databases  
• Material sourced from AustLII, Legal Online and ProQuest databases are used as part of research activity.  
• The final report was produced and sent to an external third party  
• The usage policy of AustLII only allows free access to individual end-users ... for their personal use & other uses permitted by copyright law  
• The Legal Online terms of use allows material to be used for research if the material is not a substantial portion from a single publication and the research is not on behalf of a third party unrelated to the University  
• The ProQuest terms and conditions allow materials to be used for internal research or educational purposes such as using the information for ... research, ... or sharing an insubstantial amount of material for ‘personal use or scholarly, educational or scientific use. |
CHAPTER 8: CONCLUSIONS AND IMPLICATIONS

8.1 Introduction

This thesis has examined how universities in Australia are managing copyright issues in relation to using third party copyright material as part of educational, non-educational and research activities.

The main question of this research was: How are universities in Australia managing their copyright obligations under the Copyright Act 1968 (Cth) or contracts when using third party copyright material as part of non-educational activities?

In addition to the main question, the research has also examined the following four questions:

- Are universities and individual academics in Australia meeting the contractual terms and conditions of electronic resources when accessing, downloading and printing articles (and other materials) for educational, non-educational and research activities?

- How have the United States, European Union, United Kingdom and Canada addressed the issue of universities and particularly university staff using third party copyright material for educational, non-educational and research activities?

- To what extent do university policies, procedures or guides relating to intellectual property, specifically copyright, provide advice to staff in relation to the use of third party copyright material for non-educational activities and research activities?

- What are the issues associated with the current approaches of Australian universities to the use of third party copyright material for educational, non-educational and research activities?

The findings of the research in respect to these questions are discussed in Section 8.3 below.
8.2 Overview of Operation of Copyright Act

This research has examined the educational statutory licensing schemes (Parts VA and VB), s 200AB and the fair dealing exceptions, particularly for the purpose of research or study within the Copyright Act 1968 (Cth) (hereafter referred to as the Copyright Act) and contracts and terms and conditions of electronic resources in relation to universities and individual academics within Australia using third party copyright material for educational, non-educational and research activities.

The following sections draw together the discussions in the thesis about the impact of this legislation on universities.

8.2.1 Educational provisions within the Copyright Act

The issue of copyright is a significant issue for non-educational activities including commercial activities such as contract research, consultancies and certain types of non-award programs, given that educational institutions are provided with a number of exceptions within the Copyright Act that allows them to copy and reproduce copyright material used for educational activities. As stated in Section 3.2 of Chapter Three, the educational statutory licensing schemes’ exceptions (Parts VA and VB) allow universities to ‘provide access to and use of copyright materials to their staff and students at a reasonable cost’\(^1\) and for copyright holders to receive a reasonable remuneration for use of their copyright works, via a collecting society.\(^2\) An advantage of the licensing scheme is that it provides educational institutions with immunity from copyright infringement if the criteria of the licence are met.\(^3\)

Part VA and VB of the Copyright Act allows educational institutions such as universities to copy broadcasts and works without obtaining prior consent from the copyright owner through a licensing scheme. Part VA permits copying from radio and television for educational purposes,\(^4\) provided that the educational institution has a current remuneration notice in force with a declared collecting agency.\(^5\) Similarly Part VB allows multiple copies to be made on

\(^2\) Ibid.
\(^3\) Ibid.
\(^4\) Education purposes is defined under s10(1A) of the Copyright Act 1968 (Cth).
\(^5\) Australian Vice-Chancellors’ Committee (AVCC) and the Australian Committee of Directors and Principles Limited, Copyright: A Guide for Higher Education Institutions to the Copyright Act 1968, as Amended including the 1989 Amendments (AVCC: Sydney 1990).
behalf of educational institutions for educational purposes if a remuneration notice is in place with a declared collecting agency such as the Copyright Agency (CA). The remuneration notice is the mechanism which brings the statutory licence into operation as well as being the contract with the institution in relation to a payment system. Institutions can elect to copy on a recording system and pay per copy or on a sampling system and pay per student.\(^6\) As part of this remuneration notice, since 2008 universities in Australia have generally paid the Copyright Agency approximately $30 per student for 500 pages of content.\(^7\)

What this means is that universities and university staff can only rely on the educational licensing schemes within the Copyright Act if they are undertaking an activity for an educational purpose and a remuneration notice in place. The interpretation of ‘educational purpose’ under s 10(1A) of the Copyright Act requires an activity to involve individuals that are enrolled as students of an educational institution or an affiliated institutions.

To ensure that universities and university staff are complying with their obligations under copyright legislation, will require universities to rely on contracts and licensing agreements or permissions from copyright holder for the use of third copyright material as part of activities which are referred to as non-educational in this thesis and which do not have a primary motivation of educational purpose.

### 8.2.2 2006 Amendment - Section 200AB

Section 2.6 of Chapter Two, discussed how, following several copyright law reviews in relation to digital agenda reforms, fair use and technological protection measures, the Copyright Act was amended in 2006 to address changing consumer behaviour, the development of new technology and digital markets and the growing concern over copyright piracy.\(^8\) In regards to the educational provisions, new amendments such as s 200AB were seen as a way of enabling educational institutions and libraries to assist their users in the online and digital environment by allowing educational institutions, libraries and archives to use copyright material for non-commercial purposes.\(^9\) As discussed in Section 7.3 of Chapter Seven, as a flexible dealing provision, s 200AB can potentially be relied on by libraries, archives and cultural or educational institutions if no other exceptions within the Copyright

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\(^6\) Ibid.


\(^8\) Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth).

\(^9\) Ibid.
Act are available such as the fair dealing provisions or the educational provisions (Part VA or Part VB).

The examination of the publicly accessible copyright policies and information guides from 32 universities also found that of the nine universities that included a reference to s 200AB within their copyright policy or information guide, seven stated that staff should consult the university copyright officer prior to relying on s 200AB. As discussed in Section 5.5 of Chapter Five, this conservative approach could be in response to the apparent complexity of how the section may operate and because there is no judicial interpretation on the section. This approach was also supported by the interviews conducted with copyright officers from 16 universities in Australia. Two of the copyright officers had not relied on the section due to the uncertainty surrounding the interpretation of the section. As the copyright officer at University J stated, ‘the section has not been tested and there have not been any precedents’.

To ensure that educational institutions, libraries and other cultural institutions use copyright material for non-commercial purposes only, the Government introduced a ‘commercial advantage’ test into s 200AB. The intention of this test was not to prevent cost recovery by eligible institutions but rather to prevent s 200AB from potentially being available to ‘for profit’ educational institutions or libraries in commercial organisations.10

Given that there is no legislative definition for the phrase ‘not made partly for the purpose of … a commercial advantage’, under the statutory interpretation rules,11 extrinsic material such as the Explanatory Memorandum associated with the Copyright Amendment Act 2006 (Cth) and Copyright Agency Limited and Others v Victoria University of Technology12 discussed in Section 7.4 of Chapter Seven and Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Ltd13 discussed in Sections 3.3 and 4.4.2.1 of Chapters Three and Four respectively, can be used to determine the parameters of the test.

The complexity of how to interpret the criteria of s 200AB and the confusion of the meaning of the phrase ‘not made partly for the purpose of … a commercial advantage’ can be seen in the submissions to the senate inquiry into the provisions of the Copyright Amendment Bill

11 See for example s 15AB of the Acts Interpretation Act 1901 (Cth).
2006 (Cth). While the majority of the submissions addressing the ‘commercial advantage’ test were from cultural institutions, they face the same difficulties as education institutions in determining the effect the imposed condition would have on their activities.

None of the submissions that discussed the issue of the ‘commercial advantage’ test in s 200AB were in favour of its introduction in its current form. Most of the submissions argued that the ‘commercial advantage’ test would impose an additional and unnecessary condition beyond the requirements of the three step test under international law, given that s 200AB(1) requires that the conditions of the three step test be met before consideration is given to a ‘commercial advantage’. Others argued that both removing of the word ‘partly’ plus defining the phrase ‘commercial advantage’ within the Act, would provide more clarity and make the test more straightforward. It was also argued by interested user groups ‘that a ‘commercial advantage’ condition would be too restrictive given that institutions may charge instructional fees or engage in money raising activities’ and it would prevent cost recovery.

However, given the intention of the Government to allow cost recovery, it is unlikely the ‘commercial advantage’ test would prevent an institution from relying upon the exception for activities which involve charging on a user pay system. Also, based on the decision in Copyright Agency Limited and Others v Victoria University of Technology, discussed in Section 7.4 of Chapter Seven, the intention of the activity will be analysed by the courts, as a

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16 Attorney-General’s Department Information Law and Human Rights Division, above n 10, 2.

coincidental profit should not prevent an educational or cultural institution from relying on s 200AB.

The ‘commercial advantage’ test within s 200AB also raises the issue of what portion or percentage of use would meet the criteria of not being partly for the purpose of an educational institution obtaining a commercial advantage. As allowed under the statutory interpretation rules, the Macquarie dictionary, defines ‘partly’ as ‘in part; in some measure; not wholly’.\(^{18}\) Given the ambiguousness of the definition it is most likely that the level of use will be determined on a case to case basis.

As stated above, it appears that the Government’s intention is to allow educational institutions the opportunity to break even. The Government’s stance or reasoning appears similar to the view held by Gummow J in Copyright Agency Limited and Others v Victoria University of Technology\(^{19}\) concerning the difference between something sold for a financial profit or sold at a financial profit. As Gummow J concluded:\(^{20}\)

> The sole purpose of the University was to make the copied materials available to its students for the university’s courses. The introduction of a user pays system was not inconsistent with the University having that sole purpose.

In any dispute involving s 200AB, the courts will need to analyse the educational institution’s intention and determine whether it was for an educational purpose or a commercial advantage, and whether a profit was coincidental or a primary motivation.

Section 200AB is unlikely to assist universities to comply with their obligation under copyright legislation when undertaking non-educational activities. Section 200AB requires that the activity is considered socially beneficial and the use of third party copyright material is for a set purpose such as compiling resources for students and is for a non-commercial purpose. As certain types of non-educational activities such as contract research or consultancies will involve a commercial entity and any fees paid to universities for these types of activities may be above the cost recovery price, s 200AB will not be available to universities.

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\(^{20}\) *Copyright Agency Limited and Others v Victoria University of Technology*, (1995) 128 ALR 482, 482.
8.2.3 Fair Dealing Provisions within the Copyright Act

As discussed in Section 3.3.1 of Chapter Three, any copying undertaken by individual staff and for the purpose of research or study which could be deemed ‘fair dealing’ under s 40 of the Act is not included under the educational licensing scheme. The fair dealing exceptions are used as a defence against a claim of copyright infringement. Sections 40 to 43 of the Act state that a use must be for study or research, criticism or review, parody and satire, reporting news or professional advice by a lawyer, patent attorney or trademark attorney.\(^{21}\) In relation to whether the use is considered ‘fair dealing’, s 40(2) provides guidance of what matters should be taken into consideration when deciding if a use is ‘fair dealing’. These matters relate to purpose and character of the use, the nature of the work, the possibilities of obtaining the work within a reasonable time at a commercial price, the effect of the use on the value or potential market of the work and the amount and substantially of the part copied in relation to the whole work.\(^{22}\) As stated in Section 3.3.1 of Chapter Three, an Australian court will look at\(^ {23}\)

how the reproduction was used, the type of work involved, whether the work is available at reasonable price, whether the economic interests of the copyright holder has been damaged and the amount of the work that was reproduced.

Changes to the fair dealing exceptions could potentially be introduced into Copyright Act if any of the recent proposals by the Australian Law Reform Commission (ALRC) as part of their review into whether the Copyright Act is adequate and appropriate in the digital environment is acted on. As discussed in Section 2.7 of Chapter Two, the ALRC proposed in the Copyright and Digital Economy Discussion Paper 79,\(^ {24}\) that the educational statutory licensing schemes be repealed and a fair use exception that has educational purpose as an illustrative use be introduced in the Copyright Act. However, if their preferred option is not acted on, the ALRC proposed the introduction of a new fair dealing exception for the purpose of education.

\(^{21}\) In terms of fair dealing provisions for subject matters other than works, these are identical to those relating to works and are contained in ss 103A to 103C.

\(^{22}\) Copyright Act 1968 (Cth), s 40(2);


This means that currently academic staff as individuals could be mistakenly relying on the fair dealing exceptions, particularly for the purpose of research or study when undertaking certain non-educational activities such as contract research. It is unlikely that the use of third party copyright material as part of these types of non-educational activity which could be defined as ‘research’ will be considered a ‘fair dealing’. It is likely that the use of any third party copyright material as part of these types of activities will require permission from the copyright holder or reliance on contracts or licensing agreements rather than the fair dealing exceptions, particularly for the purpose of research or study.

8.2.4 Research and Copyright Law

As stated in Section 5.5 of Chapter Five, for the 42.2 per cent\(^{25}\) of all full time university staff who are classified as either research only (14.7 per cent) or teaching and research (27.5 per cent), a major component of their role is undertaking what is referred to as ‘research’. However, unlike the term ‘educational purposes’ which is defined within the Act, the Act provides no guidance in relation to the definition of ‘research’. The Copyright Law Review Committee (CLRC) in its 1998 *Exceptions Report*,\(^{26}\) noted the opinion of Dennis Rose QC, the then Chief General Counsel to the Attorney General’s Department, in respect to what qualifies as research. Mr Rose had commented that research should be limited to activities that increases knowledge but not extended to commercial objectives:\(^{27}\)

Research might well be limited to activities for the purpose of increasing knowledge in the community as a whole i.e. basic research, as distinct from research directed at particular commercial objectives such as product development or research in a government department for the purpose of advising a minister on proposed legislation.

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Under statutory interpretation, Australian Courts are allowed to use extrinsic materials such as the Macquarie Dictionary to define phrases or terms not defined in an Act. As discussed in Sections 3.3 and 4.4.2.1 of Chapters Three and Four respectively, in *Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Ltd*, Beaumont J referred to the Macquarie Dictionary for the meaning of research. It was defined as a diligent and systematic enquiry or investigation into a subject in order to discover facts or principles. As discussed in Section 4.4.2.1 of Chapter Four, this case raised the issue of whether a press clipping service could be considered as a form or type of research and whether the activity could be considered fair dealing under s 40. While Jeffress had established an effective method for third parties to retrieve material, Beaumont J concluded that it did not follow that the purpose of Jeffress’s activity was research. Even if Jeffress’s customers were engaged in research, Jeffress could not claim a defence under the fair dealing exceptions as these sections require the individual claiming fair dealing to be engaged in the actual activity of research which Beaumont J concluded was not the case in this instance. Beaumont J found that the supply of photocopied material to third parties for a fee was an activity undertaken by Jeffress in the ordinary course of trade and the intention behind Jeffress’ activity was purely commercial. Khan and Hancock concluded that ‘any copying or reproduction for commercial motives, despite some research involvement is unlikely to be protected’.

However, a much broader view has been applied in the New Zealand courts with Blanchard J in *Television New Zealand v Newsmonitor Services Ltd* commenting that a business organisation is capable of engaging in research as well as private study, ‘when its personnel endeavour to place themselves in a better position to perform their function in or related to the organisation’. Research and the phrase ‘research and development’ are commonly referred to in business. Blanchard J stated that ‘research is ultimately intended to enable commercial exploitation … the product of the research is likely in some form to be made public’.

Similarly, as discussed in Section 4.4.2.1 of Chapter Four, McLachlin CJ in *Canadian Ltd v*
Law Society of Upper Canada concluded that ‘research is not limited to non-commercial or private contexts’. By concluding that a fair dealing for purposes of research can be something done for commercial gain, the views of Blanchard J and McLachlin CJ appear to contradict the findings from the De Garis v Neville Jeffress Pidler Pty Ltd.

With no other Australian authority on the issue on what constitutes research and in response to Mr. Rose’s opinion, Ricketson and Creswell argued that there is no reason for limiting the definition of research in the manner that Mr. Rose suggested, as long as any activity being described as research falls within the scope of the dictionary’s definition but not including dissemination or publication of the research results.

Without clarification and awareness within university intellectual property policies and procedures, specifically copyright policies and information guides about what constitutes research activity, this research considers that there is likelihood that the majority of academic staff within Australia universities will not use Ricketson and Crewell’s definition of research or only the dictionary definition of the phrase ‘research’, rather they will continue to consider the dissemination or publication of research results as part of the process of research activity.

8.2.5 Contracts and Copyright Law

As discussed in Chapter Three, as the availability of copyright material in electronic form continues to grow, access to copyright material is beginning to occur more through licensing agreements, which raises the issue of the relationship between contract law and copyright law.

Currently under the Copyright Act, contracts or provisions within contracts can exclude the fair dealing exceptions and other use exemptions from users of copyright material except in relation to software. Section 47H prevents a contract or a provision within a contract which relates to software from excluding or limiting or having the effect of excluding or limiting the operation of ss 47(B) to 47(F). This includes making a backup copy of a program and a reproduction of a program to correct errors and for security testing.
In response to the development of electronic commerce in the 1990s and concern over whether this growth area was facilitating the use of contracts to set terms and conditions for access to and use of copyright material,\textsuperscript{42} the Copyright Law Review Committee (CLRC) reviewed the relationship between copyright and contract. This 2001 review examined, \textit{inter alia}, the level in which contracts were being used during the supply of electronic or printed copyright material to exclude or modify the exclusive rights of copyright owners and users under the Act, the ability of copyright owners and users to enforce contracts and whether these types of contracts should be enforceable under the Copyright Act.\textsuperscript{43} The CLRC recommended that the Copyright Act be amended to prohibit a contract or a provision within a contract which excludes or modifies or has the effect of excluding or modifying the fair dealing defences or the libraries and archives provisions.\textsuperscript{44} As stated in Section 3.6 of Chapter Three, while there was no government response to the 2002 \textit{Copyright and Contract Report},\textsuperscript{45} the 2005 \textit{Fair Use and Other Copyright Exception}\textsuperscript{46} issue paper noted that the use of contracts considered by the Copyright Law Review Committee in the 2002 report were ‘relevant to the issue of possible new exceptions to meet the concerns about maintaining reasonable public access to copyright material in electronic form’.\textsuperscript{47}

As the Copyright Act does not explicitly exclude the use of contract law,\textsuperscript{48} contracts and licensing agreements entered into by universities with publishers or providers of aggregated resources on behalf of university libraries to provide staff and students with access to third party copyright material\textsuperscript{49} in electronic format, can override the operation of the Copyright Act, particularly in the area of fair dealing and multiple reproduction or communication. The use of contracts and other licensing agreements such as open access or creative commons may also assist in overcoming some of the issues associated with a lack of standardisation in relation to the use of copyright in the digital age.

As anecdotal evidence suggests that academic staff (and students) would usually access material in electronic form without giving any consideration to the terms and conditions

\textsuperscript{44} Ibid; Ricketson and Creswell, above n 23.
\textsuperscript{45} Copyright Law Review Committee, above n 43.
\textsuperscript{46} Attorney General Department, above n 42.
\textsuperscript{47} Ricketson and Creswell, above n 23, [11.645].
\textsuperscript{48} Except for s 47H.
\textsuperscript{49} For example academic journals, books, legal cases and opinions, research papers and theses.
governing the provision of each electronic resource, means that to ensure that universities comply with their obligations under these contracts and licensing agreements, and to limit their legal liability, universities must provide university staff (and students) with actual awareness that they will be using third party copyright material from electronic resources for educational, research and non-educational activities under terms and conditions rather than copyright legislation.

8.3 Research Questions

8.3.1 Main Research Question

*How are universities in Australia managing their copyright obligations under the Copyright Act 1968 (Cth) or contracts when using third party copyright material as part of non-educational activities?*

In relation to the main question, the research has identified that universities and academic staff in Australia are potentially at risk of breaching their obligations under the Copyright Act and licensing agreements when using third party copyright material as part of certain types of non-educational activities such as contract research, consultancies and professional development programs.

As demonstrated by the four practical examples discussed in Chapter Seven, there is a likelihood that the Copyright Act, specifically in relation to the educational statutory licensing schemes and the fair dealing exception for the purpose of study and research, will not be able to be relied on for non-educational activities such as contract research, consultancies and certain types of non-award programs such as professional development programs. However, potentially the educational statutory licensing schemes can be relied on when undertaking other types of non-award programs such as single subject or short course programs.

The analysis on the four practical examples also indicates the likelihood that the licensing agreements of electronic resources may not be complied with if materials from electronic resources are used as part of a non-educational activity. As discussed in Chapter Five and below in Section 8.3.2 below, the examination of twelve electronic database provider contracts or terms and conditions also revealed that less than half allowed for multiple copying of resources for educational purposes. However, there is uncertainty in relation to
whether licensing agreements would be infringed given the lack of clarity and definition regarding key concepts within the licensing agreements such as ‘individual end users’, ‘internal research’, ‘substantial portion’ and ‘unrelated third party’.

This research has identified that when undertaking non-educational activities, Australian universities are likely to need to seek permissions or rely on licensing agreements rather than copyright legislation to use third party copyright material. The examination of the publicly accessible copyright policies or information guides from 32 Australian universities found that 20 of the information guides provided guidance on how to seek permission for use of third party copyright material. This approach could indicate implied awareness by staff that consideration must be given to third party copyright material when undertaking educational and research activities. However awareness of the impact of using third party intellectual property including copyright material as part of non-educational activities appears limited, given that only one, four and seven respectively of the publicly accessible intellectual property, copyright and non-educational activities policies or procedures of universities addressed the issue.

The interviews conducted with copyright officers from 16 Australian universities also raises the notion that there is a possibility that permissions for the use of third party copyright material as part of a non-educational activity are not being sought from copyright holders. Of the six copyright officers who provide permission services to staff, three do so only for the purpose of obtaining permission to use third party copyright material for educational activities. For seven other copyright officers that were asked about providing permission services, all seven stated that advice and permission letter templates are available on their university’s copyright website to assist staff in obtaining permission for use of third party copyright material.

8.3.2 Research Question Two

Are universities and individual academics in Australia meeting the contractual terms and conditions of electronic resources when accessing, downloading and printing articles (and other materials) for educational, non-educational and research activities?
The twelve electronic resource provider contracts or terms and conditions examined generally allowed academics to use the electronic resources for personal, educational and research purposes. This means that there is no need for academics to argue fair dealing or fair use in relation to browsing, copying or reproducing material from the databases for research or personal internal use.

The main clauses in the contracts or terms and conditions were examined for authorised users, governing jurisdiction, permitted uses, and whether the following activities; printing, downloading, research and multiple reproduction or communication (of relevance when teaching non-award programs such as single subject courses or providing industry based training such as professional development courses) were allowed.

The examination of the twelve electronic database provider contracts or terms and conditions also revealed that less than half allowed for multiple copying of resources for educational purposes. The right to make multiple copies is provided either because the contract or terms and conditions specifically allow it, or the contract or terms and conditions states that the Australian Copyright Act or fair use under US law applies. The governing laws under each contract vary, with only three being Australia, five US law, two UK law, and two not stating the applicable law. Only one of the contracts specifically refers to the US fair use exception.

As the majority of the contracts reviewed did not allow multiple copying, this research has identified that potentially Australian academics are at risk of breaching the terms and conditions of the electronic resources being accessed for educational purposes.

If Australian academics are using material downloaded or printed from electronic resources for inclusion in research publications, then this research has found that potentially they could also be at risk of infringing the terms and conditions, as it has been argued by Ricketson, Creswell, Burrell and Coleman that dissemination of research does not fall within the dictionary meaning of research.

The interpretation of the four practical examples also demonstrates how the licensing agreements of electronic resources may not be complied with when undertaking educational, non-educational and research activities.

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The examination of the publicly accessible copyright policies or information guides from 32 Australian universities identified 19 policies or information guides that addressed the issue that the use of electronic resources is governed by terms and conditions and that these terms and conditions can override the educational statutory licensing schemes or the fair dealing exceptions available to university staff under the Copyright Act. This approach however appears to only give staff (and students) implied awareness rather than actual acceptance of terms and conditions when accessing electronic resources.

The interviews with copyright officers also supported the notion of implied awareness. Only two universities interviewed required users to accept terms and conditions of the electronic resource at the point of log-in or access. The interviews also identified three other differing approaches of university libraries in respect to how staff are made aware that they need to meet the requirements of contractual terms and conditions rather than the Copyright Act when using electronic resources available via the library website. The most common approach was through various university policies or procedures with 12 universities interviewed using this approach, of which nine used their copyright policies or information guides in inform their staff and students of their obligations under licensing agreements in respect to electronic resources. However three universities interviewed did not appear to have an approach or process for informing staff (and students) of their obligations when using electronic resources available via the library website, which is an inferior approach to only providing implied awareness.

### 8.3.3 Research Question Three

*How have the US, EU, UK and Canada addressed the issue of universities and particularly university staff using third party copyright material for educational, non-educational and research activities?*

Similar to the situation in Australia, it would appear that educational institutions in the US, EU and UK are able to use third party copyright material for non-educational activities including commercial activities only under a licensing agreement or if permission is granted by the copyright holder. In contrast, given the judicial interpretation by the Canadian Supreme Court of what constitutes ‘research’, the use of third party copyright material in relation to a non-educational activity such as contract research may potentially be a fair dealing. As is the
case in Australia, there is an apparent lack of judicial and/or legislative guidance in relation to managing copyright issues when undertaking non-educational and research activities. As stated in Chapter Four, neither the UK or Canadian Copyright Acts define the terms - ‘educational purpose’, ‘non-commercial’, what constitutes ‘a motive of gain’ or research. Similarly the US Act does not define ‘educational purposes’. However educational institutions in the US, generally accept that non-commercial activities such as instruction, teaching, study or investigations are examples of educational purposes.

8.3.4 Research Question Four

To what extent do university policies, procedures or guides relating to intellectual property, specifically copyright, provide advice to staff in relation to the use of third party copyright material for non-educational activities and research activities?

From the examination of the publicly accessible copyright policies and information guides of 32 Australian universities, a limited number, seven and eight respectively, of the publicly accessible university copyright policies or information guides discussed the issue of using third party copyright material for non-educational activities and research activities beyond the fair dealing exceptions within the Copyright Act.

Monash University was the only university of the seven that addressed non-educational activities that went beyond stating that staff should contact the University’s copyright office or legal office to seek advice on using third party copyright material for non-educational purposes. As discussed in Section 5.5 of Chapter Five, within its copyright information guide Monash University provides a section on university business activities. While the section is not specific to non-educational activities such as contract research it does provide information to staff by listing six questions that a user should consider prior to using third party copyright material for non-educational purposes. The approach of directing staff to the University’s copyright office or legal office for advice on using third party copyright material as part of a non-educational activity, while inadequate does at least raise awareness that there could be potential copyright issue when undertaking non-educational activities.

Of the eight copyright policies or information guides that address research activities beyond the fair dealing exceptions, four do so only to the extent of stating that the dictionary
definition of research as being the ‘diligent and systematic enquiry or investigation into a subject discover facts or principles’. The other four copyright policies or procedures indicate that research falls within the scope of the dictionary’s definition but does not include the dissemination or publication of research results.

The examination of publicly accessible policies and procedures related to non-educational activities of 32 universities identified that all except four were silent on the need to consider the use of third party intellectual property when undertaking a non-educational activity. Likewise, the examination of the publicly accessible intellectual property policies and procedures of 35 universities identified only one, Murdoch University that addressed the use of third party intellectual property including copyright material.

The examination of the publicly accessible intellectual property, copyright and non-educational activities policies or procedures of universities in Australia indicates that most Australian universities need to strengthen their approaches to copyright and research, specifically the use of third party intellectual property including copyright material for non-educational activities including commercial activities such as contract research, consultancies and certain types of non-award programs.

8.3.5 Research Question Five

What are the issues associated with the current approaches of Australian universities to the use of third party copyright material for educational, non-educational and research activities?

From the analysis of the interview data, the overarching themes related to risk management and the focus of copyright offices on educational activities. The majority of universities interviewed appeared to have a decentralised approach for copyright management, whereby individuals are responsible for ensuring the use of third party material is compliant with the Copyright Act and any contracts licensing agreements with third parties including electronic resources.

The research has identified potentially gaps (in staffing, organisational structure, policies and information guidelines) between managing copyright issues for educational activities of universities and the developing area related to research and non-educational activities. From the apparent lack of resources particularly in respect to staffing levels, the reporting lines associated with copyright officers’ positions and the perception of the copyright officers interviewed that research and non-educational activities are the domain of research and innovation or legal services groups within universities, potentially universities are not providing the necessary resources in the relevant areas.

The structure and responsibilities of the legal and research services within Australian universities differ and there are a number of areas within universities responsible for intellectual property including copyright such as legal services, library, industry engagement, international and research services.

This research has found that university staff may not be aware that there is a need to consider third party copyright material and other forms of third party intellectual property as part of non-educational activities. This is particularly noticeably given that only seven of the copyright policies or information guides addressed non-educational activities and the majority of the policies and procedures related to intellectual property and non-educational activities were silent on the need to consider the use of third party intellectual property when undertaking non-educational activities.

8.4 Implications for Universities

In the future, as the level of non-educational activities including commercial activities within Australian universities continue to increase, it will be essential that the copyright practices and copyright policies, procedures or information guides of universities adapt to address copyright issues in respect to licensing agreements, the educational statutory licensing schemes, other educational sections, the fair dealing exceptions and non-educational activities to ensure that copyright is not infringed on the basis that an activity has an element of commerciality.

However, how universities adapt to copyright issues related to educational, non-educational and research activities may be influenced by any potential changes to the Copyright Act as a
consequence of the current copyright review, *Copyright and Digital Economy* being conducted by the Australian Law Reform Commission (ALRC). As stated in Section 2.7 of Chapter Two, the ALRC has proposed repealing the statutory licensing schemes within the Copyright Act and negotiating voluntary licenses for the use of third party copyright material to allow educational institutions to ‘take better advantage of digital technologies and services. [Also] new licensing models may facilitate more efficient remuneration [for copyright] holders’. The ALRC has also proposed the introduction of a fair use exception into the Copyright Act, with ‘education as an illustrative purpose in the fair use exception’. However if a general fair use exception is not introduced into the Act, the ALRC proposes that a new fair dealing exception for education be introduced.

Regardless of any future changes to the Copyright Act or use of voluntary licensing agreements, this *research recommends* that universities need to consider how they educate their staff, particular academic staff in relation to copyright management. A further *recommendation of this research* is that universities require their staff, particularly academic staff and those staff working in research management, to undertake copyright compliance training. An option may be to require all staff to undertake an online copyright module similar to what currently occurs at RMIT University where each staff member must complete online privacy, occupational health and safety and Australian consumer law modules every two years. At the very least, universities should provide some training to new academics on intellectual property, specifically, copyright and the use of third party copyright material as part of educational, non-educational and research activities.

The issue of relying on educational sections within the Copyright Act in respect to non-educational activities remains a grey area. Based on Beaumont J’s comments in *Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Ltd*, it would appear that the Australian courts will take a narrower view than the New Zealand and Canadian courts to the inclusion of a commercial component in any of the uses such as research or study available under the fair dealing provisions. A commercial element would potentially prevent an individual claiming a fair dealing defence.

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53 Ibid, 110.
54 Ibid, 269.
55 Ibid.
When an external company or organisation contracts an academic department to provide a tailored series of programs to employees for a fee, this is classified as non-award teaching. While the activities being undertaken by the academic staff may be classified as educational as defined under s10(1A) of the Copyright Act, the primary motivation of the department would be for a commercial advantage and if the costing model used includes a profit component, then neither the licensing scheme nor s 200AB could be relied on.

It is most likely that a test case similar to Moorhouse and Angus & Robertson (Publishers) Pty Ltd and Others v the University of New South Wales\(^57\) and Copyright Agency Limited and Others v Victoria University of Technology\(^58\) will need to be brought against an educational or cultural institution to obtain a judicial interpretation of 200AB and what is meant by the ‘commercial advantage’ test. However, until this occurs, it may be necessary for universities to refer to the costing model used to determine the viability of an activity and consider the motivation behind the activity before relying on the education provisions for the copying and the reproduction of copyrighted works for commercial activities.

This **research recommends** increasing awareness of university staff to the impact of contracts and licensing agreements on both educational statutory licences and the fair dealing exceptions to ensure that universities and university staff (who are creators and users of copyright material) realise the potential risk of a loss of access to electronic resources or legal action being taken by electronic resource owners against the university and individuals for breach of contract.

The current common practice among universities to only require users of electronic resources to login for authorisation purposes rather than to accept terms and condition and using implied acceptance through university policies could lead to universities being fully responsible for any breach of contract.

**A recommendation is** that universities consider an option whereby all staff and student are required to accept or agree to a generalised term of use statement for the use of the electronic resources available via university library websites at the point of access or log-in.

\(^57\) (1974) 23 FLR 112.
Further, in terms of licensing agreements, to clarify the situation, this research also recommends that terms and conditions or at minimum universities need to define key phrases such as ‘individual end users’, ‘internal research’, ‘substantial portion’ and ‘unrelated third party’ within a generalised term of use statement for use of electronic resources available via university library websites.

As demonstrated through the examples of potential breaches of copyright provided by some of the copyright officers interviewed, copyright officers need to continue to raise awareness of the importance of seeking and being granted permission for the use of third party copyright material for non-educational and research activities.

If universities started to provide a permission service beyond educational activities for all academic staff, then there is presumption that the approach for copyright management would change from a decentralised approach to a centralised approach, whereby the university rather than an individual academic is responsible for ensuring the use of third party material for non-educational activities is compliant with the Copyright Act and any contracts with third parties including providers of electronic resources. A need for permission services within universities may become essential if the ALRC proposal to enable educational institutions to negotiate on a voluntary basis licences for the use of third party copyright material is introduced.

However, regardless of which approach a university adopts for copyright management, the university will retain a legal liability. It is likely that any legal action in relation to a claim of copyright infringement or breach of contract will be brought against the university or both individuals and the university.

8.6 Areas for Future Research

As the research identified that copyright management within Australian universities is split between legal, library and research services, further interviews could be undertaken with managers of university commercial research offices to explore how the research area within universities are managing intellectual property issues including copyright within research agreements and contracts. This research could confirm or contradict the assertion that there are gaps within staffing, organisational structure, policies, procedures and information guidelines in copyright management, specifically in the areas of non-educational and research activities.
As it is not straightforward to find out the rights allowed under each contract for electronic resources, a larger review of contracts, which is beyond the scope of this research, is needed to provide a clearer picture of whether such contracts do substantially exclude or modify exceptions available under the Act. What is clear is the difficulty for universities to be aware of what each contract allows and the need to determine which law applies to the contract. While it is beyond the scope of this research to conclude definitely that Australian academics are breaching the terms and conditions of electronic resource, interviews or surveys would need to be undertaken to determine how academics are utilising using material from electronic resources.

Another potential area for future research is in relation to open access publishing. Similar to the UK situation, where the UK Government is committed to ensuring that publicly funded research is freely accessible to the public including users in the commercial, educational, not-for-profit and public sectors, the Australian Research Council (ARC) now requires publications from an ARC supported research project to be deposited in an open access research repository. Research could explore the effect of open access and other licensing options such as creative commons on copyright management, educational, non-educational and research activities.
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## Appendix A: Table One: Reproduction or Communication of Works in Electronic Form by Educational Institutions

<table>
<thead>
<tr>
<th>Multiple Reproduction and Communication of Insubstantial Parts of Works in Electronic Form – s 135ZMB</th>
<th>An Article in a Periodical – s 135ZMC</th>
<th>Multiple Reproduction and Communication of Works (other than an article published in a periodical publication) in Electronic Form – s 135ZMD</th>
<th>Reproduction and Communication of Works from Electronic Anthologies – s 135ZMDA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Make one or more copies of part of a work or communicate part of a work.</td>
<td>Make one or more copies of a whole article or part of an article or communicate a whole or part of an article.</td>
<td>Make one or more copies of a whole work or part of a work or communicate a whole or part of a work (other than an article published in a periodical publication).</td>
<td>Make a copy or communicate all or part of a work if the work is contained in an anthology published electronically and the content of the anthology is unlikely to be altered/changed regardless of the system used to view, copy or communicate the content.</td>
</tr>
<tr>
<td>Copying must occur on the premises of an educational institution and be for the purpose of a course of study provided by the institution.</td>
<td>Copying or communication must be by or on behalf of an educational institution, which has a remuneration notice in place with a relevant collecting agency.</td>
<td>Copying or communication must be by or on behalf of an educational institution, which has a remuneration notice in place with a relevant collecting agency.</td>
<td>The work copied or communicated must not be more than 15 pages of the anthology.</td>
</tr>
<tr>
<td>The amount copied or communicated can be no more than 2 pages or 1 percent of the number of pages within the work.</td>
<td>Copying or communication must be for the solely for the educational purposes of the institution or another educational institution.</td>
<td>Copying or communication must be for the solely for the educational purposes of the institution or another educational institution.</td>
<td>Copying or communication must be by or on behalf of an educational institution, which has a remuneration notice in place with a relevant collecting agency.</td>
</tr>
<tr>
<td>The 2 page or 1 percent of the number of pages copying and communication limitation does not exist if the electronic content of the literary or dramatic work (from which the copying or communication is being made) is unlikely to be altered/changed regardless of the system used to view, copy or communicate the content, the copying or communicating is more than 2 pages, without altering any of the work’s content, the work is of more than 200 pages and the number of pages copied or communicated exceeds 1 percent of the number of pages within the work.</td>
<td>No more than 1 article or part of 1 article can be copied or communicated from the same periodical publications, unless the articles relate to the same subject-matter.</td>
<td>If a work is separately published then a whole work or more than a reasonable portion of a literary or dramatic work or the whole or more than 10 percent of a musical work cannot be copied or communication, if an electronic version of the work can be obtained within a reasonable time at an ordinary commercial price.</td>
<td>Copying or communication must be for the solely for the educational purposes of the institution or another educational institution.</td>
</tr>
<tr>
<td>If the work being copied or communicated is not paginated, then no more than 1 percent of the number of words within the work can be copied or communicated.</td>
<td></td>
<td>This means if a work is available electronically within a reasonable time at an ordinary commercial price, than only a reasonable portion of a literary or dramatic or no more than 10 percent of a musical work can be copied or communicated.</td>
<td>Generally under the Act, reasonable portion for works in electronic form refers to a total of 10 percent of the number of words in the work. If the work is divided into chapters, more than 10 percent of the number of words in the work can be copied on the condition that only the whole or part of a single chapter has been copied.</td>
</tr>
<tr>
<td>During the 14 day period after the initial copying or communication, no other part of the work can be copied or communicated.</td>
<td></td>
<td>Generally under the Act, reasonable portion for works in electronic form refers to a total of 10 percent of the number of words in the work. If the work is divided into chapters, more than 10 percent of the number of words in the work can be copied on the condition that only the whole or part of a single chapter has been copied.</td>
<td></td>
</tr>
</tbody>
</table>
### Appendix A: Table Two: Reproduction of Works for the Purpose of Research or Study

<table>
<thead>
<tr>
<th>Fair Dealing: s 40 – Copying a Literary, Dramatic, Musical or Artistic Work for the Purpose of Research or Study</th>
<th>Matters to be taken into Consideration in Determining Whether a Use of for a Work for Research or Study is Fair Dealing – s 40(2)</th>
<th>Reproduction of an Article in a Periodical for the Purpose of Research or Study – s 40(3) and s 40(4)</th>
<th>The Amount of a Work that can be Copied for the Purpose of Research or Study – s 40(5)</th>
</tr>
</thead>
</table>
| **Fair Dealing for Externally Enrolled Students – s 40(1)** | An externally enrolled student of an educational institution is allowed to make a copy of a literary work (other than lecture notes) if it is for the purpose of a course of study or research. Lecture notes are a literary work produced by a person lecturing or teaching in or in connection with a course of study or research. | To determine whether a copy of a work to be used for research or a course of study is fair dealing the following factors should be taken into consideration:  
- The purpose and character of the dealing  
- The nature of the work  
- The possibilities of obtaining the work within a reasonable time at a commercial price  
- The effect of the use on the potential market and value of the work  
- Where only a part of a work is copied, the amount and substantiality of the part copied in relation to the whole work. | Make a copy of whole article in a periodical publication if the purpose of the copying is for a course of study or research.  
The article must be a literary, dramatic or musical work and it must be a work in its own right.  
A 2nd article in the same periodical publication cannot be copied for the purpose of different research or a different course of study. | Irrespective of s 40(2), for the purpose of a course of study or research a reasonable portion of work can be copied for the purpose of research or a course of study.  
For a literary, dramatic or musical work (except for a computer program) that is published in an edition of more than 10 pages, a reasonable portion is 10 percent of the number of pages or if the work is divided into chapters, a single chapter.  
For a literary or dramatic work published in electronic form (except for a computer program or an electronic compilation), a reasonable portion is 10 percent of the number of words in the work or if the work is divided into chapters, a single chapter can be copied. |
Appendix B: Table One: Educational Provisions Comparison between Australia, the US, UK and Canada

<table>
<thead>
<tr>
<th>Australia – Copyright Act 1968 (Cth)</th>
<th>United States – Copyright Act of 1976</th>
<th>United Kingdom – Copyright Designs and Patents Act 1988 (UK) c 48</th>
<th>Canada – Copyright Act, RSC 1985, c. C-42</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Educational Provisions</strong></td>
<td><strong>Educational Provisions</strong></td>
<td><strong>Educational Provisions</strong></td>
<td><strong>Educational Provisions</strong></td>
</tr>
<tr>
<td>ss 135A to 135ZA</td>
<td>§ 108</td>
<td>ss 32 to 36</td>
<td>ss 29.4 to 30.4</td>
</tr>
<tr>
<td>The above sections allow educational institutions to reproduce and communicate broadcasts for educational purposes.</td>
<td>§ 110</td>
<td>Reproduction of Works</td>
<td>Reproduction of Works</td>
</tr>
<tr>
<td>ss 135ZB to 135ZZH</td>
<td>§ 112</td>
<td>Under the above sections, educational institutions are able to copy for the purpose of instruction if:</td>
<td>Under the above sections:</td>
</tr>
<tr>
<td>The above sections allow educational institutions to reproduce and communicate works and other subject matters for educational purposes.</td>
<td>TEACH Act</td>
<td>- accompanied by a sufficient acknowledgment</td>
<td>- An educational institution can reproduce work to display it for the purposes of education or training.</td>
</tr>
<tr>
<td>s 200AB</td>
<td></td>
<td>- the instruction is for a non-commercial purpose</td>
<td>- Educational institutions can also reproduce, translate, perform or communicate works or other subject matter for the purposes of a test or examination.</td>
</tr>
<tr>
<td>Educational institutions are allowed reproduce works or other subject matters for the purpose of educational instruction if the use does not conflict with normal exploitation of the work or subject matter and does not unreasonably prejudice the legitimate interests of the copyright owner. Under s 200AB (3c) the use must not provide a commercial advantage or profit.</td>
<td>Classroom Guidelines</td>
<td>Recording of Broadcasts</td>
<td>Conditions</td>
</tr>
<tr>
<td><strong>Conditions</strong></td>
<td></td>
<td>Under s 35, educational institutions are able to record broadcasts for educational purposes if:</td>
<td>Except in the case of manual reproduction, sections 29.4 to 30.4 cannot be relied on if the work or other subject matter is ‘commercially available’ in a format appropriate for the education, test or examination.</td>
</tr>
<tr>
<td>Educational institutions are allowed to rely on ss 135A to 135ZA and 135ZB to 135ZZH if the institution has a current remuneration notice in force with a declared collecting agency such as the Copyright Agency Limited. Under ss 135ZB to 135ZZH there are limits on the amount that a work or subject matter can be copied or communicated. For example s 135ZMB allows for two pages or one per cent of a work in electronic format to be copied or communicated for one or more times.</td>
<td>These guidelines state that it is reasonable to copy a chapter from a book or an article from a periodical if it is less than 2500 words or represents less than 10 per cent of the work whichever is the lesser.</td>
<td>Under s 2 of the Act ‘commercially available’ relates to the availability of the work or subject matter on the Canadian market for a reasonable price and may be located with a reasonable effort or the available of a licence via from a collective society.</td>
<td></td>
</tr>
<tr>
<td><strong>Definitions</strong></td>
<td></td>
<td><strong>Conditions</strong></td>
<td>Under s 29.3 of the Act, educational institutions cannot rely on ss 29.4, 29.5, 30.2 or 30.21 if an activity is ‘carried out with motive of gain’ but it does not prevent cost recovery.</td>
</tr>
<tr>
<td>The Copyright Act 1968 (Cth) defines educational purpose as:</td>
<td><strong>Classroom Guidelines</strong></td>
<td><strong>Definitions</strong></td>
<td><strong>Definitions</strong></td>
</tr>
<tr>
<td>• A copy made or retained for use, or is used, in connection with a particular course of instruction provided by the institution or</td>
<td>These guidelines state that it is reasonable to copy a chapter from a book or an article from a periodical if it is less than 2500 words or represents less than 10 per cent of the work whichever is the lesser.</td>
<td>The Copyright Act, RSC 1985, c. C-42 does not define ‘research’ or ‘education purposes’.</td>
<td></td>
</tr>
<tr>
<td>• A copy made or retained for inclusion, or is included, in the collection of the institution’s library.</td>
<td><strong>Cases</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The above sections and Act relate to non-profit educational institutions to enable libraries to copy for archiving and preservation purposes and allows for electronic copying for distance education programs. 

The above sections and Act relate to non-profit educational institutions to enable libraries to copy for archiving and preservation purposes and allows for electronic copying for distance education programs.

Educational purpose is not defined in the Copyright Act of 1976.

However non-commercial instruction, curriculum based teaching and planned non-commercial study or investigation are examples of educational purposes that educational institutions use.

These guidelines state that it is reasonable to copy a chapter from a book or an article from a periodical if it is less than 2500 words or represents less than 10 per cent of the work whichever is the lesser.

Under the above sections, educational institutions are able to copy for the purpose of instruction if:
- accompanied by a sufficient acknowledgment
- the instruction is for a non-commercial purpose

Under s 35, educational institutions are able to record broadcasts for educational purposes if:
- accompanied by a sufficient acknowledgment
- the educational purposes are non-commercial

Sections 32(1) and (2A) exclude copying for instruction or examination via a reprographic process such as photocopying.

Multiply copying for educational purpose requires a licence, which is issued and administered by the Copyright Licensing Agency.

Under s 36(1) no more than one percent of any literary, dramatic or musical work can be copied by reprographic means in one quarter of a year. Also the reprographic copying must be accompanied by a sufficient acknowledgment and be for a non-commercial purpose.

The Copyright Designs and Patents Act 1988 (UK) c 48 does not define ‘educational purposes’ or ‘non-commercial’.

The Copyright Act, RSC 1985, c. C-42 does not define ‘research’ or ‘education purposes’.
### Appendix B: Table Two: Fair Use/Dealing Provisions Comparison between Australia, the US, UK and Canada

<table>
<thead>
<tr>
<th>Australia – Copyright Act 1968 (Cth)</th>
<th>United States – Copyright Act of 1976</th>
<th>United Kingdom – Copyright Designs and Patents Act 1988 (UK) c 48</th>
<th>Canada – Copyright Act, RSC 1985, c. C-42</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Fair Dealing</strong></td>
<td><strong>Fair Use</strong></td>
<td><strong>Fair Dealing</strong></td>
<td><strong>Fair Dealing</strong></td>
</tr>
<tr>
<td>• ss 40 to 43</td>
<td>• § 107</td>
<td>• ss 29 to 30</td>
<td>• s 29</td>
</tr>
<tr>
<td>• ss 103A to 103C</td>
<td></td>
<td></td>
<td>• ss 29.1 and 29.2</td>
</tr>
<tr>
<td><strong>Allowable Uses</strong></td>
<td><strong>Uses</strong></td>
<td><strong>Allowable Uses</strong></td>
<td><strong>Allowable Uses</strong></td>
</tr>
<tr>
<td>The above sections provides fair dealing for the purposes of:</td>
<td>Under § 107, criticism, comment, news reporting, teaching, scholarship and research are examples of uses that may be considered fair.</td>
<td>The above sections provides fair dealing for the purposes of:</td>
<td>Section 29 provides fair dealing for the purposes of:</td>
</tr>
<tr>
<td>- research or study</td>
<td>- The inclusion of the words ‘such as’ in § 107 indicates that other uses may be considered fair.</td>
<td>- non-commercial research</td>
<td>- research</td>
</tr>
<tr>
<td>- criticism or review, parody or satire</td>
<td></td>
<td>- private study</td>
<td>- private study</td>
</tr>
<tr>
<td>- news reporting</td>
<td></td>
<td>- criticism or review</td>
<td>- education</td>
</tr>
<tr>
<td>- Judicial proceedings or professional advice by a lawyer, patent attorney or trademark attorney</td>
<td></td>
<td>- news reporting</td>
<td>- satire</td>
</tr>
<tr>
<td><strong>Factors to Consider in Determining Whether a Use for Research is Fair</strong></td>
<td><strong>Factors to Consider When Determining Whether a Use is Fair</strong></td>
<td><strong>Factors to Consider When Determining Whether a Use is Fair</strong></td>
<td><strong>Factors to Assess Whether an Allowable Use is Fair</strong></td>
</tr>
<tr>
<td>To determine whether a copy of a work to be used for research is fair dealing, the following factors need to be considered:</td>
<td>In determining whether a use of a copyright work would be fair the factors to be considered include:</td>
<td>The use of third party copyright material for research purposes within a commercial organisation was the focus of the 1995 Texaco case. This case did not discuss or define the meaning of research or a commercial use.</td>
<td>As the Copyright Act, RSC 1985, c. C-42 does not define the meaning of the uses allowable under ss 29, 29.1 and 29.2. It is necessary to assess whether a use under ss 29, 29.1 and 29.2 is fair against the six criteria set out in the CCH Canadian case:</td>
</tr>
<tr>
<td>• The purpose and character of the dealing</td>
<td>• The purpose and character of the use</td>
<td>• The 2012 Georgia State University case decision supports education as a fair use if the third party copyright material is being used:</td>
<td>• The purpose of the dealing.</td>
</tr>
<tr>
<td>• The nature of the work</td>
<td>• The nature of the copyrighted work</td>
<td>- for a non-profit scholarly activity such as teaching</td>
<td>• The character of the dealing.</td>
</tr>
<tr>
<td>• The possibilities of obtaining the work within a reasonable time at a commercial price</td>
<td>• The amount and substantiality of the portion used in relation to the copyrighted work as a whole</td>
<td>- is non-fiction and educational in nature</td>
<td>• The amount of the dealing.</td>
</tr>
<tr>
<td>• The effect of the use on the potential market for or value of the copyrighted work</td>
<td>• The effect of the use upon the potential market for or value of the copyrighted work.</td>
<td>- the amount is less than 10 percent of a work with 10 or less chapters or a single chapter of the work with 11 chapters or more</td>
<td>• Alternatives to the dealing.</td>
</tr>
<tr>
<td>• Where only a part of a work is copied, the amount and substantiality of the part copied in relation to the whole work.</td>
<td>What constitutes ‘fair use’ is left to the courts to assess.</td>
<td>Then the use will most likely be fair. However if a licence is readily available at a reasonable price, then this would not favour a fair use.</td>
<td>• The nature of the work.</td>
</tr>
<tr>
<td><strong>Definitions</strong></td>
<td><strong>Cases</strong></td>
<td><strong>Definitions</strong></td>
<td><strong>The effect of the dealing on the work.</strong></td>
</tr>
<tr>
<td>The Copyright Act 1968 (Cth) does not define the meaning of ‘research’.</td>
<td><strong>Cases</strong></td>
<td>The CCH Canadian case concluded that research must be given a large and liberal interpretation to ensure that users’ rights are not unduly constrained and must not be limited to non-commercial or private contexts.</td>
<td></td>
</tr>
<tr>
<td><strong>CCH Canadian case</strong></td>
<td><strong>Factors to Assess Whether an Allowable Use is Fair</strong></td>
<td><strong>Factors to Assess Whether an Allowable Use is Fair</strong></td>
<td><strong>Factors to Assess Whether an Allowable Use is Fair</strong></td>
</tr>
<tr>
<td>The 1990 Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Ltd case referred to the Macquarie Dictionary for the meaning of research.</td>
<td>The use of third party copyright material for research purposes within a commercial organisation was the focus of the 1995 Texaco case. This case did not discuss or define the meaning of research or a commercial use.</td>
<td>The CCH Canadian case concluded that research must be given a large and liberal interpretation to ensure that users’ rights are not unduly constrained and must not be limited to non-commercial or private contexts.</td>
<td>As the Copyright Act, RSC 1985, c. C-42 does not define the meaning of the uses allowable under ss 29, 29.1 and 29.2. It is necessary to assess whether a use under ss 29, 29.1 and 29.2 is fair against the six criteria set out in the CCH Canadian case:</td>
</tr>
<tr>
<td><strong>Definitions</strong></td>
<td><strong>Cases</strong></td>
<td><strong>Factors to Assess Whether an Allowable Use is Fair</strong></td>
<td>• The purpose of the dealing.</td>
</tr>
<tr>
<td>The 2012 Georgia State University case decision supports education as a fair use if the third party copyright material is being used:</td>
<td><strong>Factors to Assess Whether an Allowable Use is Fair</strong></td>
<td>• The character of the dealing.</td>
<td>• The character of the dealing.</td>
</tr>
<tr>
<td>- for a non-profit scholarly activity such as teaching</td>
<td>• The amount of the dealing.</td>
<td>• The amount of the dealing.</td>
<td>• The amount of the dealing.</td>
</tr>
<tr>
<td>- is non-fiction and educational in nature</td>
<td>• Alternatives to the dealing.</td>
<td>• Alternatives to the dealing.</td>
<td>• Alternatives to the dealing.</td>
</tr>
<tr>
<td>- the amount is less than 10 percent of a work with 10 or less chapters or a single chapter of the work with 11 chapters or more</td>
<td>• The nature of the work.</td>
<td>• The nature of the work.</td>
<td>• The nature of the work.</td>
</tr>
<tr>
<td>Then the use will most likely be fair. However if a licence is readily available at a reasonable price, then this would not favour a fair use.</td>
<td>• The effect of the dealing on the work.</td>
<td>• The effect of the dealing on the work.</td>
<td>• The effect of the dealing on the work.</td>
</tr>
</tbody>
</table>
Appendix C: List of Australian Universities

Australian Capital Territory
The Australian National University
University of Canberra

National
Australian Catholic University

New South Wales
Charles Sturt University
Macquarie University
Southern Cross University
The University of Newcastle
The University of New England
The University of New South Wales
The University of Sydney
University of Technology Sydney
University of Western Sydney
University of Wollongong

South Australia
Flinders University
The University of Adelaide
University of South Australia

Tasmania
University of Tasmania

Victoria
Deakin University
La Trobe University
Monash University
RMIT University
Swinburne University of Technology
The University of Melbourne
University of Ballarat
Victoria University

Western Australia
Curtin University of Technology
Edith Cowan University
Murdoch University
The University of Notre Dame Australia
The University of Western Australia

Queensland
Bond University
Central Queensland University
Griffith University
James Cook University
Queensland University of Technology
The University of Queensland
University of Southern Queensland
University of the Sunshine Coast
Appendix D: Copy of Email Invitation

Dear [Name of the Copyright Officer],

I am writing to ask if you would be available for a telephone interview as part of my "Copyright, Non-educational Activities, Research and Universities" PhD research project. I would like to interview you in your capacity as copyright officer and the interview can be anonymous.

The purpose of my research is to examine how Australian universities determine their obligations under the Copyright Act 1968 (Cth) when undertaking non-educational activities such as consultancies, contract research or non-award teaching programs. The project is outlined below and I have attached a copy of the interview questions.

Your insights into copyright within a university environment would provide valuable input into this research.

If you are interested in participating, I can be contacted via email marita.shelly@rmit.edu.au or on 03 9925 5730. If you are unable to be involved, it would be much appreciated if you could recommend an alternative contact within your office. I look forward to hearing from you.

Yours sincerely

Marita Shelly
PhD Candidate
Graduate School of Business and Law
RMIT University
GPO Box 2476 Melbourne VIC 3001
Tel: 61 3 9925 5730
Fax: 61 3 9925 5741
marita.shelly@rmit.edu.au

Project Outline

Please read this email carefully and be confident that you understand its contents before deciding whether to participate. If you have any questions about the project, please contact one of the investigators.

Who is involved in this research project? Why is it being conducted?

The ‘Copyright, Non-educational Activities, Research and Universities’ is part of my PhD that I am undertaking in the area of copyright law. I am being supervised by Professor Margaret Jackson. In this project we are talking to university copyright officers to gain an insight into the issue of using third party copyright material for non-educational activities within a university environment.

The research plan for this project has been approved by the RMIT Human Research Ethics Committee.
Why have you been approached?

We are seeking to interview university copyright officers about their university’s approach to university staff using third party copyright material for non-educational activities. We intend to interview 10 to 15 Australian university copyright officers. Your university may remain anonymous.

What is the project about? What are the questions being addressed?

In this project, we are talking to copyright officers of universities about their university’s approach to using third party copyright material for non-educational activities such as contract research, consultancies and non-award teaching. It will explore the following questions in particular:

• Could you please describe the approach of your university to the use of third party copyright material for non-educational activities such as consultancies, contract research and non-award teaching?
• How many times has university staff sought advice from the copyright office on using third party copyright material for non-educational activities such as consultancies, contract research or non-award teaching?
• What type of questions did the staff member ask?
• What advice was provided to the staff member?

If I agree to participate, what will I be required to do?

You will be interviewed by the researcher. The interview will take an hour or less. They will ask you questions such as those in the previous paragraph in addition to other questions in relation to the use of third party copyright material for non-educational purposes.

The interviews will be transcribed and used in conjunction with the interview notes to clarify the publicly accessible information about universities approaches to the use of third party copyright material for commercial activities. The information obtained will also be used to compare the Australian situation with the international experience.

What are the risks or disadvantages associated with participation?

There are no risks in undertaking this research. Your university may remain anonymous. You are free to withdraw at any time. If you withdraw, any data that you have provided will be destroyed. The interview will be taped and you may request at any stage that the taping cease.

If you are concerned about any aspect of the interview, you should contact Professor Margaret Jackson as soon as convenient. Professor Jackson will discuss your concerns with you confidentially and suggest appropriate follow-up, if necessary.

What are the benefits associated with participation?

There is no direct benefit to you as a result of your participation. The insights gathered from the interviews will, together with sly available information, assist in identifying any examples of best practice procedures within Australian universities in terms of copyright and research activities and the use of third party copyright material for non-educational activities. The
information will also assist in the developments of procedures to assist universities in dealing with the use of third party copyright material for non-educational purposes.

**What will happen to the information I provide?**

We will use the information provided by you, together with publicly accessible information, to identify any examples of best practice procedures within Australian universities in terms of copyright and research activities and the use of third party copyright material for non-educational activities.

Any information that you provide will be disclosed only with your written consent. You may request for your university to remain anonymous and not be identified in any publications including the thesis. However, you should be aware that it may also be disclosed if (1) it is to protect you or others from harm, or (2) if a court order is produced.

The information that we collect in the interviews will be used to write a thesis and other academic publications. In any reports or publications that we produce, your identity will be kept confidential.

The list linking participants’ names and the interview data will be kept securely at RMIT for a period of 5 years before being destroyed.

**What are my rights as a participant?**

As a participant, you have the right to:
- Have any questions answered at any time.
- Withdraw from the project at any time, without prejudice.
- Have any unprocessed data withdrawn and destroyed.

**Whom should I contact if I have any questions?**

If you have any questions regarding this research, please contact the researcher’s senior supervisor:

Professor Margaret Jackson  
Graduate School of Business and Law  
GPO Box 2476  
Melbourne VIC 3001  
Telephone: 03 9925 0135

**What other issues should I be aware of before deciding whether to participate?**

There are no other issues that you should be aware of before you decide to participate.

Copyright, Commercial Activities, Research and Universities Investigators:

Marita Shelly  
BBus (RMIT); Grad Dip Info Man (RMIT)

Professor Margaret Jackson  
LLB (Melb); Grad Dip Cont Ed (UNE); MBus (RMIT); PhD (Melb)
Appendix E: Interview Guide

Provide some background to the research and explain why participant has been approached for the interview.

1. Could you please provide some information about your background and how long you’ve been working in the area of copyright, in particular in the university environment?

2. How many staff work within your university’s copyright office?

3. Could you please describe the general approach of your university to the use of third party copyright material for:
   - educational activities
   - research activities
   - non-educational activities (for example consultancies, contract research and non-award teaching)?

4. How many times have university staff sought advice from the copyright office on using third party copyright material for:
   - educational activities
   - research activities
   - non-educational activities (for example consultancies, contract research and non-award teaching)?

5. What type of questions did the staff member ask?

6. What advice was provided to the staff member?

7. Is the copyright office aware of any instances within the university where the Copyright Act has been breached due to a staff member’s activities?

8. If so, what were the circumstances?

9. What action was taken by the copyright office on behalf of the university?

10. Has there been a need for a staff member to rely on s200AB? And if so what were the circumstances?

11. Does the copyright office provide seminars/training/workshops to staff?

12. If so, do these seminars/training/workshops cover using third party copyright material for research or non-educational activities?

13. How are users (both staff and students) made aware that they may need to meet the requirements of terms and conditions rather than the Copyright Act when using electronic resources available via the library website?

14. Does the university require users to read and agree to the terms and conditions of each electronic resource prior to use/access?

15. Do you have any other comments that you would like to make about copyright and universities?
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*Cambridge University Press, Oxford University Press, Inc., and Sage Publications, Inc., v Mark P. Becker, in his official capacity as Georgia State University President, Risa Palm, in her official capacity as Senior Vice President for Academic Affairs and Provost of Georgia State University, J.L. Albert, in his official capacity as Georgia State University Associate Provost for Information Systems and Technology, Nancy Seamans, in her official capacity as Dean of Libraries at Georgia State University, Robert F. Hatcher, in his official capacity as Vice Chair of the Board of Regents of the University System of Georgia, Kenneth R. Bernard, Jr., Larry R. Ellis, W. Mansfield Jennings, Jr., James R. Jolly, Donald M. Leebern, Jr., William Nesmith, Jr., Doreen Stiles Poitevint, Willis J. Potts, Jr., Wanda Yancey Rodwell, Kessel Stelling, Jr., Benjamin J. Tarbutton, III, Richard L. Tucker, Larry Walker, Rutledge A. Griffin, Jr., C. Thomas Hopkins, Jr., Neil L. Pruitt, Jr. And Philip A. Wilheit, Sr., in their official capacities as members of the Board of Regents of the University of Georgia, Civil Action No 1:08-CV-1425-ODE (N.D. Ga., May, 11, 2012).


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