



OAK LAW PROJECT REPORT NO. 1

CREATING A LEGAL FRAMEWORK FOR COPYRIGHT MANAGEMENT OF OPEN ACCESS
WITHIN THE AUSTRALIAN ACADEMIC AND RESEARCH SECTOR

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Report for the
Department of Education Science and Training (DEST)

OAK Law Project Report No. 1

Creating a legal framework for copyright management of open access within the Australian academic and research sector

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OAK Law Project

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the Commonwealth Government's *Backing Australia's Ability –
An Innovation Action Plan for the Future*

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Preface

This Report has been prepared for the Department of Education Science and Training (DEST) as part of the DEST funded Systemic Infrastructure Initiative Grant known as Open Access to Knowledge Law (OAK Law) – <www.oaklaw.qut.edu.au>.

Funding for OAK Law was announced in August 2005 and the project commenced in earnest in late January 2006. The first six months has involved a small team of researchers assessing the current literature on the legal issues relating to open access to the Australian research sector and the development of a forward action agenda. The next six to twelve months will see the research team grow and the project will work much more intensively on applied legal outcomes, such as model policies and agreements for managing copyright in accordance with open access values.

This is very much a dynamic and evolving landscape and even in the short time that we have been looking at these issues we have seen major announcements and policy developments at the international level.

The Report is formally a report to DEST but has been written in a way to be accessible by any person working as a researcher or manager across the Australian or international academic and research sectors. For that matter we believe that the Report should be, and is, accessible to any Australian citizen with an interest in access to knowledge.

To this end the Report provides a concise overview of the relevant law and maps out a clear action plan. Ultimately, we believe that understanding the new ICT (information and communications technology) fuelled knowledge landscape and the fundamentals of copyright law is a major step towards appreciating the critical role copyright management now plays in the innovation system.

The OAK Law Project, as part of the Federal Government's Systemic Infrastructure Initiative, is working towards facilitating optimal access to knowledge as a way of improving social, economic and cultural outcomes and will continue to pursue this goal through the next stage of the project. Whether it be the Australian Bureau of Statistics (ABS) deciding to move from a model of selling data to releasing it for free or Microsoft developing a Creative Commons plug-in for its standard desktop interface, the way we access, process and reuse knowledge is rapidly changing. If Australia is to 'Back its Ability' we must be at the forefront of designing knowledge models that can harness the power of the technology.

We acknowledge the tremendous support of Margot Bell, Dr. Graham Reynolds, Clare McLaughlin and Cameron Foster, at DEST; DVC Tom Cochrane, Dean Michael Lavarch, Paula Callan, Damien O'Brien and Margaret Robertson at QUT; Neale Hooper from Queensland Government and our Advisory Group.

***Professor Brian Fitzgerald, QUT Law School
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Executive Summary

‘.... by more strategically managing copyright we can gain greater access ...’

This Report analyses the copyright law framework needed to ensure open access to outputs of the Australian academic and research sector such as datasets, articles and theses. It is written in the context of an increasing recognition, in Australia and internationally, that access to knowledge is a key driver of social, cultural and economic development and that publicly funded research should be openly accessible. With the objective of enabling access to knowledge, this Report proposes the development of clear protocols for copyright management (designed as practical and effective tools) for implementation in the Australian academic and research sector

The Report explains that with the rise of networked digital technologies our knowledge landscape and innovation system is more and more reliant on best practice copyright management strategies. Furthermore in the 21st century these strategies need to accommodate both the demands for open sharing of knowledge and traditional commercialisation models. To this end, this Report examines the way in which practices for managing copyright, interact with the new web based frameworks that have developed for knowledge creation and dissemination. It focuses on specific areas that are central to the promotion of innovation and creativity in Australia, with emphasis on various types of repositories.

More specifically, this Report provides an overview of the principles of copyright law, the concept of open access to knowledge, the recently developed open content models of copyright licensing and proposes a framework for enhancing the management of copyright interests in research and academic output (including electronic theses and dissertations (ETD)). The Report describes a forward work program which, upon implementation, will provide the platform for the development of systems and practices designed to effectively promote open access to knowledge within the Australian academic and research sector.

The Report calls upon Australian research and funding institutions to consider their commitment to open access and articulate this in clear policies and copyright management frameworks. It proposes a survey of researchers about their understanding of, attitudes towards and experience with publishing agreements and the provision of model agreements that can facilitate open access and commercialisation objectives. The Report details a methodology for cataloguing and better understanding publishers’ attitudes towards open access. This list aims to be interoperable with the existing SHERPA list based in the UK and accessible through a web interface known as the OAK List. Finally the Report looks at copyright management of open access to ETD and makes proposals for better managing this process. In all of these endeavours the OAK Law Project aims to undertake work that will be of relevance to and can be utilised by key stakeholders.

The forward work plan will see the OAK Law Project:

- **Develop template guidelines for open access policies that can be considered for adoption within university and research institutions**
- **Develop a detailed list (OAK List) of the attitudes of publishers relating to open access as evidenced in the terms of publishers' agreements. The OAK List aims to be interoperable with the UK based SHERPA List**
- **Survey researchers about their understanding of, attitudes towards and experience with publishing agreements**
- **Develop or recommend model publishing agreements and addenda that facilitate open access**
- **Develop or recommend model agreements that can assist the copyright management of open access repositories**
- **Survey the existing policies of funding institutions towards open access and develop model policies based on international developments**
- **Provide more support to ETD Repositories through developing guides for students about self managing copyright issues and assisting the repositories in terms of copyright management protocols and licences**

Parts and Chapters

Part 1 — NEW KNOWLEDGE LANDSCAPE

Ch 1: The new knowledge landscape.....3-18

Part 2 — COPYRIGHT ESSENTIALS

Ch 2: Overview of copyright law.....21-54

Ch 3: Copyright and the protection of databases55-75

Part 3 — ACCESS TO KNOWLEDGE (A2K): THE CONCEPTS

Ch 4: Open access and open content licensing.....79-109

Part 4 — RESEARCH OUTPUTS: THE ACTION AGENDA

Ch 5: Creating a legal framework for open access to academic and research materials.....113-168

Ch 6: Electronic theses and dissertations.....169-223

Part 5 — CONCLUSION

Conclusion and summary.....227-228

Part 6 — BIOGRAPHIES

Author biographies.....230-234

Part 7 — REFERENCES

References.....237-243

Index.....245-249

Table of Contents

Preface	i
Executive Summary.....	ii
Acronyms and Abbreviations	xiii
Part 1 - New knowledge landscape	1
Chapter 1 - The new knowledge landscape.....	3
1. Aim of the report.....	3
2. Background forces.....	3
3. Policy overview.....	5
4. The changing framework for access to knowledge	6
Peer production: Wikipedia.....	6
Semantic Web.....	6
Web 2.0.....	7
Open source software and user led production models	7
Open Access (OA) Movement	8
Collaborative innovation: Grid computing and e-Research	9
5. New licensing models	9
Creative Commons (CC).....	10
Science Commons	11
6. Open access to knowledge, the law	12
Appendix 1	15
Other DEST SII projects	15
The JISC project.....	16
RoMEO	16
The SHERPA project.....	17
JISC–SURF copyright partnerships	17
Part 2 - Copyright essentials.....	19
Chapter 2- Overview of copyright law	21
1. Background to copyright and intellectual property	21
How does copyright differ to other forms of intellectual property?	22
The reasons for copyright	23
2. What kind of material does copyright protect?	23
Works	24
Literary works.....	24
Musical works	24
Dramatic works	24
Artistic works.....	24
Other Subject Matter.....	25
Sound recordings	25
Films.....	25
Broadcasts.....	25
Published editions	25
Multilayered rights	26
3. Prerequisites for copyright protection.....	26
Idea/expression dichotomy	26
Material form	27
Originality and authorship	27

Territorial connection to Australia	27
4. Duration of copyright	28
Period of copyright protection	28
Published material	28
Unpublished material	29
Crown material	29
5. Ownership of copyright	29
Works	30
Other subject matter	30
Sound recordings – performers’ new economic rights	30
Commissioned works	31
Crown ownership	31
6. Exclusive rights of the copyright owner	32
7. Copyright infringement	34
Direct Infringement	34
Temporary reproductions	34
Authorising infringement	35
Underlying rights and copyright infringement	37
8. Exceptions and defences to copyright infringement	37
Insubstantial Use	37
Fair Dealing	38
What is fair?	38
Fair dealing v fair use	39
Specific exceptions	41
ISP liability scheme	43
9. Remedies	43
10. Transferring copyright – assignments and licences	43
Exclusive licences	44
Non-exclusive licences	44
Implied licences	45
Statutory licences / compulsory licensing	45
Collecting societies and statutory licences	46
Statutory licences for educational institutions	46
11. Enforcing copyright – other issues	46
Technological protection of copyright material	46
Legal protection for technological protection measures	46
Circumvention devices and services	47
Exceptions to the legal protection of Technological Protection Measures	48
LACA Committee Review	49
Electronic rights management information	49
Orphan works	50
12. Rights related to copyright	51
Overview of the rights related to copyright	51
Performers’ rights under Part XIA	51
Moral rights	52
New moral rights for performers	54
13. Conclusion	54
Chapter 3 Copyright and the protection of databases	55
Introduction	55

1. Three key issues concerning data and research	55
Whether databases are protected by copyright	55
Third party content	56
Protection mechanism	56
2. International intellectual property conventions relevant to databases	56
3. The protection of databases under Australian copyright law	58
Low originality threshold	58
The Desktop Marketing case	58
Desktop's appeal to the High Court	61
Use of technological protection measures to control access to databases	62
Licensing and contract	62
Broad scope of protection and narrowly focussed exceptions to infringement	63
4. Protection of databases in the United States (US)	64
United States (US) copyright law	64
5. Protection of databases in Canada	66
6. Protection of databases in the European Union (EU)	67
The European Union Directive on the legal protection of databases	67
Chapter II – copyright protection	68
Chapter III – the sui generis right	69
Application of the EU Database Directive to foreign parties	71
7. Protection of databases in the United Kingdom (UK)	72
Copyright	72
<i>Sui Generis</i> right	73
8. Conclusion	74
Part 3 - A2K: the concepts	77
Chapter 4 - Open access and open content licensing	79
Introduction	79
1. The rise of open access to knowledge	80
Core principle of open access	83
Budapest Open Access Initiative – fostering open access to peer-reviewed journals	83
Bethesda Statement on Open Access Publishing – fostering open access to primary scientific literature	83
Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities—defining an Open Access contribution	84
Declaration on Access to Research Data from Public Funding—establishing access regimes for publicly funded digital research data	85
Support for open access	86
2. Access to knowledge as a human right	87
Existing international law – human rights	87
Development agenda – developing countries	90
Draft Treaty on Access to Knowledge	91
Key Provisions of the A2K Treaty	92
Proposed Paris Accord	94
World Summit on the Information Society Agenda	96
3. Open content licensing (OCL)	99
The open content movement (OCM)	100

CC baseline features	102
CC optional features	103
Why share digital content?	105
Does open content licensing mean that copyright law is redundant? ..	106
How does open content licensing relate to the Open Access movement?	106
In the open content licensing world where do moral rights fit?	107
Open content licensing as a model for making copyright more active ..	107
Open content licensing and sustainable business models	107
4. Conclusion	108
Part 4 - Research outputs: the action agenda.....	111
Chapter 5 - Creating legal frameworks for open access to academic and research materials... ..	113
Introduction	113
1. Open access policies	115
Proposed actions.....	116
2. Network of legal relationships	117
Proposed action:.....	119
A. Funding organisation – author/research institution (Funding Agreement).....	119
Proposed actions.....	130
B. Author – employer (Employment Agreement and IP Policy).....	131
Proposed actions.....	134
C. Author – publisher (Publishing Agreement)	135
Proposed actions.....	138
1. Author retains copyright and controls distribution (including by self-archiving or deposit in a repository).....	141
2. Author retains copyright and grants a licence to publisher to publish the article	142
3. Author assigns copyright partially to publisher but retains (reserves) part of the copyright	151
4. Author assigns copyright to publisher but obtains an express licence back from publisher to further reproduce and distribute, on terms determined by publisher	154
5. Author assigns copyright entirely to publisher, with an implied licence to self-archive or deposit the article into an institutional or disciplinary repository	156
6. Author assigns copyright entirely to publisher.....	156
Proposed actions.....	156
D. Author – digital repository (Repository Deposit Licence).....	158
Proposed actions.....	162
E. Digital repository – end users	162
Proposed Action	163
F. Author/Publisher – end users	164
Proposed Action	164
G. Copyright collecting society – digital repository and	165
end users	165
Proposed actions.....	166
Chapter 6 - Electronic theses and dissertations	169

Introduction	169
1. Ownership principles – the legal status of theses	170
Copyright	170
Theses are subject matter protected by copyright	170
Ownership of copyright in theses	171
Special cases involving licensing or assigning copyright in theses	171
Performers' rights	172
Moral rights	173
2. A history of the distribution of theses	174
The pre-digitisation of theses	174
The digitisation of theses	175
Networked Digital Library of Theses and Dissertations	175
Virginia Polytechnic Institute and State University	175
The Australasian Digital Theses Program	176
3. Copyright management issues for electronic theses and dissertations	177
Overview	177
Publishing	178
Paper theses to digital theses	180
4. Third party copyright in electronic theses and dissertations	181
Third party content	181
A substantial part	183
Fair dealing	185
For the purpose of research or study	186
For the purpose of criticism or review	189
Fair dealing and ETD	191
Exercise of the reproduction/copying right	193
Exercise of the communication right	193
Safe harbour provisions	194
Compliance Strategy	195
Suggestions for reform	197
5. Risk	198
Licensing	198
Deposit licence	199
End user licence	199
Creative Commons licences	199
Third party licence	200
Publisher licence	200
6. Protocols for the handling of theses	200
Practical guidelines	200
ETD Candidate	200
Repository	202
End user	202
Implementation and proposed actions	203
Appendix	205
Overview of ETD policy and framework materials	205
Part 5 – Conclusion and summary	225
Part 6 – Author Biographies	229
Part 7 – References	235
Index	245

Acronyms and Abbreviations

A2K	Access to Knowledge
ABS	Australian Bureau of Statistics
ADT Program	Australasian Digital Thesis Program
ALRC	Australian Law Reform Commission
APRA	Australasian Performing Right Association
Art	Article
AUSFTA	Australia-United States Free Trade Agreement
AVCC	Australian Vice Chancellors' Committee
BBSR	Biotechnology & Biological Sciences Research Council
BLAST	Basic Local Alignment Search Tool
Blogs	Web logs
BOAI	Budapest Open Access Initiative
BY	Attribution
CAL	Copyright Agency Limited
CC	Creative Commons
CD	Compact Disc
CDPA	<i>Copyright, Designs and Patents Act 1988</i>
CLRC	Copyright Law Review Committee
Copyright Act	<i>Copyright Act 1968</i> (Cth)
CRC	Convention on the Rights of a Child
CSIRO	Australian Commonwealth Scientific and Research Organization
Cth	Commonwealth of Australia
DEST	Department of Education Science and Training
DEST SII	Department of Education, Science and Training Systemic Infrastructure Initiative
DFG	Deutsche Forschungsgemeinschaft
DMCA	<i>US Digital Millennium Copyright Act 1998</i>
DOAR	Directory of Open Access Repositories
DRD	Declaration on the Right to Development
DRM	Digital Rights Management
DVC	Deputy Vice-Chancellor
DVD	Digital Versatile Disc or Digital Video Disc
EC	European Community
ECJ	European Court of Justice
EEA	European Economic Area
ERMI	Electronic Rights Management Information
ESRC	Economic & Social Research Council
ETD	Electronic Theses and Dissertations
ETM	Effective Technological Measure
EU	European Union
FLOSS	Free/Libre and Open Source Software
GNU	The GNU Project was launched in 1984 to develop a complete UNIX-like operating system which is free software: the GNU system; A recursive acronym for 'GNU's Not UNIX'
ICCPR	International Convention on Cultural and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights

ICT	Information and Communications Technology
IP	Intellectual Property
ISP	Internet Service Providers
IT	Information Technology
ITU	International Telecommunication Union
J	Justice
JJ	Justices
JISC	Joint Information Systems Committee
KCC	Knowledge commons committee
LACA	House of Representatives Standing Committee on Legal and Constitutional Affairs
MIT	Massachusetts Institute of Technology
MP	Member of Parliament
MRC	Medical Research Council
NC	Non-Commercial
NCRIS	National Collaborative Research Infrastructure Strategy
ND	No Derivative
NDLTD	Networked Digital Library of Theses and Dissertations
NGOs	Non-Government Organisations
NIH	National Institute of Health
NLA	National Library of Australia
OA	Open Access
OAI-PMH	Open Archives Initiative Protocol for Metadata Harvesting
OAK	Open Access to Knowledge
OAK Law	Open Access to Knowledge Project
OCL	Open Content Licensing
OECD	Organisation for Economic Cooperation and Development
OSDM	The Commonwealth of Australia, represented by the Office of Spatial Data Management
P2P	Peer to Peer
PLoS	Public Library of Science
QUT	Queensland University of Technology
RCUK	Research Councils UK
RDF	Resource Description Framework
RoMEO	Rights METadata for Open Archiving
s	Section
SA	Share and Share Alike
SGML	Standard Generalised Markup Language
SHERPA	Securing a Hybrid Environment for Research Preservation and Access
SOL	SCRIPT-ed Open Licence
SPARC	Scholarly Publishing and Academic Resources Coalition
SURA	Southeastern Universities Research Association
TACD	Trans Atlantic Consumer Dialogue
TPM	Technological Protection Measures
TRIPS	Agreement on the Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights

UK	United Kingdom
UMI	University Microfilms
UNGA	United Nations General Assembly
US	United States of America
VoIP	Voice over Internet Protocol
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WSIS	World Summit on the Information Society

Part 1

New knowledge landscape

"technology is changing the way we process knowledge and we need to understand how"

Chapter 1

The new knowledge landscape

1. Aim of the report

1.01 This Report addresses the measures that are needed to ensure improved access to the outputs of the Australian academic and research sector. Acknowledging the increasing importance of access to knowledge as a key driver in enhancing social, cultural and economic development, the Report recognises the need for clear protocols for copyright management across the research sector. With the objective of enabling access to knowledge the Report maps out a program of action designed to develop practical and effective copyright management protocols for implementation in the Australian academic and research sector.

2. Background forces

1.02 Networked digital technologies fuelled by supercomputers and fine grained search engines have made it possible to process and construct knowledge in ways that were unimaginable only two years ago. The evolution of the Semantic Web (making the Web a more dynamic information network through better management and processing of metadata) and Web 2.0 (the growth of rich user led applications) have provided researchers and the general community with enormous possibilities for new forms of collaborative and serendipitous innovation.

1.03 However, much of this research output which can be presented at the click of a button is subject to copyright law and can only be used with permission of the copyright owner or on the basis of some other authorising principle or provision. The great challenge for this evolving knowledge landscape is to build more efficient copyright ownership, management and licensing models that can be used to allow access to knowledge and prosper the research sector.

1.04 The argument for greater access to, and reuse of, research outputs is reinforced by the fact that much research in Australia is funded by public money. In line with worldwide movements led by organisations such as the Organisation for Economic Cooperation and Development (OECD) there is a strong argument for allowing citizens to access the outputs they have funded. To this end this Report, the Open Access to Knowledge Project (OAK Law) and other Department of Education, Science and Training Systemic Infrastructure Initiative (DEST SII) projects should be viewed in the context of the rapidly emerging international movement concerned with facilitating access to, and dissemination of, knowledge, particularly that which has been generated through the expenditure of public funds. (See **Appendix 1** to this chapter for a list of other DEST SII funded projects). A similar process has recently been undertaken in the United Kingdom by projects funded by the Joint Information

Systems Committee (JISC)¹, viz., the RoMEO², SHERPA³ and JISC-SURF Copyright Partnerships⁴. (See **Appendix 2** to this chapter for an overview of these projects).

1.05 A critical point to acknowledge is that, in order to enhance and promote innovation and creativity in the ‘knowledge landscape’, a variety of copyright management strategies need to be employed.⁵ While the commercialisation of knowledge (eg. through patents and downstream licensing) has become an increasingly important focus of the innovation sector, new business models that support and promote open innovation are rapidly emerging. The key is to understand how—as a policy, business and legal objective—releasing knowledge as opposed to locking it away or cloistering it amongst a privileged few, can sponsor innovation.⁶ In short:

‘Access becomes a driver of innovation’

Forces

Broadband: ease and cost efficiency of widespread dissemination.

Reuse and remix cultures: innovation promoted by the negotiability of the digital environment.

Seamless reuse: demands for web accessible materials.

Publicly funded information and research: demands to enhance knowledge and democratic governance through accessibility of information.

Open and collaborative innovation: distributed cooperative work, harnessing synergies.

Knowledge and creativity: driving economic growth.

Serendipitous and cumulative work: driving creativity and innovation.

¹ The Joint Information Systems Committee (JISC) <<http://www.jisc.ac.uk/>> at 22 July 2006.

² Rights METadata for Open Archiving <<http://www.lboro.ac.uk/departments/lis/disresearch/romeo/>> at 22 July 2006.

³ Securing a Hybrid Environment for Research Preservation and Access <<http://www.sherpa.ac.uk/>>.

⁴ <http://www.jisc.ac.uk/index.cfm?name=programme_jiscsurfipr> at 22 July 2006.

⁵ See Carl Shapiro and Hal Varian, *Information Rules: A Strategic Guide to the Network Economy* (1999) Boston, Mass: Harvard Business School Press, 4; Lawrence Lessig, *Free Culture : How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004) New York: Penguin Press <<http://www.free-culture.cc/freeculture.pdf>> at 22 July 2006 (hereinafter Lawrence Lessig, *Free Culture*).

⁶ *Access to Knowledge Treaty* <<http://www.cptech.org/a2k/>> at 22 July 2006; Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006) New Haven: Yale University Press <http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf> at 22 July 2006>.

John Houghton and Peter Sheehan, ‘The Economic Impact of Enhanced Access to Research Findings’ CSES Working Paper No.23 July 2006 <<http://www.cfses.com/documents/wp23.pdf>>.

Consider also the recent moves to condition research funding on open access to research outputs eg. Wellcome Trust, NIH, RCUK and those listed in JULIET breakdown discussed in Chapter 5 of this Report.

The Australian Bureau of Statistics case study

1.06 The recent decision by the Australian Bureau of Statistics (ABS) to move away from a model of selling data to researchers and others to providing it freely online is a clear example of this philosophy.⁷ The Hon Peter Costello, MP, Treasurer of the Commonwealth of Australia in announcing these changes explained that:

Statistics are so vital to our national life, and have made such a key contribution to nation-building, that they lend themselves easily to structural analogies. They are the cornerstone of our decision-making, the very building-blocks of research, planning and discussion within governments and the community and are one of the important pillars of our democracy. Ready access to those statistics for those that need them is of paramount importance.....In June this year I was happy to announce that, as a result of a May 2005 Budget initiative and consistent with the Government's policy of Backing Australia's Ability, many ABS publications would be available free of charge from the Internet. These publications previously cost between 20 and 40 dollars each.⁸

3. Policy overview

1.07 The broad underpinnings of intellectual property (IP) rights throughout the ages have relied upon a balance: on one side is the need to provide incentive and reward for creativity and innovation while, on the other, is the need to ensure the continuing flow of raw materials for further innovation and creativity. Clear examples of this balancing of interests are found throughout the IP paradigm. In the patent system the invention is disclosed and made open for inspection by all and, concomitantly, a strong monopoly is granted for a limited time. The copyright system recognises numerous exceptions and limitations to the exclusive rights of the copyright owner, through notions such as the idea/expression distinction, the permissible use of an insubstantial part of a work and the defences of fair dealing or fair use. Such exceptions and limitations permit the (non-infringing) free reuse of part of the work or, in some cases, the entire copyright work in order to stimulate further innovation and creativity.

1.08 The path to new work is dependent on the use of what has gone before: in the words of Sir Isaac Newton, 'If I have seen further it is by standing on the shoulders of Giants'.⁹ Therefore, the great challenge for the new 'knowledge landscape' is the extent to which users should be able to access knowledge seamlessly from the past and present in order to create the future. If I can see the content and can technically utilise it, then should the current law and business models prevent such capacity or should they be adapted through solutions such as new licensing models, in order to promote and harness the new 'knowledge landscape'? This ability to enable access to

⁷ <<http://www.abs.gov.au/websitedbs/d3310114.nsf/4a256353001af3ed4b2562bb00121564/83b66e9ffaf6d6abca257140007575b5!OpenDocument>> at 21 July 2006.

⁸ The Hon Peter Costello MP Treasurer, *The ABS Centenary Celebration*, 8 December 2005 <<http://www.treasurer.gov.au/tsr/content/speeches/2005/019.asp>> at 22 July 2006.

⁹ Sir Isaac Newton expressed this in a letter to Robert Hooke, February 5, 1675/1676, quoted in Robert Merton, *On the Shoulders of Giants: A Shandean Postscript* 31 (1965).

knowledge is a critical factor for the current development environment, whether in creative industries, academic research, or industrial innovation. The key questions discussed in this Report revolve around this ability to enable access, whilst still rewarding and providing incentives for creativity and inventiveness.

4. The changing framework for access to knowledge

1.09 The digital, networked environment and, in particular the widespread availability of broadband Internet access, is democratising creativity and innovation. It is now in the hands of millions of people to readily produce and disseminate their own creative works; research groups can share information and develop collaborative synergies in ways that were not previously feasible.¹⁰

1.10 The following examples illustrate how technological advances in recent decades have contributed to fundamental changes in the framework within which knowledge is generated, accessed, disseminated and reused.

Peer production: Wikipedia

1.11 The Wikipedia project commenced in 2001 as an online encyclopaedia that is written collaboratively by volunteers and web users in a process of peer production. Currently, Wikipedia contains more than four million articles in 229 languages.¹¹ Since its early beginnings through a networked effect of increased use and increased contributions the number of articles available, in particular those available in English, has risen exponentially.¹² This is a good example of the ability of the new networked technologies to contribute to the dissemination of knowledge through wide-spread contribution and access.

Semantic Web¹³

1.12 The Internet (web) has become a universal medium in the developed world for the creation and dissemination of knowledge. However, the ability of computers and web pages to talk to each other is still rather limited:

Humans are capable of using the Web, say, to find the Swedish word for ‘car,’ to reserve a library book, or to search for the cheapest DVD and buy it. But if you asked a computer to do the same thing, it wouldn’t know where to start. That is because web pages are designed to be read by people, not machines. The Semantic Web is a project aimed to make web pages understandable by computers, so that they can search websites and perform actions in a standardized way.¹⁴

¹⁰ See Eric Von Hippel, *Democratizing Innovation* (2006) MIT Press, Cambridge MA. <<http://web.mit.edu/evhippel/www/democ.htm>> at 22 July 2006.

¹¹ <<http://en.wikipedia.org/wiki/Wikipedia>> at 22 July 2006.

¹² <http://en.wikipedia.org/wiki/Image:Wikipedia_growth.png> at 22 July 2006.

¹³ See generally Tim Berners-Lee, James Hendler and Ora Lassila ‘The Semantic Web’, *Scientific American* 17 May 2001 <http://www.scientificamerican.com/print_version.cfm?articleID=00048144-10D2-1C70-84A9809EC588EF21> at 27 July 2006.

¹⁴ ‘Semantic Web’ *Wikipedia* <http://en.wikipedia.org/wiki/Semantic_web> at 22 July 2006.

1.13 The semantic web projects such as those following the World Wide Web Consortium recommendations are leading to a better means for describing knowledge on the web.¹⁵ The objects of such projects are to create shared sets of ontologies that can support advanced browser searching as well as other online knowledge management tools.¹⁶ In turn, this will lead to a much deeper network of knowledge built on the back of machine readable data.

Web 2.0

1.14 One example of the evolution of the Internet can be seen in a conceptualisation known as Web 2.0 which refers to the second generation of web services available on the Internet that enables users to collaborate and disseminate information online and contribute to a more interactive and rudimentary social network.¹⁷ Advocates of Web 2.0 describe it as ‘a social phenomenon referring to an approach to creating and distributing Web content itself, characterized by open communication, decentralization of authority, freedom to share and reuse, and ‘the market as a conversation’.¹⁸ Web 2.0 provides users with a high level experience, which is closer to that of desktop applications as opposed to traditionally static web pages. Examples of Web 2.0 include Google Maps, Flickr, Wikipedia and Weblogs.¹⁹ Another common example of the application of Web 2.0 can be seen in the increasing popularity of mashups, which combine Internet content from a number of different sources to produce something new and creative. It is these emerging web concepts and their application in forms such as mashups which are helping to enhance access to knowledge. For example, a scientific mashup may enable a user to access at one place and in a co-ordinated fashion ‘gene sequences from the GenBank database, its homologues from the Basic Local Alignment Search Tool (BLAST)²⁰ assignment service and the ensuing protein structures from the Swiss-Model site.’²¹

Open source software and user led production models

1.15 From the 1960s, the development of computer software code was undertaken principally by research laboratories and user groups in which developers characteristically freely shared code among themselves. Practice had changed markedly by the early 1980s when much software code was being distributed as

¹⁵ <<http://www.w3.org/2001/sw>> at 22 July 2006. An interesting parallel development is that of user-generated machine readable descriptions or ‘tags’ such as are used in flickr known as ‘folksonomies’.

¹⁶ Andrew Updegrave, *The Semantic Web: An Interview with Tim Berners-Lee*, <<http://www.consortiuminfo.org/bulletins/jun05.php#feature>> at 22 July 2006.

¹⁷ See Tim O’Reilly *What is Web 2.0* (hereinafter O’Reilly, *What is Web 2.0*)

<<http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-2.0.html>> at 22 July 2006.

¹⁸ <http://en.wikipedia.org/wiki/Web_2.0> at 22 July 2006.

¹⁹ See O’Reilly, *What is Web 2.0*.

²⁰ <<http://www.ncbi.nlm.nih.gov/BLAST/>> at 31 July 2006.

²¹ Declan Butler, ‘Mashups mix data into global service’, *Nature* 439(5) January 2006, 6 <<http://www.nature.com/nature/journal/v439/n7072/full/439006a.html>> at 22 May 2006 cited in Damien O’Brien and Brian Fitzgerald, ‘Mashups, Remixes and Copyright Law’ (2006) 9 *Int L B* 17 <<http://eprints.qut.edu.au>> at 22 July 2006. See further Jonathan Mosedale ‘A Proposal for A Government Data Mashing Lab’ (2006) <<http://lists.okfn.org/pipermail/okfn-discuss/2006-July/000114.html>>; UK Department of Transport, ‘Data Grand Challenge’ <http://www.dft.gov.uk/stellent/groups/dft_science/documents/page/dft_science_611659.hcsp>.

compiled (machine readable) object code under proprietary licences. However, the traditions of the earlier era of software development were kept alive by the Free/Libre and Open Source Software (FLOSS)²² movement which continued to support the public release and distribution of the (human readable) source code. This software-specific form of open access provides an excellent opportunity of examining the software in order to understand its functioning. In contrast, software distributed in binary (or object code) form without the source code fosters secrecy and ignorance as to how it works and, importantly, where its weaknesses may lie. Moreover, free software allows users and for that matter any citizen to more fully participate in and improve upon the software product.

1.16 As well there is growing interest in and rhetoric about the ability of FLOSS to bring more transparency to core software infrastructure within government systems²³ and as to how we can better implement democracy through open source technology. It has recently been highlighted that the basic democratic ideals of openness, transparency, participation and non discrimination are embedded in the FLOSS methodology.

1.17 In summary, the FLOSS model can be seen as a successful collaborative and participatory knowledge paradigm which has provided inspiration for notions such as open access, open content and peer production.

Open Access (OA) Movement

1.18 Over the last ten years we have seen the rapid growth of the Open Access (OA) Movement. Open Access aims to utilise the great advances we have seen in information and communication technologies to make research outputs more easily

Issues

Copyright: ease and cost of replication is low.

Innovation and creativity: hindered by inflexible copyright laws.

Licensing: demands online framework and taxonomy.

Access: demands clear IP laws and licensing regimes.

Collaboration: requires management to harness synergies.

Change: economic growth will be stimulated by the adoption of models that match the new environment.

Roadblocks: legacy structures can impede development, whether they are policy, legal, or business.

²² See further: Glyn Moody, *Rebel Code: Linux and the Open Source Revolution*, (2001) Penguin Books, NY. See also: Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (2001) Random House, NY, p50ff; Sam Williams, *Free as in Freedom: Richard Stallman's Crusade for Free Software* (2002) O'Reilly, San Francisco; Eric Raymond, *The Cathedral and the Bazaar* <<http://www.catb.org/~esr/writings/cathedral-bazaar>> at 22 July 2006; Brian Fitzgerald and Nic Suzor, 'Legal Issues For the Use of Free and Open Source Software in Government' (2005) 29 *Melbourne University Law Review* 412.

²³ Mark Perry and Brian Fitzgerald 'FLOSS as Democratic Principle' <http://eprints.qut.edu.au/archive/00004425/01/FLOSS_DP_17.pdf> at 21 July 2006.

and immediately accessible. This has resulted in the development of a worldwide network of institutional and disciplinary repositories containing numerous research outputs.

1.19 One of the building blocks of OA are the Bermuda Principles (1996) enunciated during the race to map the human genome. They provide:

Bermuda Principles (1996)

- 1) Automatic release of sequence assemblies larger than 1kb (preferably within 24 hours).
- 2) Immediate publication of finished annotated sequences.
- 3) Aim to make the entire sequence freely available in the public domain for both research and development in order to maximise benefits to society.²⁴

Collaborative innovation: Grid computing and e-Research

1.20 The impetus for rapid technological development has also instigated a worldwide movement to evaluate and implement the benefits of collaborative innovation and e-Research. e-Research is a part of the new generation of information and communication infrastructures, where advanced Internet computing and Grid technologies are being utilised to enable direct and shared collaboration amongst researchers. Global Grid computing is the term used to describe the sharing of computing resources remotely over a network, typically the Internet, and may be directed at a defined set of computing centres, or it may be distributed to use under-utilised processing power of computers of individual users on the Internet.

1.21 Many different e-Research projects are already underway in Australia from initiatives like EPrint and Digital Theses Repositories to large supercomputing projects based around bio-informatics and geo-spatial data.²⁵ The recently announced National Collaborative Research Infrastructure Strategy (NCRIS) maps out areas for capacity building and a development agenda for the next seven years.²⁶

5. New licensing models

1.22 From a legal perspective, one of the most significant responses to the technological advances that have revolutionized the creation and distribution of

²⁴ John Sulston, 'Heritage of Humanity', *Le Monde diplomatique* (2002) <<http://mondediplo.com/2002/12/15genome>> at 21 July 2006.

²⁵ The Australian Partnership for Advanced Computing (APAC) has been a key player in building this framework over the last six years. <<http://www.apac.edu.au/>> at 31 July 2006.

²⁶ National Collaborative Research Infrastructure Strategy, *Strategic Roadmap* <http://www.dest.gov.au/sectors/research_sector/policies_issues_reviews/key_issues/ncris/> at 22 July 2006.

copyright materials during the last decade has been the development of new systems for licensing (or authorising) others to obtain access to, and make use of, the protected material. These new forms of licences — usually referred to as ‘open content’ — are founded upon an acknowledgement of the existence of copyright in materials embodying knowledge and information, but differ from licences commonly used before the advent of the digital era in key respects. As well as being relatively short, simple and easy to read, they are standardised, conceptually interoperable with other open content licences, machine (computer) enabled. Open content licences also have the advantage that, since they are automated and do not require negotiation, they eliminate (or at least minimise) transaction costs. Running with the copyright material to which they are attached (thereby avoiding the privity issue where rights are conferred contractually), open content licences identify materials that are available for reuse and grant permissive rights to users, thereby facilitating access and dissemination.

1.23 The best known of the open content licensing systems are those developed by the Creative Commons (CC) project and its associated Science Commons project.²⁷ Other projects employing open content licensing models include AShareNet,²⁸ a collaborative system designed to streamline copyright licensing to enable the more efficient development, sharing and adaptation of Australian educational materials.²⁹

Creative Commons (CC)

1.24 The most widely used of the open content licensing systems is the suite of licences developed the Creative Commons (CC) project which was established in 2001 by Stanford University Law Professor Lawrence Lessig. Its aim is to build a distributed information commons by encouraging copyright owners to licence their material through open content licensing protocols, thereby enabling content to be more readily identified, transacted and reutilised for creative and innovative purposes. The motivation for the CC project is the belief that, for the ‘first time in history, human expression by default is subject to regulation because of two architectural features. First, the cultural objects or products created on a computer can be easily copied, and secondly, the default copyright law requires the permission of the owner. The result is that by law you need permission to engage in acts of remixing.’³⁰

1.25 The CC licences aim to make copyright-protected content more ‘active’ by enabling it to be reutilised with a minimum of transactional effort. Like the free and open source software movement, CC uses IP rights as the platform on which to structure downstream user rights. Through claiming copyright in the content that will

²⁷ See <<http://creativecommons.org>> and <<http://sciencecommons.org>>.

²⁸ <<http://www.aesharenet.com.au/>> at 22 July 2006.

²⁹ See further Intrallect Ltd (Ed Barker, Charles Duncan) and AHRC Research Centre (Andres Guadamuz, Jordan Hatcher and Charlotte Waelde) *Final Report to the Common Information Environment Members of a study on the applicability of Creative Commons Licenses* (2005) Ch 3.6 <<http://www.intrallect.com/cie-study/>> at 22 July 2006.

³⁰ Lawrence Lessig as quoted in Dan Farber *Mashups and the law* <<http://blogs.zdnet.com/BTL/?p=2614>> at 20 June 2006; See further Lawrence Lessig, *Free Culture*.

go into the commons, the owner can determine how that content can be used downstream.³¹

1.26 The CC licences provide that anyone can use the content subject to providing **attribution** to the author (BY) and any one or a number of these optional conditions³²:

- **non-commercial** distribution (NC)
- that **no derivative** materials based on the licensed material are made (ie. all copies are verbatim) (ND)
- **share and share alike** (others may distribute derivative materials based on the licensed material under a licence identical to that which covers the licensed material) (SA).

Science Commons

1.27 Related to the CC project is Science Commons, an exploratory project applying the philosophies and activities of CC to the realm of science. Its aim is to increase and enhance access to and use of scientific knowledge through the areas of publishing, licensing and data. One example of this is the Science Commons NeuroCommons, a collaborative project between Science Commons and the Teranode Corporation that builds upon open access scientific knowledge to create a semantic web for neurological research.³³ The NeuroCommons is a proving ground for the ideas behind the Science Commons Data Project. Its foundations are the legal opportunities created by OA to the scientific literature and the technical capabilities of the Semantic Web. The aims of the NeuroCommons project are to:

- demonstrate that scientific impact is directly related to the freedom to legally reuse and technically transform scientific information — in other words, that OA is an essential foundation for innovation
- establish a framework to increase the impact of investment in neurological research in a public and clearly measurable manner
- develop an open community of neuroscientists, funders of neurological research, technologists, physicians, and patients to extend the NeuroCommons work in an open, collaborative, distributed manner.³⁴

1.28 It is envisaged that, through text mining data with semantic web applications, it will be possible to synthesise a large number of articles and datasets to build a more dynamic and accessible knowledge base.

³¹ For an overview of the Creative Commons licensing model see: Anne Fitzgerald and Brian Fitzgerald, *Intellectual Property in Principle* (2004), 455 (hereinafter Fitzgerald and Fitzgerald, *Intellectual Property in Principle*).

³² Note that the ND and SA terms are mutually exclusive.

³³ <<http://sciencecommons.org/data/neurocommons>> at 22 July 2006.

³⁴ Ibid.

6. Open access to knowledge, the law

1.29 Intellectual property laws throughout history have been finely tuned to maximise the stimulation and innovation of creativity, although there are naturally pressures that push for use-constraint maximisation at the expense of reuse and wide dissemination of knowledge. The rapid emergence and widespread adoption of new communication technologies (such as computers and the Internet) during the past ten years have brought about fundamental changes in our ability to develop, access, communicate and reuse knowledge. The speed of these changes together with the fact that the digital environment continues to evolve has not allowed IP law to implement an effective balancing of competing interests.

1.30 On the one hand there is the ability for everyone to access and contribute to the knowledge base of the Internet world. On the other hand there are economic legacy structures which do not fit easily with this new paradigm.

***PLoS ONE* case study**

1.31 The new publishing model announced by the Public Library of Science (PLOS) for its *PLoS ONE* journal is a great case study in understanding the emerging knowledge landscape. PLOS is a non-profit open access scientific publishing project which aims to create a library of peer-reviewed scientific and medical journals that are made available online without restrictions under open content licences.³⁵ *PLoS ONE* which is to be launched in 2006 will be a peer-reviewed journal which publishes scientific literature in a vibrant online forum that is designed to encourage improved scientific dialogue and debate. *PLoS ONE* will ensure that scientific research is able to be published and disseminated within weeks, avoiding delays associated with traditional means of publication. PLOS believe that *PLoS ONE* 'will offer a new approach to the way that scientific research is communicated'.³⁶

The features of *PLoS ONE* include:

- *inclusive scope* – reacting to the fact that scientific fields of research are becoming increasingly interconnected, *PLoS ONE* will provide a forum for not only traditional scientific literature, but all scientific research ensuring a broader coverage of connections and synergies across the literature
- *objective peer-review process* – departing from the traditional subjective process of peer-review which can delay the publication of research, *PLoS ONE* will confine its peer-review process to whether the literature is 'rigorously and technically sound' ensuring rapid publication that is available for review by the whole community
- *personalised content* – *PLoS ONE* will enable users to subscribe to individual areas of interest, with papers also containing links to other related research

³⁵ <<http://www.plosone.org>>.

³⁶ Ibid.

- *encouraging discussion and debate* – capturing a readers critical evaluation of a paper's strengths and weaknesses, *PLoS ONE* will enable readers to engage in a discussion on every paper, including the ability to annotate and comment on papers directly
- *interactive papers* – realising that research is an ongoing process with new information constantly arising, *PLoS ONE* will enable authors to build upon and make changes to their papers which incorporates the evolution of their ideas
- *rapid publication* – realising that the rapid publication and dissemination of research is one of the highest priorities, *PLoS ONE* will ensure a streamlined electronic production workflow which ensures papers are published within weeks of submission
- *freedom of use and ownership* – in accordance with the CC attribution licence, *PLoS ONE* will enable users to read, copy, distribute and share papers freely without restrictions and formal permission, provided that the original author and source are cited
- *high impact* – *PLoS ONE* has been designed in light of the fact that papers published in OA journals are more likely to be read and cited given the lack of barriers to access.³⁷

1.32 The purpose of this Report is to examine the way in which practices for managing IP rights (particularly copyright), interact with the frameworks that have developed for knowledge creation and dissemination. It focuses on specific areas that are central to the promotion of innovation and creativity in Australia, with emphasis on various types of repositories.

1.33 More specifically, this Report provides an overview of the principles of copyright law, the concept of open access to knowledge and the newly developed open content models of copyright licensing and proposes a framework for enhancing the management of copyright interests in research and academic output (including Electronic Theses and Dissertations (ETD)). The Report describes a proposed forward work program which, upon implementation, will provide the platform for the development of systems and practices designed to effectively promote open access to knowledge.

Solutions

Copyright: laws to reflect policy for innovation and creativity.

New licensing models: the adoption of new licensing models such as Creative Commons.

Framework: network infrastructure to ease access to knowledge.

Systems: protocols and technologies that support clarity and ease in licensing.

Models: models that aid future development.

Agile Response: systems and legal protocols that can adapt rapidly to new circumstances.

³⁷ Ibid.

Appendix 1

Other DEST SII projects

- ADT Program– Australasian Digital Thesis Program³⁸
- MAMS – Meta-Access Management System³⁹
- ARROW – Australian Research Repositories Online to the World⁴⁰
- DART – Dataset Acquisition Accessibility and Annotation e-Research Technologies⁴¹
- APSR – Australian Partnership for Sustainable Repositories⁴²
- RUBRIC – Regional Universities Building Research Infrastructure Collaboratively⁴³
- MMIM – Molecular Medicine Informatics Model⁴⁴
- BlueNet – The Australian Marine Science Data Network⁴⁵

³⁸ <<http://adt.caul.edu.au/>> at 22 July 2006.

³⁹ <<http://www.melcoe.mq.edu.au/projects/MAMS/>> at 22 July 2006.

⁴⁰ <<http://arrow.edu.au/>> at 22 July 2006.

⁴¹ <<http://dart.edu.au/>> at 22 July 2006.

⁴² <<http://www.apsr.edu.au/>> at 22 July 2006.

⁴³ <<http://www.rubric.edu.au/default.htm>> at 22 July 2006.

⁴⁴ <<http://mmim.ssg.org.au/>> at 22 July 2006.

⁴⁵ <<http://www.bluenet.org.au>> at 22 July 2006.

Appendix 2

Joint Information Systems Committee (JISC) funded projects (United Kingdom)

An investigation of the factors affecting the provision of access to knowledge, particularly publicly funded knowledge, is not unique to Australia. In the United Kingdom, a similar process has been undertaken by the Joint Information Systems Committee (JISC) funded projects – including Rights METadata for Open Archiving (RoMEO),⁴⁶ Securing a Hybrid Environment for Research Preservation and Access (SHERPA)⁴⁷ and JISC-SURF Partnering on Copyright⁴⁸.

The JISC project⁴⁹

JISC was established to provide strategic guidance, advice and opportunities to use ICT (information and communications technology) to support teaching, learning, research and administration. JISC is designed to support the United Kingdom further and higher education sectors by providing the expertise, independent advice, guidance and resources to promote the effective and innovative use ICT.⁵⁰ JISC initiatives include: access to high quality resources to support learning, teaching and research; advice on the creation and preservation of digital resources; information about the implications of using ICT, including legal and organisational issues; front-line support for the further education sector through regional support centres; network services and support and research to develop innovative solutions to fully exploit the potential of ICT.⁵¹

RoMEO⁵²

The RoMEO Project (Rights METadata for Open Archiving) was funded by the JISC for one year (1 August 2002–31 July 2003) to investigate the rights issues surrounding the 'self-archiving' of research in the United Kingdom academic community under the Open Archives Initiative Protocol for Metadata Harvesting (OAI-PMH).

The RoMEO Project performed a series of stakeholder surveys to ascertain how 'give-away' research literature (and metadata) is used, and how it should be protected. Building on existing schemas and vocabularies (such as Open Digital Rights Language) a series of rights elements were developed. A solution for the protection of the IP Rights in metadata itself was also created.

⁴⁶ <<http://www.lboro.ac.uk/departments/lis/disresearch/romeo/>> at 22 July 2006.

⁴⁷ <<http://www.sherpa.ac.uk/about.html>> and <<http://www.sherpa.ac.uk/romeo.php?all=yes>> at 22 July 2006.

⁴⁸ <http://www.jisc.ac.uk/index.cfm?name=programme_jiscsurfpr> at 22 July 2006.

⁴⁹ <<http://www.jisc.ac.uk/>> at 22 July 2006.

⁵⁰ <http://www.jisc.ac.uk/index.cfm?name=about_services> at 22 July 2006.

⁵¹ Ibid.

⁵² <<http://www.lboro.ac.uk/departments/lis/disresearch/romeo/>> at 22 July 2006.

The SHERPA project⁵³

The SHERPA project (Securing a Hybrid Environment for Research Preservation and Access) followed on from the RoMEO project and sought to establish institutional open access ePrint repositories in 20 partner institutions which comply with the OAI-PMH using ePrint software.⁵⁴

SHERPA/RoMEO: Publisher copyright policies & self-archiving - the SHERPA List

A colour grading system was developed from the original RoMEO project list to differentiate between four categories of archiving rights adopted by publishers:

White – archiving not formally supported

Yellow – can archive pre-print (ie. pre-refereeing)

Blue – can archive post-print (ie. final draft post-refereeing)

Green – can archive pre-print and post-print.

A list (commonly known as the ‘SHERPA List’) of publishers and their archive policies has been created to assist digital repository managers in complying with publisher requirements.

JISC–SURF copyright partnerships⁵⁵

The JISC–SURF copyright program focuses on five work packages that are jointly funded and managed by JISC and SURF.⁵⁶

- 1) **Publishing Agreements** — focuses on the author to publisher relationship and seeks to develop a ‘toolkit’ to assist publishers, authors and institutions in determining the rights that are important to their business. An important part of the ‘toolkit’ will be the presentation of a limited number of model agreements.
- 2) **University Copyright Policies** — focuses on the university to author relationship and aims to do a multi-national study of different university copyright policies in the UK and the Netherlands, to assist universities in (re)phrasing their copyright policies. The work package will develop a toolkit to allow relevant terms and clauses to be selected and used in university copyright policies. This is particularly important for institutional repositories that need to consider the rights and warranties they require of academics in order to mount and disseminate their work electronically.
- 3) **Copyright Knowledge Bank** — the JISC funded RoMEO/SHERPA project developed a list of publishers’ self-archiving policies, discussed above, and the Copyright Knowledge Bank work package seeks to address the long-term

⁵³ <<http://www.sherpa.ac.uk/>> at 22 July 2006.

⁵⁴ <<http://www.sherpa.ac.uk/about.html>> at 22 July 2006.

⁵⁵ <http://www.jisc.ac.uk/index.cfm?name=programme_jiscsurfpr> at 22 July 2006.

⁵⁶ Ibid.

maintenance of this database. The work package will seek to enhance the functionality of the database to form a Copyright Knowledge Bank. The database needs to be developed to include a wider range of prohibited or allowed activities, for example including the ability to use work in PhD theses, to distribute to colleagues, students, etc. The primary focus of this work will be on journal articles but there will also be an investigation into broadening the scope towards relevant copyright information regarding other scientific publications and teaching and learning materials.

- 4) **Advocacy** — this work package will seek to disseminate the outputs of the other JISC–SURF work packages. The outputs are likely to cover: policies, exemplar clauses and licences, examples of good practice and reports. The work package will develop a work plan for communication as well as designing an approach to advocacy to support better copyright practice and understanding within universities.
- 5) **Open Access** — the work package commissioned a study to examine the consequences of Open Access (OA) for the Zwolle Principles <<http://www.surf.nl/copyright/edition2.php#principles>> in general and for the different stakeholder groups. The study examined different copyright approaches and possible copyright models for use with OA journals and then surveyed OA authors to assess views on copyright in order to recommend a way forward for best practice. The work package produced a report entitled *Towards good practices of copyright in Open Access Journals A study among authors of articles in Open Access journals*.⁵⁷

At the time of writing the Report, reports for work packages 1-4 had not been released.

⁵⁷ See: Esther Hoorn and Maurits van der Graaf, 'Towards Good Practices of Copyright in Open Access Journals' (2005) <http://www.jisc.ac.uk/uploaded_documents/Towards%20Good%20Practices%20of%20Copyright%20in%20Open%20Access%20Journals%20-%20version%201.0new.pdf> at 22 July 2006 (hereinafter 'Hoorn and van der Graaf, *Good Practices of Copyright*').

Part 2

Copyright essentials

" if copyright is the touchstone – what do we need to understand?"

Chapter 2

Overview of copyright law

Introduction

2.01 Copyright is a type of intellectual property founded on a person's creative skill and labour. It allows the copyright owner to control certain acts (such as copying) and to prevent others from using protected material without permission, unless an exception applies. In Australia, the *Copyright Act* 1968 (Cth) (*Copyright Act*) is the main legislation governing copyright.⁵⁸

2.02 Australian copyright law owes its origins to the United Kingdom's Statute of Anne of 1709, which originally provided a monopoly over the printing of books for printing companies of the day for a 14 year term (renewable). Over time, the range of materials protected by copyright and the length of copyright protection have expanded. For example, copyright law now protects not only written material (eg. books, theses, and reports) but also scientific and technical creations (eg. computer software and datasets), artistic works, music, films and even broadcasts. Copyright law is now a complex array of rights and obligations, largely due to developments in technology which have provided new forms and uses of material, new markets and new ways in which copyright owners can protect and enforce their rights.

2.03 In order to assist with the development of best practice guidelines for managing copyright issues in open access environments, this chapter outlines the basic concepts of copyright law and ways in which general principles of copyright law, through mechanisms such as licensing, can support open access to knowledge. It also examines new provisions within the *Copyright Act* which reinforce the use of technology, in the form of digital locks (known as technological protection measures) to regulate access and further copying of copyright material.

1. Background to copyright and intellectual property⁵⁹

2.04 Copyright is one branch of the area of law known as intellectual property (IP). IP law grants the creators of certain types of material exclusive rights over those materials, subject to certain conditions. Copyright is the area of IP law that deals with

⁵⁸ There are also a number of regulations under the *Copyright Act* such as the *Copyright Regulations* 1969 (Cth), the *Copyright Tribunal (Procedure) Regulations* 1969 (Cth) and the *Copyright (International Protection) Regulations* 1969 (Cth) which specify matters related to the operation of the *Copyright Act*, including the international protection of Australian copyright material and the protection of foreign material in Australia. The Crown also has prerogative rights acknowledged by s 8A (1) *Copyright Act* eg. in respect of copyright in Acts of Parliament and possibly judgments: s 182A, Copyright Law Review Committee, *Crown Copyright* (2005) (hereinafter CLRC *Crown Copyright*) at 16, Chapter 6 <www.clrc.gov.au> at 22 July 2006.

⁵⁹ See generally: Fitzgerald and Fitzgerald, *Intellectual Property in Principle*.

creative works (eg. literary, dramatic, musical and artistic works, and films and sound recordings). The main categories of IP are outlined in the World Trade Organisation's Agreement in 1994 on *Trade-Related Aspects of Intellectual Property Rights* (TRIPS), and, in addition to copyright, include:

- patents - which deals with scientific inventions
- trade marks - which deals with commercial names and symbols
- industrial designs - which deals with manufactured goods
- geographical indicators - which identify products based on their place of origin
- integrated circuit layout designs
- trade secrets.

2.05 The exact nature of the rights granted to copyright owners will depend on the nature of the material being protected; however, in general they will include the exclusive right of reproduction; publication; performance; communication; and adaptation. As with all IP rights, the exclusive rights provided by copyright are intangible in nature, generally granted for a limited time and are distinct from the physical property in which protected material is embodied.

Example

In most cases copyright will be owned by one or more of an author or publisher of a book. Upon purchasing a book these rights will not necessarily transfer to a student who can only claim rights to the physical copy of the title they purchased.

While the student could rely on one of the exceptions to copyright infringement (eg. fair dealing for research or study) in order to copy some of the book, he or she is likely to need the permission of or a licence from the copyright owner/s to reproduce/copy the entire work. However, once the period of copyright in the book and any other material in the work such as pictures or other graphics expires, the book could be freely copied or communicated by anyone without infringing copyright (such as by placing it on the Internet).

How does copyright differ to other forms of intellectual property?

2.06 Unlike other forms of IP, there is no need to register material with authorities or pay a fee in order to obtain copyright protection. Copyright material is protected as soon as it is created, provided the criteria set out in the *Copyright Act* are met. The prerequisites to copyright protection are outlined in paras 2.22–2.28 of this chapter. Copyright is also generally protected for a longer period of time than other IP rights.⁶⁰

⁶⁰ A registered patent provides exclusive rights to the owner to exploit the invention for 20 years. Trade marks can be initially registered for 10 years to protect a 'mark' (letter, word, phrase, smell, shape, logo, picture, device etc) used by traders in the course of business, with the possibility of further renewals for as long as the mark is used. Similarly, the visual appearance or design of a manufactured article which is new or original can be registered as a design and protected for up to 16 years. In contrast, in the case of literary, dramatic, musical or artistic works, copyright material is generally protected for the life of the creator and an additional 70 years, or 70 years from the end of year of the

The reasons for copyright

2.07 Copyright primarily serves an economic function: by granting creators monopoly rights in their creations for a limited time, copyright enables them to receive remuneration (should they wish to) for the use of those creations. This in turn, provides an incentive for further creativity and innovation.

2.08 However, most copyright laws have been structured to provide a balance between providing incentives in the area of innovation and creativity and ensuring access to information for users of copyright material, while also being careful not to restrict competition in the marketplace. At the international level, copyright law has long been considered to be a balance of competing policy objectives. The Preamble to the *World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT)* recognises the need to balance the following interests:

...the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.⁶¹

2.09 To give effect to this balance, the *Copyright Act* contains a range of ‘free use’ or ‘blanket’ exceptions to copyright infringement which allow material to be used without the permission of or a licence from the copyright owner. These provisions are designed to ensure access to information and to achieve the public interest goal of encouraging education, research, the free flow of information and freedom of expression.⁶² The copyright exceptions of relevance to the research sector are explored in further detail in section 8 (paras 2.69–2.88), below.

2. What kind of material does copyright protect?

2.10 The *Copyright Act* divides the types of material that can be protected by copyright into two groups:

- *Works* – ie. literary, dramatic, musical and artistic works⁶³
- *Subject matter other than works* (referred to throughout this Report as ‘other subject matter’) – ie. sound recordings, films, sound and television broadcasts and published editions.⁶⁴

While each category is exhaustive, the range of materials falling within the scope of each category can be quite broad, as outlined below.

first publication of a film or sound recording (see, paras 2.29–2.35 for a discussion of the term of copyright protection).

⁶¹ Preamble, *WIPO Copyright Treaty (WCT)* 1996. The WCT entered into force on 6 March 2002. Australia has yet to accede to the WCT but will do so in the near future in order to satisfy its obligations under the Australia-United States Free Trade Agreement.

⁶² Copyright Law Review Committee, *Copyright and Contract* (2002) at 24 <www.clrc.gov.au> at 22 July 2006 (hereinafter CLRC, *Copyright and Contract*).

⁶³ Part III of the *Copyright Act*.

⁶⁴ Part IV of the *Copyright Act*.

Works

Literary works

2.11 The term literary work is defined in s 10 of the *Copyright Act*, although this definition is not exhaustive. It forms a very broad category and applies to written material, tables, compilations and computer programs (by virtue of their source code).⁶⁵ The work does not have to be of a high literary standard to be protected, provided that it is in print or writing and conveys information, instruction or pleasure.⁶⁶ A large range of utilitarian materials, such as lists, catalogues, betting coupons and telephone directories, have been held by Australian courts to be literary works.⁶⁷

Musical works

2.12 The term ‘musical work’ is not defined in the *Copyright Act* but it is likely to extend to any composition of sound and noises provided they are fixed in some form (eg. as a musical score, composition or sounds recorded on a tape, cassette, compact disk or other form of technology including storage in a computer). It is important to note that musical works do not include lyrics or the sound recording itself, which is separately protected by copyright.

Dramatic works

2.13 The dramatic works category covers works which are intended to be performed or presented, such as a choreographic show or the scenario or screenplay for a film (but not the film itself⁶⁸). As with musical works, these must be recorded in a fixed form to receive copyright protection (eg. video taped or written down).

Artistic works

2.14 Section 10 of the *Copyright Act* defines an artistic work as a painting, sculpture, drawing⁶⁹, engraving,⁷⁰ photograph, building, or model of a building. These materials will be protected irrespective of the artistic quality or merit of the work. Within this category, a ‘work of artistic craftsmanship’ can also be protected provided that the work has aesthetic appeal and is result of the work of a skilled craftsman.

⁶⁵ S 10 of the *Copyright Act*.

⁶⁶ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 608.

⁶⁷ Provided the material is organised in such a way as to demonstrate a degree of labour, skill and ingenuity: see *Kalamazoo (Australia) Pty Ltd v Compact Business Systems Pty Ltd and Ors* (1985) 5 IPR 213; *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112.

⁶⁸ Note that films were only separately protected by copyright after the current *Copyright Act* came into force (1 May 1969). Films made before this date only receive copyright protection to the extent of being protected as a series of photographs or as a dramatic work. Section 222 of the *Copyright Act* requires that films protected as dramatic works display a degree of originality (ie. that the film be arranged, edited or scripted in some way).

⁶⁹ Further defined by s 10 of the *Copyright Act* as including a diagram, map, chart of plan.

⁷⁰ Further defined by s 10 *Copyright Act* as including an ‘etching, lithograph, product of photogravure, woodcut, print or similar work, not being a photograph’.

Items such as hand woven tapestry, handmade jewellery or crafted furniture may be considered to be a ‘work of artistic craftsmanship’.⁷¹

Other Subject Matter

2.15 This category of protectable subject matter covers sound recordings, cinematograph films, sound and television broadcasts, and published editions.

Sound recordings

2.16 Section 10 defines a sound recording as an aggregate of sounds embodied in a record. Sound recording copyright can, therefore, subsist in sounds recorded in any form, including a compact disc, a record, an audiotape or any other technology. A number of high profile cases such as the decision in *Napster*⁷² in the United States and *Kazaa*⁷³ in Australia, have drawn attention to the widespread practice of unauthorised copying and swapping of music files on peer to peer (P2P) networks via the Internet and the resulting infringements of both the sound recording copyright and any underlying rights in the musical work and the lyrics.

Films

2.17 Copyright protection for cinematograph films extends to moving pictures and any associated sounds, in any form. It thereby provides protection for a range of materials including films, videos and the moving pictures associated with a computer game or CD-ROM.

Broadcasts

2.18 Copyright also provides protection for broadcasts themselves, separate from the protection provided to any film or sound recording included in the broadcast. Copyright protects both television and radio broadcasts, whether they are based on pre-recorded material or are live broadcasts.

Published editions

2.19 In addition to providing copyright protection for written material as a literary work, the particular presentation of printed material (such as the typographic layout, juxtaposition of text and photographs, or headlines of a book, newspaper or magazine) can be separately protected by published edition copyright.⁷⁴

⁷¹ See Attorney-General's Department *Copyright Law in Australia: a short guide*, June 2005, <<http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP63590544B72BAC3DCA25705F0007BD51>> at 22 July 2006 (hereinafter AGD, *Copyright Law in Australia: a short guide*).

⁷² *A & M Records Inc v Napster Inc* (2001) 239 F 3d 1004; (2000) 50 IPR 232 (9th Cir. 2001).

⁷³ *Universal Music Australia Pty Ltd and Others v Sharman License Holdings Ltd and Others* [2005] FCA 1242.

⁷⁴ Published edition copyright is protected for a shorter time (25 years) than other subject matter - s 96 *Copyright Act*. Under s 88 *Copyright Act*, unless the contrary intention appears, copyright, in relation to a published edition of a literary, dramatic, musical or artistic work or of two or more literary, dramatic, musical or artistic works, is the exclusive right to make a facsimile copy of the edition.

Multilayered rights

2.20 As the categories of ‘other subject matter’ are usually based on or derived from a work (for example, a film is usually based on a script), there is often more than one layer of copyright protection in an audiovisual item, broadcast or a published edition. For example, the music and lyrics contained in a sound recording will be protected separately from each other and from the recording itself. These rights are generally referred to as the ‘underlying rights’ of the sound recording.

2.21 There may also be multiple layers of copyright protection underlying a film, such as copyright in the script protected as a dramatic work; separate protection for any pre-existing sound recording included in the film or the original score or lyrics; and possibly protection for any sets or costumes. These same rights may also co-exist in a television broadcast of the film, along with the separate copyright in the film itself.

3. Prerequisites for copyright protection

2.22 Before copyright can exist in a work or other subject matter and be protected in Australia there are certain threshold requirements that must be met. The work or other subject matter must:

- *involve the expression of ideas or information*
- *exist in a tangible/material form* – ie. be written down or recorded in some other form (such as a video or sound recording). This requirement does not apply to broadcasts.
- *be original* – ie. originate from the author and not be a copy
- *satisfy the requisite ‘territorial connecting factors’* – by having a connection (whether personal or territorial) to Australia.

Idea/expression dichotomy

2.23 As a general proposition copyright exists in the expression but not the idea. As the Australian Federal Court has stated:

...in general there is no copyright in the central idea or theme of a story or play however original it may be; copyright subsists in the combination of situations, events and scenes which constitute the particular working out or expression of the idea or theme.⁷⁵

Therefore, copyright protection provides that it is the product of a creator’s intellectual efforts (ie. the text, pictures or sounds themselves) that must not be appropriated, not the underlying ideas.

⁷⁵ *Zeccola v Universal City Studios Inc* (1982) 67 FLR 225. There have traditionally been boundary issues relating to plays and novels. For example, reproducing the plot of a novel or play has in some cases been found to be an infringement of copyright. However, the copying of stock scenes that are commonly used will not constitute infringement.

Material form

2.24 The general principle is that, in order to be protected by copyright, an idea must be expressed in a tangible form, in the sense of being written down, recorded or stored in some other way. In response to new technologies, this principle has been interpreted broadly, and includes material that has been recorded in any digital form, such as on a computer or portable storage medium (eg. a CD, DVD or thumb drive).

Originality and authorship

2.25 In Australia, the threshold for determining when a work will be considered to be original and therefore, capable of copyright protection is low. This standard does not require a high degree of inventive thought or originality. Rather, the material must originate from the author and be more than a copy of other material, in the sense that he or she expended skill and labour in the creation of the work.⁷⁶ This standard contrasts with other jurisdictions, such as the US, which requires both labour and a spark of creativity, and Canada, which requires skill and judgement to establish copyright protection.⁷⁷

2.26 The issue of originality can also emerge in relation to compilations and databases. Certain materials such as facts are regarded as basic and inherently beyond copyright protection. However, compilations and databases (such as compilations of all telephone numbers for a region presented alphabetically) and seemingly unoriginal items can obtain copyright protection if they are organised in such a way as to demonstrate a degree of labour, skill and ingenuity.⁷⁸

2.27 The requirement of originality for other subject matter (eg. films and sound recordings) is not expressly stated in the Act. However, the general view is that there is an implicit requirement that copyright will not subsist in a film or sound recording that is simply a copy of a pre-existing item.⁷⁹ For broadcasts, the originality requirement does not apply (as they will generally only be compilations of existing works).⁸⁰ Copyright subsists in a broadcast as soon as it is made, provided that there is a territorial connection between the broadcast and Australia (see para 2.28 below).

Territorial connection to Australia

2.28 Copyright will only subsist where there is a territorial connection between the material and Australia (ie. the material is created or first published in Australia or in a country with which Australia has a reciprocal agreement) or where the author of a

⁷⁶ *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112.

⁷⁷ *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339; 2004 SCC 13 (CanLII); (2004) 236 D.L.R. (4th) 395; (2004), 30 C.P.R. (4th) 1; (2004), 247 F.T.R. 318 <<http://www.canlii.org/ca/cas/scc/2004/2004scc13.html>> at 22 July 2006.

⁷⁸ *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112.

⁷⁹ Emily Hudson and Andrew Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitisation* (2005) Centre for Communications and Media Law, University of Melbourne, 23 (hereinafter Hudson and Kenyon, *Copyright and Cultural Institutions*), quoting James Lahore and Warwick Rothnie, *Copyright and Designs*, May 2005 at [10,165], <<http://www.ipria.org/publications/>> at 22 July 2006.

⁸⁰ See Fitzgerald and Fitzgerald, *Intellectual Property in Principle*, 87.

work has a personal connection with Australia (eg. the author may be an Australian citizen or resident).⁸¹

4. Duration of copyright

Period of copyright protection

2.29 The duration of copyright protection in Australia depends on a number of factors, including: the nature of the work, the time when it was made and whether it has been published.⁸²

2.30 Given that copyright can be assigned and bequeathed, it is possible for copyright to be transmitted from the original creator to one or more individuals and/or companies many times over.⁸³ However, in order to determine the copyright status of 'works', where the term of copyright protection is based on the term of the creator's life, it is imperative that the creator/original owner be identified, irrespective of the current ownership of the material.

2.31 As of 1 January 2005 the term of copyright protection has been extended by 20 years for most categories of copyright material⁸⁴ in order to implement Australia's obligations under the Australia - United States Fair Trade Agreement (AUSFTA).⁸⁵ As the amendments have no retrospective application, copyright is not revived in materials where the term of protection had expired on or before 1 January 2005.⁸⁶ However, the extended term applies to most material that was protected by copyright at the commencement of the new provisions (ie. 1 January 2005) and to most materials created after this date.

Published material

2.32 Since the AUSFTA amendments, the duration of copyright for published material in Australia is as follows:

- *works* are protected for the life of the author plus 70 years⁸⁷

⁸¹ S 91 *Copyright Act*.

⁸² AGD, *Copyright Law in Australia: a short guide*, 18-21.

⁸³ Hudson and Kenyon, *Copyright and Cultural Institutions*, 34.

⁸⁴ *US Free Trade Agreement Implementation Act 2004*.

⁸⁵ However, despite the AUSFTA-related amendments to the term of copyright protection, the period of copyright protection for broadcasts, published editions and Crown Copyright material remains unchanged.

⁸⁶ For example, as the term of copyright protection for photos and sound recordings made before 1969 used to be 50 years from the date the photo was taken or the sound recording was made, copyright has now expired in all photographs taken before 1 January 1955 (due to s 212) and in all sound recordings made before 1 January 1955 (due to s 220(3)). However, in some cases underlying copyright in the music and lyrics may still have been in copyright as of 1 Jan 2005 when the duration rules were changed (given that these materials are works which are protected for the longer period of the creator's life and 50 years). If so, a further 20 years of protection would have been added to the copyright term for these works and as of 1 January 2005 these underlying works would now be protected for the creator's life plus 70 years.

⁸⁷ Except for works first published or created under a pseudonym or anonymously, which will be protected for 70 years from the end of the year of first publication. It should also be noted that for the

- *subject matter other than works* (ie. sound recordings and films) is protected for 70 years from the end of the year of first publication.

2.33 It is important to note that the period of protection for broadcasts and published editions has remained unchanged despite the recent amendments to the copyright term. Broadcast copyright subsists for 50 years from the date of the first broadcast for material broadcast on or after 1 May 1969⁸⁸; while published edition copyright lasts for 25 years from the end of the year of its first publication.⁸⁹

Unpublished material

2.34 Copyright subsists indefinitely in a literary, dramatic and musical work which has not been published, performed, broadcast or sold as a recording during the creator's lifetime. Once the work is posthumously made public in any of those ways, the copyright will expire at the end of 70 years after that event. Unpublished engravings are the only artistic works where copyright subsists indefinitely: for all other forms of artistic works, copyright will last for 70 years after the end of the year in which the artist dies. Similarly, if a film or sound recording is unpublished the protection period is indefinite until it is published.

Crown material

2.35 As is discussed at paras 2.45-2.49 below, the Crown (ie. the Commonwealth, State and Territory governments) can own copyright according to the standard provisions of the *Copyright Act* or under the special 'Crown copyright' provisions in Part VII relating to materials made or first published by the Crown or under its direction or control.⁹⁰ Material protected under the special Crown copyright provisions in Part VII is protected for 50 years from the date the material is made or first published.⁹¹ This shorter period of protection applies even where the material is later assigned to a third party.

5. Ownership of copyright

2.36 As is noted above, given that it is possible to assign, bequeath or otherwise transfer copyright it should not be assumed that the original creator or maker of a work always owns the copyright. For example, an academic may have written a paper, but may have transferred all of his or her copyright to a publisher as a condition of having the paper published in an academic journal. Furthermore there are special rules relating to ownership of copyright material made in an employment context and in relation to films, sound recordings and photographs that are commissioned.

purposes of determining the copyright duration of a work, the 'life' of the author is determined by the end of the year of the author's death.

⁸⁸ Broadcast copyright was not recognised in Australia prior to 1 May 1969.

⁸⁹ Protecting the typographical arrangement and layout of a published work as outlined in paras 2.19.

⁹⁰ Ss 176 – 179 *Copyright Act*:

⁹¹ See generally ss 180-181 *Copyright Act*; CLRC *Crown Copyright* at 17-19.

Works

2.37 Usually the creator of a literary, dramatic, musical or artistic work is the first owner of the copyright, but there are several exceptions. For example, where a work is made by a creator in accordance with the terms of their employment, the employer is the owner of copyright in the work, subject to an agreement to the contrary.⁹²

Other subject matter

2.38 The owner of any copyright in a sound recording or a film is normally the person/s who made it. The ‘maker’ of a sound recording is the owner of the master recording.⁹³ This means that, in practice, record companies often own copyright in commercially produced sound recordings, rather than the people who have creative input into the recording.⁹⁴ Where the recording is of a live performance the performers are also makers and will usually jointly own copyright in the material with the original maker; unless there is an agreement which specifies otherwise. These rights are limited in respect of performances made before 1 January 2005 (see paras 2.42 below).

2.39 The ‘maker’ of a film is the person who undertook the arrangements necessary for the making of the film. Again, this means that for a commercially produced film, the copyright will usually be owned by a production company, and the directors, scriptwriters and actors involved in making the film will not own any copyright other than moral rights in the script (for the scriptwriter) and moral rights in the film for the director and the producer.⁹⁵ However, in the university sector, students undertaking film-studies, multi-media and other related courses are likely to either directly make or be involved in all arrangements for the making of the film /moving image and are, therefore, likely to own the copyright in the title.

Sound recordings – performers’ new economic rights

2.40 The AUSFTA-related amendments to the *Copyright Act* now provide for new economic rights for performers in sound recordings, effective from 1 January 2005.⁹⁶

2.41 In general, unless otherwise specified by an agreement to the contrary, the performer and the owner of any sound recording medium will own copyright jointly.⁹⁷ This applies not just to commercial sound recordings, but to any sound recording such as recordings of interviews. However, if the sound recording is commissioned and a fee is paid the performer will not be able to claim economic rights and all economic rights will be held by the original copyright owner being the maker of the recording.⁹⁸

⁹² S 36 *Copyright Act*.

⁹³ S 97 *Copyright Act*. In relation to interviews see Hudson and Kenyon, *Copyright and Cultural Institutions*, 123.

⁹⁴ See Hudson and Kenyon, *Copyright and Cultural Institutions*, 34.

⁹⁵ See ss 191, 195AZJ-AZL explaining that moral rights will be accorded to principal directors, screenwriters and producers; Hudson and Kenyon, *Copyright and Cultural Institutions*, 108.

⁹⁶ See generally s100AA-AH *Copyright Act*

⁹⁷ S 22(3A) *Copyright Act*.

⁹⁸ S 97(3) *Copyright Act*.

2.42 These rights apply to performers in respect of sound recordings made both before and after 1 January 2005. However, the rights provided to performers in respect of sound recordings made before this date are limited to stopping/preventing third party infringements of the recording rather than providing any right to exploit the copyright in the recording or to rely on any of the standard remedies for copyright infringement (eg. damages or a right to recover infringing copies).⁹⁹ Furthermore, the original owner of the copyright will be able to continue exploiting the copyright as he or she expected to do when contracting the performers to make the recording and to license the use of the recording by third parties.¹⁰⁰

2.43 It is also important to note that these new rights do not apply to performances in films and as such actors or any other performer cannot claim any economic rights in a film, although the issue of economic rights extending to performances captured not only in sound recordings but also in films is the subject of continuing discussion and negotiation in the international copyright arena. As discussed in paras 2.126–2.129, singers and other performers (such as a conference speaker filmed for ‘podcasting’ or Internet-streaming purposes etc.) do have the personal right to prevent and control the making of unauthorised recordings and communications (ie. ‘bootleg recordings’) of their live performance.

Commissioned works

2.44 For commissioned sound recordings and films, the copyright is owned by the commissioning party, unless there is a separate arrangement.¹⁰¹

Crown ownership

2.45 As mentioned at para 2.35 above, the Crown (ie. the Commonwealth, State and Territory governments)¹⁰² can own copyright under the standard provisions of the *Copyright Act* (eg. where it is the creator’s employer, or where it has commissioned the work in circumstances where copyright arises).¹⁰³

⁹⁹ S 100AG *Copyright Act*. See generally, *Attorney-General’s Department fact sheet: US Free Trade Agreement Implementation Act 2004 New Performers’ Rights in Sound Recordings* from 1 January 2005

<<http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP7B3B6A5CD28F19B5CA25704C001A5627>> at 22 July 2006.

¹⁰⁰ S 100AF *Copyright Act*. For instance, the performer could take action to stop the making, distribution or importation of pirate copies of their recording where the original owner of the copyright was in no position to do so, eg. because of insolvency.

¹⁰¹ Photographs commissioned for private and domestic purposes will also usually be owned by a commissioning party, but will be owned by the photographer in all other circumstances.

¹⁰² The definition of the ‘Crown’ is discussed further in CLRC, *Crown Copyright* (2005) Ch 2, paras 2.03–2.16.

¹⁰³ Note also that the Crown has prerogative rights acknowledged by s 8A (1) *Copyright Act* eg. in respect of copyright in Acts of Parliament and possibly judgments: s 182A, Copyright Law Review Committee, *Crown Copyright* (2005) at 16, Chapter 6 <www.clrc.gov.au> at 22 July 2006.

2.46 However, Part VII of the *Copyright Act* also gives the Crown special rights to own copyright under certain circumstances.¹⁰⁴ Subject to any agreement to the contrary, the Crown is the owner of copyright in any:

- original literary, dramatic, musical or artistic works made by or under the direction or control of the Crown (s 176)
- sound recordings and films made by or under the direction or control of the Crown (s 178)
- original literary, dramatic, musical or artistic works first published by the Crown or under its direction or control (s 177).

2.47 The scope of these provisions is uncertain, however material commonly understood to fall within these provisions includes material created by government employees, volunteers and persons creating or submitting material to the Crown pursuant to a statutory direction. It has been suggested that these provisions also cover works commissioned by the Crown, where the contract is silent as to ownership of copyright material.¹⁰⁵ Therefore, it is particularly important to ensure that copyright ownership is explicitly addressed in any contract with the Crown.

2.48 The Copyright Law Review Committee (CLRC) conducted an inquiry into the appropriateness of the law in Australia in relation to Crown Copyright. Key recommendations of its report (released April 2005) include that the provisions of the *Copyright Act* relating to Crown copyright (ie. ss 176–179) be repealed and that official records of parliamentary debates, legislation and judgments be regarded as public domain material.

2.49 The Australian Government is yet to respond to the CLRC's report. In any event, it is important that best practice copyright management for Crown materials be further developed.¹⁰⁶

6. Exclusive rights of the copyright owner

2.50 Copyright refers to not one single right but rather a bundle of exclusive economic rights. It includes the right to:

- reproduce (ie. copy) which includes digitising an analogue work — such as a thesis or dissertation
- perform – including playing a film or sound recording in public

¹⁰⁴ Part VII *Copyright Act*. In the USA, Federal Government does not hold copyright in government material, § 105 *Copyright Act 1976*.

¹⁰⁵ See generally: Staniforth Ricketson and Christopher Cresswell, *The Law of Intellectual Property: Copyright Designs and Confidential Information* (2nd ed 2002) [14.170]–[14.185] (hereinafter Ricketson and Creswell, *Law of Intellectual Property*).

¹⁰⁶ See, in particular, Recommendations 12 and 13 of the CLRC, *Crown Copyright* (2005) <www.clrc.gov.au> at 22 July 2006.

- communicate – this includes both electronically transmitting (eg. broadcasting) material and making it available online (eg. on a website or via a P2P service) and includes publishing a digital copy of a work
- make an adaptation of a work eg. adapting a literary work into a screenplay or adapting a foreign text into an English version.

2.51 The scope of the rights granted differs according to the types of subject matter protected by copyright, as indicated by the following table.¹⁰⁷

Material	Exclusive rights
Literary, dramatic and musical works	Reproduce in a material form Publish Perform in public Communicate to the public Make an adaptation of the work Control rental of the work reproduced in a sound recording Control rental of a computer program
Artistic work	Reproduce in a material form Publish the work Communicate to the public
Sound recording	Make a copy Cause the recording to be heard in public Communicate the recording to the public Control rental of the recording
Cinematographic film	Make a copy Cause the film to be seen or heard in public Communicate the film to the public
Broadcasts	Make a film of a television broadcast or a copy of such film Make a sound recording of sounds in a television or sound broadcast and make a copy of the sound recording To rebroadcast the broadcast To communicate it to the public (ie. otherwise than by broadcasting it)
Published edition of literary, dramatic or artistic works	Make a facsimile copy of the edition

¹⁰⁷ Based on figure 4.5, Fitzgerald and Fitzgerald, *Intellectual Property in Principle*, 105.

2.52 It should be noted that, in addition to the standard economic rights discussed here, the Australian *Copyright Act* also provides for a number of ‘associated’ rights, including performers’ rights and moral rights. These rights are discussed at paras 2.124 – 2.139 below.

7. Copyright infringement

Direct Infringement

2.53 Sections 36(1) and 101(1) of the *Copyright Act* provide that copyright is infringed where:

- a person who is not the copyright owner
- performs in Australia any of the exclusive acts (or authorises some one else to perform these acts)
- in relation to the whole or a ‘substantial part’ of a work
- without the ‘licence’/consent of the copyright owner (whether express or implied)
- where no defence or exception to infringement applies.

2.54 It is important to note that liability for copyright infringement is strict and there is no defence that the infringer was not aware that the act constituted infringement (although this will be relevant in setting any remedy for infringement).¹⁰⁸

2.55 Copyright will only be infringed where a substantial part of the material is reproduced. There is not strict definition as to what amounts to a ‘substantial’ part; the portion copied must be an important, essential or distinctive part of the original material, but it need not necessarily be a large part. It will largely be a question of fact and degree as to whether a substantial part has been reproduced.

2.56 It is also not an infringement of copyright to independently create a work which by coincidence happens to be similar to a copyright work. Infringement will only be established where there is a sufficient degree of objective similarity between two works and there has been some act of copying.¹⁰⁹

Temporary reproductions

2.57 Recent amendments to the *Copyright Act* as a result of the AUSFTA have broadened the situations in which a temporary reproduction or copy will infringe copyright.¹¹⁰ Prior to these amendments, copyright would only be infringed where a

¹⁰⁸ In recent US cases the requirement of a ‘volitional act’ has been raised: *CoStar v. Loopnet*, 373 F.3d 544 (4th Cir. 2004).

¹⁰⁹ Fitzgerald and Fitzgerald, *Intellectual Property in Principle*, 146.

¹¹⁰ The *US Free Trade Agreement Implementation Act 2004* (Cth) amends the definition of ‘material form’ and ‘copy’ in section 10 of the Act and creates an exception to infringement where the

reproduction or copy was capable of further reproduction.¹¹¹ This meant that the temporary copies made in the Random Access Memory of a digital device (eg. a computer or DVD player) when a digital product (eg. a computer program or DVD) was used would not generally infringe copyright. Since the AUSFTA amendments came into force on 1 January 2005, a reproduction or copy no longer needs to be capable of further reproduction to infringe copyright.¹¹² This means that any reproduction, whether temporary or permanent, can now potentially be infringing.

2.58 To ensure that legitimate products could continue to be used in an ordinary manner without infringing copyright, an exception was introduced to the *Copyright Act* that permits temporary reproductions made as an incidental part of the technical process of using a copyright product.¹¹³ This exception only applies where the product or use in question is legitimate (ie. would not otherwise infringe the Australian *Copyright Act*).

Authorising infringement

2.59 A person or organisation can also be liable for copyright infringement if they have authorised someone else to infringe copyright, to the extent that they sanction, approve or countenance the infringing conduct.¹¹⁴

2.60 Sections 36(1A) ('works') and 101(1A) ('other subject matter') lists the matters which **must** be taken into account in determining whether a person (or organisation) has authorised an infringement, including:

- (a) the extent (if any) of the person's power to prevent the act
- (b) the nature of any relationship between the person and the infringer (ie. the person who did the act)
- (c) whether the person took reasonable steps to avoid the act, including complying with any relevant industry codes of practice.

2.61 A considerable amount of case-law has developed around the application and scope of these authorisation provisions. In general, decisions of courts to date have focused on two essential elements as relevant to establishing authorisation of copyright infringement:

1. the level of control a party has over activities resulting in copyright infringement
2. the extent to which a party approves, sanctions or countenances a copyright infringement.

reproduction is made as part of the technical process of using a non-infringing copy of the copyright material (see ss 43B and 111B).

¹¹¹ See *Kabushiki Kaisha Sony Computer Entertainment v Stevens*, [2002] FCA 906 at [137, 147-8, 150]; [2003] FCAFC 157, *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 and *Australian Video Retailers Association v Warner Home Video Pty Ltd* (2001) 53 IPR 242 at 262-3.

¹¹² See: Attorney-General's Department Fact Sheet *US Free Trade Agreement Implementation Act 2004 Right to Reproduce / Copy Exception for the Normal Use of Copyright Material* <<http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP2AA00B3806DC857ECA25706700183F96>> at 22 July 2006.

¹¹³ S 43B *Copyright Act*.

¹¹⁴ Ss 36(1) and 101(1A) *Copyright Act*.

2.62 These factors can be established by permitting someone to use equipment (such as photocopiers or CD burners etc.) to infringe copyright without issuing an accompanying copyright notice or placing other copyright warnings on the photocopier or other copying technology to alert users to their copyright obligations. The High Court held in the *Moorhouse*¹¹⁵ case that the University of New South Wales was liable for authorising copyright infringement due to its failure to exercise control or supervision in relation to a self-service photocopying machine installed in library without a corresponding notice for users.¹¹⁶ Following this decision, a specific exception¹¹⁷ was introduced into the *Copyright Act* in 1980 to provide libraries and archives with a defence to authorising infringement provided a prescribed copyright notice is placed near publicly available photocopiers.¹¹⁸ In 2000 this defence was extended to any ‘machine’ (including computers) set up by a library or archive in or outside its premises, and to other subject matter (eg. films and sound recordings).¹¹⁹

2.63 The issue of what constitutes authorisation and the nature of the ‘control test’ was examined in detail in *Australasian Performing Right Association Limited v Metro on George Pty Ltd (APRA v Metro)*¹²⁰ by Justice Bennett who noted that:

[A] person cannot be said to authorise an infringement unless he or she has some power to prevent it, therefore, the element of control is necessary to establish that copyright infringement has been authorised. However, merely facilitating infringing conduct is insufficient to establish authorisation, as is knowledge that there is a likelihood that there will be an infringing use.

2.64 At the end of the day, a finding of authorisation still depends upon an assessment of all the facts of a particular case.¹²¹

2.65 Given the *Moorhouse* case it is now a matter of standard practice for universities to place copyright notices near photocopying machines in libraries, and often also near copying equipment such as CD burners and publicly accessible computers in libraries. Traditionally, universities have also been vigilant about plagiarism and appropriate academic citation. However, despite these measures there is always the risk of a university or research institute being liable for authorising copyright infringement, particularly given that the notice defences discussed above can only be relied on by university libraries rather than the university itself. For example, one area of potential risk for universities in the research area is in approving the communication of research outputs such as articles and ETD in a manner that infringes third party copyright.

¹¹⁵ *University of New South Wales v Moorhouse and Angus and Robertson* (1975) 133 CLR 1.

¹¹⁶ The form of the ‘notice’ is specified in the *Copyright Regulations 1969* (Cth).

¹¹⁷ *Copyright Act* ss 39A.

¹¹⁸ *University of New South Wales v Moorhouse and Angus and Robertson* (1975) 133 CLR 1.

¹¹⁹ *Copyright Act* ss39A and 104B. The changes were introduced via the *Copyright Amendment (Digital Agenda) Act 2000*. (See Ricketson and Creswell, *Law of Intellectual Property* at [9.595]).

¹²⁰ *Australasian Performing Right Association Limited v Metro on George Pty Ltd* [2004] FCA 1123 (31 August 2004).

¹²¹ *Ibid*. See further *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.

2.66 These issues will be discussed in later chapters, together with protocols and measures for reducing the risk of liability for authorising copyright infringement.

Underlying rights and copyright infringement

2.67 As outlined in paras 2.20 – 2.21 above, multiple levels of copyright protection can co-exist in the one item. This is particularly the case for other subject matter, such as films and sound recordings. A permission or exception that applies to one layer of copyright (eg copyright in the sound recording) may not apply to other layers (eg copyright in the composition or lyrics). It is, therefore, important when using copyright material that care is taken to ensure that the permission of or a licence has been obtained from all the relevant copyright owners, including the underlying rights holders.

2.68 Given that there is the potential for ‘other subject matter’ to have multiple copyright owners and the administrative difficulty in managing multiple rights holders, it is common practice in the film, broadcast and music industries for underlying rights to be assigned or exclusively licensed to film production companies, broadcasters, music publishers or record companies, respectively. In such cases, the production company or publisher will generally have the right to grant permission to others to deal with the product as a whole (eg the other subject matter and the underlying works). However, if there is no assignment or exclusive licence, separate permission will generally be required from the underlying rights holders.

8. Exceptions and defences to copyright infringement

2.69 In order to ensure that an appropriate balance is struck between the rights of copyright owners and the public interest in the dissemination of material, the *Copyright Act* also includes a wide range of exceptions which allow copyright works to be used for certain purposes without the permission of the copyright owner. These exceptions can be general in application (eg. the fair dealing defences), or they can be limited to certain users (eg. libraries and archives) or uses (eg. backing up computer programs). These are too numerous to be fully detailed in this Report. However, most relevant and commonly used of these are discussed below.

Insubstantial Use

2.70 As outlined above in paras 2.53–2.56, copyright is infringed when a person uses all, or a ‘substantial part’, of copyright material in one of the ways exclusively controlled by the copyright owner, without their express or implied permission and where no defence or exception to infringement applies. Therefore, one very important defence to copyright infringement in the research sector is that an insubstantial part of the material was used or that the use was insubstantial. As the test relies on a qualitative rather than quantitative assessment of the material at hand, it is hard to generalise about how this test will apply. The best that can be done is to try and gauge how like cases might be treated by looking at past decisions.

Fair Dealing

2.71 Fair dealing serves as a general exception to copyright for certain approved purposes. The *Copyright Act* provides that a fair dealing with a copyright work or other subject matter will not constitute a copyright infringement if it is done for the following purposes:

- research or study (ss 40 and 103C)
- criticism or review provided sufficient acknowledgement is made (ss 41 and 103A)
- reporting of news (ss 42 and 103B)
- judicial proceedings or the giving of professional legal advice (ss 43)¹²².

2.72 It is important to note that in order to be a fair dealing under current Australian law the dealing must have been performed for one of these four purposes, and it must be considered to be 'fair'.

2.73 It is also important to note that a fair dealing can only be performed by the individual who will be using the material. This means that a library or teacher cannot rely on the fair dealing exceptions to reproduce material for students. In such cases, the librarian or teacher must use the more specific exceptions or statutory licences discussed at paras 2.85 – 2.89 below.

What is fair?

2.74 The *Copyright Act* provides limited guidance as to when a dealing will be 'fair'.

2.75 Section 40(2)(a)-(e) of the *Copyright Act* does provide a list of factors that should be considered in determining whether a reproduction of a work or adaptation of a work for the purpose of research or study is fair. These include:

- the purpose and character of the dealing
- the nature of the work
- the possibility of obtaining the work within a reasonable time at an ordinary commercial price
- the effect of the dealing on the potential market for, or value of, the work
- in a case where part only of the work is copied, the amount and substantiality of the part copied in relation to the whole work.

¹²² There is no fair dealing counterpart in relation to the use of audio-visual items for the purposes of giving legal advice, rather, s 104 provides a blanket exception, irrespective of the fairness of the dealing, in relation to the use of audiovisual material or published editions for the purposes of judicial proceedings or giving legal advice.

2.76 The *Copyright Act* also states that, in the case of a reproduction of a literary, dramatic or musical work (or adaptation of such a work) for the purposes of research or study:

- a single copy of a journal article
- one chapter or 10% of a book of 10 or more pages, or
- 10% of the number of words of a work that is in electronic form

is deemed to be a fair dealing. This is generally referred to as the ‘10 per cent rule’.

2.77 However, it is important to note that the ‘10 per cent rule’ and the set of factors listed in s 40(2)(a)-(e) only apply to determining the fairness of a dealing in relation to reproduction of a work or an adaptation of a such a work for research and study purposes. For all other fair dealing exceptions, whether the dealing is fair will be determined on the facts of each case.

2.78 Recent cases such as *TCN Channel Nine v Network Ten Pty Ltd*¹²³ have explored the boundaries of Australian fair dealing and are useful to understanding how the courts assess the fairness of a use for the purposes of determining the application of the fair dealing exceptions. In that decision, Conti J (at para [66]) stated that:

[F]air dealing involves questions of degree and impression; it is to be judged by the question of a fair minded and honest person, and is an abstract concept. Fairness is to be judged objectively in relation to the relevant purpose... in short, it must be fair and genuine for the relevant purpose.

Fair dealing v fair use

2.79 Under current Australian law, the range of uses which can fall within the scope of fair dealing is strictly limited to the four fair dealing purposes outlined above. This contrasts to the US where the fair use exception (s 107) can apply to a broader range of uses provided that the criteria in s103C of the US *Copyright Act* 1974 (which is the equivalent of our s 40(2)) are met. As a result, there are a range of uses of copyright material by the research sector which are likely to fall within the scope of fair use in US but which would otherwise require the permission of or a licence from the copyright owner in Australia, such as:

- use of copyright material in the ‘public interest’ where there is no negative effect on the market/value of the copyright material¹²⁴
- library photocopying where the purpose is not related to research or study but where the circumstances are ‘fair’¹²⁵
- dealing with an unpublished work where the circumstances are ‘fair’¹²⁶
- single and multiple copying of books, periodicals and music for use by teachers/students in certain circumstances¹²⁷

¹²³ (2001) 50 IPR 335.

¹²⁴ *Time Inc v Bernard Geis Associates*, 293 F. Supp. 130 (SDNY 1968).

¹²⁵ United States Copyright Office, Circular 21, <<http://www.copyright.gov/circs/circ21.pdf>> at 22 July 2006 (hereinafter United States Copyright Office).

¹²⁶ S 107 *Copyright Act* 1968 <<http://www.copyright.gov/title17/>> at 22 July 2006.

- quoting for information purposes (ie. not criticism or review)¹²⁸
- use of an extract of copyright material for information purposes in new material¹²⁹
- parody, including for commercial release.¹³⁰

2.80 In May 2005, following the first round of amendments to the *Copyright Act* pursuant to the AUSFTA, the Australian Government conducted a review into *Fair Use and Other Copyright Exceptions* (Fair Use Review). The inquiry received 162 submissions from interested stakeholders. On 14 May 2006, the Attorney-General issued a statement about the Government's intended legislative reform of the copyright exceptions arising out of the Fair Use Review and the Government's *Review of the Digital Agenda Amendments of 2000*, which Philips Fox reported on in 2004.

2.81 In his media statement, the Attorney-General, Philip Ruddock, MP indicated that the reforms will (amongst other things) include new exceptions for consumers to use technology which they have legitimately purchased or accessed. This includes new rights for consumers to record television or radio programs to view or listen at a later time (ie. 'time-shifting') and to copy into a different format copyright material they have legitimately purchased. These exceptions, however, are limited to the use of copyright material for private purposes and could not be relied on by a research institute wanting to build up a library of off-air recordings of copyright material or maintaining their existing collection.

2.82 The Government also intends to broaden the present exceptions and statutory licences that allow copyright materials to be used for purposes that benefit the wider public interest, by introducing a new 'flexible dealing exception' that will allow for:

- non-commercial uses by libraries, museums and archives
- non-commercial uses by educational institutions for the purposes of teaching
- non-commercial uses for the benefit of people with disabilities
- parody and satire works

provided that the use complies with the standards in Australia's copyright treaty obligations. That is, the use must be a certain special case that does not conflict with a normal exploitation of the work and not unreasonably prejudice the legitimate interests of the copyright owner.

2.83 The Attorney-General, Philip Ruddock, MP, has characterised the proposed reforms as:

...significant copyright reforms which make our laws fairer for consumers and tougher on copyright pirates.¹³¹

¹²⁷ United States Copyright Office, 7-10.

¹²⁸ *Wright v Warner Books Inc* 953 F 2d 731 (2d Cir 1991).

¹²⁹ *Monster Communications Inc v Turner Broadcasting Sys Inc*, 935 F Supp. 490 (SDNY 1996).

¹³⁰ *Campbell v Acuff-Rose Music*, 510 US 569 (1994),

<<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=U10426&linkurl=http://fairuse.stanford.edu>> at 22 July 2006.

2.84 The changes promise to remedy long-standing concerns such as the ability to legally:

- copy television and radio programs and watch or listen to the recording at another time
- copy music from a CD to digital format such as MP3 so it can be played on an iPod, computer or similar device
- use copyright material to produce a parody or satire
- enable schools, universities, libraries and other cultural institutions to use copyright material for non-commercial purposes.¹³²

However, until such time as a draft exposure Bill is prepared, the precise scope and impact of the proposed changes on open access to knowledge are still uncertain.

Specific exceptions

2.85 In addition to the general fair dealing exceptions, the *Copyright Act* also sets out a broad range of additional exceptions that are designed to allow certain uses for public policy purposes.

2.86 The most extensive of these exceptions, and the most relevant for educational institutions, are the library and archives exceptions. These allow library and archive officers to deal with copyright material in certain ways without permission from or payment to the copyright owner. The uses permitted by these exceptions include (but are not limited to):

- copying and communicating works for research and study in response to a user request¹³³
- copying and communicating works to another library as part of an inter-library loan¹³⁴
- copying and communicating material in their collection for preservation or administrative purposes¹³⁵
- copying and communicating for replacement purposes published material that is or has been held in their collection that has deteriorated or been damaged, lost or stolen¹³⁶
- making electronic works available for access on computers within the library premises¹³⁷.

¹³¹ Attorney-General, Philip Ruddock, MP, *Major Copyright Reforms Strike a Balance*, Press Release, 14 May 2006

<http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balance_-_0882006> at 22 July 2006.

¹³² Ibid.

¹³³ S 49 *Copyright Act*.

¹³⁴ S 50 *Copyright Act*.

¹³⁵ Ss 51A and 110B *Copyright Act*.

¹³⁶ S 51A(1) *Copyright Act*.

¹³⁷ S 49A(5A) *Copyright Act*.

2.87 The *Copyright Act* also prescribes conditions for each exception, which must be met before the officer can make use of the exception. These conditions are complex, and hence will not be dealt with in detail here. It should also be noted that, as part of the fair dealing review discussed above, the Attorney-General announced an intention to expand the scope of these exceptions but relevant amendments are yet to be introduced.

2.88 Another important group of permitted exceptions relate to dealings with computer programs.¹³⁸ These are designed to allow individuals (including students, teachers and researchers) to reproduce the source code of a computer program for certain purposes, which are viewed as being necessary for the ordinary use and development of software. The uses permitted by these exceptions include reproductions for the purpose of:

- normal use or study¹³⁹
- backing up¹⁴⁰
- making interoperable products¹⁴¹
- error correction¹⁴²
- security testing¹⁴³.

Once again, additional conditions apply which will not be dealt with in this Report.

Other specific exceptions in the *Copyright Act* that may be important to tertiary institutions include exceptions that:

- limit the liability of libraries for authorising infringing reproductions of material made on machines (eg. photocopiers) provided on their premises, where a copyright notice has been placed near the machine¹⁴⁴
- limit the liability of those who are merely providing facilities for others to make communications (eg. Internet Service Providers or ISPs) for authorising infringing communications made on their facilities¹⁴⁵
- allow temporary copies made in the course of a legitimate communication (eg. copies made in the Random Access Memory of a computer when a web page is accessed)¹⁴⁶
- allow temporary copies incidentally made as part of the technical process of using a copyright product (eg. copies made in the Random Access Memory of a computer when a computer program is used or a DVD is played)¹⁴⁷.

¹³⁸ Part 3 Division 4A *Copyright Act*.

¹³⁹ S 47B *Copyright Act*.

¹⁴⁰ S 47C *Copyright Act*.

¹⁴¹ S 47D *Copyright Act*.

¹⁴² S 47E *Copyright Act*.

¹⁴³ S 47F *Copyright Act*.

¹⁴⁴ Ss 39A and 104B *Copyright Act*.

¹⁴⁵ Ss 39B and 112E *Copyright Act*.

¹⁴⁶ Ss 43A and 111A *Copyright Act*.

¹⁴⁷ Ss 43B and 111B *Copyright Act*.

ISP liability scheme

2.89 As part of the AUSFTA copyright-related amendments, new ‘ISP safe harbour’ provisions were introduced to the *Copyright Act*.¹⁴⁸ These provisions, which are based on similar provisions in the US *Digital Millennium Copyright Act 1998* (DMCA), are separate from the specific exception for ISPs discussed at para 2.88 above, and limit the remedies available against ‘carriage service providers’ for infringements that occur on their systems, as long as they comply with certain conditions designed to help combat online copyright infringement (eg. by complying with the prescribed notice and take-down system).

2.90 It should be noted that, under the current provisions, it is unlikely that Australian Universities (except the University of Queensland) can access this safe harbour scheme, as they are not carriage service providers for the purpose of the scheme. This issue is discussed in further in paras 6.83 – 6.85.

9. Remedies

2.91 Where one of the exclusive rights of the copyright owner is directly infringed, a court can award the following remedies:

- *Injunction* — a court order to prohibit an infringement from occurring or to stop an infringer from continuing.
- *Damages* — compensation for financial loss resulting from the infringement, often based on the amount the copyright owner would usually have been able to charge for the use of the work. If the infringer’s conduct has been flagrant or where some particular benefit has accrued to the defendant, then a court may award additional/punitive damages.
- *Account of profits* — an order for payment to the copyright owner of any profits made from the infringement.
- *Conversion damages* — where the infringement was particularly deliberate, a court has the discretion to order that any infringing materials be delivered up to the copyright owner.

10. Transferring copyright – assignments and licences

2.92 Like other forms of personal property, copyright can be assigned, licensed, given away, sold, left by will, or passed on according to the laws relating to intestacy or bankruptcy. The most common forms of transfer are assignments or licences.

2.93 An assignment of copyright results in the complete transfer of copyright from one party to the other, so that the person to whom the copyright is assigned becomes

¹⁴⁸ Ss 116AA-AJ *Copyright Act*.

the new owner (for example, as occurs when copyright is sold). To be legally effective, an assignment must be in writing, signed by or on behalf of the assignor.¹⁴⁹

2.94 In contrast, a licence is a ‘permission’ or form of authorisation from the copyright owner to use the copyright material in one or more of the ways which falls within the copyright owner’s exclusive rights. A licence can be exclusive, non-exclusive or implied. Each of these is explored in further detail, below.

2.95 With both assignments and licences, copyright can be divided in a number of ways, including by territory, time and type of use. For example, a licence can give a person permission to reproduce a work, without giving permission to publish or communicate the work. Similarly, a licence may give a publisher the right to publish the material only in Australia, or only until a certain date. However, in practice, most publishers will require that creators grant them full reproduction, publishing and communication rights, to ensure they are able to exploit the work commercially.

Exclusive licences

2.96 Under an exclusive licence the licensee (ie. the recipient of the licence) is the only person who can use the works in the way or ways covered by the licence (even to the exclusion of the copyright owner). An exclusive licensee can take remedial action, such as suing a third party for copyright infringement, as though he or she were the copyright owner in respect of the rights granted under the licence. As with assignments, exclusive licences must be in writing and signed by the copyright owner to be legally effective.

Non-exclusive licences

2.97 A non-exclusive licence merely provides the right to exercise one or more of the copyright owner’s rights in the work but not to the exclusion of the copyright owner or other licensees. Therefore, a copyright owner may grant multiple and simultaneous non-exclusive licences.

Example

The production company owning the copyright in a film may grant a student a non-exclusive right to reproduce more than a substantial part of the film in a multimedia work to be included in part of their film studies thesis, while at the same time granting a documentary film-maker the non-exclusive right to include excerpts of the footage in a particular documentary. The non-exclusive licence to the student may be provided free of charge (ie. on a ‘royalty-free’ / ‘fee-free’ basis), whereas the licence to the documentary film-maker may be based on the percentage of revenue generated from any sales of the documentary.

¹⁴⁹ S 196(3) *Copyright Act*,

Unlike assignments and exclusive licences, non-exclusive licences do not have to be in writing to be legally effective.

Implied licences

2.98 In some cases, permission from a copyright owner to use the copyright material may be implied by law. Whether there is an implied licence will depend on the circumstances. For example, a freelance writer who submits material for publication may impliedly licence the relevant media organisation to publish it, as without such an implied licence, the contractual arrangement between the writer and the media company may be ineffective.¹⁵⁰ However, it is often difficult to rely on an implied licence with any legal certainty, as the nature and scope of the licence and who can rely on it will always depend on the facts of a particular case.¹⁵¹

Statutory licences / compulsory licensing

2.99 The *Copyright Act* contains statutory licensing schemes which allow communication, reproduction or retransmission of material subject to the terms of the relevant part (usually including payment). Some of the more significant include the statutory licences for:

- the copying and communication of broadcasts by educational institutions and institutions assisting people with a disability¹⁵²
- the reproduction and communication of works by educational institutions and institutions assisting people with a disability¹⁵³
- the retransmission of free-to-air broadcasts¹⁵⁴
- the inclusion of a literary or dramatic work in a print disability radio broadcast¹⁵⁵
- the public performance of a sound recording¹⁵⁶
- use of copyright material for the services of the Crown¹⁵⁷.

The relevance of these licences for the university sector is explored in further detail, below.

¹⁵⁰ *De Garis v Neville Jeffres Pidler Pty Ltd* (1990) 189 IPR 292 at 303.

¹⁵¹ See further *Trumpet Software Pty Ltd v OzEmail Pty Ltd (Australia)* (1996) 34 IPR 481; *A&M Records Inc v Napster Inc* 239 F.3d 1004 (9th Cir. 2000); *Field v Google Inc* 412 F Supp 2d 1106 (District Court of Nevada, 2006).

¹⁵² Part VA *Copyright Act*.

¹⁵³ Part VB *Copyright Act*.

¹⁵⁴ Part VC *Copyright Act*.

¹⁵⁵ S 47A *Copyright Act*.

¹⁵⁶ S 108 *Copyright Act*.

¹⁵⁷ S 183 *Copyright Act*.

Collecting societies and statutory licences

2.100 Statutory licences give the copyright owner a right to be paid equitable remuneration through an approved collecting society. They thereby facilitate the making and communication of multiple reproductions of works for specified purposes, such as education and government use with minimal administration and transactional costs. Collecting societies collect licensing fees from those using these mass licences (eg. universities, schools, clubs and music venues) and distribute royalties for the use of their material to copyright owners.

Statutory licences for educational institutions

2.101 Parts VA and VB of the *Copyright Act* enable educational institutions to copy television and radio programs off-air and to reproduce and communicate print copyright works and electronic versions of literary, dramatic, artistic and musical works for educational purposes, in return for payment to declared collecting societies. Under both licences, remuneration is determined on the basis of a sampling system assessed on a per student per annum basis rather than an amount per copy. Such a system is designed to reduce the overall administration of the licence system.

2.102 In general, the provisions only allow a portion of a particular commercially available item to be copied and communicated. However, entire television and radio programs may be recorded whether or not they are commercially available.

2.103 The Copyright Agency Limited (CAL) and Screenrights are the declared collecting societies for copying of works and off-air recordings, respectively. The amount of remuneration payable for such copying is negotiated between the institution and the collecting society or determined by the Copyright Tribunal.

11. Enforcing copyright – other issues

Technological protection of copyright material

2.104 Digital technology has made it possible to easily reproduce and communicate copyright material in near perfect form. Copyright owners have, therefore, sought—as an alternative to traditional forms of legal protection—to rely on technology to prevent others from using their work without their permission. These technologies can be in the form of technological protection measures (TPMs) which include access codes (eg. password protection) and copy control measures (eg. encryption), or digital rights management systems, which describe, identify, track and monitor digital materials.

Legal protection for technological protection measures

2.105 In general terms, TPMs are software, components and other devices that copyright owners use to protect copyright material. Examples of TPMs include encryption of software, passwords and access codes.

2.106 Section 10(1) of the *Copyright Act* defines a ‘technological protection measure’ as:

A device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject matter by either or both of the following means:

(a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or other subject matter) with the creator of the owner or licensee of the copyright;

(b) through a copy control mechanism.¹⁵⁸

2.107 This definition provides for two main types of TPMs: access control TPMs and copy control TPMs. While an access control TPM will block access generally (not only access that is unlawful), a copy control TPM will only operate at the point where there is an attempt to do an act which is protected by copyright (eg. to make an unauthorised copy of the material). Common uses of TPMs include copy-control protection for compact discs, encryption for DVDs, software protected by passwords and registration codes.¹⁵⁹ In practice some copyright owners bundle access and copy control mechanisms together into one mechanism.

Circumvention devices and services

2.108 The TPMs used by copyright owners seeking to protect their work from unauthorised access can often be disabled or circumvented, such as through the use of computer programs or devices such as microchips. Australian domestic copyright law provides legal protection against the circumvention of TPMs. It is a civil infringement and/or a criminal offence (the level of liability depending on the circumstances of the infringement) under sections 116A and 132(5A)-(5B) of the *Copyright Act* to deal in circumvention devices, including the making, importing, selling, distribution (including online) and promotion of circumvention devices and services. The Act also contains a set of exceptions which allow the circumvention of TPMs for certain permitted purposes (eg. security testing or error correction).

2.109 Australia has given undertakings in the AUSFTA which will result in the current provisions being strengthened to more closely resemble those in the US. This includes a commitment to introducing sanctions against circumventing a TPM to gain access to a copyright work and limiting the exceptions for circumvention. Australia has two years from the entry into force of the AUSFTA (1 Jan 2005) to implement these amendments.

2.110 The AUSFTA requires, in particular, that Australia impose civil and criminal liability in relation to (i) acts of circumvention of TPMs which prevent access to copyright protected material; (ii) dealings with devices and services that may be used to circumvent TPMs by restricting access to copyright protected material; and (iii) dealings with devices and services that circumvent TPMs which protect copyright by

¹⁵⁸ S 10(1) *Copyright Act*.

¹⁵⁹ Matthew Rimmer, ‘Robbery under arms: copyright law and the Australia-United States Free Trade Agreement’ (2006) *First Monday* at 13
<http://www.firstmonday.dk/ISSUES/issue11_3/rimmer/index.html> at 22 July 2006.

means other than by restricting access to the copyright protected material (eg. copy controls). This represents a departure from Australia's current TPM scheme in a number of ways (for example, Australia does not prohibit the act of circumvention) and will significantly increase the protection provided to TPMs under Australian law.

Exceptions to the legal protection of Technological Protection Measures

2.111 The current exceptions to the TPM provisions are designed to provide an important means of maintaining the copyright balance in the digital environment and to ensure that TPMs can be circumvented for lawful activity or in order to facilitate the use of copyright material for important public purposes such as education and research. A 'permitted purpose' includes something done under the following provisions:

- reproducing computer programs to make interoperable products (s47D), to correct errors (s 47E) and for security testing (s 47F)
- reproducing and communicating works by other libraries for users (s 49)
- reproducing and communicating works for other libraries or archives (s 50)
- reproducing and communicating works for preservation (s 51A)
- use of copyright material for the services of the Crown (s 183)
- reproduction and communication by educational institutions and institutions assisting persons with a print or intellectual disability under Part VB.

2.112 With the implementation of the AUSFTA, these permitted purposes are to be replaced with a narrower set of exceptions based on those that are currently used in the US. These will include a right to circumvent or deal with a TPM for the purposes of or related to:

- reverse engineering for the purposes of achieving interoperability
- security testing of encryption technology
- parental control locks
- security testing of computers/networks
- privacy issues
- law enforcement and national security
- acquisition decisions by libraries.

2.113 Article 17.4.7(e)(viii) of the AUSFTA also allows both nations to determine specific exceptions to TPM liability which would be appropriate for Australia to create in addition to the above areas where circumvention would be permitted. However, the AUSFTA specifically requires that any such exception must address a credibly demonstrated actual or likely adverse effect on infringing use.

LACA Committee Review

2.114 The House of Representatives Standing Committee on Legal and Constitutional Affairs¹⁶⁰ (hereinafter the LACA Committee) were asked by the Government in 2005 to conduct an independent inquiry into whether any further exemptions to the TPM provisions should be considered by the Government (LACA TPM Review).¹⁶¹ The Committee, while not asked to propose any new definition of ‘effective technological measure’ (ETM), noted that a broad definition would supersede the High Court’s decision in *Stevens v Sony*.¹⁶²

2.115 The Committee made a number of recommendations regarding the scope of the new TPM provisions. These included a recommendation that the definition of TPM ‘clearly require a direct link between access control and copyright protection’¹⁶³ (this is not necessarily the case under current US law). The Committee also recommended that region coding TPMs (such as are currently included in some computer games and DVDs) ‘be specifically excluded from the definition of ‘effective technological measure’¹⁶⁴ or, alternatively, that exceptions be granted for the circumvention of region coding TPMs wherever the criteria under Article 17.4.7(e)(viii) are met.¹⁶⁵ The Committee made further recommendations regarding exceptions for TPMs in relation to a range of activities — including fair dealing, library and archive exceptions, the use of copyright material by educational intuitions, security testing and reverse engineering.¹⁶⁶

2.116 As the Government has yet to implement the TPM provisions or respond to the Committee’s recommendations, there is uncertainty as to what extent the Government will seek to tailor the provisions to soften the impact of the new AUSFTA-related TPM provisions on access to knowledge.

Electronic rights management information

2.117 Like a TPM, Electronic Rights Management Information (ERMI) is another technological mechanism copyright owners are increasingly using to protect their copyright material against unauthorised use often in combination with a TPM. ERMI allows digital copyright material to be described, identified, monitored and tracked and potentially enables a copyright owner to monitor every access and use of their copyright material. ERMI typically includes details about the copyright owner, and terms and conditions of use of the copyright material and is specified in the *Copyright Act* as information that relates to a copy of a work or other subject-matter, or any numbers or codes which represent such information electronically.¹⁶⁷ This would include, for example, technology such as digital watermarks.

¹⁶⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Review of Technological Protection Measures Exceptions* (2006) at 8 (hereinafter LACA Committee) <<http://www.aph.gov.au/house/committee/laca/protection/report.htm>> at 22 July 2006.

¹⁶¹ LACA Committee, xiii.

¹⁶² LACA Committee, 11.

¹⁶³ LACA Committee, 26.

¹⁶⁴ LACA Committee, 48.

¹⁶⁵ LACA Committee, 48.

¹⁶⁶ LACA Committee, Chapter 6.

¹⁶⁷ S 10 *Copyright Act*.

2.118 Following amendments to the *Copyright Act* implementing Australia's obligations under the AUSFTA, legal protection for ERMI has been broadened. Prior to the AUSFTA amendments penalties only applied to the unauthorised removal or alteration of ERMI which was *attached to a copy of a copyright work or other subject matter*. Civil remedies and criminal offences now apply to the unauthorised removal or alteration of ERMI that is separate from, but *appears in connection with* (eg. near or in conjunction with), or has at some point in time appeared in connection with, a copy of the work or other subject-matter.¹⁶⁸ This is of particular relevance to libraries and teachers reproducing or distributing electronic material, as they must take extra care to ensure that any ERMI associated with the material is also reproduced or distributed, even where that material is not attached to the document.

Orphan works

2.119 Given the lack of formalities or a registration system for the subsistence of copyright in Australia, it is often difficult to identify or locate a copyright owner within a reasonable timeframe for permission to use their material. If the material is old, unpublished (such as manuscripts), created by an anonymous author (eg. unattributed photographs) or where the copyright owner has passed away or no longer exists (eg. a publishing company who may have gone out of business) – there may be uncertainty as to whether the copyright has been passed to heirs or separately transferred (ie. assigned) to a third party.

2.120 These types of material are commonly referred to as 'orphan works' and are particularly problematic for researchers in the social sciences and humanities, as they may not be able to rely on exceptions or statutory licences to reproduce an entire work (such as primary sources like historical letters and documents) simply because they are unable to locate the current copyright owner/s.

2.121 However, it is not only older material where there are difficulties in locating copyright owners. Computer software and related technology can become obsolete and unsupported after only a few years and many computer companies quickly become defunct. This impacts on the ability of lecturers in IT courses (such as computer programming and games courses) to use old computer software as examples for students.

2.122 There are currently no provisions or exceptions in the Australian *Copyright Act* dealing with orphan works. The Australian Government announced in February 2006 its intention to conduct an inquiry into the issue of orphan works, largely in response to the issue being independently raised by a range of copyright interest groups from the cultural institutions, education and university sectors in submissions

¹⁶⁸ Ss116B(1)(a)-(1)(b) and 132(5C)-(5DA) *Copyright Act*. See also Attorney-General's Department Fact Sheet: *US Free Trade Agreement Implementation Act 2004 Electronic Rights Management Information*
<<http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWPAA49D50024C4B717CA257067001693FA>> at 22 July 2006.

to the Government's review of fair use and other copyright exceptions (May 2005).¹⁶⁹ Submissions from the university sector generally supported a specific exception to copyright infringement for orphan works provided that a potential user be required to go through a process of reasonable enquiry to locate the owners in order to rely on any defence/exception that is introduced into the *Copyright Act*. Arguments in support of an exception generally focused on the need for the exception to facilitate open access to knowledge to balance the public interests of users against the exclusive rights of copyright owners and to facilitate the creation of a rich public domain of resources to promote further creativity and innovation by future copyright owners.

2.123 For example, on the issue of orphan works the Australian Vice Chancellor's Committee (AVCC) noted that:

Simply, the current copyright regime effectively 'locks up' such material for not good reason and represents a clear failure in providing a balance between the interests of owners and users of copyright material.¹⁷⁰

12. Rights related to copyright

Overview of the rights related to copyright

2.124 As mentioned in para 2.52, in addition to the traditional economic rights discussed at paras 2.50–2.52, the *Copyright Act* also provides for certain personal rights such as moral rights and performers' rights. These rights are not 'copyrights' as such, but are rather called 'related rights'. As these are personal rights they can not be assigned, but they can be exercised by the legal personal representatives of the creator.

Performers' rights under Part XIA

2.125 In addition to the joint ownership of copyright in sound recordings discussed in para 2.40–2.43, Part XIA of the *Copyright Act* also gives performers limited personal rights in relation to their live audio performances (eg. musical or dramatic performance; speech or recitation or improvisation of a literary work).¹⁷¹ These rights co-exist with any standard copyright rights that exist in any recording of the performance (eg. on film or tape). They are commonly referred to as 'bootleg rights' because they are generally used to stop the making or distribution of unauthorised bootleg recordings of a performance.

2.126 The basic rights extended to performers are:

- the right to prevent the making of an unauthorised recording or communication of a live performance

¹⁶⁹ Attorney-General's Department, *Fair Use and Other Copyright Exceptions - An examination of fair use, fair dealing and other exceptions in the Digital Agenda* (2006).

<http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Publications_2005_Copyright_Review_of_Fair_Use_exception> at 22 July 2006.

¹⁷⁰ Ibid., submission # 152, 15.

¹⁷¹ Part XIA *Copyright Act*.

- the right to prevent others from making copies of an unauthorised recording of their performance, where the person knew or ought reasonable to have known that it was an unauthorised recording
- The right to prevent others from causing an unauthorised recording of their performance to be seen or heard in public, where the person knew or ought reasonable to have known that it was an unauthorised recording
- the right to prevent a recording of their performance (even an authorised recording) from being used in the soundtrack of a film.

This means that you must have permission from each of the performers involved before you can do any of these acts.

2.127 The rights only apply to audio performances (as opposed to performances that are purely visual, such as mime shows) that took place on or after 1 October 1989. The rights to prevent the recording of a performance, or the reproduction or performance of that recording, generally last for 50 years from the date of making the performance. The rights to prevent the communication of the performance or its use in the soundtrack of a film last for 20 years from the date of making the recording.¹⁷²

2.128 As personal as opposed to economic rights, Part XIA performers' rights simply extend to the right to grant or refuse consent to the restricted acts and do not extend to a right to claim a share of any economic returns on performances. They cannot be assigned (given away to another), licensed, bequeathed or otherwise transferred, although they may be exercised by to the performer's legal representative if the performer dies before they expire.

Moral rights

2.129 Aside from the economic rights referred to above, the *Copyright Act* also provides creators with personal rights known as moral rights. As outlined in para 2.05, in many cases the creator of a work is not necessarily the owner of copyright in the work. As such, they will not have any economic rights over the material, but they will still retain their moral rights.

2.130 The *Copyright Act* recognises that individual creators of literary, dramatic, musical and artistic works and films¹⁷³ have the following moral rights in relation to works or films they have created:

- the right to be attributed (or credited) for their work
- the right not to have their work falsely attributed
- the right not to have their work treated in a derogatory way.

These moral rights were introduced by the *Copyright Amendment (Moral Rights) Copyright Act 2000* (Cth) in December 2000, and apply to all copyright materials made before or after this date.

¹⁷² Ss 248G(1) and 248G(2) *Copyright Act*.

¹⁷³ In relation to a film, the director, producer and screenwriter all separately own moral rights in relation to a film and where there are multiple directors etc. it is only the principal director, screenwriter and producer who hold moral rights.

2.131 Moral rights are historically derived from the French concept ‘droit moral’ and the idea that a created work is seen as an extension of the creator’s personality. Therefore, unlike economic rights, moral rights are ‘personal’ rights which can only be held by individuals and not companies or other entities and cannot be assigned (given away to another), licensed, bequeathed or otherwise transferred. However, they can be waived in certain circumstances (see discussion of moral rights consent, below).

2.132 While they cannot be bequeathed, given that the duration of moral rights in a work is generally the same as for copyright in the work¹⁷⁴ they can outlast the author. Therefore, when an author dies his or her moral rights may be exercised by his or her personal legal representative.¹⁷⁵

2.133 Moral rights will not be infringed where only an insubstantial part of a work is being reproduced¹⁷⁶. Furthermore, the rights of attribution and integrity will not be infringed where a person’s conduct was ‘reasonable in the circumstances’¹⁷⁷ (note that this exception does not apply to the right of false attribution). Factors the courts will consider in assessing the reasonableness of the infringing conduct include the nature of the work; the purposes for which the work is used; the manner and context of the use; and any practice within the industry that is relevant to the work or the use of the work. For example, while it may not be reasonable to attribute the author of a bus schedule, moral rights are likely to be infringed by the failure to identify an author of an article published in an academic journal.

2.134 It is also possible to obtain the consent of a moral rights holder to use their creations in a way which would otherwise infringe their moral rights. This is particularly useful in relation to the creative arts, where it may be practically difficult to attribute all creators in a multi-media work and where the re-use and juxtaposition of their creations in a new work could potentially breach their moral right of integrity. However, the consent must relate to a specific act or class of acts (eg. the publication of the work, or its inclusion in a derivative work). The only time a general consent can be granted is when the material was created as part of the creator’s employment. In this case, the employer can obtain a general consent to deal with the work as they require.

2.135 There are a wide range of remedies a court can award for infringement of moral rights, including:

- an injunction (subject to terms as the court thinks fit)
- damages for loss resulting from the infringement
- a declaration that a moral right has been infringed
- an order that the defendant make a public apology for the infringement

¹⁷⁴ S 195AM(2), (3) *Copyright Act*- except the right of integrity in a film which continues in force until the author dies.

¹⁷⁵ S 195AN(1) *Copyright Act*.

¹⁷⁶ S 195AZH *Copyright Act*.

¹⁷⁷ Ss 195 AR and AS *Copyright Act*.

- an order that any false attribution of authorship or derogatory treatment of the work be removed or reversed.

2.136 It is important to note that to date there have been no actual cases of moral rights infringements brought before the Australian courts, although there have been a range of out of court settlements. As a result, the actual scope of moral rights under Australian law and the circumstances in which they will be infringed is still unclear. This reflects the position internationally, where the application of the rights and their adaptability to the digital era remains an issue. It is notable that, although moral rights are prescribed by Article 6bis(1) of the *Berne Convention for the Protection of Literary and Artistic Works* (1886) (Berne Convention), subsequent international copyright treaties, whilst giving effect to almost all the other Berne Convention rights, expressly exclude moral rights.

2.137 It is established practice in the research sector to attribute authors whose works are quoted or used in theses, articles, papers etc. However, with the growth of multimedia works and the popularity of pastiche and remixing in the visual arts, music and film genres and the ease with which this can be done in the digital environment, issues around protecting the moral right of integrity in a work are becoming more relevant to the research sector.

New moral rights for performers

2.138 The AUSFTA required Australia to amend the *Copyright Act* to introduce new moral rights for performers in live aural performances and performances captured in sound recordings. These amendments have yet to come into effect and are expected to do so later this year, once Australia accedes to the *World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty* (a major international copyright treaty).

2.139 The new provisions provide performers with personal (non-economic) rights, requiring them to be attributed in relation to their performance and providing them with the right to take legal action if their performance is dealt with in a derogatory manner. These amendments largely mirror the existing moral rights regime for works and films.

13. Conclusion

2.140 This aim of this chapter has been to provide an up-to-date overview of basic copyright law principles as a platform for understanding issues discussed in the Chapters that follow. It is important to remember that providing better access to research through best practice copyright management can only be achieved by appreciating and understanding the scope and limitations of copyright law.

Chapter 3

Copyright and the protection of databases

Introduction

3.01 Data in a raw or compiled form is very much the building block of research. Therefore, it is critical to understand the way in which the law, particularly copyright law, protects data gathering and compilation as an act of intellectual or physical effort.

3.02 As a general principle copyright law protects the expression of an idea not the idea itself. To this end data, without more, is not protected by copyright law. The compilation of data however, is protected to varying degrees by copyright law in different jurisdiction throughout the world. In the United States (US) and the European Union (EU) data compilation — selection and arrangement of the data — is protected where there is an element of intellectual creation. The mere arrangement of names in alphabetical order in a phone book is probably not sufficient to found copyright protection in Europe or the US. However, the EU has now introduced a *sui generis* (of its own kind) legal right, known as a database right, that protects the effort given to compiling a database — albeit only for 15 years. In Australia, recent case law confirms that copyright law will protect the compilation of a database even where the intellectual effort is very low or non existent.

3.03 To promote better understanding of the chapters that follow and the policy issues facing access to data this chapter highlights the key copyright issues concerning databases including an analysis of International, Australian, EU and US law.

1. Three key issues concerning data and research

3.04 In developing systems designed to promote open access to knowledge in the Australian academic and research sector, three fundamental issues arise in relation to databases created or used by academics and researchers. These issues are:

- whether databases are protected by copyright
- whether third party copyright is affected by making a database available to the public
- the type of legal or technological measures that can be used to protect a database.

Whether databases are protected by copyright

3.05 The first legal issue to arise is whether the material contained in the database is capable of being protected by copyright. The copyright issue is important because if the database is protected by copyright then the database compiler has a variety of rights with which to control the use of the material in the database.

Third party content

3.06 The second legal issue to arise is in relation to third party content. When researchers develop databases containing information from a range of sources, copyright in some of the materials selected for inclusion will belong to third parties (eg. commercial publishers, governments, individual authors and research institutes). The researcher may be legally entitled to use the material in this way, whether through the operation of general principles of copyright law (notably, fair dealing for purposes of research or study and the substantiality rule), pursuant to the express terms of a contractual licence or under an implied licence. However, when the researcher makes the database available for access by other researchers, it will be necessary to ensure that the researcher has the legal authority to do so, either under a recognised exception or through a licence. Where a licence is relied upon it is necessary to ensure that the permissions obtained from the third party owners of copyright material included in the database are sufficient to permit the researcher to authorise other persons to use the material in the way in which the database compiler and database users wish to use the material.

Protection mechanism

3.07 The third legal issue is the choice of mechanisms that the database compiler chooses to rely upon in protecting the database. Copyright, with the bundle of property-type rights that it provides, is an attractive option if it is available to the database compiler especially as it is applicable to the world at large. However, copyright law in Australia is governed by the *Copyright Act 1968* (Cth) (*Copyright Act*)¹⁷⁸ which provides for some limitations to the exclusive rights of copyright owners. The ability of the database compiler to control the use of material through copyright may be affected by exceptions to copyright infringement such as fair dealing. Fair dealing is discussed in Chapter 2 and will be considered again below. If these exceptions apply they would allow users to make certain uses of the database material. Contract is the other legal mechanism that would be available to database compilers. It is unclear as to whether contractual obligations can oust the operation of the fair dealing exceptions.¹⁷⁹ Another legal measure that can be used to protect databases is the employment of technological protection measures (TPMs). TPMs can be used to regulate the access and usage of a database. However, TPMs are highly controversial and at this stage, Australia's laws relating to TPMs are likely to change as Australia implements its obligations under the AUSFTA.¹⁸⁰

2. International intellectual property conventions relevant to databases

3.08 The convenient starting point for any discussion of database law is with international law where there is protection for databases under the international intellectual property (IP) treaties and conventions. However, it should be noted that the enforcement of the treaties is dependant upon the member states legislating to do

¹⁷⁸ <www.ag.gov.au> at 22 July 2006.

¹⁷⁹ CLRC, *Copyright and Contract*.

¹⁸⁰ <http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html> at 22 July 2006.

so and that none of the treaty rights can be directly enforced by database compilers in Australia, unless such national legislation exists. Furthermore, the legal standards set by the treaties allow member states considerable latitude with respect to the implementation of the treaty into domestic law. The corner-stone of international copyright treaties is the *Berne Convention for the Protection of Literary and Works* (Berne Convention).¹⁸¹ Under Article 2 of the Berne Convention it is possible that databases could be protected as literary works, although the requirements for meeting the standard for protection, especially in terms of the level of originality, are allowed to vary between member states.

3.09 As explained in Chapter 2 (para 2.08), a more recent copyright treaty is the WCT.¹⁸² Article 5 of the WCT deals with databases and provides some degree of protection. Article 5 states:

Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

3.10 Similar protection can be found in the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).¹⁸³ The TRIPS Agreement is a central part of the World Trade Organisation treaties and can be enforced via the World Trade Organisation (WTO) Dispute Settlement System. Article 10(2) of the TRIPS Agreement requires that copyright protection be extended to ‘compilations of data or other material...which by reason of the selection or arrangement of their contents constitute intellectual creations.’ Australia’s main bilateral trade agreement, Chapter 17 of the AUSFTA, which is also linked to the WTO Dispute Settlement System, imposes no substantive obligations in this area (implicitly acknowledging the higher standard of protection already recognised in Australian law as a result of decided cases).¹⁸⁴

3.11 A proposal for a treaty on databases (the Draft Treaty) was advanced at the same time that the WCT and the WIPO Performances and Phonograms Treaty were being considered. The Draft Treaty failed to proceed due to substantial opposition from developing countries. The substance of the treaty related to *sui generis* or unique treatment of databases. The Draft Treaty was in essence a version of the European Parliament and Council’s Directive on the Legal Protection of Databases (EU Database Directive) which is discussed below. The EU and the US differed on the requisite duration of protection to be offered proposing fifteen years and twenty-five years respectively. At this stage it appears unlikely that any database treaty will eventuate in the near future.

¹⁸¹ <<http://www.wipo.int/treaties/en/ip/berne/index.html>> at 22 July 2006.

¹⁸² <<http://www.wipo.int/treaties/en/ip/wct/index.html>> at 22 July 2006.

¹⁸³ <http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> at 22 July 2006.

¹⁸⁴ *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112.

3. The protection of databases under Australian copyright law

3.12 In considering Australian law the first question that needs to be addressed is whether copyright can extend to databases. Copyright law in Australia has certain features which make it a suitable form of protection for databases. These include:

- The lower originality threshold to be met in order to attract copyright protection under Australian law, with the result that a much wider range of informational databases are protected in Australia than is the case in other jurisdictions
- Extensions to Australian copyright law required by the AUSFTA will give copyright owners the right to prevent the removal or circumvention of technological protection measures applied to their copyright materials (including databases) to restrict or limit access to those materials
- The broad scope of protection and the narrow focus of exceptions such as fair dealing.

Low originality threshold

3.13 It is an established principle of copyright law that protection does not extend to mere facts.¹⁸⁵ It is also well-established that a fundamental prerequisite for copyright protection is that the material is sufficiently original.¹⁸⁶ These principles are of particular relevance to the legal protection of databases. While databases will often contain facts, which do not, in themselves, attract copyright protection, they may attract copyright protection if the creation of the database has involved sufficient expenditure of time, money, skill or effort to satisfy the threshold level of originality.

The Desktop Marketing case

3.14 The decision of the Full Court of the Federal Court in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited*¹⁸⁷ (*Desktop Marketing*) illustrates the legal issues surrounding database protection in Australia. It also places Australian copyright law at odds with the law of the United States. However, with regard to the legal concerns of researchers and universities, *Desktop Marketing* does provide certainty on the issue of the availability of copyright protection for informational databases.

3.15 In *Desktop Marketing*, the appellant, Desktop Marketing Systems Pty Ltd (Desktop) had produced CD versions of Telstra Corporation Limited's (Telstra) White and Yellow Page directories whilst adding its own features through search options by postcode address and reverse phone numbers. Telstra sued for copyright infringement in the White and Yellow Page telephone directories. In response Desktop argued that there could be no copyright in the directories because they did not satisfy the threshold requirement for protection under s 32 of the *Copyright Act*.

¹⁸⁵ *Hollinrake v Truswell* [1894] 3 Ch 420.

¹⁸⁶ S 32 *Copyright Act*.

¹⁸⁷ [2002] FCAFC 112.

3.16 The case was initially heard by a single judge of the Federal Court of Australia. At first instance, Finklestein J held in favour of Telstra, finding that previous court decisions established that for compilations, the originality element could be satisfied through industriousness or sweat of the brow rather than through intellectual input or great creativity.¹⁸⁸ Desktop appealed Finklestein J's decision to the Full Court of the Federal Court. The issue was whether data collected and arranged in an obvious and routine manner could be protected under copyright law.

3.17 The Full Court held that Telstra had expended sufficient effort and expense in creating the directories to satisfy the originality requirement. The key points emerging from the opinions of Sackville and Lindgren JJ (Black CJ substantially agreeing) are highly favourable to compilers of databases.

Key Principles

Lindgren J's statement of the key principles provides:

authorship (and its corollary, originality) does not require novelty, inventiveness or creativity, whether of thought or expression, or any form of literary merit

the test of originality must be applied to the entire literary work (including a compilation) in which copyright is claimed to exist, rather than dissecting the work and applying the test to its component parts

it is not the law that where there is only one way of expressing and arranging a whole of universe factual compilation, the compilation cannot attract copyright protection

there is no principle that the labour and expense of collecting, verifying, recording and assembling (albeit routinely) data to be compiled are irrelevant to, or are incapable of themselves establishing, ... originality; on the contrary the authorities strongly suggest that labour of that kind may do so.¹⁸⁹

Sackville J's statement of the key principles explains:

(i) A compilation will ordinarily be an original literary work for copyright purposes if the compiler has exercised skill, judgment or knowledge in selecting the material for inclusion in the compilation (as with a collection of commentaries) or in presenting or arranging the material (as with the births and deaths column in *John Fairfax v ACP*.)

(ii) In addition, a compilation of factual information will ordinarily be an **original** literary work for copyright purposes if the compiler has undertaken substantial labour or incurred substantial expense in collecting the information recorded in the compilation.

(iii) In order for copyright to subsist in a factual compilation, on the basis of the labour or expense required to collect the information, the compiler must show that the labour or expense exceeds a minimum threshold (*Cramp v Smythson*; *Victoria Park v Taylor*). Various formulations have been advanced to describe the threshold requirement (see *Kalamazoo v Compact Business Systems* (1985) 84 FLR 101, at 120ff, per Thomas J), but it is not necessary to pursue the issue further in this case. In this sense, the question of whether a factual compilation is original is a matter of fact

¹⁸⁸ *Telstra Corporation Limited v Desktop Marketing Systems Pty Ltd* [2001] FCA 612 at [84]-[85].

¹⁸⁹ *Ibid* at [223].

and degree (cf. *Ladbroke v William Hill*).

(iv) In assessing whether a factual compilation is an original work, the labour or expense required to collect the information can be taken into account regardless of whether the labour or expense was directly related to the preparation or presentation of the compilation in material form, provided it was for the purpose of producing the compilations (*Football League v Littlewoods*; *Ladbroke v William Hill*).

(v) Copyright in a factual compilation will be infringed only where the alleged infringer takes a substantial part of the copyright work. Substantiality is to be determined by reference to the originality of that part of the work taken by the alleged infringer (*Data Access v Powerflex*). Where originality in a factual compilation is found, in whole or in part, in the compiler's labour or expense required to collect the information, infringement depends on the extent to which the collected information has been appropriated by the alleged infringer. To this extent, too, the issue of infringement may involve matters of fact and degree.

(vi) These principles apply to "whole of universe" compilations.¹⁹⁰

In upholding the trial judge's decision that infringement had occurred Lindgren J explained that:

Infringement

.....I have noted earlier that the well-known dichotomy in respect of literary works between form (copyrightable) and fact or idea (non-copyrightable) (cf. *Jefferys v Boosey* (1854) 4 HLC 815 at 867 (10 ER 681 at 702); *Hollinrake v Truswell* at 427; *Hanfstaengl v HR Baines & Co Ltd* [1895] AC 20 at 26-27; *Blackie & Sons Ltd v Lothian Book Publishing Co Pty Ltd* (1921) 29 CLR 396 at 400; *Smith's Newspapers* at 596-597; *Victoria Park* at 498, 511; *Computer Edge* at 181; *Autodesk Inc v Dyason* (1992) 173 CLR 330 at 344-345) can be problematical. The infringement issue in the present case illustrates this. In one sense, Desktop did take Telstra's form: it accurately reproduced all the individual names, addresses, telephone numbers and business descriptions, more or less as they individually appeared in the Directories. In another sense it did not do so: it did not reproduce Telstra's alphabetical arrangement. Moreover, in one sense Desktop took ideas: it took the ideas denoted by names, addresses, telephone numbers and business descriptions. In another sense it did not do so: it did not take the idea of alphabetical arrangement.

Be this as it may, as was seen earlier, form was not important in the attraction of copyright protection in the present case. The use of the well-known alphabetical arrangement was predictable, indeed inevitable. Comparatively, little work went into the alphabetisation of the entries (as opposed to the considerable labour involved in gathering and checking the data): see [240] below. **As will appear below, in my opinion, at least in the case of a factual compilation intended to be a work of utility, infringement must be tested by reference to the interest which copyright**

¹⁹⁰ Ibid at [409].

is intended to protect in the particular case. In the present case, that interest was the labour and expense of gathering together in the one place the details of all the members of a given universe all the telephone subscribers in a region.

The element of sufficient objective resemblance can also give rise to difficulty. Objective resemblance has two potential roles. First, it can, in appropriate circumstances, give rise to an inference of actual copying. The House of Lords recently pointed out in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] FSR 113, a case concerning an artistic work, that once actual copying is proved or admitted, attention must be focused on the simple question whether what is proved or admitted to have been taken from the copyright work was the whole or a substantial part of that work. In my view, this approach, which has been followed in Australia in relation to an artistic work (see *Vella v Cummins* (2001) 53 IPR 538), is also generally applicable to literary works (cf. *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2001] 3 All ER 977 at 983-984). But this leaves outstanding a question as to the second role of objective resemblance. Ordinarily, reproduction (production again) requires some degree of objective resemblance between the copyright work and the alleged infringing work. Does this requirement apply, and if so how, in the case of copyright compilations of factual information? Does reproduction in such a case require visual resemblance? The copyright compilations here were in the form of alphabetical lists. Does reproduction of them require arrangement in the form of alphabetical listings?.....¹⁹¹ (emphasis added)

.....The relevant principle is that where copyright protection is attracted to a compilation of factual information by the labour of collecting, verifying, recording and assembling the data and not by reference to the form of the compilation, reproduction does not require formal resemblance, and the notion of a substantial part of the compilation is not defined by reference to its form.¹⁹²

The respective judgments of Lindgren J and Sackville J provide a clear message that the question of infringement in cases concerning factual compilations (databases) that rely on 'sweat of the brow' rather than creativity for copyright protection will need to be assessed in light of the labour and expense invested in compiling the database.

Desktop's appeal to the High Court

3.18 Desktop applied for special leave to appeal the decision to the High Court of Australia. The application was heard on 20 June 2003.¹⁹³ Desktop argued that the Full Court erred in applying the industrious collection test which states that copyright can subsist in a factual compilation on the basis of labour undertaken or expense incurred. They argued that for a work to be considered original under Australian copyright law, an element of creativity is necessary.

3.19 Special leave to appeal the decision of the Full Federal Court was refused.

¹⁹¹ Ibid at [224]-[228].

¹⁹² Ibid at [238].

¹⁹³ *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* M85/2002 (20 June 2003).

For a transcript of the application proceedings see

<<http://www.austlii.edu.au/au/other/hca/transcripts/2002/M85/1.html>> at 22 July 2006.

3.20 The case of *Desktop Marketing* is useful in that it deals with the issue of whether copyright can protect databases and resolves this question in the affirmative. However, it does not touch on the issue of third party content because this issue was not relevant to the case. Further, it must be a decision for the database compilers as to which legal or technological mechanism/s they seek to rely upon in protecting their databases, namely: contract, technological protection measures or general copyright law.

Use of technological protection measures to control access to databases

3.21 Technological protection measures (TPMs) are components or devices that copyright owners use to limit access to their works and to regulate copying. That is, a TPM may be employed by a copyright owner to protect copyright by limiting access to material to only those with the appropriate authority to access the material. Similarly, copy controls can prevent unauthorized copying once lawful access has been obtained. Pursuant to the AUSFTA, Australia is currently engaged in the process of updating its laws on TPMs. Further consideration of this issue should be undertaken in light of the actual amendments which must be introduced by 1 January 2007. It can be expected that use of TPMs to protect databases will continue to grow. Potentially this will result in greater control over the database which will have a variety of impacts on exploitation and use.

Licensing and contract

3.22 One of the options open to safeguard liabilities with respect of databases is to require database users to comply with certain terms of use.¹⁹⁴ This can be achieved either through reliance on contract or licensing. A contract is a binding agreement between two or more parties for the performance, or non-performance, of some specified act(s) in exchange for lawful consideration. The term lawful consideration can refer to money or some other service or exchange of goods. A licence is a legal permission to do certain acts. Generally, a licence or contract will allow the database compiler to clearly set out the terms of use of the database. Similarly, a licence or contract will allow a third party copyright holder to give permissions or set restraints upon a database compiler in relation to the use of the third party copyright. In summary, licences and contracts are useful in that they set out the clear consents to certain uses.

3.23 Some of the problems that may arise in relation to licensing and contract may occur if there are no such agreements in place at the time when the database becomes available to the public. The database compiler needs to consider these issues before allowing access.

3.24 Another difficulty may be that the copyright owner is unidentifiable or untraceable. In copyright law a work whose owner cannot be located or identified is

¹⁹⁴ For a general discussion of licensing issues see further Emily Hudson, *Cultural Institutions, Law and Indigenous Knowledge: A Legal Primer on the Management of Australian Indigenous Collections* (2006) IPRIA at <<http://www.law.unimelb.edu.au/ipria/publications/Reports/Legal%20Primer.pdf>> at 27 July 2006.

referred to as an orphan work. The Australian Government is currently preparing to undertake an inquiry into the problem of orphan works.

3.25 Where there is no express agreement in place there could be further uncertainty as the issue of an implied licence to use may arise. An implied licence arises where there is no express agreement but the circumstances are such as to give rise to a presumption that permission has been given to commit an act. The implied licence can apply in relation to the use of third party copyright by the database compiler. It can also arise in relation to the use of the database by a lawful database user. However, it is difficult to predict when the court will uphold the notion of an implied licence.¹⁹⁵ The case of *Field v Google*¹⁹⁶ illustrates the issue of implied licences. In *Field v Google* the failure of Field to include a 'no archive' meta tag on his website and his knowledge of Google's caching policy gave rise to an implied licence for Google to allow access to his web pages via cached links. Regardless of this decision, it is advisable that a database compiler seek the appropriate permissions for use of third party copyright and also clearly set out the terms of use of the database.

Broad scope of protection and narrowly focussed exceptions to infringement

3.26 As explained above in relation to the *Desktop Marketing* decision the effect of copyright law in relation to databases is to give a very broad scope for protection which, contrary to the old adage that copyright protects expression not the idea, is tantamount in many instances to protecting facts as through they were copyright. Combined with this is the situation that the primary exceptions to copyright infringement relied upon by general users, namely, the fair dealing exceptions (discussed in section 8 of Chapter 2) are very narrowly defined. In general, fair dealing is available as an exception to copyright infringement for the purposes of research and study, reporting the news, criticism or review, judicial proceedings and legal advice. However, it is unclear as to whether research would extend to commercial research.¹⁹⁷ The Australian Government has just completed an inquiry into fair use and other copyright exceptions, which will lead to amendments to Australia's fair dealing laws and the outcomes of this inquiry may be of relevance to copyright exceptions as they apply to databases.¹⁹⁸

¹⁹⁵ See further *Gold Peg International Pty Ltd v Kovan Engineering (Aust) Pty Ltd* [2005] FCA 1521 (28 October 2005). See also *Trumpet Software Pty Ltd & Anor v OzEmail Pty Ltd & Ors* [1996] 560 FCA 1 (10 July 1996).

¹⁹⁶ 412 F.Supp 2d 1106.

¹⁹⁷ See Copyright Law Review Committee, *Simplification of the Copyright Act Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998) at 37 <www.clrc.gov.au> at 22 July 2006; Australian Law Reform Commission, *Genes and Ingenuity: Gene Patenting and Human Health*, ALRC Report No. 99 (2004) Ch 28 <<http://www.austlii.edu.au/au/other/alrc/publications/reports/99/>> at 30 May 2006 (hereinafter 'ALRC, *Genes and Ingenuity*').

¹⁹⁸ Attorney-General's Department, *Fair Use and Other Copyright Exceptions - An examination of fair use, fair dealing and other exceptions in the Digital Agenda* (2006) <http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Publications_2005_Copyright_-_Review_of_Fair_Use_exception> at 22 July 2006.

4. Protection of databases in the United States (US)

3.27 In the US there have been various unsuccessful attempts to introduce database legislation. For example, the Database Investment and Intellectual Property Antipiracy Bill was discussed in the US Congress.¹⁹⁹ However, as the Bill was extremely protectionist and provided little exceptions it was highly controversial and was never brought to a vote. In 1997 the Collections of Information Antipiracy Bill was introduced.²⁰⁰ This Bill failed to pass after the Department of Justice formed the view that it would not be constitutional.²⁰¹ In response to debate over the Bill a Senate Judiciary Committee Staff Bill was introduced as a potential compromise solution. However, debate on that Bill also stalled. Subsequent Bills in the 106th Congress also failed to progress.²⁰²

3.28 Accordingly, the US has been unable to legislate directly on databases. It follows that if databases are to be protected they must be considered under the US *Copyright Act* and other existing IP legislation.

United States (US) copyright law

3.29 Databases are likely to be considered as ‘compilations’ under s 101 of the US *Copyright Act 1976* which provides that a compilation is:

a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work constitute an original work of authorship.²⁰³

3.30 However, while US copyright law does extend protection to compilations it is less clear whether databases having a basic level of arrangement, such as alphabetical order, will obtain the benefit of copyright protection. The US position on databases is informed by the seminal decision of the US Supreme Court in *Feist Publications Inc v Rural Telephone Service Co Inc*²⁰⁴ (*Feist*). A significant outcome of the *Feist* decision was that it resolved a long-standing dispute between competing US Federal Circuit courts over the standard of originality. The courts of the Second, Fifth, Ninth and Eleventh Circuits had previously promoted a standard of originality that required authors to display some ‘creative selection’ before copyright protection could be obtained. The Supreme Court in *Feist* effectively endorsed this view.

3.31 In *Feist* the US Supreme Court rejected the sweat of the brow doctrine. The facts in *Feist* are broadly analogous to those in *Desktop Marketing*. However, the reasoning of the US Supreme Court was informed by Article 1, section 8, clause 8 of the US Constitution which provides the US Congress with the power to make laws for copyright for the purpose of ‘the Progress of Science and useful Articles, by securing

¹⁹⁹ House of Representatives Bill 3531, introduced on 23 May 1996 by Rep. Moorhead (R-CA).

²⁰⁰ House of Representatives Bill 2652.

²⁰¹ Dov Greenbaum, ‘The Database Debate: In Support of an Inequitable Solution’, 13 *Alb. LJ Sci. & Tech.* 431 at 469 (hereinafter Dov Greenbaum, ‘*The Database Debate*’).

²⁰² See further: The Collections of Information Antipiracy Act, House Bill 354 and the Consumers and Investors Access to Information Act, House Bill 1858.

²⁰³ 17 USC 101.

²⁰⁴ 499 US 340 (1991).

for limited Times to Authors and Inventors the exclusive Right to the respective Writings and Discoveries.²⁰⁵

3.32 The Supreme Court stated:

The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. ... Original as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be. ... Originality does not signify novelty; a work may be original even though it closely resembles other works, so long as the similarity is fortuitous, not the result of copying.

Originality is a constitutional requirement. For a particular work to be classified 'under the head of writings of authors,' the Court determined, 'originality is required.' The Court explained that originality requires independent creation plus a modicum of creativity. ... In *Burrow Giles*, the Court distilled the same requirement from the Constitution's use of the word 'authors.' The Court defined 'author' in a constitutional sense, to mean 'he to whom anything owes its origin; originator; maker.' .. 'No one may claim originality as to facts.' This is because facts do not owe their origin to an act of authorship. the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.²⁰⁶

3.33 The significance of the *Feist* decision for databases is that where a database is arranged in a very basic way, it is highly likely that it will be outside the scope of copyright protection unless some degree of originality can be discerned from the way in which the facts are presented.²⁰⁷ The Supreme Court's rejection of the sweat of the brow doctrine means US is different from that of Australia in relation to the issue of originality as the Australian Federal Court in *Desktop Marketing* has endorsed the sweat of the brow doctrine. Moreover, the decision of the Supreme Court in *Feist* is not one of mere policy choice, it is a decision guided by constitutional imperatives.

3.34 The difference in the legal approaches could have an impact if an Australian compiled database was on a compact disc (CD) and available in the US, as any alleged infringement in the US would, under the principle of national treatment in the Berne Convention and subject to choice of law rules, be considered under US law. If the Australian compiled database were available for access through the Internet the more complicated question would be where the infringement takes place.²⁰⁸

3.35 The *Feist* decision has been followed in several US cases. However, the ruling on originality is not necessarily a significant barrier to copyright protection. As

²⁰⁵ <<http://www.law.cornell.edu/constitution/constitution.overview.html>> at 22 July 2006.

²⁰⁶ 499 US 340 (1991).

²⁰⁷ *CDN v Kapes*, 197 F.3d 1256 (9th Cir. 1999).

²⁰⁸ See further *Dow Jones & Co Inc v Gutnick* (2002) 194 ALR 433; Brian Fitzgerald, Gaye Middleton and Anne Fitzgerald, *Jurisdiction and the Internet* (2004) (hereinafter Fitzgerald, Middleton and Fitzgerald, *Jurisdiction and the Internet*).

the Second Circuit noted in *CCC Information Services, Inc v Maclean Hunter Market Reports, Inc*²⁰⁹:

The thrust of the Supreme Court's ruling in *Feist* was not to erect a high barrier of originality requirement. It was rather to specify, rejecting the strain of lower court rulings that sought to base protection on the 'sweat of the brow,' that some originality is essential to protection of authorship, and that the protection afforded extends only to those original elements. Because the protection is so limited there is no reason under the policies of copyright law to demand a high degree of originality. To the contrary, such a requirement would be counterproductive. The policy embedded into law is to encourage authors to publish innovations for the common good – not to threaten them with the loss of their livelihood if works of authorship are found to be insufficiently imaginative.

3.36 In summary under US copyright law the selection and arrangement of certain databases will be very hard to protect through copyright law. However, any copyright material placed in a database does not lose copyright protection merely by being placed in a database.

5. Protection of databases in Canada

3.37 In the case of *CCH Canadian Limited v The Law Society of Upper Canada*²¹⁰, the Full Federal Court of Canada adopted the same approach as its Australian counterpart in *Desktop Marketing*. The question in this case was whether copyright subsisted in published law reports and whether the Law Society of Upper Canada (the Law Society) had infringed those copyrights through its custom photocopying service and by making free-standing copiers available in its library.

3.38 After a review of the authorities, the Court held that Anglo-Canadian authority establishes that the test of originality under Canadian law does not require a minimum level of creativity. The Court distinguished the Canadian standard from the American threshold for copyright protection established in *Feist* which the trial judge had mistakenly adopted. The Court held that industriousness as opposed to creativity is enough to give a work sufficient originality to make it copyrightable. The work must merely be independently created and display at least a minimal degree of skill, judgment and labour in its overall selection or arrangement.

3.39 The Court went on to find that copyright subsisted in the headnotes, case summary, reported judicial decisions and topical index and that the Law Society had infringed the publishers' right to authorise reproductions of these works.

3.40 Like the Australian Federal Court in *Desktop Marketing*, the Canadian judges did address policy concerns about the overprotection of works.²¹¹ However, the Court

²⁰⁹ 44 F.3d 61 (2d Cir. 1994).

²¹⁰ 2002 FCA 187 (14 May 2002) *cf. Tele-Direct Publications Inc. v American Business Information Inc.* (1997) 3D 296 (FCA). See also Daniel J. Gervais 'Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law' (2002) *J. of the Copyright. Society of the USA* 949.

²¹¹ See, for example, at [59] per Linden JA.

considered that the fair dealing provisions of the Canadian *Copyright Act 1985* were a more appropriate mechanism to consider user rights and counter any potential imbalance generated by a low threshold of originality. They found that there was insufficient evidence in the case to make a definitive conclusion on the fairness of the dealings by the Law Society.²¹²

3.41 On appeal the Supreme Court of Canada agreed with the findings of the Full Federal Court on the issue of the subsistence of copyright in the headnotes, case summary, reported judicial decisions and topical index, but they disagreed with the Full Federal Court's findings in relation to authorisation of copyright infringement and fair dealing.²¹³

3.42 The Court considered the competing views on the meaning of 'originality' in copyright law and held that the standard of originality under the Canadian *Copyright Act* is somewhere between the sweat of the brow or industrious collection standard and the *Feist* standard of originality.²¹⁴ It held that, to be considered 'original', a work must be something more than a mere copy of another work, that is, the exercise of skill and judgement. The Court held that the exercise of skill and judgement must not be so trivial that it could be characterized as a purely mechanical exercise.²¹⁵ However, on the other hand, it held that it need not be creative, in the sense of being novel or unique.²¹⁶

3.43 It follows that Canadian copyright law is likely to extend some protection to databases.

6. Protection of databases in the European Union (EU)

3.44 The European Parliament and Council's EU Database Directive on the Legal Protection of Databases (EU Database Directive) was implemented in 1996 in order to facilitate the development of the European Union database market.²¹⁷ The member states of the EU are expected to implement the EU Database Directive into their domestic law. In the sections below, the EU Database Directive is discussed in detail and the UK law on databases is analysed as an example of the implementation of the EU Database Directive.

The European Union Directive on the legal protection of databases

3.45 The EU Database Directive requires copyright protection for databases that through their selection and arrangement can be regarded as being the author's

²¹² Ibid. at [123] per Linden JA and [292]-[296] per Rothstein J.

²¹³ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

²¹⁴ Ibid at [15].

²¹⁵ Ibid at [16].

²¹⁶ Ibid.

²¹⁷ <<http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html>> at 22 July 2006.

intellectual creation.²¹⁸ The EU Database Directive was intended to ensure that the protection of databases throughout the EC was uniform. This was recognised as being particularly important in light of the varying approaches to database protection in different countries.²¹⁹

3.46 The EU Database Directive extends protection in two ways; firstly by granting copyright protection in Chapter II and secondly, by creating a *sui generis* right to protect databases in Chapter III.

Chapter II – copyright protection

3.47 The threshold criteria for copyright protection is whether the database ‘by reason of the selection or arrangement of their contents constitutes the author’s own intellectual creation’.²²⁰ Copyright protection extends only to the structure of the database itself, not the contents.²²¹ The author of the database is taken to be the natural person or group of persons who created the database.²²² If the database is created jointly by a group of people, they will hold the copyright ownership jointly.²²³ If the relevant European Community (EC) member state recognises ‘collective works’ then the exclusive rights attaching by virtue of the EU Database Directive shall be owned by the person who owns copyright under the laws of the member state.²²⁴ Collective works are works where the copyright is owned jointly by two or more people.

3.48 Chapter II conveys exclusive rights to the owner of copyright in a database. The exclusive rights are the right to carry out or authorize:

- temporary or permanent reproduction
- translation, adaptation, arrangement or alteration
- distribution to the public of the database or copies (though if a copy is sold in the EC with the consent of the copyright owner this exhausts the right of resale)
- communication, display or performance to the public of the database
- reproduction, distribution, communication, display or performance of any translation, adaptation, arrangement or alteration arising from the Article 5(b) right.²²⁵

3.49 Chapter II also provides exceptions to the rights of copyright owners. The major exception is that where a user lawfully performs the database in order to access

²¹⁸ *Directive 96/9/EC of the European Parliament and of the Council on the Legal Protection of Databases* (entered into force 11 March 1996) Ch II.

²¹⁹ For a recent review of the operation of the Directive see: Commission of the European Communities, *The First Evaluation of Directive 96/9/EC on the Legal Protection of Databases* (2005) (hereinafter Commission of the European Communities, *Directive Evaluation*) <http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf#search=%22european%20commission%20database%20directive%20evaluation%22>.

²²⁰ Article 3(1).

²²¹ Article 3(2).

²²² Article 4(1).

²²³ Article 4(3).

²²⁴ Article 4(2).

²²⁵ Article 5.

it, or a copy is made as a result of their lawful use of it, they are taken not to have infringed the exclusive rights of the copyright holder.²²⁶ The Directive also provides that contractual provisions that are inconsistent with this exception are null and void.²²⁷ In general, member states are given some option on the number and extent of exceptions under their domestic legislation. However, Article 6 states that limitations on the exclusive rights provided in Article 5 can be given only in the following cases:

- reproduction for private purposes of a non-electronic database
- use for the sole purpose of illustration for teaching/scientific research
- use for the purpose of public security or for the purposes of administrative or judicial procedure
- other traditional exceptions to copyright under the national law of the member state.

All exceptions given must be in accordance with the three-step test in Article 9(2) of the Berne Convention in that exceptions to the database copyright must not unreasonably prejudice the rights-holder's legitimate interests or conflict with the normal exploitation of the database.

Chapter III – the sui generis right

3.50 Chapter III creates a *sui generis* (unique) right to protect databases. The protection of the right extends to databases where there has been 'qualitatively or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents'.²²⁸ The right applies if the investment referred to in Article 7(1) has been established regardless of whether the database is protected by copyright or other rights.²²⁹

There are two components of the right. The first is to prevent the extraction whilst the second is to prevent the re-utilization of the whole or a substantial part of the database.²³⁰ Whether the right has been infringed is to be evaluated quantitatively or qualitatively. The concept of extraction is defined to mean the temporary or permanent transfer of all or a substantial part of the contents of the database to another medium.²³¹ Re-utilization is defined as any form of making available to the public, all or a substantial part of the contents of a database by the distribution of copies, by renting, by online or other forms of transmission.²³² Interestingly, the 'repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.'²³³ The first sale of a copy of a database within the Community

²²⁶ Article 6(1).

²²⁷ Article 15.

²²⁸ Article 7(1).

²²⁹ Article 7(4).

²³⁰ Dov Greenbaum, 'The Database Debate'.

²³¹ Article 7(2)(a). See further William Cornish, '1996 European Community Directive on Database Protection,' (1996) 21 *Columbia-VLA Journal of Law and the Articles* (hereinafter Cornish, 'EC Directive').

²³² Article 7(2)(b).

²³³ Article 7(5).

by the right-holder with his or her consent shall exhaust the right to control resale of that copy within the Community.²³⁴ The right generally has a term of 15 years.²³⁵ The term can be extended if there has been a substantial re-investment and addition to the database. Changes to the database can occur incrementally and if they are substantial enough, time will start to run again.²³⁶

3.51 The database compiler may not prevent a lawful user of the database made available to the public 'from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever'²³⁷ On the other hand a lawful user of the database may not 'perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.'²³⁸ The *sui generis* right is subject to narrowly tailored exceptions that bear some similarity to fair dealing exceptions.²³⁹ However, public documents, which may be beyond copyright protection in some EC jurisdictions, are covered by the *sui generis* right. This recognises the fact that governments increasingly create databases that are highly valuable and should have the right to recoup the cost of creating such databases.²⁴⁰

3.52 There have been four decisions of the European Court of Justice (ECJ) that have narrowed the ambit of article 7(1).²⁴¹ Whilst it is unnecessary for our purposes to consider each of these decisions in detail it is clear that the European Court of Justice (ECJ) has been concerned with the consequences of an overly broad construction of the EU Directive. The leading judgment of the ECJ on the *sui generis* issue is the *British Horseracing Board Limited and others v William Hill Organisation Limited*.²⁴² In that case the ECJ held that the decision of the English High Court was outside the ambit of article 7(1). The decision turns upon the distinction between the creation of data for some purpose that may later include compilation in a database and the collection of data for inclusion in a database. This distinction might appear to be somewhat tenuous in its nature but it does reflect a concern with the over protection of basic data. Interestingly, the Commission of the European Communities in its recent working paper on the Directive has expressed concern with this development.²⁴³ The

²³⁴ Ibid.

²³⁵ Article 10(2).

²³⁶ Article 10(3).

²³⁷ Article 8 (1).

²³⁸ Article 8 (2).

²³⁹ Article 9 provides: 'Exceptions to the *sui generis* right

Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

- (a) in the case of extraction for private purposes of the contents of a non-electronic database;
- (b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
- (c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.'

²⁴⁰ Cornish, 'EC Directive'.

²⁴¹ Cases C-46/02 (*Fixtures Marketing Ltd v. Oy Veikkaus Ab*); C-203/02 (*The British Horseracing Board Ltd and Others v. William Hill Organisation Ltd*); C-338/02 (*Fixtures Marketing Limited v. AB Svenska Spel*) and C-444/02 (*Fixtures Marketing Ltd v. Organismos prognostikon agonon podosfairouAE - 'OPAP'*). The text of the 4 judgments can be found at <www.curia.eu.int>.

²⁴² HC 2000 1335, judgment of 9 February 2001. The decision is discussed at paragraphs 365-366.

²⁴³ See further Commission of the European Communities, *Directive Evaluation*.

British Horseracing Board decision is discussed in greater detail in the next section. The English Court of Appeal, to whom the case was remanded, has endorsed the decision of the ECJ.²⁴⁴

3.53 The EU while offering copyright protection for some databases has a higher threshold test of originality than in Australia. The difference in the legal approaches could have an impact if an Australian compiled database was on a CD and available in an EU member state, as a low level of originality could mean no copyright protection. Whereas for citizens of the EU the low level of originality of a database would be solved by reliance on the *sui generis* right. Further, if the Australian compiled database were available for access through the Internet once again the more complicated question would be where the infringement takes place.²⁴⁵

Application of the EU Database Directive to foreign parties

3.54 Recital 56 of the EU Database Directive raises the possibility that EU member states might provide reciprocal treatment to jurisdictions, such as Australia, whose laws protect databases. Recital 56 provides:

Whereas the right to prevent unauthorized extraction and/or re-utilization in respect of a database should apply to databases whose makers are nationals or habitual residents of third countries or to those produced by legal persons not established in a Member State, within the meaning of the Treaty, only if such third countries offer comparable protection to databases produced by nationals of a Member State or persons who have their habitual residence in the territory of the Community.

3.55 Despite the principle enunciated in recital 56 it would appear that the EU standard on this issue is not yet fully developed. Article 11(2)(1) provides that agreements extending the right provided for in Article 7 to databases made in third countries, and not applying to firms which have their registered office or principal place of business in a member states, shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of that procedure shall not exceed that available pursuant to Article 10. Accordingly, it appears that the actual implementation of recital 56 has not been formally concluded at an EU level.²⁴⁶

3.56 However, there is some conditional protection available for foreign firms operating within the EU under Article 11. This principle is given some effect in Article 11(2) of the EU Database Directive. However, Article 11(2) requires that where a company of a non-member state seeks protection for a database within the EU it must have an ongoing genuine link with the economy of the member state.

3.57 Whilst there is conditional protection available for foreign firms, there is no such protection available for foreign individuals who own databases. Accordingly, the protection available to foreign individuals will depend upon the laws of each jurisdiction. Where the database can be protected by copyright law, the principle of

²⁴⁴ [2005] EWCA Civ 863.

²⁴⁵ See further: *Dow Jones & Co Inc v Gutnick* (2002) 194 ALR 433; Fitzgerald, Middleton and Fitzgerald, *Jurisdiction and the Internet*.

²⁴⁶ <<http://www.ivir.nl/publications/hugenholtz/fordham2001.html>> at 22 July 2006.

national treatment under Berne and TRIPS will require that the EU member state provide the same level of protection for foreign individuals within its jurisdiction as it does for its own citizens. However, this principle will not apply where databases are protected under the *sui generis* right. In the United Kingdom, protection would be available for database owners where the database could be considered a literary work and as such protectable by copyright. Thus in the United Kingdom, as discussed below, some level of protection is available to foreign individuals who own databases. However, qualification for the *sui generis* right in the United Kingdom is conditional and requires that the individual be a resident of the European Economic Area (EEA) or habitually resident in the EEA.²⁴⁷

3.58 Mark Davison has advanced an argument that the national treatment obligation in the TRIPS Agreement requires that EC member states provide equal protection to nationals of non-EC states within their borders in relation to the *sui generis* right in the EU Database Directive.²⁴⁸ The concept of national treatment requires that signatories to a particular treaty provide the same level of legal protection within its jurisdiction to the nationals of other treaty states as it does for its own citizens. Davison's argument advances on two fronts. The first proposition is that intellectual property under the TRIPS Agreement is broad enough to cover database rights (both *sui generis* and copyright). The second proposition is that in substance the *sui generis* right is actually copyright and, as such, not a separate type of intellectual property right. The merits of these arguments must be faced by the reality of the fact that the *sui generis* right is now well established in the EU.

7. Protection of databases in the United Kingdom (UK)

Copyright

3.59 The United Kingdom (UK) has complied with its obligations as an EU member to implement the EU Database Directive. The *Copyright and Rights in Databases Regulations 1997* which entered into force on 1 January 1998 implemented these obligations. The amendments included databases as a literary work in the copyright regime.²⁴⁹ Section 3 of the *Copyright, Designs and Patents Act 1988* (CDPA) was amended such that 'literary work' now includes reference to a database.

3.60 The term 'database' is defined in s 3A of the CDPA as 'a collection of independent works, data or other materials which: (a) are arranged in a systematic or methodical way; and (b) are individually accessible by electronic or other means.' Section 3A(2) sets out the exclusive criteria to determine whether a database is original (originality is required by s 3 for all literary works) to be the criteria from Article 3(1) EU Database Directive (see paras 3.44–3.58, above). This amendment sets a higher standard of originality for databases than for any other works under the

²⁴⁷ Regulation 18 *Copyright and Rights in Databases Regulations 1997*.

²⁴⁸ Mark Davison, *The Legal Protection of Databases*, (2003) Cambridge University Press, Cambridge.

²⁴⁹ Section 3 *Copyright, Designs and Patents Act 1988*.

copyright regime. This criteria removes ‘sweat of the brow’ copyright which was pre-EU Database Directive part of UK common law²⁵⁰.

3.61 However, the amendments set a higher standard of originality for databases than for other works. Specific rights of copyright holder are similar to those in the EU Database Directive. The UK needed to make only one amendment in relation to the exclusive rights listed in Article 5, EU Database Directive. The UK amended s 21 of the CDPA regarding adaptation so that s 21(3)(ac) states ‘in relation to a database, [adaptation] means an arrangement or altered version of the database or a translation of it’. The other exclusive rights provided in the EU Database Directive were already in the CDPA.

3.62 The amendments also ensured that lawful user rights were provided for as per the EU Database Directive. The CDPA amendments included s 50D which gave lawful users of a database the right to access or use the database and to do anything necessary to access or use the contents of the database. The amendments also created s 296B which provides that any contractual restriction or limitation on this right is void.²⁵¹

***Sui Generis* right**

3.63 The UK provides *sui generis* protection under regulation 13(1). Regulation 14 defines the maker of a database as the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation.²⁵² Whilst s 3A(1), which defines databases, applies for both copyright and *sui generis* protection, regulation 13(1) effectively confers the database right where there has been substantial investment in obtaining, verifying or presenting the contents of a database.

3.64 The database right was considered in the case of *British Horseracing Board Ltd v William Hill Ltd*²⁵³ (British Horseracing). In British Horseracing the respondent used information from the appellant’s website, an Internet betting service, to provide his own Internet betting service. Mr Justice Laddie expressed the view that the term ‘database had a very wide meaning covering virtually all collections of data in searchable form.’²⁵⁴ Mr Justice Laddie was further of the view that the level of investment required to qualify for database protection was fairly low.²⁵⁵ The respondent was also found to have infringed the database right despite obtaining the data from a third party. This indicates the broad scope of regulation 16 which provides that the database right is infringed by the extraction or re-utilisation of a substantial part of a database. The difficulty that this would pose in cases different from British Horseracing is that third parties who are unaware that they are dealing with database content may be exposed to liability under UK law.

²⁵⁰ *Waterlow Directories Ltd v Reed Information Services Ltd* [1992] FSR 409. See further Stanley Lai, ‘Database Protection in the United Kingdom: The New Deal and its Effects on Software Protection’, [1998] *EIPR* 32.

²⁵¹ This imports Article 6(1) Directive.

²⁵² Regulation 14.

²⁵³ HC 2000 1335, judgment of 9 February 2001.

²⁵⁴ *Ibid* at paragraph 30.

²⁵⁵ *Ibid* at paragraph 32.

3.65 The decision of the High Court was appealed to the English Court of Appeal. The Court of Appeal formed the view that the law was substantially ambiguous so as to warrant reference to the ECJ. As stated above, the ECJ has read down the ambit of article 7(1). The decision of the ECJ turns upon the distinction between the creation of data for some purpose that may later include compilation in a database and the collection of data for inclusion in a database. Whilst the basis for this decision may appear to be thin, the ECJ has effectively made a distinction between the two categories on the basis of time and purpose. Indeed, it seems implicit in the analysis of the ECJ that the purpose for which the data is compiled must be for immediate inclusion in the database. Simply creating data for another purpose and then compiling it into the database at a later stage is not sufficient to invoke the *sui generis* right.

3.66 Up until now people have looked upon the *sui generis* right as providing a higher level of protection that is greater than that available under US law. However, the decision of the ECJ and, its subsequent endorsement by the English Court of Appeal has complicated this view. It is understandable that with the extension of existing rights and the creation of new intellectual property rights, the database right and the *sui generis* right respectively, that there would be some period of confusion as to the exact scope and proper interpretation of the rights. Accordingly, *sui generis* protection in the UK poses a difficulty for foreign database compilers in relation to both its scope and interpretation as well as the issue of whether a foreign party can rely on the right. Under regulation 18, foreign individuals do not qualify for protection under the database right unless they are resident or habitually resident in the EEA. Similarly, article 18(2) imposes the same requirements upon foreign firms as article 11(2) of the EC Database Directive. That is, the firm must have a genuine link with the EEA either by having its central administration, principal place of business or registered office and ongoing business operations within the EEA.

8. Conclusion

3.67 Copyright law will clearly protect the selection and arrangement of data in Australia, Canada, Europe and in some instances in the US.²⁵⁶ It is clear that facts that are compiled through industrious labour will receive a higher degree of protection in Australia than in other jurisdictions.

3.68 From a practical standpoint, database compilers need to identify the uses of their database that they wish to allow. They then need to put in place the relevant agreements to facilitate those uses. This involves identifying and, where necessary, obtaining copyright permissions from third party copyright owners. It also involves preparing agreements that clearly set out the conditions of use of the database.

3.69 Technological protection measures are another tool that can be employed to regulate the use of a database. However, as stated previously, the law in relation to TPMs will be revised in Australia with new provisions to take effect from 1 January 2007. As explained above in paragraphs 2.112 and 2.113 a new set of exceptions will also be introduced.

²⁵⁶ On proposals for reform of Australian law see: ALRC, *Genes and Ingenuity* Ch 28.

3.70 Further, in terms of open content licensing and Creative Commons type licensing; these licences would be readily employable by a database compiler who owned copyright in the database. Once again, where there is third party copyright the database owner would need to acquire any necessary permissions.

Hypothetical case study

HelpYou Pty Ltd, an Australian research corporation, which has one of its researchers based in London, decides to create a website — HealthMaps.com — which will display an interactive map that presents data regarding key health issues in Australian cities, suburbs and towns. It utilises maps it finds on the Internet and extracts and reuses data available on government and other websites along with its own survey data. Users are also encouraged to submit information to the website. The website which is what some might call in modern language a ‘mash up’ allows the user to click on their location and bring up different levels of data. A preliminary level of data is provided for free while deeper levels of detail must be accessed via a subscription fee. The web resource, HealthMaps.com, also displays advertising about pharmaceutical products.

One can see from this increasingly common scenario the myriad of copyright and other legal questions that may arise. At a very broad level, to understand this situation, we need to ask in relation to each party what copyright material is involved, who owns that material, what activities are being undertaken in relation that material and are they authorised? What agreements are in place and what exceptions apply? For instance, is the data extracted and reused from other databases by HelpYou Pty Ltd taken under a CC non commercial licence? Is it allowable under fair dealing exceptions? The answers to these questions will be more closely considered in the next phase of the OAK Law Project which aims to work with key data managers in the Australian academic and research sector to provide select case studies and analyses.

Part 3

A2K: the concepts

*‘what is meant by access to knowledge and how
will it change the process of knowledge
management?’*

Chapter 4

Open access and open content licensing

Introduction

4.01 As explained in Chapter 1, the rapid growth of digital reproduction and communication technologies linked together through international networks has allowed the potential for broader dissemination of knowledge. However, with the growth of this new digital and virtual knowledge landscape we have also seen the potential for greater control over access and usage by copyright owners. The rising costs of subscriptions to key academic journals, in large part made possible by, and implemented through, the first generation of digital distribution and licensing models, has motivated a frustrated research community into finding new ways to disseminate knowledge. Faced with the enormous potential of the Internet and the increasing limitations presented by traditional journal licensing, researchers worldwide have united in a movement known as Open Access (OA) which aims to disseminate knowledge broadly and freely across the Internet in a timely fashion. Reinforced by the fact that much research is publicly funded (in essence owned by the people) the OA movement has captured worldwide attention and support.

4.02 This chapter will overview the notion of OA providing an introduction to the key international documents and movements that are promoting its implementation. It is important to note, as this chapter will highlight, that the idea of access to knowledge is supported to some degree by international human rights conventions and declarations. It is also the moving force behind a bold and visionary development agenda known as A2K (Access to Knowledge) that aims to convince the World Intellectual Property Organisation (WIPO) to invigorate intellectual property laws with an ethos of balance in the name of access.

4.03 To fully appreciate the concepts of OA and A2K we also need to consider the notion of open content licensing (OCL). While the A2K agenda asks that intellectual property (IP) laws be more flexible and balanced, some people within our community have already moved to try to make the existing IP regime more workable and attuned to access through voluntary IP licensing agreements. These agreements call on IP owners to consider sharing knowledge with the world through a legal mechanism that will allow a broad ambit of reuse. While OA aims to have research disseminated rapidly through the Internet, OCL aims to ensure that downstream user rights are clear.

1. The rise of open access to knowledge

4.04 As discussed in chapter 1, advances in digital communication technologies raise many cultural and legal issues, often pushing the limits of what has previously been the norm. Blogs (Web logs), wikis, VoIP (Voice over Internet Protocol), podcasts and vodcasts are now commonplace, as are digital repositories.²⁵⁷ We employ these things to access knowledge quickly on a worldwide basis in an instant. Society is trying desperately to keep pace with these developments, to keep a reign on what is acceptable, appropriate and legal.

These technological capabilities ‘massively raise expectations with regard to access to research articles and make it virtually impossible to limit or restrict their dissemination without resorting to tortuous and difficult to police, even draconic, legal constructions. Expectations are raised because, subconsciously perhaps, scholarly information has always been seen as belonging to the worldwide scholarly community, even mankind as a whole. The fact that universal dissemination and access were not possible when one had to rely on print alone was tacitly accepted as a fact of life, an inevitable shortcoming, not in any way as a desirability. The whole purpose of information is to be shared, as the purpose of bread is to be eaten.’²⁵⁸

4.05 In order to embrace the new technologies that facilitate access to knowledge and to counter the rising costs for journal subscriptions²⁵⁹ (and the associated decline in institutional subscriptions and thereby access) a movement has arisen commonly referred to as ‘Open Access’ (OA).²⁶⁰ The evolution of the OA movement is well-documented by Peter Suber of Earlham College.

²⁵⁷ Neil Jacobs believes that technologies such as blogs, wikis and peer-to-peer repositories often come into universities and colleges ‘under the radar’. ‘The PROWE project <<http://www.prowe.ac.uk>> is asking whether blogs and wikis in particular can be used to support the huge distributed networks of tutors associated with the Open and Leicester Universities. The SPIRE project <<http://spire.conted.ox.ac.uk/cgi-bin/trac.cgi>> is installing the secure Lionshare <<http://lionshare.its.psu.edu/main/>> peer-to-peer system, to explore its potential in teaching and learning and, in part, to dispel the mistaken notion that peer-to-peer equals Napster equals insecure and probably illegal activity.’ Neil Jacobs, *Digital Repositories in UK universities and colleges*, FreePint, No. 200, 13-15 (16 February 2006), <<http://www.freepint.com/issues/160206.htm>> at 23 February 2006, 15 (hereinafter Jacobs, *Digital Repositories*).

²⁵⁸ Open Society Institute *Open Access Publishing and Scholarly Societies: A Guide* (2005) <www.soros.org/openaccess/scholarly_guide.shtml> at 19 December 2005 (hereinafter OSI, *Open Access Publishing*).

²⁵⁹ ‘Hoorn and van der Graaf, *Good Practices of Copyright*’ and European Commission, ‘Study on the economic and technical evolution of the scientific publication markets in Europe’ <http://ec.europa.eu/research/science-society/pdf/scientific-publication-study_en.pdf>.

²⁶⁰ In 1991, the first free scientific online archive, arXiv, was created at Los Alamos but it is now hosted by Cornell University. The fields covered include physics, mathematics, non-linear science, computer science and quantitative biology. <<http://www.lib.mtu.edu/eresources/eresearch/searchresults.aspx?publisherid=240>> and <<http://arxiv.org/>>.

As he explains, the OA movement:

- proposes that authors electronically publish (or 'archive') pre-prints of their papers, in a manner analogous to Departmental Working Papers series of bygone days
- recommends the establishment of ePrints Archives by universities and other research institutions (to provide a manageably small number of persistent, professionally-managed and readily-discoverable locations, rather than tens of thousands of ephemeral, personal web-sites)
- publishes software that enables such ePrints archives to be managed
- recommends use of the Open Archive Initiative metadata standard, in order to support cross-discovery services
- approaches journal publishers to sanction author self-archival (already with great success)
- communicates with governments, with a view to ensuring that government policy and amendments to copyright law support and not undermine open access to authors' pre-prints.²⁶¹

4.06 Many new forms of OA publishing have arisen including the collaborative online encyclopaedia, Wikipedia, which chronicles the development of OA in the following way:

The beginnings of the scholarly journal were a way of expanding low-cost access to scholarly findings... The modern OA movement springs from the potential unleashed by the electronic medium, and by the world wide web. It is now possible to publish a scholarly article and also make it instantly accessible anywhere in the world where there are computers and internet connections.

²⁶¹ Roger Clarke, A proposal for an open content licence for research paper (Pre)print, *First Monday* Vol 10, number 8 (August 2005) <http://firstmonday.org/issues/issue10_8/clarke/index.html> at 22 November 2005 (hereinafter Clarke, *(Pre)Prints*).

²⁶² 'Open Access', *Wikipedia* <http://en.wikipedia.org/wiki/Open_access> at 20 April 2006.

At least two different publishing approaches have evolved in relation to OA. One is the 'gold' publishing model, such as the Public Library of Science (PLOS) which explains it's model in the following way:

'To provide open access, the PLOS journals will use a non-traditional business model, in which all of our expenses (managing peer review, providing editorial oversight, and ensuring the highest production standards) will be recovered by imposing a modest charge on the authors or research sponsors for each article they publish. These one-time publication charges will allow us to make all works that appear in our journals freely available to everyone for viewing, full-text searching, and downloading from the moment of publication.

Our goal is not to have these publication charges place an additional financial burden on scientists. Our model treats publication as a fundamental part of the scientific and medical research process, and the costs of publication as a small but essential part of the cost of research.' <<http://www.plos.org/journals/model.html>> at 18 February 2006.

The other is the so called 'green' model:

... many researchers opt instead for the 'Green Road'. Rather than publishing with an OA publisher, they continue to publish in traditional subscription-based scholarly journals, but

The first free scientific online archive is arXiv.org, started in 1991, initially a preprint service for physicists, initiated by Paul Ginsparg. Self-archiving has become the norm in physics, with some sub-areas of physics, such as high-energy physics, having a 100% self-archiving rate. In 1997, the U.S. National Library of Medicine made Medline, the most comprehensive index to medical literature on the planet, freely available. In 1998, one of the first Open Access journals in medicine, the Journal of Medical Internet Research (JMIR) was created, publishing its first issue in 1999.²⁶²

4.07 As part of growing support for the OA movement, various organisations have endorsed the principles of OA through developing organisation-specific declarations or policies on the topic. For example, some tertiary institutions recommend that staff deposit their papers in the institutional repositories. Some tertiary institutions make the submission of post-graduate research papers and PhD theses into the institutional repository mandatory. In Australia, projects like Australian Partnership for Sustainable Repositories are looking for ways to enhance the management, operation and development of digital repositories.²⁶³ In the United Kingdom, the Digital Repositories development program²⁶⁴ ‘consists of some 25 projects that are exploring the role and operation of repositories. Many of these are concerned with how repositories can help academic researchers both do and share their work more effectively. Open access is a key driver and demands are growing for the outputs of publicly-funded research to be freely available on the web.’²⁶⁵

then ‘self-archive’ an electronic copy of their papers, either on their home pages, or in an e-print archive such as their institutional repository or a centrally-based archive like PubMed Central (cf. sources) or arXiv (cf. sources).

However, the rights situation on the green road is complex, since traditional subscription-based journals generally insist that authors assign copyright as a condition of publication. As a consequence, researchers relinquish all control in how their IPR is managed. The RoMEO study, for instance, found that in 90% of cases authors are asked to transfer the copyright in their papers. Moreover, while 92% of scholarly journals now allow their authors to self-archive it is a far from ideal solution. As authors are not permitted to use the publisher's PDF, for instance, the self-archived version may be somewhat different from the publisher's version.

More problematically, the rights status of self-archived papers is vague and frequently misunderstood. Indeed, there are reasons to believe that general confusion and uncertainty over copyright represents one of the greatest obstacles to self-archiving today, and perhaps explains why still only 15 % of authors self-archive. ‘The fact is that copyright raises its head all the time when authors are asked about OA, and it is acting as a deterrent to self-archiving,’ says Alma Swan (Swan 2005), co-founder and director of UK-based scholarly publishing consultancy Key Perspectives (KPL). ‘So it can’t be ignored’. Richard Poynder, ‘The role of digital rights management in Open Access’ *INDICARE* (2005) <http://www.indicare.org/tiki-read_article.php?articleId=93> at 18 February 2006 (hereinafter Poynder, *DRM in OA*).

²⁶³ See <www.apsr.edu.au/>.

²⁶⁴ <<http://digbig.com/4fyee>> is building on a previous program called Focus on Access to Institutional Resources (FAIR) at <<http://digbig.com/4gfac>>.

²⁶⁵ Jacobs, *Digital Repositories*, 13.

Core principle of open access

4.08 The core principle of OA is to open up access to research and scholarship, especially that which is publicly funded.²⁶⁶ This principle has been endorsed and further developed in the following declarations.

Budapest Open Access Initiative – fostering open access to peer-reviewed journals

4.09 During the first two days of December 2001, the Open Society Institute conducted a meeting in Budapest, the capital of Hungary. Those in attendance were the leading proponents of OA for scientific and scholarly journal literature who sought to explore the possibility of working together to further the goals of OA. On 14 February 2002, the Budapest Open Access Initiative (BOAI) was launched in an effort to accelerate progress in OA to peer-reviewed journal literature fostered by self-archiving and a new generation of OA journals²⁶⁷. At that time, sixteen people signed the BOAI however, as of 26 August 2006, 4171 individuals and 366 organizations have added their signatures to the BOAI.²⁶⁸

Bethesda Statement on Open Access Publishing – fostering open access to primary scientific literature

4.10 Following the BOAI, a meeting was held on 11 April 2003 to discuss how to proceed as rapidly as possible with the goal of the BOAI in providing OA to primary scientific literature. The Bethesda Statement on Open Access Publishing (Bethesda Statement) was released on 20 June 2003 and stated that the goal of the meeting was:

to agree on significant, concrete steps that all relevant parties — the organizations that foster and support scientific research, the scientists that generate the research results, the publishers who facilitate the peer-review and distribution of results of the research, and the scientists, librarians and others who depend on access to this knowledge—can take to promote the rapid and efficient transition to open access publishing.²⁶⁹

4.11 A working definition of Open Access Publication was drafted in the Bethesda Statement together with statements of the Institutions and Funding Agencies Working Group and the Libraries and Publishers Working Group.²⁷⁰

²⁶⁶ Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (2003), <<http://www.zim.mpg.de/openaccess-berlin/berlindeclaration.html>>, and the Bethesda Statement on Open Access Publishing (2003), <<http://www.earlham.edu/~peters/fos/bethesda.htm>>.

²⁶⁷ See <<http://www.soros.org/openaccess/read>>.

²⁶⁸ See <<http://www.soros.org/openaccess/view.cfm>> at 26 August 2006.

²⁶⁹ See <<http://www.earlham.edu/~peters/fos/bethesda.htm>>.

²⁷⁰ See <<http://www.earlham.edu/~peters/fos/bethesda.htm>>. These three items constitute the whole statement and are contained under each respective heading.

Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities—defining an Open Access contribution

4.12 During 20–22 October 2003, a meeting was held in Berlin, Germany to further the goal of the BOAI. The Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (Berlin Declaration) which was released on 22 October 2003, defines its goals as the following:

Our mission of disseminating knowledge is only half complete if the information is not made widely and readily available to society. New possibilities of knowledge dissemination not only through the classical form but also and increasingly through the OA paradigm via the Internet have to be supported. We define OA as a comprehensive source of human knowledge and cultural heritage that has been approved by the scientific community.

In order to realize the vision of a global and accessible representation of knowledge, the future Web has to be sustainable, interactive, and transparent. Content and software tools must be openly accessible and compatible.²⁷¹

4.13 The Berlin Declaration also provided a definition of an Open Access Contribution, mirroring the definitions drafted in the BOAI and Bethesda Statement:

Establishing open access as a worthwhile procedure ideally requires the active commitment of each and every individual producer of scientific knowledge and holder of cultural heritage. Open access contributions include original scientific research results, raw data and metadata, source materials, digital representations of pictorial and graphical materials and scholarly multimedia material.

Open access contributions must satisfy two conditions:

1. The author(s) and right holder(s) of such contributions grant(s) to all users a free, irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship (community standards, will continue to provide the mechanism for enforcement of proper attribution and responsible use of the published work, as they do now), as well as the right to make small numbers of printed copies for their personal use.
2. A complete version of the work and all supplemental materials, including a copy of the permission as stated above, in an appropriate standard electronic format is deposited (and thus published) in at least one online repository using suitable technical standards (such as the Open Archive definitions²⁷²) that is supported and maintained by an academic institution, scholarly society, government agency, or other well established organization that seeks to enable open access, unrestricted distribution, inter operability, and long-term archiving.²⁷³

²⁷¹ See <<http://www.zim.mpg.de/openaccess-berlin/berlindeclaration.html>>.

²⁷² See <<http://www.openarchive.org>>.

²⁷³ Ibid.

It is interesting to note that there is no stipulation that the work be made available by the author or copyright owner solely for non-commercial re-use.

4.14 There are three main essentials: free accessibility, further distribution, and proper archiving:

Open access is real open access if:

1. The article is universally and freely accessible, at no cost to the reader, via the Internet or otherwise, without embargo
2. The author or copyright owner irrevocably grants to any third party, in advance and in perpetuity, the right to use, copy, or disseminate the article, provided that correct citation details are given
3. The article is deposited, immediately, in full and in a suitable electronic form, in at least one widely and internationally recognized open access repository committed to open access and long-term preservation for posterity.²⁷⁴

By 26 August 2006, 164 organisations around the world had signed the Berlin Declaration.²⁷⁵

Declaration on Access to Research Data from Public Funding—establishing access regimes for publicly funded digital research data

4.15 On 30 January 2004, Ministers of the Organisation for Economic Co-operation and Development (OECD) Committee for Scientific and Technological Policy recognised that fostering broader, open access to, and wide use of, research data will enhance the quality and productivity of science systems worldwide. All 34 Ministers adopted, on behalf of 34 countries,²⁷⁶ a Declaration on Access to Research Data from Public Funding.

The Ministers declared their commitment to:

Work towards the establishment of access regimes for digital research data from public funding in accordance with the following objectives and principles:

Openness: balancing the interests of open access to data to increase the quality and efficiency of research and innovation with the need for restriction of access in some instances to protect social, scientific and economic interests.

Transparency: making information on data-producing organisations, documentation

²⁷⁴ OSI, *Open Access Publishing* at 6.

²⁷⁵ <<http://www.zim.mpg.de/openaccess-berlin/signatories.html>> at 26 August 2006.

²⁷⁶ The governments of Australia, Austria, Belgium, Canada, China, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Russian Federation, the Slovak Republic, the Republic of South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States at

<http://www.oecd.org/document/0,2340,en_2649_34487_25998799_1_1_1_1,00.html>.

on the data they produce and specifications of conditions attached to the use of these data, available and accessible internationally.

Legal conformity: paying due attention, in the design of access regimes for digital research data, to national legal requirements concerning national security, privacy and trade secrets.

Formal responsibility: promoting explicit, formal institutional rules on the responsibilities of the various parties involved in data-related activities pertaining to authorship, producer credits, ownership, usage restrictions, financial arrangements, ethical rules, licensing terms, and liability.

Professionalism: building institutional rules for the management of digital research data based on the relevant professional standards and values embodied in the codes of conduct of the scientific communities involved.

Protection of intellectual property: describing ways to obtain open access under the different legal regimes of copyright or other intellectual property law applicable to databases as well as trade secrets.

Interoperability: paying due attention to the relevant international standard requirements for use in multiple ways, in co-operation with other international organisations.

Quality and security: describing good practices for methods, techniques and instruments employed in the collection, dissemination and accessible archiving of data to enable quality control by peer review and other means of safeguarding authenticity, originality, integrity, security and establishing liability.

Efficiency: promoting further cost effectiveness within the global science system by describing good practices in data management and specialised support services.

Accountability: evaluating the performance of data access regimes to maximise the support for open access among the scientific community and society at large.

Seek transparency in regulations and policies related to information, computer and communications services affecting international flows of data for research, and reducing unnecessary barriers to the international exchange of these data.

Take the necessary steps to strengthen existing instruments and - where appropriate - create within the framework of international and national law, new mechanisms and practices supporting international collaboration in access to digital research data.

Support OECD initiatives to promote the development and harmonisation of approaches by governments adhering to this Declaration aimed at maximising the accessibility of digital research data.

Consider the possible implications for other countries, including developing countries and economies in transition, when dealing with issues of access to digital research data.²⁷⁷

Support for open access

4.16 As the goals and benefits of OA to knowledge become apparent, more organisations especially key research funding institutions are starting to support the OA movement. In 2005, the world's two largest funders of medical researchers, the

²⁷⁷ See <http://www.oecd.org/document/0,2340,en_2649_34487_25998799_1_1_1_1,00.html>.

United States National Institutes of Health²⁷⁸ and the United Kingdom's Wellcome Trust²⁷⁹, adopted policies with a recommendation and a requirement, respectively, to provide OA to the results of successful grantees. Such support of OA arguably benefits society by enabling access to medical research that can be used to save lives or enhance the quality of life.

4.17 Acknowledging the benefits of OA, the Royal Society for the Encouragement of Arts, Manufactures and Commerce published the Adelphi Charter on Creativity, Innovation and Intellectual Property (Charter) on 13 October 2005²⁸⁰. The Charter consists of nine principles and the seventh seeks to facilitate the use of OA to scientific literature. In this way the OA principles are developing momentum into all areas of society and will continue to do so in the years to come. National governments throughout the world are being asked to promote the principles encompassed in the Charter by applying a new public interest test, ensuring that everyone has access to ideas and knowledge and that IP laws do not become too restrictive.

2. Access to knowledge as a human right

4.18 International human rights law is clear in providing that people should have the right to hold private property – including IP rights. However, this obligation is not absolute and must be read in the context of international human rights law that supports access to knowledge.

Existing international law – human rights

4.19 The clearest enunciation of the right to hold private property is found in Art 27(2) of the *Universal Declaration of Human Rights*²⁸¹ (UDHR) which recognises the right for everyone to protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author.²⁸²

4.20 On the other hand international human rights law is also filled with an ambition to facilitate greater access to knowledge. Article (Art) 17 of the *Convention on the Rights of a Child*²⁸³ (CRC) ensures that children have access to information and material especially aimed at the promotion of the child's social, spiritual and moral well-being and mental health.²⁸⁴ Article 13 of the CRC provides a child's right to

²⁷⁸ See <<http://www.nih.gov>>.

²⁷⁹ See <<http://www.wellcome.ac.uk/>> and <http://en.wikipedia.org/wiki/Wellcome_Trust>.

²⁸⁰ See <<http://www.adelphicharter.org>>.

²⁸¹ See <<http://www.unhchr.ch/udhr/lang/eng.htm>>.

²⁸² 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'

²⁸³ See <<http://www.ohchr.org/english/law/pdf/crc.pdf>>.

²⁸⁴ 'States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds, orally, in writing, in print, in the form of art or any other media of the child's choice.²⁸⁵ Similarly, Art 19 of the UDHR states that everyone has the right to freedom of opinion and expression without interference and to seek, receive and impart information and ideas through any media.²⁸⁶

4.21 Article 26 of the UDHR states that everyone has the right to education,²⁸⁷ as does Art 13 of the *International Covenant on Economic, Social and Cultural Rights*²⁸⁸ (ICESR)²⁸⁹ while Art 29 of the CRC provides a right to education that includes development of the child's personality, talents and mental and physical abilities to

-
- (c) Encourage the production and dissemination of children's books;
 - (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
 - (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.'

²⁸⁵ '1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others; or
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.'

²⁸⁶ 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

²⁸⁷ '1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

- 2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
- 3. Parents have a prior right to choose the kind of education that shall be given to their children.'

²⁸⁸ <http://www.unhchr.ch/html/menu3/b/a_cesr.htm>.

²⁸⁹ '1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.'

their fullest potential.²⁹⁰ Article 31 of the CRC recognises a child's right to participate freely in cultural life and the arts and the parties to the CRC shall respect and promote that right.²⁹¹ Likewise, Art 27(1) of the UDHR recognises everyone's right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.²⁹²

4.22 Article 1.1 of the *International Convention on Cultural and Political Rights* (ICCPR)²⁹³ provides freedom of cultural development amongst other rights.²⁹⁴ Article 19 provides a right to share information as well as protection of one's reputation.²⁹⁵ Such rights are not only provided on an international level but also exist on a supranational basis. For example, the *European Constitution*²⁹⁶ contains the *Charter of Fundamental Rights of the Union* with Chapter II being Freedoms and Chapter V being Citizens' Rights. Article II-73 provides freedom of the arts and scientific research²⁹⁷ and Art II-74 the right to education.²⁹⁸ Article II-102 provides a right to

²⁹⁰ '1. States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

²⁹¹ '1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.'

²⁹² 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.'

²⁹³ See <<http://www.ohchr.org/english/law/ccpr.htm>>.

²⁹⁴ '1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

²⁹⁵ '1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.'

²⁹⁶ See <http://www.unizar.es/euroconstitucion/Treaties/Treaty_Const.htm>.

²⁹⁷ 'The arts and scientific research shall be free of constraint. Academic freedom shall be respected.'

²⁹⁸ '1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

information²⁹⁹ while Art II-112 aligns the constitutional rights with the *Convention for the Protection of Human Rights and Fundamental Freedoms*.³⁰⁰ Article III-283³⁰¹ together with Art III-316³⁰², fosters support for developing nations.

4.23 These declarations, conventions and covenants provide a basis for access to knowledge in international human rights law. They may also act as an interpretative guide when courts are called on to define the ambit of IP rights.³⁰³

Development agenda – developing countries

4.24 The *Declaration on the Right to Development*³⁰⁴ (DRD) confirms ‘that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations’. Article 1 of the DRD provides, amongst other rights, a right to participate in social and cultural development ‘in which all human rights and fundamental freedoms can be fully realised’.³⁰⁵

4.25 More recently and in furtherance of the development agenda through WIPO we have seen countries such as Brazil and Argentina along with powerful non-government organisations (NGOs) and large corporations interested in access to knowledge as part of their business models produce a Draft Treaty on Access to Knowledge (A2K Treaty). The A2K Treaty seeks to make IP law more responsive to the need for, and innovation inherent in, better access to knowledge and builds on the spirit of the international human rights outlined above.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.’

²⁹⁹ ‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.’

³⁰⁰ ‘3. Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

³⁰¹ ‘2. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of vocational training.’

³⁰² ‘1. ...Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.’

³⁰³ *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 <<http://www.austlii.edu.au/au/cases/cth/HCA/1995/20.html>> at paragraphs 25 and 26. As at 27 June 2006, this case has been applied in 34 subsequent decisions. See also *Kruger v Commonwealth* (1997) 190 CLR 1; *Horta v Commonwealth* (1994) 181 CLR 183; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; *Kartinyeri v Commonwealth* (1998) 195 CLR 337. See also Bryan Horrigan and Brian Fitzgerald, ‘International and Transnational Influences on Law and Policy Affecting Government’ in Bryan Horrigan (ed), *Government Law and Policy: Commercial Aspects* (Federation Press, 1998) 2; Brian Fitzgerald, ‘International Human Rights and the High Court of Australia’ (1994) 1 *James Cook University Law Review* 78.

³⁰⁴ See <<http://www.un.org/documents/ga/res/41/a41r128.htm>>.

³⁰⁵ ‘1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.’

Draft Treaty on Access to Knowledge³⁰⁶

4.26 Amongst many purposes and objectives, the A2K Treaty is seeking to enhance the sharing of the benefits of scientific advancement and promote new incentives to create and share knowledge resources without restrictions on access.³⁰⁷

4.27 The A2K Treaty is a major international step forward in promoting open access to knowledge, and more broadly the sharing of knowledge. The A2K Treaty is largely a result of the work of Brazil and Argentina who, in August 2004, discussed a possible treaty concerning access to knowledge as part of the development agenda for WIPO.³⁰⁸ Support for a possible treaty on access to knowledge grew in early 2005 following the input from a number of non-governmental organisations, academics, scientists, businesses and governments on key areas which the treaty should cover.³⁰⁹ Following this discussion, the 14 member Group of the Friends of Development formally asked WIPO to consider the core components of a treaty on access to knowledge.³¹⁰ As a result of this the A2K Treaty was drafted in May 2005.

4.28 The A2K Treaty is aimed at providing for the easy transfer of knowledge and securing the viability of open innovation systems worldwide³¹¹. Article 1-1 of the A2K Treaty provides that the main objectives of the treaty are to protect and enhance access to knowledge, and to facilitate the transfer of technology to developing countries. The key areas which the A2K Treaty covers includes: provisions regarding limitations and exceptions to copyright and related rights; patents; expanding and enhancing the knowledge commons; the promotion of open standards; the control of anticompetitive practices; authors' and performers' rights; and the transfer of technology to developing countries.

³⁰⁶ See <<http://www.access2knowledge.org/cs/a2k>>.

³⁰⁷ In the preamble.

³⁰⁸ See <<http://www.access2knowledge.org/cs/a2k>>.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Ibid.

- 4.29 Of particular significance for open access and the OAK Law Project are:
- Article 3-1 which provides general limitations and exceptions to copyright
 - Article 3-6 which addresses digital rights management and measures regarding circumvention of technological protection measures
 - Article 3-7 which provides that facts and works lacking in creativity, should not be subject to copyright or copyright-like protections
 - Article 3-8 which seeks to ensure access to orphan works
 - Article 3-9 which provides retroactive application of an Article limiting extension of the terms of protection for copyright and related rights
 - Article 4-1 which deals with patents to ensure that innovation is not inhibited
 - Article 5-2 which provides that works resulting from government funded research should be made publicly available at no charge within a reasonable time
 - Article 5-6 which provides for the adoption of a knowledge commons database
 - Part 6 which provides for the promotion of open standards.

4.30 It is envisaged that the A2K Treaty will have a significant impact and influence upon the future development of domestic legislation relating to IP laws and access to knowledge.

Key Provisions of the A2K Treaty

4.31 The following Articles of Part 5 of the A2K Treaty will be key provisions in providing greater access to knowledge:

A2K Treaty

PART 5 - EXPANDING AND ENHANCING THE KNOWLEDGE COMMONS

Article 5-1 - Knowledge Commons Committee

A knowledge commons committee (KCC) is established to promote cooperation and investment in databases, open access journals and other open knowledge projects that expand the knowledge commons.

Article 5-2 – Access to Public Funded Research

- (a) Members agree that works resulting from government-funded research shall be publicly available at no charge within a reasonable time frame, subject to reasonable exceptions, for example, for classified military research, for patentable discoveries, and for works that generate revenue for the author such as books.
- (b) The KCC shall publish and periodically update best practices for providing public access to government funded research.

The best practices will include such topics as support for open access journals, open access archives/repositories, interoperability, etc.

...

Article 5-5 - Access to Government Information

- (a) Members shall facilitate public access to information held by public bodies and private bodies that are conducting public business. This shall include laws and regulations to provide for legal procedures for access to information based on the principles of openness and transparency.
- (b) The right to information shall be guaranteed by law in accordance with the following principles:
 - (i) everyone has the right to access information held by public bodies;
 - (ii) any exemptions to this right shall be set down in law, limited in scope, and proportional to the interest to be protected, and subject to a review of the public interest.
 - (iii) any refusal to disclose information shall be subject to review by an independent body such as an ombudsman and/or a court;
 - (iv) public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
 - (v) secrecy laws and other legislation shall be amended as necessary to comply with freedom of information principles.

Article 5-6 - Knowledge Commons Databases

- (a) The KCC shall adopt procedures whereby persons, organizations or communities that seek to establish certain qualifying open databases apply for a time limited period during which no patent applications can be submitted that rely upon the data from the database. To qualify, the databases must address an important public interest, and be freely available to all.

- (b) Members agree that during the time period determined in (a), no patents will be granted for patent applications that contain claims to particular uses of the data obtained from such a qualifying database, unless such claims do not restrict, or are licensed on such terms that they do not restrict, the ability of others to use the data at no cost.

Proposed Paris Accord

4.32 Another very recent initiative within the broader A2K movement is the proposed Paris Accord (Paris Accord) which outlines a new set of relations between creative individuals and communities, consumers and citizens.³¹² It aims to establish an agreement between creative communities and the public that includes recognition of, and suggestions for, improving access to, and income for, the knowledge goods produced by creative communities. Drafting commenced in May 2006 with a Trans Atlantic Consumer Dialogue (TACD) workshop during 19 and 20 June 2006 where a 17 June 2006 draft of the Paris Accord was discussed. The Paris Accord contains a number of provisions that will enhance or assist open access to knowledge. These include the following:

Proposed Paris Accord

Medical Research and Development

...6. There is also a need to expand methods of funding projects that support open research, the development of databases and other research tools, as well as high-risk R&D [research and development] projects that are likely to be useful for follow-on innovation.

7. Science depends upon access to knowledge. Hoarding of data and materials must be discouraged.

8. Intellectual property rules should not prevent experimental use of inventions or materials, nor should they discourage or prevent investments in any field of invention.

9. National governments should eliminate visa restrictions that limit the ability of students to study at universities in another nation, or restrict the ability of scientists or engineers to participate in conferences or gain experience at firms in another nation.

.....

Software

...12. For any software functionality that is essential to creative, expressive knowledge and innovation activities in today's or tomorrow's information society, there should exist, as soon as possible, at least one practical solution that is implemented as FLOSS (free/libre/open source software), and whose usage does not depend on proprietary software.

....

³¹² See <<http://www.cptech.org/a2k/pa/>>.

The Public as Creative Community

...4. Intellectual property rules must be evaluated to determine if or how copyright and other norms will accommodate and these developments, in order to support rather than undermine the opportunities for more democratic, open and collaborative participation in the production and disseminations of creative works.

5. It is essential that the public have the opportunity to freely use World Wide Web hypertext links and other tools to point to information, and to make copies and use excerpts of other published works, in order to engage in criticism, commentary and analysis, and to design new technologies and methods to expand the power of collaborative creative efforts.

6. These rights should not be undermined by DRM [digital rights management] measures.

7. The ability of persons to engage in anonymous speech is important, as well as the right to protect confidential sources.

8. Bloggers must be protected from frivolous or abusive threats and lawsuits by copyright owners, or others that assert limits of speech or the use or sharing of information, particularly in the context of reviews or criticisms of important political, economic or cultural figures or institutions.

....

Films, Video and Art – Filmmakers, Artists, Actors and the Viewing Public

...12. Audiovisual makers should expect that broadcasting and computer networks receive the necessary investment to ensure state of the art, efficient, delivery of digital content to users;

....

20. Consumers benefit from cultural diversity in all aspects of broadcasting and publishing of cultural works. Mechanisms to support such diversity, including promotion for diverse languages, and minority productions are needed. States or Regional entities must consider diverse methods to support the creation and diffusion of communitarian or artistic works, from quotas to subventions for scripting, filming or diffusion and theatres.

....

Recorded Music: Songwriters, Performers and Listening Public

...12. Commentary and promotion of works they enjoy, provide measures to overcome technological or other means that restrict access that harms creators, libraries, educational, institutions, archives and persons with disabilities, and undermine privacy and freedom.

....

Proposal on DRM [digital rights management]

...3. We oppose technological and other measures that restrict access to knowledge goods, harm creators, libraries, educational institutions, archives and persons with disabilities, and undermine privacy and freedom. Such measures should not be granted legal protection.

....

Scholarly Publishing: Authors and Readers

...2. Concentration of ownership of scholarly and scientific publishing presents risks and

³¹³ See <<http://www.cptech.org/a2k/pa/>>.

dangers to authors and readers, in terms of high prices, lack of diversity of content, and undue influence on discourse involving scientific, cultural, professional and political life.

....

7. Authors should retain:

- The rights to reproduce, distribute, publicly perform, and publicly display the Article in any medium for non-commercial purposes;
- The right to prepare derivative works from the Article; and
- The right to authorize others to make any non-commercial use of the Article so long as the author receives credit as author and the journal in which the Article has been published is cited as the source of first publication of the Article.

....

11. Authors/Researchers funded by governments should submit an electronic version of their final, peer-reviewed manuscript to a publicly available online archive upon acceptance for publication in a journal.³¹³

World Summit on the Information Society Agenda

4.33 In 1998, the International Telecommunication Union (ITU) sought to place the holding of a World Summit on the Information Society (WSIS) on the agenda of the United Nations Administrative Committee on Coordination.³¹⁴ Extensive planning occurred and, pursuant to the ITU and United Nations General Assembly Resolutions 56/183³¹⁵ and 57/238³¹⁶, both organisations endorsed the holding of the WSIS in two phases; the first in Geneva and the second in Tunis.³¹⁷ During 10 through 12 December 2003, the WSIS was held in Geneva.³¹⁸ On 12 December 2003, a *Declaration of Principles – Building the Information Society: A Global Challenge in the New Millennium*³¹⁹ was released. Approximately ‘50 Heads of state/government and Vice-Presidents, 82 Ministers, and 26 Vice-Ministers and Heads of delegation as well as high-level representatives from international organisations, private sector, and civil society provided political support to the WSIS Declaration of Principles and Plan of Action³²⁰ that were adopted on 12 December 2003. More than 11,000 participants from 175 countries attended the Summit and related events.’³²¹ The principles include the following:

³¹⁴ <<http://www.itu.int/wsis/newsroom/fact/background.html>> at 25 July 2006.

³¹⁵ <http://www.itu.int/wsis/docs/background/resolutions/56_183_unga_2002.pdf> at 25 July 2006. The Resolution was adopted on 21 December 2001.

³¹⁶ See <<http://www.itu.int/wsis/docs/background/resolutions/57-238.pdf>> at 25 July 2006. The Resolution was adopted on 20 December 2002.

³¹⁷ <<http://www.itu.int/wsis/basic/about.html>> at 25 July 2006.

³¹⁸ See <<http://www.itu.int/wsis/geneva/index.html>>.

³¹⁹ See <<http://www.itu.int/wsis/docs/geneva/official/dop.html>>.

³²⁰ See <http://www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=1161|1160>.

³²¹ See <<http://www.itu.int/wsis/geneva/index.html>>.

WSIS Declaration of Principles

1. We, the representatives of the peoples of the world, assembled in Geneva from 10-12 December 2003 for the first phase of the World Summit on the Information Society, declare our common desire and commitment to build a people-centred, inclusive and development-oriented Information Society, where everyone can create, access, utilize and share information and knowledge, enabling individuals, communities and peoples to achieve their full potential in promoting their sustainable development and improving their quality of life, premised on the purposes and principles of the Charter of the United Nations and respecting fully and upholding the Universal Declaration of Human Rights.

....
4. **We reaffirm**, as an essential foundation of the Information Society, and as outlined in Article 19 of the Universal Declaration of Human Rights, that everyone has the right to freedom of opinion and expression; that this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone, everywhere, should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers.
8. **We recognize** that education, knowledge, information and communication are at the core of human progress, endeavour and well-being. Further, Information and Communication Technologies (ICTs) have an immense impact on virtually all aspects of our lives. The rapid progress of these technologies opens completely new opportunities to attain higher levels of development. The capacity of these technologies to reduce many traditional obstacles, especially those of time and distance, for the first time in history makes it possible to use the potential of these technologies for the benefit of millions of people in all corners of the world.

....
19. We are resolute in our quest to ensure that everyone can benefit from the opportunities that Information and Communication Technologies (ICTs) can offer. We agree that to meet these challenges, all stakeholders should work together to: improve access to information and communication infrastructure and technologies as well as to information and knowledge; build capacity; increase confidence and security in the use of ICTs; create an enabling environment at all levels; develop and widen ICT applications; foster and respect cultural diversity; recognize the role of the media; address the ethical dimensions of the Information Society; and encourage international and regional cooperation. We agree that these are the key principles for building an inclusive Information Society.
20. Governments, as well as private sector, civil society and the United Nations and other international organizations have an important role and responsibility in the development of the Information Society and, as appropriate, in decision-making processes. Building a people-centred Information Society is a joint effort which requires cooperation and partnership among all stakeholders.

....
24. The ability for all to access and contribute information, ideas and knowledge is essential in an inclusive Information Society.

25. The sharing and strengthening of global knowledge for development can be enhanced by removing barriers to equitable access to information for economic, social, political, health, cultural, educational, and scientific activities and by facilitating access to public domain information, including by universal design and the use of assistive technologies.
26. A rich public domain is an essential element for the growth of the Information Society, creating multiple benefits such as an educated public, new jobs, innovation, business opportunities, and the advancement of sciences. Information in the public domain should be easily accessible to support the Information Society, and protected from misappropriation. Public institutions such as libraries and archives, museums, cultural collections and other community-based access points should be strengthened so as to promote the preservation of documentary records and free and equitable access to information.
27. Access to information and knowledge can be promoted by increasing awareness among all stakeholders of the possibilities offered by different software models, including proprietary, open-source and free software, in order to increase competition, access by users, diversity of choice, and to enable all users to develop solutions which best meet their requirements. Affordable access to software should be considered as an important component of a truly inclusive Information Society.
28. We strive to promote universal access with equal opportunities for all to scientific knowledge and the creation and dissemination of scientific and technical information, including open access initiatives for scientific publishing.
29. Each person should have the opportunity to acquire the necessary skills and knowledge in order to understand, participate actively in, and benefit fully from, the Information Society and the knowledge economy. Literacy and universal primary education are key factors for building a fully inclusive information society, paying particular attention to the special needs of girls and women. Given the wide range of ICT and information specialists required at all levels, building institutional capacity deserves special attention.
-
39. The rule of law, accompanied by a supportive, transparent, pro-competitive, technologically neutral and predictable policy and regulatory framework reflecting national realities, is essential for building a people-centred Information Society. Governments should intervene, as appropriate, to correct market failures, to maintain fair competition, to attract investment, to enhance the development of the ICT infrastructure and applications, to maximize economic and social benefits, and to serve national priorities.
-
42. Intellectual Property protection is important to encourage innovation and creativity in the Information Society; similarly, the wide dissemination, diffusion, and sharing of knowledge is important to encourage innovation and creativity. Facilitating meaningful participation by all in intellectual property issues and knowledge sharing through full awareness and capacity building is a fundamental part of an inclusive Information Society.
-

67. **We are firmly convinced** that we are collectively entering a new era of enormous potential, that of the Information Society and expanded human communication. In this emerging society, information and knowledge can be produced, exchanged, shared and communicated through all the networks of the world. All individuals can soon, if we take the necessary actions, together build a new Information Society based on shared knowledge and founded on global solidarity and a better mutual understanding between peoples and nations. We trust that these measures will open the way to the future development of a true knowledge society.³²²

4.34 During 16 through 18 November 2005, the WSIS met again in Tunis³²³ and released the *Report of the Tunis phase of the World Summit on the Information Society, Tunis, Kram Palexpo, 16-18 November 2005* on 15 February 2006.³²⁴ 174 states were represented at the Summit³²⁵ and the principles listed above were affirmed as means by which 'to develop and implement an effective and sustainable response to the challenges and opportunities of building a truly global Information Society that benefits all our peoples'³²⁶. All forty commitments are provided in the *Tunis Commitment*³²⁷ adopted on 18 November 2005. The *Tunis Agenda for the Information Society*³²⁸ was also adopted on 18 November 2005 and focused on implementation of the *Geneva Plan of Action*³²⁹.

The Tunis Agenda for the Information Society states that the WSIS **implementation mechanism at the international level** should be organised taking into account the themes and action lines in the Geneva Plan of Action, and moderated or facilitated by UN agencies when appropriate. It also states that **ITU, UNESCO and UNDP** should play a leading facilitating role in the implementation of the Geneva Plan of Action and organise a **meeting of moderators/facilitators of action lines**.³³⁰

3. Open content licensing (OCL)

4.35 While greater access to knowledge is the primary goal of the OA movement, we also need to appreciate that access to knowledge also requires us to map out the rights to reuse knowledge. Copyright law makes it unlawful to reproduce and communicate copyright material unless we have the permission of the copyright

³²² See <<http://www.itu.int/wsis/docs/geneva/official/dop.html>>.

³²³ See <<http://www.itu.int/wsis/tunis/index.html>>.

³²⁴ See *Report of the Tunis phase of the World Summit on the Information Society, Tunis, Kram Palexpo, 16-18 November 2005* <<http://www.itu.int/wsis/docs2/tunis/off/9rev1.pdf>>.

³²⁵ <<http://www.itu.int/wsis/docs2/tunis/off/9rev1.pdf>> page 28. See Appendix 1 to this chapter.

³²⁶ <<http://www.itu.int/wsis/docs2/tunis/off/9rev1.pdf>> page 6 commitment number 39. See also the *Tunis Agenda for the Information Society* <<http://www.itu.int/wsis/docs2/tunis/off/6rev1.pdf>> which reaffirms the WSIS commitments made in *Declaration of Principles and Plan of Action* in Geneva. The adoption of the *Tunis Agenda for the Information Society* is recorded in Chapter VIII of the *Report of the Tunis phase of the World Summit on the Information Society, Tunis, Kram Palexpo, 16-18 November 2005* <<http://www.itu.int/wsis/docs2/tunis/off/9rev1.pdf>>.

³²⁷ <<http://www.itu.int/wsis/docs2/tunis/off/7.pdf>> at 25 July 2006.

³²⁸ <<http://www.itu.int/wsis/docs2/tunis/off/6rev1.pdf>> at 25 July 2006.

³²⁹ <http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0005!!PDF-E.pdf> at 25 July 2006.

³³⁰ See <<http://www.itu.int/wsis/implementation/index.html>>. For the meeting of moderators/facilitators of action lines see <<http://www.itu.int/wsis/implementation/consultation24feb.html>>.

owner or can rely on some other form of authorisation. Therefore, while I might place an article in an institutional repository, if I say nothing more, the 'all rights reserved' default position will most likely apply, meaning that the end user's rights to engage in reproduction or communication of the material as an act of reuse will be unclear. Users may be able to read it online or print a copy but can they post an enhanced version on another website or make 30 copies for their students in class? In order to deal with these questions and to provide greater legal certainty and fluidity to the act of sharing knowledge, we have seen the rise of open content licensing (OCL).

The open content movement (OCM)

4.36 The open content movement (OCM) has developed a range of licensing models to broaden the means by which users can use and reuse digital content without infringing copyright than is available under statutory exceptions to copyright.

4.37 The term 'open content' describes 'any kind of creative work including articles, pictures, audio, and video that is published in a format that explicitly allows the copying of the information.'³³¹ David Wiley, who founded the OpenContent Project to facilitate greater access to instructional content, is regarded as the creator of the term because he used the words 'open content' when drafting the Open Content License³³² in 1998.³³³ The Open Publication License³³⁴ followed in June 1999. Lawyers such as Pamela Samuelson, James Boyle, Yochai Benkler and Larry Lessig 'were becoming increasingly interested in the interrelated issues of copyright, intellectual property, digital content and the public domain'.³³⁵ In 1999 Lessig³³⁶ wrote *Code and other laws of Cyberspace*³³⁷ which discussed the legal issues encompassing software code and in 2001 he founded the Creative Commons³³⁸.

4.38 A range of open content licences exist including the following:

- Creative Commons Licenses (11 versions)³³⁹
- AEShareNet Instant Licences³⁴⁰
- Design Science License³⁴¹

³³¹ 'Open content', *Wikipedia* <http://en.wikipedia.org/wiki/Open_content_license> at 6 May 2006.

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<<http://www.fsf.org/licensing/licenses/fdl.html>.

³³² <<http://opencontent.org/opl.shtml>> at 6 May 2006.

³³³ 'Open content', *Wikipedia* <http://en.wikipedia.org/wiki/Open_content_license> at 6 May 2006.

³³⁴ <<http://opencontent.org/openpub/>> at 6 May 2006. A number of books, mostly in the field of computing, adopted the license, including GTK+/Gnome Application Development by Havoc Pennington, and Grokking the GIMP, by Carey Bunks. It was also adopted for Bruce Perens' Open Source Series, published by Prentice Hall. *Source*:

<http://en.wikipedia.org/wiki/Open_content_license>.

³³⁵ Glyn Moody, 'Learning the lesson: open content licensing', *LWN.net* <<http://lwn.net/Articles/181374/>> at 6 May 2006.

³³⁶ See <<http://www.lessig.org/>>.

³³⁷ <<http://code-is-law.org/>> at 6 May 2006.

³³⁸ See <<http://creativecommons.org/>>.

³³⁹ See <http://en.wikipedia.org/wiki/Creative_Commons_License>.

³⁴⁰ See <<http://www.aesharenet.com.au/coreBusiness/#Instant>>.

³⁴¹ See <http://en.wikipedia.org/wiki/Design_Science_License>.

- GNU Free Documentation License³⁴²
- Open Content License³⁴³
- Open Directory Project License³⁴⁴ used by Open Directory Project³⁴⁵
- Open Game License³⁴⁶ – Licence of the Open Gaming Foundation³⁴⁷, as drafted by Wizards of the Coast³⁴⁸
- Open Publication License³⁴⁹ – Licence for the Open Content Project³⁵⁰
- The Commonwealth of Australia, represented by the Office of Spatial Data Management (OSDM), Spatial Data Licence used by Geoscience Australia.³⁵¹

4.39 To highlight the terms common to many of the open content licences, the following is a brief case study on the licences developed by the Creative Commons.

Creative Commons licensing case study

Professor Lawrence Lessig of Stanford University in the USA and a number of his colleagues frustrated by the fact that the technology offered so much but that negotiability of copyright material in law was so cumbersome, came up with the idea of the ‘Creative Commons’ (CC). Lessig’s vision was for a space in the online world where people could share and reuse copyright material without fear of being sued – a creative commons. To do this, copyright owners had to agree or give permission for their material to be shared through a generic licence that gave permission in advance.³⁵²

Creative Commons is now a worldwide project that aims to build a distributed information commons by encouraging copyright owners (where they wish) to license use of their material through open content licensing protocols and thereby promote

³⁴² See <http://en.wikipedia.org/wiki/GNU_Free_Documentation_License>.

³⁴³ See <http://en.wikipedia.org/wiki/Open_Content_License> and <<http://opencontent.org/opl.shtml>> at 6 May 2006.

³⁴⁴ See <http://en.wikipedia.org/wiki/Open_Directory_Project_License>.

³⁴⁵ See <http://en.wikipedia.org/wiki/Open_Directory_Project>.

³⁴⁶ See <http://en.wikipedia.org/wiki/Open_Game_License>.

³⁴⁷ See <http://en.wikipedia.org/wiki/Open_Gaming_Foundation>.

³⁴⁸ See <http://en.wikipedia.org/wiki/Wizards_of_the_Coast>.

³⁴⁹ See <http://en.wikipedia.org/wiki/Open_Publication_License>.

³⁵⁰ See <http://en.wikipedia.org/wiki/Open_Content_Project>.

³⁵¹ See <https://www.osdm.gov.au/osdm/docs/internet_licence.htm> and <https://www.ga.gov.au/products/servlet/controller?catno=63643&catno=63680&catno=63695&catno=63722&event=FILE_SELECTION>.

³⁵² On March 9, 2006 the District Court of Amsterdam in *Curry v Audax Publishing B.V.*, LJN: AV4204, Rechtbank Amsterdam, 334492 / KG 06-176 SR (9 March 2006) upheld the validity of a Creative Commons Attribution-Noncommercial-ShareAlike license attached to photos on the website www.flickr.com; <http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ljn&ljn=AV4204&u_ljn=AV4204> at 6 May 2006.

better identification, negotiation and reutilization of content for the purposes of creativity and innovation.³⁵³ It aims to make copyright content more ‘active’ by ensuring that content can be reutilized with a minimum of transactional effort. As the CC project highlights, the use of an effective identification or labeling scheme (eg. a ‘CC licence’) and an easy to understand and implement legal framework is vital to furthering this purpose. This is done by establishing generic protocols or licence terms for the open distribution of content that can be attached to content with a minimum difficulty under a CC label. In short, the idea is to ask copyright owners to ‘licences out’ or distribute their material on the basis of protocols designed to enhance reusability and build on the information commons.

Creative Commons licences are part of a genre of licences that are used to negotiate legal rights in content as opposed to software. Wikipedia, the online peer produced knowledge resource, uses the GNU Free Documentation Licence and, as listed above in para 4.38, many other types of open content licences exist.³⁵⁴ CC licences have gained significant attention and popularity over the last three years with over 145 million ‘link backs’ to CC licences recorded. Compatibility of content licensed under the different open content licences is a key issue for the future.

Unlike the free and open source software licences like the GNU General Public Licence (GNU GPL) and the Berkeley Software Development Licence (BSD) from which they took their inspiration, the CC licences are not designed for software, but are intended for use in relation to other kinds of creative copyright material: websites, educational materials, music, film, photographs, blogs etc. Along with the text of the various open content licences, the project has developed metadata that can be used to associate creative works with their licence status in a machine-readable way. In addition to certain ‘baseline’ rights and restrictions which are included in all CC licences, the copyright owner can choose from a number of licensing options, which can be used alone or in combination.

CC baseline features

The following features are common to all CC licences:

- licensees are granted the right to copy, distribute, display, digitally perform and make verbatim copies of the work into another format
- the licences have worldwide application that lasts for the entire duration of copyright and are irrevocable
- licensees cannot use technological protection measures to restrict access to the work
- copyright notices should not be removed from all copies of the work

³⁵³ CC is a not for profit corporation based in San Francisco and sponsored by the Centre for the Public Domain, the MacArthur Foundation and the Hewlett Foundation: <<http://creativecommons.org>>. An affiliated organization is iCommons Ltd. a not for profit corporation based in London <<http://icommons.org/>>.

³⁵⁴ See <<http://www.wikipedia.org>>.

- every copy of the work should maintain a link to the licence
- attribution of the creator or author must be given.³⁵⁵

CC optional features

Copyright owners can choose from among the following optional licence conditions³⁵⁶:

- **Non-commercial:** others are permitted to copy, distribute, display and perform the copyright work—and derivative works based upon it—but for non-commercial purposes only
- **No derivative works:** others are permitted to copy, distribute, display and perform only exact copies of the work but cannot make derivative works based upon it³⁵⁷

Share alike: others may distribute derivative works only under a licence identical to that in the original work.³⁵⁸

Each CC licence is expressed in three ways:³⁵⁹

- (1) the **Commons Deed**, that is, a simple, plain-English summary of the licence, together with the relevant icon/s that indicates the scope of permitted use
- (2) the **Legal Code**, that is the dense legal ‘fine print’ licence document
- (3) the **Digital Code**, that is, metadata that highlights what licence is attached to the content.³⁶⁰

CC Implementation

Creative Commons licences are also being ported or translated to meet the legal requirements of national laws. This has happened in 28 countries with another 19 working on this aspect.³⁶¹ The following are notable examples of how the CC licences are being used:

- The producers of the anti-Fox News Channel documentary ‘Outfoxed’ have released some of the unedited footage under a CC licence.

³⁵⁵ ‘Base Line Rights and Restrictions in All Licenses’

<<http://creativecommons.org/about/licenses/fullrights>>.

³⁵⁶ See <<http://creativecommons.org/about/licenses/meet-the-licenses>>.

³⁵⁷ Note that the ‘No derivative works’ option is incompatible with the ‘Share Alike’ option.

³⁵⁸ Note that the ‘Share Alike’ option only applies to derivative works and is in-compatible with the ‘No derivative works’ option.

³⁵⁹ See <<http://creativecommons.org/about/licenses/meet-the-licenses>>.

³⁶⁰ For further information, see ‘Creative Commons Developers – Using Creative Commons Metadata’ at <<http://creativecommons.org/technology/usingmarkup>>.

³⁶¹ See <<http://creativecommons.org/worldwide>>.

- The Public Library of Science and BioMed Central licence their publications under CC licences.³⁶²
- On Line Opinion, a leading Australian news and opinion website is using CC licences.³⁶³
- The Australian Creative Resources Online (ACRO) website contains a range of materials (such as audio tracks and still images) which are licensed for use under CC licences.³⁶⁴
- In the UK, the British Broadcasting Corporation (BBC) has adapted the CC licensing model for use by the BBC Creative Archive, which will allow people to download clips of BBC programs for non-commercial use.³⁶⁵
- The OYEZ Project, founded in 1989 by Jerry Goldman, a Professor of Political Science at Northwestern University, is an archive of recorded oral arguments and bench statements in the Supreme Court of the USA. In June 2003 the OYEZ Project released hundreds of hours of MP3 versions of their archived audio files under a CC licence.³⁶⁶

Online digital music hosting services GarageBand.com, Dmusic.com and Soundclick.com and alternative record label Opsound.org offer CC licences as an optional tag for all songs uploaded to their websites. As a result, a large portion of the music content hosted on these sites is licensed under CC licences.

- In their November 2004 issue, *Wired* magazine gave away a CD which features 16 songs released under CC licences by artists such as the Beastie Boys, Talking Heads front man David Byrne and Brazilian artist Gilberto Gil.
- Vibewire is an e-zine for young people to publish creative works and enables contributors to use CC licences.³⁶⁷
- flickr is an online photo library with millions of photos licensed under CC licences.³⁶⁸
- The National Library of Australia utilises flickr to enable members of the public to contribute their photographs to the Picture Australia Project, and encourages CC licensing.³⁶⁹
- Four Docs is an archive and forum for four minute documentaries established by Channel 4 in the United Kingdom and uses CC licences.³⁷⁰

In June 2006, Microsoft Corp. released a copyright licensing tool that enables the addition of CC licensing information for works in Microsoft Office applications.³⁷¹ In

³⁶² See <<http://www.plos.org>> and <<http://www.biomedcentral.com/home/>>.

³⁶³ See <<http://onlineopinion.com.au>>.

³⁶⁴ See <<http://www.acro.edu.au>>.

³⁶⁵ See <<http://creativearchive.bbc.co.uk>>.

³⁶⁶ See <<http://www.oyez.org/oyez/frontpage>>.

³⁶⁷ See <<http://www.viberwire.net>>.

³⁶⁸ See <<http://www.flickr.com>>.

³⁶⁹ See <<http://www.pictureaustralia.org/flickr.html>>.

³⁷⁰ See <<http://www.channel4.com/fourdocs>>.

a CC press released dated 20 June 2006, it was stated that the tool will enable the 400 million users of Microsoft Office Word, Excel and PowerPoint to select one of the CC licences from within the specific application.³⁷²

Material that has been released under a CC licence can be specifically searched for on the Google³⁷³ and Yahoo!³⁷⁴ search engines. For Google, this is possible by choosing the licence terms of the work along side the 'usage rights' heading in the advanced search mode.³⁷⁵ The Yahoo! advanced search code provides a CC licence selection to include in the search.³⁷⁶ The Mozilla web browser provides a search button to facilitate searching of CC licensed material.³⁷⁷

Why share digital content?

4.40 A common question is 'why would people want to share digital content?'. The reasons include:

- A desire to sponsor or stimulate innovation
- Ideologically and financially this may be acceptable—the most compelling example is government where information is ultimately owned by and for the people
- Open contenting one version of the material eg. a draft (pre-print) or a chapter may in fact be a strategy for enhancing the commercialised version of the content
- A wish to share with others for creative, educational, scientific or research purposes
- Publicity – what the free and open software movement calls 'egoboo' or reputation within the open community which in some cases will be exploited commercially at a later date
- Negotiability – through technologically implemented generic protocols that can be utilised with the click of a mouse
- 'What is junk to one may be gold to another' – the idea that the off cuts or digital junk of one person may be the building blocks of knowledge and creative genius for another
- 'Indirect appropriation' – money, design and use of end product, pleasure or social profile gained through involvement in peer production.³⁷⁸

³⁷¹ See <<http://www.microsoft.com/downloads/details.aspx?FamilyId=113B53DD-1CC0-4FBE-9E1D-B91D07C76504&displaylang=en>>.

³⁷² See <<http://creativecommons.org>>.

³⁷³ See <<http://www.google.com>>.

³⁷⁴ See <<http://www.yahoo.com>>.

³⁷⁵ See <http://www.google.com/advanced_search?hl=en>.

³⁷⁶ See <<http://search.yahoo.com/search/options?fr=fp-top&p=>>>.

³⁷⁷ For example, Firefox <<http://www.savingsmountain.com/Firefox.html>>.

³⁷⁸ Yochai Benkler, 'Coase's Penguin, or Linux and the Nature of the Firm' (2002) 112 *Yale Law Journal* 369.

Does open content licensing mean that copyright law is redundant?

4.41 Open Content Licensing draws on the work of the free software movement. ‘Free software’ means free, as in freedom (to access code) not price, and has come to the fore in an environment of proprietary software distribution where source (human readable) software code is hidden from public view. The free software model is to distribute software with the source code open and accessible so that the recipient can easily view and better understand the software. This in turn enhances further innovation, error detection and/or security testing. In its copyleft licences such as the GNU GPL the free software movement requires that if open code is used, innovated upon and then distributed, that code in a derivative work and all of the code of the derivative work must be shared back to the public or the commons.

The powerful insight that Richard Stallman and his advisers at the Free Software Foundation discovered was that if you want to structure open access to knowledge you must leverage off or use as a platform your intellectual property rights. The genius of Stallman was in understanding and implementing the ethic that if you want to create a community of information or creative commons you need to be able to control the way the information is used once it leaves your hands. The regulation of this downstream activity was achieved by claiming an intellectual property right (copyright in the code) at the source and then structuring its downstream usage through a licence (GNU GPL). This was not a simple ‘giving away’ of information but rather a strategic mechanism for ensuring the information stayed ‘free’ as in speech. It is on this foundation that we now see initiatives like the Creative Commons expanding that idea from open source code to open digital content.³⁷⁹

4.42 The point being made is that OCL relies on the power of copyright ownership and law to structure open access downstream. Therefore, OCL is not anti-copyright. It uses copyright as the basis for structuring open access. However, OCL is designed to provide an effective model for managing copyright in digital content.

How does open content licensing relate to the Open Access movement?

4.43 The Open Access (OA) movement is intimately connected with OCL. As outlined in part 1 of this chapter [see paras 4.04 to 4.17], OA as defined in the Berlin Declaration³⁸⁰ and the Bethesda Statement³⁸¹ seeks to open up access to research and scholarship especially that which is publicly funded. Open Content Licensing is seen as a mechanism through which open access to research can be promoted.³⁸² For example, if a person writes an article on the legal aspects of downloading MP3s off the Internet, they might put that up on their website with an OC licence allowing the user to reproduce, recast and communicate the content so long as they provide

³⁷⁹ Fitzgerald and Fitzgerald, *Intellectual Property in Principle* (2004), [11.100].

³⁸⁰ See <<http://www.zim.mpg.de/openaccess-berlin/berlindeclaration.html>>. See paragraphs 4.12 – 4.14 above.

³⁸¹ See <<http://www.earlham.edu/~peters/fos/bethesda.htm>> See paragraphs 4.10 – 4.11 above.

³⁸² Poynder, *DRM in OA*.

attribution (BY), do not use it for a commercial purpose (NC) and share their innovations with the people of the world (SA).

In the open content licensing world where do moral rights fit?

4.44 Most OC licences will require some form of attribution of the author and in some instances expressly prohibit false attribution. Increasingly such licences are including ‘no endorsement’ clauses.

4.45 In terms of the moral right of integrity, most OC licences except those based on US copyright law will acknowledge this moral right.³⁸³

Open content licensing as a model for making copyright more active

4.46 There is great concern worldwide that too much copyright material is left inactive in archives (eg. government, public film or television authorities, museums) because the process of negotiating the licence is too time consuming or expensive, even where the copyright owner does not want to make money. Now that we have a vast array of digital technology that can present much of this material to the world cheaply and rapidly, more institutions are considering how they might allow greater access to their archives/knowledge (eg. the BBC³⁸⁴). A facility for accessing archived material, especially publicly funded material, will increasingly be demanded as part of the landscape of information management and creative innovation. OCL provides an effective and simple way in which sharing and collaborative effort can be facilitated in the realm of digital content and provides a potential means by which inactive copyright material can be given new life.

Open content licensing and sustainable business models

4.47 As with free and open source software it has become obvious that it is possible to develop business models associated with the provision of open content. With software, the approach has been to provide services along with the open code eg. the Red Hat model³⁸⁵, or provide value added code or knowledge under a dual licensing model eg. the MySQL model³⁸⁶ — one open and one restricted/commercial.

4.48 Under the OCL model it has quickly become apparent that the majority of people prefer to license out under the non-commercial condition. This means they reserve the right to commercialise and to set up a traditional commercial contract with a client. Therefore, under a non-commercial OCL, a person can give permission in advance to use the content for non-commercial purposes but before it can be used commercially, the user is required to obtain permission in the form of a commercial contract. This dual licensing approach provides open access for non-commercial

³⁸³ US authors of works of visual art have the rights of attribution and integrity as stated in section 106A of the US *Copyright Act* 1976.

³⁸⁴ See <<http://creativearchive.bbc.co.uk>>.

³⁸⁵ See <<http://www.redhat.com>>.

³⁸⁶ See <<http://www.mysql.com>>.

purposes but restricts reuse for commercial purposes. Some licences are offering these options within the same licence.³⁸⁷

4.49 A number of people have used OCL as a tool to promote and profile their work and to even convince commercial publishers to enter foreign markets. The ability for people to access content and translate it has opened up new possibilities and market opportunities. In the case of open access journal articles we have seen the development, by publishers, of business models where researchers pay for their open access academic work to be refereed and published in a commercial format—the so called Gold Model.³⁸⁸

4. Conclusion

4.50 Never before in history have we been faced with a greater demand for, and capacity to fulfil, access to knowledge. As this chapter highlights the effective blending of technological innovation and dissemination, with sustainable and innovative business models and a responsive and facilitative IP law will be critical.

³⁸⁷ That is, if you use the non-commercial option you are governed, for example, by clause 4 of the contract while, if you use the commercial option you are governed by clause 5 which requires a licence fee to be paid.

³⁸⁸ See footnote to paragraph 4.06 above.

APPENDIX 1

Parties represented at the WSIS Tunis Summit

Afghanistan, Albania, Algeria, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bhutan, Bolivia, Bosnia & Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Rep., Chad, Chile, China, Colombia, Comoros, Congo (Rep. of the), Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Rep., DPR of Korea, Dem. Rep. of Congo, Denmark, Djibouti, Dominican Rep., Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, FYR of Macedonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Holy See, Iceland, India, Indonesia, Iraq, Ireland, Isl. Rep. of Iran, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Korea (Rep. of), Kuwait, Kyrgyzstan, Lao P.D.R., Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Moldova, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Rwanda, Samoa, Sao Tome & Principe, Saudi Arabia, Senegal, Serbia & Montenegro, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Tanzania, Thailand, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Zambia, Zimbabwe.

Source: <<http://www.itu.int/wsisis/docs2/tunis/off/9rev1.pdf>> at 24 May 2006, page 28.

Part 4

Research outputs: the action agenda

‘.... copyright management is fundamental to innovation and we need to develop clear policies and protocols to realise the potential’

Chapter 5

Creating legal frameworks for open access to academic and research materials

Introduction

5.01 As discussed in the previous chapter, there is increasing interest in ensuring that the output of publicly funded academic and research work is accessible and widely disseminated through open access channels. In establishing the legal framework for a system of open access to academic and research materials, it is necessary to:

- determine the degree of ‘openness’ required in relation to those materials³⁸⁹
- understand the roles of, and relationships among, the relevant parties involved in funding, creating, publishing, distributing and using academic and research materials
- consider how best to manage the often complex inter-relationships among the various parties, especially with respect to their copyright interests in the materials, so that the relationships and copyright interests can be effectively managed to achieve the desired degree of open access in the system.

5.02 Various means are available for providing open access to academic and research output. It can be achieved by simply posting the article or report on the author’s own website (‘self-archiving’), depositing it in an institutional or disciplinary digital repository (or archive) or publishing it in an open access journal (which may involve a formal refereeing process). It is essential to appreciate at the outset that, from the legal perspective, it is not possible to establish any kind of open access system simply by default. Rather, development of an open access system can only successfully occur through deliberate construction and active management.³⁹⁰

³⁸⁹ There are various statements/declarations on open access in the context of academic materials, including: The Bethesda Statement on Open Access Publishing (2003) <<http://www.earlham.edu/~peters/fos/bethesda.htm>> at 16 July 2006; the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (2003) <<http://www.zim.mpg.de/openaccess-berlin/berlindeclaration.html>> at 16 July 2006; the Zwole Principles (2003) <<http://www.surf.nl/copyright/keyissues/scholarlycommunication/principles.php>> at 16 July 2006; the Budapest Open Access Initiative (2002) <<http://www.soros.org/openaccess/view.cfm>> at 14 July 2006; and the Bermuda Principles (1996) <http://en.wikipedia.org/wiki/Bermuda_Principles> at 14 July 2006. In addition to the numerous articles and blogs dealing with open access, there is now an emerging literature. Recently published books include: Richard Jones, Theo Andrew and John MacColl, *The Institutional Repository*, Chandos Publishing, Oxford, 2006; N Jacobs (ed), *Open Access: Key Strategic, Technical and Economic Aspects*, Chandos Publishing, Oxford, 2006 (most of the chapters are self-archived at <http://www.earlham.edu/~peters/fos/2006_07_16_fosblogarchive.html#115325936391251995>, accessed 30 July 2006; John Willinsky, *the Access Principle: The Case for Open Access to Research and Scholarship*, MIT Press, 2005, available in part at <<http://mitpress.mit.edu/catalog/item/default.asp?tid=10611&tttype=2>> at 30 July 2006.

³⁹⁰ This point is reflected in Principle 1 of the Zwole Principles (2003) which states:

5.03 The European Commission's Directorate-General for Research provides the following account of the emergence of open access repositories in its 2006 *Study on the economic and technical evolution of the scientific publication markets in Europe*³⁹¹:

In the nineties, the development of open source software in universities facilitated the creation of e-print archives and institutional repositories; the best-known programs are ePrints (University of Southampton), DSpace (MIT).

Two different types of open access e-print archives started to be set up:

- subject-based archives, collecting and providing access to articles and documents in a specific discipline. Their main objective is to allow for a quicker and more efficient dissemination of papers that are deposited by the authors themselves. They have emerged in domains with a long-standing tradition for exchanging pre-prints and where speed of publication is key (physics, computer science).
- Institutional repositories, preserving, disseminating and managing the scientific productions of a specific institution, typically including theses and dissertations, working papers, conference papers and published articles.

In parallel to software developments, the Open Archives Initiative set up a standard protocol ensuring interoperability between the archives servers. The OAI-PMH (Open Archives Initiative Protocol for Metadata Harvesting), first released in 2001, allows metadata to be retrieved from scattered archives and repositories, and to aggregate this data so that it can be searched with a single query. Services have been set up to help users locate relevant archives, provide unified search facilities and access the documents archived, some of which are discipline-specific, others are generic; for instance, OAIster currently harvests metadata from over 390 archives.

More recently, search engines have also come into play. Scirus, Elsevier's science-specific search engine on the Internet, which also covers proprietary databases (such as ScienceDirect), started a program to index open access repositories.

Google and Yahoo! have begun to index metadata from various archives and service providers: Google Scholar searches specifically for scholarly literature, from a wide variety of academic publishers, professional societies, preprint repositories and universities, as well as scholarly articles available across the web. Yahoo! started to index data harvested by OAIster in 2005 and has just launched its new Search Subscriptions service enabling users to find subscription content and public web content with a single search.

1. Achievement of [the overall objective] requires the optimal management of copyright in scholarly works to secure clear allocation of rights that balance the interests of all stakeholders.

See: <<http://www.surf.nl/copyright/keyissues/scholarlycommunication/principles.php#Principles>> at 16 July 2006.

³⁹¹ European Commission Directorate-General for Research, *Study on the economic and technical evolution of the scientific publication markets in Europe* (2006) at 60-61; the report is available at <http://ec.europa.eu/research/science-society/pdf/scientific-publication-study_en.pdf> at 24 July 2006 at 13 June 2006 (hereinafter European Commission Directorate-General for Research). The report was produced by a consortium led by Mathias Dewatripont of the Universite Libre de Bruxelles and was released on 31 March 2006.

By enabling researchers to find and access articles available in scattered resources, all these search services help to maximise research access, usage and impact.

In July 2005, the Institution Archives Registry, tracking the number and size of open access e-print archives, counts 560 archives in the world (of which 222 institutional or departmental, 56 cross-institution, 55 e-theses, 51 e-journals). The openDOAR Project is currently building a Directory of Open Access Repositories that will categorise and list the wide variety of open access research archives that have grown up around the world. National approaches are witnessed in various countries. In Australia, all the major universities have developed their Institutional Repositories with support of the Department of Education, Science and Training.

5.04 Open access systems vary not only in the extent to which material is made available for access and use but also in the way the relationships among the various stakeholders are managed in order to provide the desired degree of openness.³⁹² The degree of openness can be defined in terms of rights to access and use specified kinds or classes of materials and the categories of persons who are entitled to exercise those rights. The issue of open access may arise in relation to a range of academic and research output that has grown increasingly diverse as a result of technological developments during the last decade. The new technology has had an impact not only on the kinds of materials produced but also on the means available for their distribution. Consequently, the issue of open access may arise not only in relation to academic and research output in traditional forms (eg. research proposals, project plans, summaries of research results, conference papers, journal articles and books in published form) but also to new forms of output such as data files, complex databases involving compilations of datasets and embedded software and multimedia works. While the open access movement may have had its origins in the technological developments that revolutionised the publication, reproduction and dissemination of traditional academic materials, the question of open access now has an immediate relevance to a much wider range of academic and research output.

1. Open access policies

5.05 Key tasks in establishing an open access system are the identification of the kinds of materials (specifically or by category) which are to be made available and determination of the scope of access which is to be afforded. In the pursuit of the overall objective of promoting open access, different kinds of materials may be treated differently.³⁹³ While terms such as 'open access' and 'open content' are widely used, they are not terms of art and can have different meanings according to context.

³⁹² For a survey and analysis of disciplinary differences in relation to materials and access channels, see Sue Sparks, 'JISC Disciplinary Differences Report' *Rightscom Ltd* (2005)

<http://www.jisc.ac.uk/index.cfm?name=schol_comms_reports> at 31 July 2006.

³⁹³ Note that this point is recognised in the *Zwolle Principles* (2003) which state:

2. Optimal management may be achieved through thoughtful development and implementation of policies, contracts, and other tools, as well as processes and educational programs, (collectively 'Copyright Management') that articulate the allocation of rights and responsibilities with respect to scholarly works.

3. Appropriate Copyright Management and the interests of various stakeholders will vary according to numerous factors, including the nature of the work; for example, computer programs, journal articles, databases and multimedia instructional works may require different treatment.

To reduce uncertainty and promote efficient management of open access systems, both the scope of the materials included and the rights extended to users in relation to those materials should be specified.

5.06 Each institution should develop and publish its policy on open access, clearly enunciating its objectives and interests in providing materials by this means.³⁹⁴ The starting point in developing any system for open access to academic materials is to identify the various materials to be made available by open access and the ways in which the materials deposited in the particular repository can be dealt with, both by the repository itself and by end users who access the materials it makes available. The essential (or minimum) rights reflecting the open access model adopted by that repository need to be clearly identified, articulated and observed in the terms applying to inputs to and outputs from the repository. Different repositories vary in the extent to which they facilitate open access to academic and research materials. Consequently, those repositories intent on maximising open access must develop an extensive and clearly articulated statement of the bundle of rights exercisable by end users which are consistent with the repository's objectives. By contrast, those repositories with a more restricted operational focus would need to develop a less extensive (but nevertheless clearly articulated) statement of the bundle of rights exercisable by end users.

5.07 On the assumption that open access will often be provided at the institutional level³⁹⁵, each institution wishing to establish an open access repository should develop an institutional policy which provides the means for ascertaining the kinds of materials that are to be made available by open access and for determining the scope of open access which is to be provided. Each institution should formally allocate responsibility to a suitability experienced and resourced office within the institution for implementation of the open access policy and for periodically reviewing its operation.

5.08 Copyright and contract law are central to the establishment and administration of open access systems. Much academic output, irrespective of the form in which it is expressed, is protected by copyright while the relationships among the relevant parties (including their rights to use the copyright material) are largely defined by contract. In developing an open access system it is necessary to develop a sound understanding of how copyright and contract interact to determine the rights of the various parties in relation to access and use of academic materials.

Proposed actions

5.09 *Assuming that open access to academic materials is to be facilitated at the institutional level, the OAK Law project will develop template guidelines and model documents (designed to be tailored for use by individual institutions) to practically*

³⁹⁴ For example, the Zwolle Principles (2003) state the overall Objective as follows:

To assist stakeholders—including authors, publishers, librarians, universities and the public—to achieve maximum access to scholarship without compromising quality or academic freedom and without denying aspects of costs and rewards involved.

See: <<http://www.surf.nl/copyright/keyissues/scholarlycommunication/principles.php#Principles>> at 16 July 2006.

³⁹⁵ The other principal alternatives at this stage being self-archiving by individual academic authors or disciplinary repositories arranged according to specialist fields of knowledge.

assist in the establishment and management of open access systems, which will include:

- *guidance on the development of institutional open access policies, outlining different models of open access and providing means for determining and reviewing:*
 - *the categories of materials that are to be made available by open access*
 - *the scope of open access which is to be afforded, in terms of the classes of persons who are to be allowed access and the extent of rights granted to access and re-use the materials*
- *examples of model institutional open access policies, accompanied by explanatory statements of each open access policy*
- *guidance on matters to be considered in formally allocating responsibility to an appropriate office within the institution's governance structure, in order to ensure appropriate ongoing administration of the open access policy*
- *guidance on the operation of copyright and contract in structuring an open access system.*

2. Network of legal relationships

5.10 It is essential to ensure that the rights exercisable by the repository and end users under any particular open access model are secured through the legal relationships between the relevant parties (or 'stakeholders'). The rights to use the material will be determined by the application of principles of copyright law,³⁹⁶ together with the terms of any contract/s between the parties. To ascertain who is permitted to use academic materials deposited in a repository and the extent of the permitted use of such materials, it is necessary to identify the various stakeholders and their respective roles, describe the legal relationships among them and understand how copyright interests are allocated.³⁹⁷

5.11 To date, much of the literature and research on copyright issues in open access systems has failed to adopt a sufficiently broad perspective which encompasses not only the full range of stakeholders involved but also the way the legal relationships among them impact upon the rights of repositories and end users. In particular, in considering rights to use materials deposited in repositories, much of the discussion has been overly focused on the Author-Publisher relationship, as defined in the Publishing Agreement (see below). Further, this already narrow focus has been channelled even more narrowly by the fact that much of the discussion has considered only those situations where copyright is assigned (or exclusively licensed) by the

³⁹⁶ Particularly the principles of copyright law relating to subsistence and ownership of copyright.

³⁹⁷ This point is reflected in Principle 5 of the Zwolle Principles which states: 'Copyright Management should strive to respect the interests of all stakeholders involved in the use and management of scholarly works; those interests may at times diverge, but will in many cases coincide.' See: <<http://www.surf.nl/copyright/keyissues/scholarlycommunication/principles.php#Principles>> at 16 July 2006.

copyright owner (usually the author) to the publisher. The broader range of possible arrangements in relation to copyright ownership, including retention of copyright by the author, has received insufficient attention. To fail to adopt a broader perspective on the relationships between all the relevant stakeholders means a loss of the opportunity to achieve the most efficient and effective open access system by leveraging all the factors that can be brought to bear in pursuit of the open access objective.

5.12 In establishing and managing open access systems, the roles of the stakeholders and the legal relationships among them will determine the rights that can be exercised by the repository and end users. The key stakeholders and relationships that will come into play in the structuring of an open access system are:

- A **Funding organisation – Author:** the relationship between the organisation providing grants of funding for research and the author of outputs (eg. academic articles and research reports) of the funded research project, or the author's university or research institution [*Funding Agreement*]
- B **Author – Employer:** the relationship between the author of academic or research output and their employer (eg. university or research institution) [*Employment Agreement and IP Policy*]
- C **Author – Publisher:** the relationship between the author (or another party who owns copyright in works produced by the author, eg. the author's employer) and the publisher [*Publishing Agreement*]
- D **Author – Digital repository:** the relationship between the author (or another party who owns copyright in the author's works, eg. the author's employer or the publisher) and the digital repository in which a copy of the author's article is deposited [*Repository Deposit Licence*]
- E **Digital repository – End users:** the relationship between the digital repository in which the author's article is deposited and persons who are authorised to access it (which may be the public at large or may be restricted to a particular group with defined access rights) [*Repository Distribution (End User) Agreement*]
- F **Author/Publisher – End users:** the relationship between the author/publisher (or other owner of copyright, eg. author's employer) and end users (ie. persons authorised to access and use the material) [*Distribution Agreement*]
- G **Copyright Collecting Society – Digital Repository and End Users:** Much of the administration of copyright in the educational context in Australia occurs pursuant to statutory licences administered by copyright collecting societies such as the Copyright Agency Limited (CAL), which collect fees from educational institutions as compensation for educational use of copyright materials. In establishing a system to enable access to academic and research materials in online repositories, it is necessary to consider how such materials will be treated under the statutory licence for reproduction and communication of works in electronic form under Division 2A of Part VB (ss 135ZMA to

135ZME of the *Copyright Act 1968* (Cth) (*Copyright Act*) [*Educational Statutory Licence*].

Proposed action:

5.13 *To provide practical assistance to institutions establishing or managing open access systems, the OAK Law project will develop template guidelines describing the respective roles of each of the relevant stakeholders in the academic and research environment and how the relationships among them interact to determine*

- *whether academic and research output should be made available through open access channels*
- *if so, the kinds or categories of material which are to be made available*
- *the extent to which such material is to be available, that is, the extent of the rights granted to access and use the material*
- *how the desired scope of access and use to the identified materials can be secured within the legal framework applying in the particular institution.*

A. Funding organisation – author/research institution (Funding Agreement)

5.14 Where research is being funded by an external source, that organisation may impose conditions on the researcher or recipient institution in relation to how the output of the funded research will be made available. For example, it would not be unusual for a funding organisation to impose requirements relating to protection and/or ownership of intellectual property (IP) in research output and how the research output is to be disseminated. If the funding organisation is seeking to encourage or ensure open access to the research output of funded projects (whether in the form of raw data, reports or journal articles), it may stipulate that such output is to be made available in an open access repository or published in an open access journal.

5.15 For some time, funding bodies have been increasingly concerned with maximising the commercial returns from the results of funded research projects. However, a focus on commercialisation is not necessarily incompatible with the objective of increasing access to research results by requiring them to be deposited in open access repositories. A critical issue is how to strike the appropriate balance between commercialisation and increased access.³⁹⁸ It follows that research funding bodies need to review the terms of their funding agreements to ensure that the objective of providing open access to research results is not contradicted by obligations on funding recipients to protect and commercialise IP that is developed in funded projects.

³⁹⁸ See generally, Department of Education, Science and Training, *Knowledge Transfer and Australian Universities and Publicly Funded Research Agencies*, March 2006, <http://www.dest.gov.au/NR/rdonlyres/36818C20-9918-4729-A150-464B662644B3/12630/Knowtran_FinalCompilation_005_web1.pdf> at 30 July 2006.

5.16 In recent years, research funding bodies in the United States (US), the United Kingdom (UK) and Germany have adopted open access policies and guidelines calling upon researchers to publish in open access journals and to deposit materials resulting from funded research available in an open access repository.³⁹⁹ According to Stevan Harnad:

Articles made “Open Access,” (OA) by self-archiving them on the web are cited twice as much, but only 15% of articles are being spontaneously self-archived. The only institutions approaching 100% self-archiving are those that mandate it. Surveys show that 95% of authors will comply with a self-archiving mandate; the actual experience of institutions with mandates has confirmed this.⁴⁰⁰

Since surveys indicate that a majority of researchers favour research funding bodies mandating self-archiving⁴⁰¹ and 95% of authors say they would comply with a self-archiving mandate, it has been proposed that institutions and funding bodies should mandate that the author’s final draft⁴⁰² must be deposited into the institutional repository immediately upon acceptance for publication.⁴⁰³

5.17 In the US, in February 2005 the National Institute of Health (NIH), the world’s largest non-military research funder, ‘prodded by federal departments and Congressional committees’, adopted an Open Access Policy⁴⁰⁴ with the aim of increasing the availability of research that it funds. The policy requested all NIH-funded investigators to submit, from 2 May 2005, an electronic version of the author’s final, peer-reviewed manuscripts to the PubMed Central⁴⁰⁵ database, the NIH’s free digital archive of journal literature in the biomedical and life sciences, upon acceptance for publication. The policy applies to any journal articles resulting from

³⁹⁹ For an overview of research funding bodies’ policies on open access, see the European Commission, Directorate-General for Research, 69-70.

⁴⁰⁰ Stevan Harnad, ‘Monitoring Research Impact Through Institutional and National Open-Access Self-Archiving Mandates’, in Keith Jeffrey (ed.), *Proceedings of CRIS2006. Current Research Information Systems: Open Access Institutional Repositories* (in press) (2006), <<http://eprints.ecs.soton.ac.uk/12093/>> at 16 July 2006; An example is CERN (<http://public.web.cern.ch/Public/Welcome.html>) which has an institutional self-archiving mandate and is close to providing open access to 100% of its own current published research article output in its institutional repository, see <<http://cdsweb.cern.ch/>> at 31 July 2006.

⁴⁰¹ Sue Sparks, ‘JISC Disciplinary Differences Report’ *Rightscom Ltd* (2005) <http://www.jisc.ac.uk/index.cfm?name=schol_comms_reports> at 31 July 2006. For a survey of public attitudes to access to publicly funded research output, see *Americans Support Free Access to Research*, Alliance for Taxpayer Access, Washington DC, 31 May 2006 <<http://www.taxpayeraccess.org/media/Release06-0531.html>> at 16 July 2006.

⁴⁰² That is, the version that is commonly referred to as the ‘PostPrint’.

⁴⁰³ For the best up to date overview of the open access policies applied or being developed by funding bodies in the US, UK, Canada, South Africa and several European countries (including Sweden, France and Germany), focusing on whether open access is mandated or merely encouraged, see Peter Suber, *SPARC Open Access Newsletter*, #100, 2 August 2006, *Ten Lessons from the Funding Agency Open Access Policies* <<http://www.earlham.edu/%7Epeters/fos/newsletter/08-02-06.htm>> at 3 August 2006; See also Stevan Harnad ‘Opening Access by Overcoming Zeno’s Paralysis’, forthcoming in Neil Jacobs (ed.), *Open Access: Key Strategic, Technical and Economic Aspects* (2006) Chandos Publishing. Self-archived March 19, 2006 <<http://eprints.ecs.soton.ac.uk/12094/>> at 16 July 2006.

⁴⁰⁴ National Institutes of Health, Office of Extramural Research, *Policy on Enhancing Public Access to Archived Publications Resulting from NIH-Funded Research* <<http://publicaccess.nih.gov/>> at 23 May 2006 and <<http://publicaccess.nih.gov/policy.htm>> at 23 May 2006.

⁴⁰⁵ See: <<http://www.pubmedcentral.nih.gov/>> at 23 May 2006.

research supported wholly or partially with direct funds from NIH. In a survey conducted by Janice Hopkins Tanne⁴⁰⁶ it was found that less than 5% of NIH-funded researchers are acting in accordance with the NIH's policy.⁴⁰⁷

5.18 While the NIH's current policy only requests and encourages open access to the outputs of its funded research, there are indications that it is moving closer to mandating open access. In view of the very low compliance rate (less than 5%) with NIH's voluntary policy it has been suggested that it will be necessary to introduce a mandatory posting regime if NIH-funded articles are to be freely available. On 15 November 2005, the NIH's Public Access Working Group recommended that the request for public access be strengthened to mandate access and that the maximum period between publication and open access availability be reduced from 12 months to six. Bills have recently been introduced into the US Senate proposing legislative requirements for public access to federally funded research output. On 2 May 2006 Senators Joseph L Lieberman⁴⁰⁸ and John Cornyn⁴⁰⁹ introduced the *Federal Research Public Access Act* of 2006 (S.2695) into the US Senate.⁴¹⁰ If enacted, the legislation would require US government agencies with research expenditures totalling more than US \$100 million to make journal articles stemming from research financed by federal grants available via the Internet.⁴¹¹ The proposed Act would require the journal articles resulting from federally funded research to be publicly accessible online without charge within six months of their initial publication in a peer-reviewed journal.⁴¹² An earlier Bill, the *American Center for CURES Act* of 2005, introduced on 7 December 2005 by Senator Lieberman and cosponsored by Senator Thad Cochran⁴¹³ contained similar provisions for research sponsored by agencies of the Department of Health and Human Services.⁴¹⁴

5.19 In June 2006, in the Appropriations Bill for the fiscal year 2007 (commencing 1 October 2006), the US House Appropriations Committee directed the NIH to adopt an open access policy mandating that grantees submit their research publications to an open access repository. The Bill, which would require funded researchers to post a copy of every article they produce using NIH funds into the NIH's PubMed Central archive within 12 months after publication in a journal, was adopted by the Committee and sent to the full House on 15 June 2006.⁴¹⁵

⁴⁰⁶ Janice Hopkins Tanne, *Researchers funded by NIH are failing to make data available* BMJ 2006;332:684 (25 March), doi:10.1136/bmj.332.7543.684-b

⁴⁰⁷ From Peter Suber's 'Open Access News', <<http://www.earlham.edu/~peters/fos/fosblog.html>> at 24 March 2006.

⁴⁰⁸ Democrat, Connecticut.

⁴⁰⁹ Republican, Texas.

⁴¹⁰ <http://cornyn.senate.gov/doc_archive/05-02-2006_COE06461_xml.pdf> at 2 August 2006.

⁴¹¹ On 28 July 2006, 25 university provosts published 'An Open Letter to the Higher Education Community', in support of the FRPAA and open access

<<http://www.cic.uiuc.edu/groups/CICMembers/archive/documents/FRPAAletterFinal7-24-06.pdf>> at 2 August 2006.

⁴¹² For an explanation of the operation of the *Federal Research Public Access Act* of 2006 see SPARC Resources <<http://www.arl.org/sparc/resources/frpaa.html>> at 2 August 2006.

⁴¹³ Republican – MS.

⁴¹⁴ For discussion on these legislative proposals, see Ray English and Peter Suber, 'Public access to federally funded research: The Cornyn-Lieberman and CURES bills' *C&RL News* (2006) 67:6 <<http://www.ala.org/ala/acrl/pubs/crlnews/backissues/2006/june06/fedfundedresearch.htm>> at 15 June 2006.

⁴¹⁵ See Peter Suber, SPARC Open Access Newsletter, Issue #99, 2 July 2006 <<http://www.earlham.edu/~peters/fox/newsletter/07-02-06.htm>> at 30 July 2006.

5.20 In June 2005, the Research Councils UK (RCUK) published a draft Position Statement on Access to Research Outputs⁴¹⁶ setting out the Research Councils' views on the issues 'surrounding the evolving models for the dissemination of and access to research outputs, particularly but not exclusively open-access models'.⁴¹⁷ The draft Position Statement, covering all areas of research (including the social sciences, arts and humanities), set out several principles, including:

RCUK Principles (2005 draft Position Statement on Access to Research Outputs)

2. Ensuring that the results of research supported by public funds are made accessible and available for consultation by the research community and others is an integral part of the research process. It involves a partnership between all players involved (universities and other employers of researchers, funders, publishers, libraries, as well as researchers themselves). RCUK believes that it also requires the recognition of a set of rights and responsibilities based on four fundamental principles, and it is on these principles that the RCUK position is founded.

3. Research Councils are responsible for supporting and promoting the activities of a research base that is vibrant, productive, and sustainable. In seeking to maximise the impact of their investment in maintaining and improving the research base, and increasing the contribution it makes to the benefit of the UK's society and economy, they must, therefore, seek to ensure that:

a. **Ideas and knowledge derived from publicly-funded research are made available and accessible for public use, interrogation, and scrutiny, as widely, rapidly and effectively as practicable.** New Internet-based models for the publication of research outputs and also of the underpinning data are likely to play an increasingly useful role in the widening and speeding of access, which in turn supports the Research Councils' strategies for ensuring that the results of research are exploited more effectively for the benefit of the UK's society and economy. Only in exceptional circumstances should public funding of research not lead to publicly-available outputs.

b. **Effective mechanisms are in place to ensure that published research outputs are subject to rigorous quality assurance, through peer review.** Historically, subscription-based academic journals (printed or electronic) have provided quality assurance of this kind. But there is no reason in principle why other publishing models cannot accommodate similar mechanisms; and so long as they do, they can play an effective role in enhancing the communications of research results both to the research community and to other stakeholders, including the general public.

c. **The models and mechanisms for publication and access to research results are both efficient and cost-effective in the use of public funds.** This means that Research Councils must constantly seek to achieve a balance between the freedom of researchers to publish their output wherever and however they consider most appropriate for their audience on the one hand, and the need to ensure on the other hand that the means of publication are cost effective; and that there are effective and sustainable financial models, with appropriate funding streams to support them.

⁴¹⁶ <<http://www.rcuk.ac.uk/access/2005statement.pdf>> at 16 July 2006.

⁴¹⁷ There are eight UK Research Councils. For further information see: <<http://www.rcuk.ac.uk/about.asp>> at 23 May 2006.

⁴¹⁸ <<http://www.rcuk.ac.uk/access/2005.asp>> at 30 July 2006.

d. The outputs from current and future research can be preserved and remain accessible not only for the next few years but for future generations. Printed material has proved itself durable for several centuries. But there are challenges in seeking to ensure that both published and unpublished resources in digital formats will prove to be similarly durable.

4. In considering the issues stemming from these principles, and from the report of the House of Commons Science and Technology Select Committee, Scientific Publications: Free for All, RCUK is setting out, in consultation with others, a joint position statement. RCUK recognises that partnership with other national agencies, including the Funding Councils, the Joint Information Systems Committee (JISC), the new Research Libraries Network (RLN), and the British Library, will be essential in developing and implementing the RCUK line. It will also be important to liaise closely with Government, which is defining its own policy and several of whose Departments have a direct interest in this broad area. But RCUK also recognises the central role that the Research Councils themselves have to play in both responding to and stimulating new developments in publishing and communicating research results; and in ensuring that both researchers and the users of research benefit from the new models and mechanisms as they develop.

5.21 Following the release of the Position Statement on Access to Research Outputs in 2005 (Position Statement), the RCUK undertook further consultation and published an updated version of the Position Statement on 28 June 2006 (2006 Position Statement).⁴¹⁹ While the RCUK's new policy on open access is not as strong as the draft, in effect it will mandate open access to a large proportion of publicly-funded research in the UK. The 2006 Position Statement reaffirms the four guiding principles articulated in the 2005 draft:

- ideas and knowledge derived from publicly-funded research must be made available and accessible for public examination as rapidly as practicable
- published research outputs should be effectively peer-reviewed
- models and mechanisms for publication and access must be an efficient and cost-effective use of public funds
- outputs must be preserved and remain accessible for future generations.⁴²⁰

5.22 Like the 2005 draft, the 2006 Position Statement focuses on open access archiving rather than publication in open access journals. However, the 2006 Position Statement does not directly require open access archiving for all RCUK-funded research. Rather, the approach taken in the 2006 Position Paper is to allow each of the eight Research Councils (representing diverse research disciplines)⁴²¹ to develop its

⁴¹⁹ RCUK, Position Statement on Access to Research Outputs
<<http://www.rcuk.ac.uk/access/2006statement.pdf>> at 30 July 2006.

⁴²⁰ RCUK, News Release, 28 June 2006
<<http://www.rcuk.ac.uk/press/20060628openaccess.asp>> at 30 July 2006.

⁴²¹ There are eight Research Councils: Arts & Humanities Research Council (AHRC); Biotechnology & Biological Sciences Research Council (BBSRC); Council for the Central Laboratory of the Research Councils (CCLRC); Economic & Social Research Council (ESRC); Engineering & Physical Sciences Research Council (EPSRC); Medical Research Council (MRC); Natural Environment Research Council (NERC) and Particle Physics & Astronomy Research Council (PPARC).

own specific guidelines for the communities it funds, relating to access to research outputs in the particular field/s of research. The intention is to ensure that each discipline is able to respond in ways best suited to its own needs. Three of the eight Research Councils, the Medical Research Council (MRC), Biotechnology & Biological Sciences Research Council (BBSRC) and the Economic & Social Research Council (ESRC) have already indicated that they will mandate open access to the research they fund. The MRC and BBSRC will require articles to be deposited in open access repositories at the earliest possible opportunity (within six months of publication for the MRC). The MRC will require articles to be deposited in PubMed Central while the BBSRC will require deposit in 'an appropriate e-print repository'.⁴²²

5.23 The 2006 Position Statement applies to conference presentations as well as journal articles, and requests that metadata be deposited ('wherever possible... at or around the time of publication') along with the full text of the article. The RCUK reaffirmed its commitment that academic authors can choose where to publish their research. While the Position Statement supports RCUK grantees using grant fund to pay fees to open access journals, it does not direct grantees to submit their work to open access journals. The RCUK has developed plans to assess the impact of changes to publication methodologies, such as 'author-pays' publishing and self-archiving, on research publishing. This study will commence in 2006 and report in 2008, when the RCUK's position will again be reviewed.

5.24 The RCUK's 2006 Position Statement has been welcomed by other organisations advocating open access, such as SPARC (the Scholarly Publishing and Academic Resources Coalition).⁴²³ The significance of the RCUK's revised Position Statement on Access to Research Outputs is captured in the following comments by leading open access commentator and advocate, Peter Suber:

Before the new RCUK policy, there were OA [open access] mandates from private research funders (Wellcome Trust), near-mandates from public research funders (Germany), OA requests, exhortations, or non-mandates from public research funders (US, Finland) and proposed mandates for public research funders (Australia, Canada, South Africa, Ukraine, US, and the European Union). But the RCUK mandates will be the world's first OA mandates from public research funders. The BBSRC [Biotechnology & Biological Sciences Research Council], ESRC [Economic & Social Research Council], MRC [Medical Research Council] are the first public funding agencies anywhere to take this important stance. This is a huge step forward.⁴²⁴

5.25 In Germany, the Deutsche Forschungsgemeinschaft (DFG)⁴²⁵ published its Open Access Guidelines in January 2006.⁴²⁶ The DFG supports open access, having

⁴²² Note that the access policies of the UK Research Councils, along with the policies of research funding bodies in other countries (eg. Germany and the US) are included in the Juliet website established by SHERPA, available at <<http://www.sherpa.ac.uk/juliet>>.

⁴²³ See SPARC News, *SPARC Supports UK Research Councils' Commitment to Provide Access to Publicly Funded Research*, 14 July 2006, <<http://www.arl.org/sparc/announce/060714.html>> at 2 August 2006.

⁴²⁴ Peter Suber, SPARC Open Access Newsletter, Issue #99, <<http://www.earlham.edu/~peters/fos/newsletter/07-02-06.htm>> at 2 July 2006. For further comment, see SPARC Open Access Newsletter, Issue #100, 2 August 2006, <<http://www.earlham.edu/~peters/fos/newsletter/08-02-06.htm>> at 3 August 2006.

⁴²⁵ German Research Foundation.

signed the *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities* in 2003.⁴²⁷ It has now tied open access to research results to its funding policy. The DFG's Senate and Joint Committee, in meetings held in January 2006, recommended encouraging funded scientists to:

also digitally publish their results and make them available via open access. In order to put secondary publications (ie. self-archived publications by which the authors provide their scientific work on the Internet for free following conventional publication) on the proper legal footing, scientists involved in DFG-funded projects are also requested to reserve the exploitation rights. [emphasis added]⁴²⁸

5.26 The recommendations in the DFG Open Access Guidelines, which are being written into the usage guidelines that form an integral part of every research funding approval, are as follows:

The DFG expects the research results funded by it to be published and to be made available, where possible, digitally and on the Internet via open access. To achieve this, the contributions involved should either be published in discipline-specific or institutional electronic archives (repositories), or directly in referenced or recognised open access journals, in addition to conventional publishing.⁴²⁹

5.27 In May 2006, a Bill was introduced into the German Bundesrat with the objective of amending the law to support open access to publicly-funded scientific information.⁴³⁰ The Bundesrat has asked for inclusion of a provision amending s 38 of the Copyright Law that would permit author-initiated open access to publicly-funded research in Germany, without mandating it. Authors would have the right to make their articles available online, even if they have granted exclusive rights to the publisher, if the following requirements are met:

- expiration of 6 months since first publication
- research predominantly based on public funding
- the publication is in periodical form only
- the article is to be used for non-commercial purposes

⁴²⁶ DFG, *Information for Researchers No. 4*, 30 January 2006, see:

<http://www.dfg.de/en/news/information_science_research/other_news/info_wissenschaft_04_06.html> at 16 July 2006.

⁴²⁷ The Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (2003) <<http://www.zim.mpg.de/openaccess-berlin/berlindeclaration.html>> at 16 July 2006.

⁴²⁸ Note that Stevan Harnad (by email to AMERICAN-SCIENTIST-OPEN-ACCESS-FORUM@LISTSERVER.SIGMAXI.ORG, Re: DFG Passes Open Access Guidelines, Sent: Sunday, 12 March 2006 12:30 PM) considers the DFG Open Access Guidelines to be too weak and need to bring out more clearly that what is 'actually being 'required' is that a digital version of the publication should be made open access (OA) by self-archiving it (ie. depositing it in an OA repository)'. Harnad suggests re-drafting of the DFG Guidelines to 'require funded scientists to also self-archive their published results in an online repository to make them available via open access'.

⁴²⁹ Although not made mandatory, the requirement is stronger than a mere request: see comment by Peter Suber, 'The German OA Bill', *Open Access News*, 22 May 2006 <<http://www.earlham.edu/~peters/fos/fosblog.html>> at 16 July 2006.

⁴³⁰ Ibid. For comment on the German legislative proposal, see Gerd Hansen, *GRUR Int.* (2005) 378. Hansen's article, still only available in the German language version, has been self-archived, <http://www.gerd-hansen.net/Hansen_GRUR_Int_2005_378ff.pdf> at 6 June 2006.

- the author's final version of the article is used.

If the provision were to be enacted, it would not be possible to contract out of the open access rights granted to authors.

5.28 One of the strongest indicators of the future direction in Europe is the recently published report of a study undertaken on behalf of the European Commission's Directorate-General for Research, *Study on the economic and technical evolution of the scientific publication markets in Europe* (2006)⁴³¹. The report considered that:

there is a central role for funding bodies to define policies towards their funded researchers which will improve access and dissemination of publications, especially in terms of self-archiving requirements, copyright contract model, 'social responsibility' rankings of journals.⁴³²

Such policies should ensure that the market is sufficiently competitive and 'dissemination-friendly'. In particular, they should address the need to:

- (i) enhance access to research output
- (ii) prevent strategic barriers to entry and to experimentation.⁴³³

5.29 The report recommended that public access to publicly-funded research shortly after publication should be guaranteed and, among actions that could be taken at the European level, proposed establishing a policy mandating articles funded from European sources to be available in open access archives, eg. by author self-archiving:

RECOMMENDATION A1. GUARANTEE PUBLIC ACCESS TO PUBLICLY-FUNDED RESEARCH RESULTS SHORTLY AFTER PUBLICATION

Research funding agencies have a central role in determining researchers' publishing practices. Following the lead of the NIH and other institutions, they should promote and support the archiving of publications in open repositories, after a (possibly domain-specific) time period to be discussed with publishers. This archiving could become a condition for funding.

The following actions could be taken at the European level: (i) Establish a European policy mandating published articles arising from EC funded research to be available after a given time period in open access archives, and (ii) Explore with Member States and with European research and academic associations whether and how such policies and open repositories could be implemented.⁴³⁴

5.30 In the Australian context, a high proportion of the funding for research in universities and specialised research institutes is provided by the Commonwealth, State and Territory governments. The Australian Government now provides more

⁴³¹ European Commission, Directorate-General for Research.

⁴³² At pp. 10, 72.

⁴³³ At p. 11.

⁴³⁴ At pp. 11, 87.

than \$5 billion annually in funding science and innovation.⁴³⁵ In some fields (eg. human health-related biotechnology), virtually all research carried out in Australia (whether in universities, research institutes, or government departments or agencies) is funded by the Australian Government. Australian governments favour increased access to, and dissemination of, the results of publicly funded projects, so as to maximise the potential benefits to be derived from the expenditure of public funds. Significantly, the importance of ensuring that research data can be discovered and accessed was emphasised in the Australian Government Department of Education, Science and Training's (DEST) *National Collaborative Research Infrastructure Framework – Strategic Roadmap* (NCRIS Strategic Roadmap) (2006)⁴³⁶. Since many of the capabilities identified in the NCRIS Strategic Roadmap will result in the production of new data sets or require the use of existing data sets and information resources, investment in research collaboration platforms should provide researchers with the ability to:

gain access to information relevant to their field from a variety of sources seamlessly; exchange information collaboratively with colleagues; annotate their datasets or publications; and to manage and disseminate the results of their research through supported repositories.⁴³⁷

5.31 The NCRIS Strategic Roadmap recognizes the role that repositories will have in enabling access to and dissemination of information, moving beyond their traditional roles to support innovative new forms of research data, collections and research output. For example, repositories may develop systems to enable other researchers to obtain access to original raw data (even for different purposes than the researchers who have generated it) or provide stronger support for authenticity, authority and integrity of research.⁴³⁸ The NCRIS Strategic Roadmap acknowledges that the management of research outputs requires the coordination of many elements, including the appropriate hardware and software, supporting workflows, policy and regulatory frameworks, administrative arrangement and resources (especially staff). Of particular importance in the present context, the NCRIS Strategic Roadmap points out that while much of the work on data access has focused on the removal of barriers, by means of technical mechanisms such as software and hardware, it is also necessary to ensure that the legal context is understood and that intellectual property interests (notably copyright) are effectively managed.

Seamless access to information and other resources can be impeded, particularly in a networked environment, if researchers are not mindful of intellectual property law. In many cases, there is no certainty. A key challenge for the future is to establish legal protocols that can allow access to, or downloading of, research to be clarified and simplified.⁴³⁹

⁴³⁵ Australian Government, Productivity Commission, *Terms of Reference for Economic, Social and Environmental Returns on Public Support for Science and Innovation in Australia*, March 2006, <<http://www.pc.gov.au/study/science/tor.html>> at 13 June 2006.

⁴³⁶ Department of Education, Science and Training (DEST), *National Collaborative Research Infrastructure Strategy (NCRIS)*, 28 February 2006, <http://www.dest.gov.au/sectors/research_sector/policies_issues_reviews/key_issues/ncris/> at 25 July 2006.

⁴³⁷ Ibid, para 5.16.1 at p. 49 –50.

⁴³⁸ Ibid, para 5.16.1 at p. 50.

⁴³⁹ Ibid, para 5.16.1 at p 50.

5.32 The relationships between government funding bodies, universities and publicly funded research organisations has also been considered by the Australian Law Reform Commission (ALRC) in its 2005 report, *Genes and ingenuity: Gene patenting and human health*,⁴⁴⁰ and in two studies commissioned by the Department of Education Science and Training (DEST): *Review of closer collaboration between universities and major publicly-funded research agencies* (2005)⁴⁴¹ and *Analysis of the legal framework for patent ownership in publicly funded research institutions* (2003).⁴⁴² The relevance of these reports is that they each address the issue of whether conditions should be attached to grants of research funding by public sector bodies, obliging the grant recipient to comply with specified requirements relating to the outcomes of the research project. None of the reports focuses directly on the question of imposition of conditions regarding open access to publications and other output resulting from funded research projects. Nevertheless, they are significant in that they demonstrate that the issue of attaching conditions to funding grants to ensure that the project output is dealt with in the desired manner and, in particular, is consistent with the funding body's public benefit objectives, has been actively considered in Australia in recent years.

5.33 The 2003 DEST-commissioned report, *Analysis of the Legal Framework for Patent Ownership in Publicly Funded Research Institutions*⁴⁴³, made a useful contribution to the discussion by considering not merely the imposition of conditions on grants of research funding by public bodies but also the kinds of mechanisms that could be used to ensure that any such conditions are complied with. It proposed that federal government funding grants to research institutions should be made conditional upon acceptance of specific responsibilities in relation to IP protection for research outcomes.⁴⁴⁴ Such responsibilities could apply to grants to all Australian research institutions, including universities and government. In support of this proposal, the report also recommended that consideration should be given to whether processes

⁴⁴⁰ ALRC, *Genes and Ingenuity*.

⁴⁴¹ Department of Education, Science and Training, *Review of Closer Collaboration between Universities and Major Publicly Funded Research Agencies* (2004) <<http://www.dest.gov.au/NR/rdonlyres/327F4C1D-99CC-4F93-91FB-1A2DEA8F299E/3623/pub.pdf>>.

⁴⁴² Department of Education, Science and Training, *Analysis of the Legal Framework for Patent Ownership in Publicly Funded Research Institutions* (2003). <http://www.dest.gov.au/sectors/research_sector/publications_resources/other_publications/patent_ownership_in_publicly_funded_research_institutions.htm#6._Recommendations_for_Australia> at 23 May 2006.

⁴⁴³ Andrew Christie, Stuart D'Aloisio, Katerina Gaita, Melanie Howlett and Elizabeth Webster, *Analysis of the Legal Framework for Patent Ownership in Publicly Funded Research Institutions* (2003) para. 6.3(3) at p. 93 <http://www.dest.gov.au/sectors/research_sector/publications_resources/other_publications/patent_ownership_in_publicly_funded_research_institutions.htm#6._Recommendations_for_Australia> at 23 May 2006..

⁴⁴⁴ The report proposed that the rights of funded research institutions to ownership of patents generated from the research should be coupled with the assumption of responsibility for the effective identification, protection, management and commercialisation of the invention. The following responsibilities should attach to the ownership of patent rights:

- a responsibility to identify, and have systems in place to support the identification of, commercially valuable inventions
- a responsibility to protect commercially valuable inventions
- a responsibility to reward employees who create commercially valuable inventions
- a responsibility to appropriately exploit patented inventions.

should be instituted to monitor and supervise research institutions to ensure that they discharge the management and commercialisation obligations set out in the funding agreements.⁴⁴⁵ Further, the Report recommended that consideration be given to whether it would be desirable to institute incentives for research institutions to comply with the responsibilities attaching to the ownership of patents, leaving it to individual funding agencies to identify and apply the incentives most appropriate to their circumstances.⁴⁴⁶

5.34 The ALRC report, *Genes and ingenuity: Gene patenting and human health* (2005) considered that certain kinds of research results are so important that the grant of funding should be made subject to conditions designed to ensure that they are broadly disseminated, by including a requirement that they be made openly accessible by putting them in the public domain. The report recommended that:

in exceptional circumstances, where the public benefit would clearly be served by broad dissemination of the results of publicly funded research, the ARC and the NHMRC should consider attaching conditions to the grant of funding. These conditions might include *a requirement that research results be placed in the public domain*, or that a patented invention be widely licensed. [emphasis added]⁴⁴⁷

Open access to publicly funded research has not yet been mandated by Australian funding providers, although there are some strong advocates for such an approach.

5.35 After reviewing the policies of Australian universities on open access to materials produced by academic and research employees, Professor Arthur Sale proposed the adoption of a mandatory deposit requirement for research output resulting from projects funded by DEST:

[I]t is well overdue for the Australian Department of Education, Science & Training to rule that postprints of all research that Australian universities report to it must be deposited in an institutional repository, to take effect say for 2007. The costs to universities are ridiculously small. The benefits from increased global research impact, and enabling Australians to access the research they fund through the public purse, are enormous.⁴⁴⁸

5.36 In March 2006 the federal government requested the Productivity Commission to undertake a research study on public support for science and innovation in Australia.⁴⁴⁹ The Terms of Reference require the Commission to:

Identify impediments to the effective functioning of Australia's innovation system *including knowledge transfer*, technology acquisition and transfer, skills development, commercialisation, collaboration between research organisations and

⁴⁴⁵ At para. 6.3(4), p. 93.

⁴⁴⁶ At para. 6.3(5), p. 93.

⁴⁴⁷ ALRC, *Genes and Ingenuity*, Chapter 11, 'Publicly Funded Research and Intellectual Property', recommendation 11-3.

⁴⁴⁸ Arthur Sale 'Comparison of content policies for institutional repositories in Australia', *First Monday*, 11:4 (April 2006) 3 <http://firstmonday.org/issues/issue11_4/sale/index.html> at 16 July 2006 (hereinafter Sale, *Comparison of Content Policies*).

⁴⁴⁹ *Economic, Social and Environmental Returns on Public Support for Science and Innovation in Australia* <<http://www.pc.gov.au/study/science/index.html>> at 13 June 2006.

industry and the creation and *use of IP*, and identify any scope for improvements.
[emphasis added]

5.37 As the Productivity Commission's Terms of Reference require it to research and report on a broad range of factors affecting the returns received from public support for science and innovation, the Commission's brief would apparently encompass the issue of access to and dissemination of knowledge and publications resulting from publicly funded academic and research activities.⁴⁵⁰ The reference to the Productivity Commission provides an opportunity to examine, in the Australian context, a number of the matters that were considered by the European Commission's Directorate-General for Research in its 2006 *Study on the economic and technical evolution of the scientific publication markets in Europe*⁴⁵¹. In particular, this may be an opportunity for research into the various business models that are available to funding organisations for enabling access to and dissemination of academic and research output⁴⁵², including an economic analysis of the alternative forms of dissemination.⁴⁵³

Proposed actions

5.38 *The OAK Law project will:*

- *Conduct a comprehensive review of the current practices and policies of all major Australian Government research funding bodies to ascertain whether, and to what extent, they provide for the inclusion of requirements in funding grants for the output of funded research projects to be made available through open access repositories.*
- *Draft statements for use by funding bodies to make clear to funding applicants and recipients their policies regarding open access to the output of funded research projects.*
- *Draft guidelines and clauses for use by funding bodies when entering into funding agreements, clearly setting out the funding body's requirements regarding open access to research output and, where compliance with such conditions is to be mandatory, the means by which the open access requirements will be enforced.*

⁴⁵⁰ See in particular submissions to the Productivity Commission's Science and Innovation inquiry that address the issue of 'open innovation'. These include submissions 21 (Prof. Brian Fitzgerald), 42 (CAMBIA) and 43 (Dr T Cutler) <<http://www.pc.gov.au/study/science/subs/sublist.html>> at 3 August 2006.

⁴⁵¹ European Commission, Directorate-General for Research.

⁴⁵² See recommendation A2 at p. 87.

⁴⁵³ See recommendation C2 at p. 89. Economic analyses of publication models have been undertaken elsewhere, a recent example from the US being Jessica Litman's, 'The Economics of Open Access Publishing' (2006) 10(4) *Lewis & Clark Law Review* <<http://www.lclark.edu/org/lclr/>> at 1 August 2006, which is yet to be released, however, a draft of Professor Litman's paper is available at <http://law.lclark.edu/dept/blaw/objects/Litman_LC.pdf>.

- *Further examine—in view of the low levels of open access achieved under voluntary open access policies adopted by funding organisations (ie. which merely recommend or encourage open access practices) and in light of international developments—whether and, if so, how, mandatory open access requirements may be imposed on funding recipients.*

B. Author – employer (Employment Agreement and IP Policy)

5.39 Universities and research institutes may require their academic and research staff to make their academic and research output available through open access institutional⁴⁵⁴ or disciplinary (or subject-based)⁴⁵⁵ repositories. The legal context in which this outcome is secured is the relationship between the university or research institute as employer and the academic or research project author as employee.

5.40 Since the mid-1990s, the majority of Australian universities have developed IP policies addressing ownership of IP (patents, copyright, confidential information etc.) generated in the course of academic or research activities performed within the scope of the employment relationship. Intellectual Property policies are often part of the formal regulations approved by the governing body of the university for its administration and are generally published in the university handbook and on the institutional website. Such policies may also be incorporated by reference into employment contracts between the university and its employees.

5.41 A range of approaches to the question of copyright ownership can be found in university IP policies. Most policies seek to balance the interests of the parties by reserving certain rights to the party which does not own copyright. In a review of university copyright policies, the Zwolle project identified the following three approaches taken by UK universities:⁴⁵⁶

Scenario A: individuals own copyright with a licence to the institution

University College London, UK: 'UCL recognises the rights of its staff to ownership of copyright in research publications, books and other similar academic publications in all format... UCL will seek to secure, free, unconditional and perpetual, non-exclusive licence to use academic and teaching materials in all formats which are generated by members of staff arising out of employment by UCL.' The policy is available at www.ucl.ac.uk/staff/resources/copyright-policy/

Scenario B: institution owns copyright but university agrees not to benefit from individuals' work

⁴⁵⁴ Institutional repositories assist in raising the profile of institutions, making their research output more visible and accessible.

⁴⁵⁵ Disciplinary, or subject-based, archives provide efficient and centralised access to full text articles in specific domains. Eight disciplines have successfully set up e-print archives: high-energy physics and mathematics (arXiv), economics (RePEc), cognitive science (CogPrints), astronomy, astrophysics and geophysics (NTRS and ADS), and computer science (NCSTRL).

⁴⁵⁶ Zwolle Group, 'Implementing the Zwolle Principles: University Copyright Policies' <http://www.surf.nl/copyright/keyissues/scholarlycommunication/implementing_policies.php> at 16 July 2006 (hereinafter Zwolle Principles).

University of Bristol, UK: ‘University policy adopts and imposes UK Statute [Copyright, Designs and Patents Act 1988]. University policy is set out in the Standing Orders of Council eg. section 12.3 of the Standing Orders of Council governing the appointment of members of the Non-professorial Academic Staff. Normally, therefore, the University is the first owner of IP and IP rights generated by its employees... The University will not in normal circumstances seek to benefit from any rights it may have as employer in the academic publications of members of the Academic Staff.’ The policy is available at
 <<http://www.bris.ac.uk/research/ip/policy/ownership.html>>

Scenario C: institution owns IP rights but publications excepted or rights waived

University of Oxford, UK: ‘The University claims ownership of all IP... devised, made or created... by persons employed by the University in the course of their employment... Notwithstanding section 6 of this statute, the University will not assert any claim to the ownership of copyright in... artistic works, books, articles, plays, lyrics, scores, or lectures, apart from those specifically commissioned by the university.’ The policy is available at
 <<http://www.admin.ox.ac.uk/rso/policy/ip.shtml>>

5.42 The IP policies adopted by Australian universities typically vest ownership of copyright in some materials (eg. course guides and handbooks) in the university while providing for copyright in a wide range of other materials (including published journal articles, books and reports) to be owned or controlled by the employee author/s.⁴⁵⁷ This splitting of copyright according to the nature and purpose of the material is apparent in many university IP policies.

5.43 An example is Charles Sturt University’s IP policy⁴⁵⁸ which states that the university owns all IP created by an employee author in pursuance of the author’s duties under a contract of employment, including copyright in ‘courseware (books, print, videos, CD-ROMs, manuals, audiovisual recordings, computer software or other materials) created specifically for use in, or in connection with, a course, subject or unit offered by the university’.⁴⁵⁹ On the other hand, employee authors own IP in copyright works ‘the subject matter of which is primarily concerned with scholarship, research, artistic expression, creativity or academic debate’, including ‘books, articles or other similar works, whether in written or any other form’, ‘artistic works created by researchers in fine art or design’ and ‘any other professional work’ created by an employee author.⁴⁶⁰ The policy expressly excludes from employee copyright ownership which ‘were prepared for CSU course work and teaching’, ‘were created using IP owned by CSU’ or if CSU ‘has made a specific and significant contribution of funding, resources, facilities or apparatus which led to the creation of [the] works’.⁴⁶¹

⁴⁵⁷ For a comprehensive overview of the IP policies of Australian universities, see Monotti and Ricketson, *Universities and Intellectual Property*. The IP policies of many Australian universities are set out on the SURF website <<http://www.surf.nl/copyright/keyissues/countries/australia.php>> at 16 May 2006.

⁴⁵⁸ Version 4.0, adopted 1997, last modified November 2000
 <<http://www.csu.edu.au/adminman/inf/INF01.rtf>> at 16 May 2006.

⁴⁵⁹ Clause 6.1.

⁴⁶⁰ Clause 6.2, paras (a) to (d).

⁴⁶¹ Clause 6.2, paras (e) to (h).

5.44 For those materials in which the IP policy vests copyright ownership in the university, no problems arise. The university, as copyright owner, can exercise all the rights required to make the material available through its own institutional open access repository or an external disciplinary repository. By contrast, where the terms of the IP policy vest copyright ownership in the employee, the situation is more complex and needs to be carefully managed by the university if it is to ensure that its employees do not, by exercising their rights as copyright owners, limit the university's ability to implement its policy on open access to academic and research output. In particular, in the absence of any restriction imposed by the university (whether through its IP policy or express terms of the employment contract) there is nothing to prevent employed academics and researchers who own copyright in their academic and research output from assigning copyright or granting an exclusive licence to a third party (such as a publisher), without reference to the university. In the typical case, where the assignment is of the whole of the copyright (eg. in the traditional Publishing Agreement), the university will not be in a position to require the material to be made available in an institutional or disciplinary repository once the transfer has been effected.

5.45 Where a university is seeking to develop a comprehensive open access institutional repository containing the academic and research output of its employees, it should review the terms of its employment contracts and IP policy to ensure consistency between the institution's policies regarding open access to academic and research output and the obligations imposed on academic and research staff. To address the problems arising from copyright transfer by employees, it may be appropriate for universities to include in their IP policies a requirement that before transferring copyright ownership to a third party the employee must first grant the university all the rights required to enable it to make the material available in an open access repository. Such grant of rights may take the form of an assignment of part of the copyright to the university or it may be in the form of an irrevocable, non-exclusive licence in favour of the university. In either case, it should expressly state the rights granted to the university and should be in writing, signed by the employee.

5.46 University IP policies in Australia and elsewhere have rarely addressed the issue of maximising access to copyright material generated by academic and research staff. The Zwolle project noted that some US university policies consider the interests of those outside the university, giving as an example the University of Texas whose Policy and Guidelines for Management and Marketing of Copyrighted Works states that:

Careful management of these assets will benefit the authors, the citizens of Texas, state government, the component institutions and the U.T. system.⁴⁶²

5.47 The only Australian university which has to date implemented formal requirements for academic authors to deposit all academic and research output is the Queensland University of Technology (QUT), under *Policy F/1.3 E-print repository for research output at QUT* adopted in 2003.⁴⁶³ The QUT E-prints policy states that deposit of materials is subject to 'any necessary agreement with the publisher' and

⁴⁶² Zwolle Principles.

⁴⁶³ <http://www.mopp.qut.edu.au/F/F_01_03.html> at 8 May 2006.

advises that ‘guidance on copyright arrangements and standards for publishers is available from the University Copyright Officer.’

5.48 The deposit policies of all other Australian universities are based on voluntary submission by academic and research staff. In a recent survey conducted by Professor Arthur Sale of the proportion of DEST⁴⁶⁴ funded research output deposited in institutional repositories, it was found that no Australian university with a voluntary policy collects significantly more than 15% of DEST reportable content, and in most cases the amount was considerably less. This finding was comparable with international surveys which have also found 15% to be the average deposit level achieved voluntarily.⁴⁶⁵ In comparison, QUT achieved deposit rates 2.5 times higher than its nearest competitor in 2005 and 5 times higher in 2006, with estimated deposit rates of 60% for 2005 and 80% for 2006.⁴⁶⁶ Sale attributes the difference between the high deposit levels being achieved by QUT as compared to those observed at other Australian universities to ‘the deposit policy coupled with good author support practices’,⁴⁶⁷ a finding consistent with a major international study by Swan and Brown in 2005.⁴⁶⁸ Sale drew the following conclusion:

A requirement to deposit research output into a repository coupled with effective author support policies works in Australia and results in high deposit rates.... Authors are willing to comply with a requirement to deposit. Voluntary deposit policies do not result in significant content, regardless of any author support....⁴⁶⁹

Proposed actions

5.49 *The OAK Law project will:*

- *Survey the terms of employment of academic and research staff and university IP policies, to ascertain current policies and practices in relation to ownership of and rights to use copyright materials produced in the course of employment.*
- *Identify and present examples of good/best practice in employment contracts and IP policies that support open access to academic and research output through institutional and/or disciplinary repositories.*
- *Draft practical guidelines for universities on developing employment contracts and IP policies that support open access to academic and research output through institutional and/or disciplinary repositories.*
- *Develop sets of standard terms and clauses for inclusion in employment contracts and institutional IP policies to support policy objectives and practices in relation to open access.*
- *Develop guidelines for use by universities in:*

⁴⁶⁴ Commonwealth Department of Education, Science & Technology.

⁴⁶⁵ Sale, *Comparison of Content Policies*.

⁴⁶⁶ Ibid at p. 3.

⁴⁶⁷ Ibid.

⁴⁶⁸ Alma Swan and Sheridan Brown, ‘Open access self-archiving: an author study’ *Technical Report, External Collaborators*, JISC, HEFCE <<http://eprints.ecs.soton.ac.uk/10999>> at 16 July 2006.

⁴⁶⁹ Sale, *Comparison of Content Policies*.

- *reviewing their current employment contracts/IP policies to ensure that they are consistent with the institution's policy objectives and practices in relation to open access to academic and research materials produced by the institution's employees*
- *revising, where necessary, the terms of employment for academic and research staff and institutional IP policies to ensure they are consistent with and promote the institution's policy objectives and practices relating to open access to academic and research materials*
- *considering whether to adopt a formal requirement for deposit of academic and research output in an institutional or disciplinary repository or whether deposit should occur on a voluntary basis.*

C. Author – publisher (Publishing Agreement)

5.50 In the absence of legislation, the means by which open access to academic and research output is achieved depends, in practice, to a large extent on the contractual allocation of rights to exercise control over the published article, as between the author and the publisher. The degree of control that an academic author is able to exercise in respect of a published article, in terms of the use he can personally make of it or authorise others to make of it, depends on the scope of the rights (if any) that he has in the published article. This, in turn is largely dictated by the legal relationship between the author and publisher, as established by the Publishing Agreement.

5.51 Generally, the conditions of use of the published article will be set out as express terms of the Publishing Agreement. However, it will often be the case that there is no single document signed by the parties and in some cases it may be possible to imply terms in addition to those expressly stated in the Publishing Agreement.

5.52 The extent to which authors of published articles can continue to reproduce, distribute or provide access to the article, eg. by self-archiving it or depositing it with an institutional or disciplinary repository, depends on the scope of the rights (if any) retained by the author. If an author wishes to be able to continue to reproduce and distribute a published article (eg. to include it as part of a later publication or distribute it under a Creative Commons licence) they need to ensure they have the legal authority to do so. Even though the author has written the article, if they have assigned copyright to the publisher and have not obtained a licence back from the publisher permitting them to continue reproducing and distributing the article, their actions in doing so will be every bit as much an infringement of copyright as if the acts were done by a completely unrelated third party. Likewise, if academic writers are to permit third parties to use their published articles, they must have the authority to be able to grant that permission. In particular, academic authors who wish to submit copies of their published articles to digital repositories from which they can be reproduced, viewed etc. by the public at large or by members of a qualified community, must be able to warrant to the repository manager ('custodian') that they have the rights to authorise the repository to make the copyright material available to those who access the repository. In copyright terms, the author must be able to grant to the repository manager all the rights that the repository manager needs to be able to exercise in order to host the article on the repository's computer system and to make it

available for viewing and downloading by persons who have access to the repository. Specifically, the author must be able to grant the repository manager the rights to do the various acts falling within the copyright owner's exclusive rights, including, as appropriate, the rights to reproduce, first publish and communicate electronically to the public (by making the material available on a website or by transmitting the material in digital form).

5.53 There has been surprisingly little discussion in the literature of the models of rights ownership underlying the management of rights in academic articles. This lack of discussion of the models of allocating rights is surprising given that where there is a written agreement, the contract represents the bargain struck between the publisher and the author regarding the allocation of rights between the parties. The way in which the respective rights of publisher and author to exercise control over the article following publication are defined by the terms of the Publishing Agreement has not, until recently, been subject to close examination. There has been a tendency to focus on the rights exercisable by the publisher and the author rather than to seek to understand how that particular allocation of rights was achieved and how it could be varied to better represent the parties' interests and requirements.

5.54 More recently, a greater recognition has emerged of the integral role of copyright management in achieving the objective of open access to academic and research output. The importance of achieving an appropriate allocation of rights among the relevant stakeholders was recognised in the Zwolle Principles (2003), which provide:

1. Achievement of this [general] objective⁴⁷⁰ requires the optimal management of copyright in scholarly works to secure clear allocation of rights that balance the interests of all stakeholders.
2. Optimal management may be achieved through thoughtful development and implementation of policies, contracts, and other tools, as well as processes and educational programs, (collectively 'Copyright Management') that articulate the allocation of rights and responsibilities with respect to scholarly works.
3. Appropriate Copyright Management and the interests of various stakeholders will vary according to numerous factors, including the nature of the work; for example, computer programs, journal articles, databases and multimedia instructional works may require different treatment.
5. In the development of Copyright Management, the primary focus should be on the allocation to various stakeholders of specific rights.⁴⁷¹ [emphasis added]

5.55 The relationship between appropriate copyright arrangements and dissemination of published scientific material was acknowledged by the European Commission's Directorate-General on Research in its 2006 report, *Study on the economic and technical evolution of the scientific publication markets in Europe*. It

⁴⁷⁰ The overall objective of the Zwolle Principles is as follows: 'To assist stakeholders—including authors, publishers, librarians, universities and the public—to achieve maximum access to scholarship without compromising quality or academic freedom and without denying aspects of costs and rewards involved.' See Zwolle Principles <http://www.surf.nl/copyright/zwolle_principles.php>.

⁴⁷¹ See <http://www.surf.nl/copyright/zwolle_principles.php>.

recommended that further research be carried out into ‘precise legal solutions that would provide legal certainty to authors, but also potentially to other parties, in terms of dissemination of published material.’⁴⁷²

5.56 Much of the discussion of the allocation of rights between publishers and authors in the academic context has started from the assumption that copyright is assigned in its entirety from the author to the publisher at the time the publishing arrangements are agreed. There has also been little discussion of the importance of identifying the actual owner of copyright in a published article. Too often, discussion of authors’ rights in relation to ongoing use of their published articles has been based upon assumptions which do not necessarily apply across the board. There has been a tendency to assume that the author has, prior to publication, assigned copyright to the publisher. The focus on the publisher as controlling the ongoing use of published articles has tended to put into the shadows alternative models of rights management, which involve a lesser ceding of control by the author, eg. through a partial transfer of copyright or merely granting the publisher a licence to publish.

5.57 In fact, it is possible to readily identify a range of models of copyright management in the author-publisher relationship. These models can be viewed as occupying positions along a continuum of control, with maximum control by the author at one extremity and maximum control by the publisher at the other. At the one end of the spectrum the author retains copyright and merely licenses the publisher to publish the article, on a non-exclusive basis. Under this model, the author may simply give the publisher the right of first publication. At the other end of the spectrum, the publisher obtains a full assignment of copyright from the author and does not permit the author to self-archive the article (either in its draft PrePrint form or the published PostPrint) or further distribute it (although the author may purchase hard copy reprints).

5.58 The single most important point of differentiation among current models of rights management is whether or not copyright has been assigned by the author to the academic publisher and, if there has been an assignment of copyright, whether it has been assigned in its entirety or only partially. Where copyright has been assigned, the author will usually have given up or limited their rights to exercise any ongoing control over the work whereas if the author has retained copyright (even partially) they are more likely to have continuing rights to control many uses of the work.

5.59 In many publishing contracts with journals, the publisher requires authors to assign copyright in its entirety to the publisher. However, there are also a significant number of journals which permit the author to retain the copyright, in which case the author can exercise a greater degree of control over further distribution and use of the article. Retention of copyright by authors is more likely where authors are well-known, with an extensive experience of publishing and able to negotiate to retain copyright or to make only a partial assignment of copyright to the publisher. Other factors (such as the nature of the journal, subject matter, degree of editorial input required to produce the finished version of the article etc.) are relevant to whether and, if so to what extent, the publisher requires copyright to be assigned.

⁴⁷² European Commission, Directorate-General for Research.

5.60 The Publishing Agreement between the author and publisher represents a statement of the respective interests of the author and the publisher. Although agreements between publishers and academic authors can rarely be considered to have been truly negotiated, they represent an accommodation of the parties' interests, based on 'industry practice' in a particular field of academic publishing. The balance of interests between publisher and author varies considerably among academic disciplines and is influenced by numerous factors including the prestige of the publication, the intensity and expense of the review and editing process, the commercial risk borne by the publisher and the format of the publication.

5.61 Points along the continuum from maximum author control to maximum publisher control can be identified, in broad terms, as follows:

1. Author retains copyright and controls distribution (which may include self-publishing, self-archiving or depositing it in a repository)
2. Author retains copyright and grants a licence (exclusive, sole or non-exclusive) to publisher to publish the article
3. Author assigns copyright partially to publisher, retaining (reserving) ownership of part of the copyright
4. Author assigns copyright to publisher but obtains an express licence back from publisher to further reproduce and distribute, on terms determined by publisher
5. Author assigns copyright entirely to publisher, with an implied licence to self-archive or deposit the article into an institutional or disciplinary repository
6. Author assigns copyright entirely to publisher.

5.62 However, academic authors generally have little understanding of the range of Publishing Agreements. Many, particularly junior academics or those with less extensive experience in publishing, lack the skills, confidence or interest to engage in negotiations with publishers to ensure that the allocation of rights in the Publishing Agreement is appropriate for the needs of the author or his/her institution with respect to making a copy of the article available in an open access repository.

5.63 Among the factors identified by repository managers that contribute to lower than expected rates of compliance with institutional policies requiring research articles to be deposited in an open access repository is 'individual authors' legal worries about copyright and publication contracts'.⁴⁷³

Proposed actions

5.64 *The OAK Law project recommends that funding organisations and academic institutions should with the assistance of the OAK Law project:*

⁴⁷³ Leslie Carr and Stevan Harnad, *Keystroke Economy: A Study of the Time and Effort Involved in Self-Archiving* at p. 2 <<http://eprints.ecs.soton.ac.uk/10688/01/KeystrokeCosting-publicdraft1.pdf>> at 16 July 2006.

- ***Engage in advocacy about:***
 - *the need to actively manage copyright in order to achieve open access objectives*
 - *the importance of ensuring that appropriate structures are in place to enable copyright to be appropriately managed.*
- ***Develop and implement systems designed to raise awareness and understanding among academic authors, research offices and repository administrators of:***
 - *copyright principles in general (ie. ownership, assignment and licensing)*
 - *the various models of copyright management*
 - *requirements of funding organisations in relation to enabling open access to academic and research output produced under a funding arrangement*
 - *requirements of the author's employer institution (under the author's employment contract or the institutional IP policy) in relation to enabling open access to academic and research output produced in the course of the author's employment*
 - *the relationship between allocation of copyright interests in Publishing Agreements and enabling open access rights (access and re-use) to published academic and research materials*
 - *how the various models of copyright management can be used to achieve an appropriate allocation of rights between author and publisher, which is consistent with open access objectives*
 - *how to negotiate an appropriate allocation of copyright interests with publishers*
 - *how and where to obtain access to specialist advice and assistance about copyright allocation before publishing agreements are finalised.*
- ***Develop information packages (toolkits) covering the matters listed above and provide practical and ongoing training to all relevant staff, including academics, research office staff and repository administrators.***
- ***Each institution should develop or identify an entity (or entities) with responsibility for ensuring that the institution's open access objectives are achieved through the proper management of copyright so that an appropriate allocation of copyright is achieved in all publishing agreements.***

5.65 Developing a better understanding of the range of approaches towards copyright ownership found in Publishing Agreements has been a focus of recent projects on open access to academic and research material in the UK, Europe and the US.⁴⁷⁴ The relationship between author and publisher has traditionally been based on

⁴⁷⁴ See for example, the SURF report, *Copyright Policies and Agreements: Implementing the Zwolle Principles* http://www.surf.nl/copyright/keyissues/scholarlycommunication/implem_Zwolle_principles.pdf at 22 May 2006.

the transfer of copyright from the author to the publisher. However, as discussed above [at paragraph 5.56] a much broader range of approaches to copyright ownership can be identified. The different balance achieved between the stakeholder interests is reflected in the particular allocation of copyright interests as between author and publisher in the Publishing Agreement.

5.66 The quest for ways of promoting greater accessibility to academic and research output has focused attention on whether the traditional model (ie. full assignment of copyright to the publisher) is appropriate or justifiable. The increased emphasis on open access has been accompanied by a shift away from the dominant model in favour of one in which copyright is retained by the author, the publisher is granted a licence to publish and the author retains rights over further re-use of the material. Recent surveys of authors have clearly indicated a preference for a copyright model under which the author retains copyright and continues to be able to exercise rights over re-use of the material for educational, academic or commercial purposes.⁴⁷⁵ In *The Institutional Repository* (2006)⁴⁷⁶, Jones, Andrew and MacColl comment that they have ‘noted that the major difficulties with clearing permission arise when dealing with materials that are not owned by the submitting author [and] advocate that [generally speaking] authors should retain as much of their rights as possible’.⁴⁷⁷

5.67 The policies and practices of academic journal publishers need to be surveyed to ascertain where they are positioned along the spectrum from maximum author control to maximum publisher control over the published material. Any survey of publishers’ practices would involve a study of the terms of the publishers’ standard Publishing Agreements, that is, the terms dealing with the granting of rights (eg. transfer of copyright) by the author to the publisher as well as the terms of any licences granted back by the publisher to the author. However, many publishers have also issued policy statements setting out their position in relation to self-archiving and deposit of published articles in digital repositories. Often, the effect of these policy statements in terms of the rights they confer on authors is either unclear or not fully understood.⁴⁷⁸

5.68 As publishers often agree to variations to the terms of Publishing Agreements at the request of authors, the survey should extend to publishers’ attitudes towards and practices relating to variations of their standard Publishing Agreements, particularly where the effect of the variation is to reserve rights to the author (eg. the SPARC Addendum which partially reserves copyright ownership). A detailed analysis of Publishing Agreements (in their standard form or as varied at the request of authors) should be carried out, in conjunction with the publishers’ statements on open access.

⁴⁷⁵ See ‘Hoorn and van der Graaf, *Good Practices of Copyright*’, the first output of the JISC-SURF partnering on copyright project <<http://www.surf.nl/en/publicaties/index2.php?oid=50>> at 26 May 2006.

⁴⁷⁶ Chandos Publishing, Oxford, UK.

⁴⁷⁷ Richard Jones, Theo Andrew and John MacColl, *The Institutional Repository*, Chandos Publishing, 2006, 54 – 155.

⁴⁷⁸ An item posted by Peter Suber on the Open Access News website on 18 March 2006 illustrates the problems that can arise and the need for the scope of the author’s licence to be clearly described in the Publishing Agreement. See <<http://www.earlham.edu/~peters/fos/fosblog.html>> at 16 July 2006, *Limiting self-archiving to institutional repositories*, Steve Oberg, Elsevier’s response to depositing articles in E-LIS, *Family Man Librarian*, March 17, 2006.

5.69 Since authors frequently seek and obtain variations to the standard Publishing Agreements provided to them by publishers, if any review of publishing practices is to provide an accurate picture it should not only survey publishers but also authors. By surveying authors and viewing their publishing agreements as signed, it will be possible to assess whether and if so, to what extent, publishers' practices vary from their published policies. Information from authors about the actual terms of publication will indicate whether publishers are deviating from their published policies and whether such variance favours ongoing control by the author or by the publisher.

5.70 Using information obtained from consultations with academic authors and publishers and following a review of the standard Publishing Agreements currently in use by major publishers of Australian academic and research output, a set of model Publishing Agreements should be drafted. The model Publishing Agreements should cover the spectrum of models of rights allocation between author and publisher, from retention of copyright by the author and granting of a licence to the publisher through to the assignment of copyright to the publisher and the granting of a licence by the publisher to permit use of the material by the author. As well as drafting a model set of Publishing Agreements, open access objectives will be promoted by developing a set of standard clauses, designed for use with standard form Publishing Agreements provided by publishers, to ensure that the rights required for open access are secured by the author (or his/her institution), by insertion of the open access clauses into the standard publishers' contracts, at the author's request.

1. *Author retains copyright and controls distribution (including by self-archiving or deposit in a repository)*

5.71 In the typical situation an academic author who writes an article will be the first owner of copyright, in accordance with the general principle stated in s 35(2) of the *Copyright Act*.⁴⁷⁹ Where two or more authors have collaborated on a work such that the contribution of each author cannot be separated from the contribution of the other, the authors own copyright jointly. Notwithstanding the principle stated in s 35(6) of the *Copyright Act* that where a work is produced by an employee in pursuance of the terms of his or her employment under a contract of service or apprenticeship, the employer owns copyright in the work, Australian universities have not generally asserted ownership of copyright in their employees' academic publications (as distinct from materials created specifically for particular courses). While it will be necessary in each case to have recourse to the university or institution's IP policy to ascertain the position with respect to copyright ownership, as a general rule it has been accepted that, at least in the case of academic articles, copyright belongs to the academic author rather than the employer institution. However, the extent of this practice should not be over-emphasised and there will be many cases where persons who are employed to research and whose usual employment role involves producing articles for publication (eg. employees of government scientific research organisations) will not retain the copyright.

⁴⁷⁹ Section 35(2) provides: 'Subject to this section, the author of a literary, dramatic, musical or artistic work is the owner of any copyright subsisting in the work by virtue of this Part.'

5.72 At the ‘author control’ extremity of the continuum, the academic author retains all copyright rights and controls the publication and distribution of the article. Under this model the author may, for example, self-archive the article on his or her own website where it can be accessed by other users or distribute it by email to a discussion group for comment, permitting others to use the article (by reading, copying, further distributing etc).⁴⁸⁰ The author may, alternatively, deposit the article in an institutional repository (such as QUT’s ePrints) or a disciplinary (subject-based) repository (such as the US National Institutes of Health’s PubMed Central).⁴⁸¹

2. *Author retains copyright and grants a licence to publisher to publish the article*

5.73 The licensing models favoured by the Open Access Law project⁴⁸², Science Commons and many academic authors are based on retention of copyright ownership by the author, with the author granting the publisher a contractual licence to publish the article.

5.74 The current US focus on open access practices is based on this model of rights allocation and it is likely to attract more attention in the UK and Europe in light of studies (eg. JISC-SURF’s 2005 study⁴⁸³) which clearly show that the vast majority of academic authors would prefer to retain ownership of copyright.

5.75 The scope of the rights granted to the publisher will be determined by how the licence deals with a range of issues, including:

- whether the licence granted is exclusive, sole, or non-exclusive
- the period of time for which the licence is granted
- the territory covered by the licence
- whether any restrictions are imposed on the commercial use of the material (or whether it can be used only for non-commercial purposes)
- conditions applying to any further distribution of the material.

Science Commons Open Access Model Publishing Agreement

5.76 The Science Commons Publishing Project is working to support open access to scholarly research in a range of disciplines including agriculture, entomology, biology, anthropology and law. The Open Access Law Program, established by

⁴⁸⁰ For information on, and tools to enable, author self-archiving see Science Commons: <<http://sciencecommons.org/resources/selfarchive>> at 16 July 2006.

⁴⁸¹ PubMed Central is a free digital archive of biomedical and life sciences journal literature established by the US National Institutes of Health. See <<http://www.pubmedcentral.gov/>> at 16 July 2006.

⁴⁸² See <<http://www.openaccesslaw.org/openaccesslaw/contracts/index.html>> at 16 July 2006. Open Access Law provides as examples of model publication agreements the agreements drafted by Professor Mark Lemley and Brian Saxe, senior articles editor of the Michigan State Law Review.

⁴⁸³ Esther Hoorn and Maurits van der Graaf, ‘Copyright Issues in Open Access Research Journals’, (February 2006) 12:2 *D-Lib Magazine* <<http://www.dlib.org/dlib/february06/vandergaaf/02vandergaaf.html>> at 11 August 2006.

Lawrence Lessig (Stanford Law School), Michael Carroll (Villanova Law School) and Dan Hunter under the umbrella of the Science Commons project (see <<http://sciencecommons.org/literature/oalawpublication>>) encourages authors to negotiate individually with the journals in which they publish, to retain ownership of copyright and the right to open their material on open access repositories.

5.77 The Open Access Law Program (OAL Program)⁴⁸⁴ has developed resources to promote open access in legal publishing, including:

- *The Open Access Law Journal Principles*: The OAL Program encourages law journals to commit to a set of OAL Journal Principles. These Principles require that a journal: (1) take only a limited term licence, (2) provide a citable copy of the final version of the article, and (3) provide public access to the journal's standard publishing contract. In return, the author promises to attribute first publication to the journal.

(See <<http://sciencecommons.org/literature/oalawjournal>>).

- *The Open Access Law Author Pledge*: For authors wishing to commit publicly to open access ideals, we have established an OAL Author Pledge. This pledge commits authors to only publish law review articles in journals that adhere to a minimum OAL commitment.
- *The Open Access Model Publishing Agreement*: The OAL Program also provides a Model Agreement that embodies the OAL Journal Principles in a fair and neutral contract that is easy for both authors and law reviews to adopt. It also provides for an easy mechanism for authors and journals to adopt Creative Commons (CC) licences to make their work more easily available. (See <<http://sciencecommons.org/literature/oalawpublication>>).

5.78 The Open Access Law principles⁴⁸⁵, developed for use by publishers of law journals, state:

1. The Journal will require from the Author no more than a reasonable, limited-term exclusive license for commercial publication. The Journal will not interfere at any time with the author's freedom to make his or her work available under a license as free as the Creative Commons Attribution-NonCommercial License⁴⁸⁶
2. In the event of reprinting or republication (of any part) of the Article the Author will always attribute first publication to the Journal, unless the Journal does not require this.
3. Upon publication of the Article, the Journal will make available to the Author an electronic version of the edited Article—such as the PDF or the word processing document of the published Article—with the expectation that this will be posted in an Open Access Repository⁴⁸⁷

⁴⁸⁴ <<http://sciencecommons.org/literature/oalaw>> at 16 July 2006.

⁴⁸⁵ <<http://sciencecommons.org/literature/oalawjournal>> at 16 July 2006.

⁴⁸⁶ <<http://creativecommons.org/licenses/by-nc/2.0/>> at 16 July 2006.

⁴⁸⁷ Further information on Open Access Repositories see:

<<http://sciencecommons.org/resources/oarepositories>> at 16 July 2006.

4. In the event that the Journal does not use the Science Commons Open Access Law Model Publication Agreement, it will post a current copy of its publication agreement on its web site, and will ensure that its agreement complies with these four principles.

5.79 The Publication Agreement and Copyright Licence ('the Science Commons Open Access Model Publishing Agreement') developed by the Open Access Law Program as is premised on retention of copyright by the author. Under clause 1.2 of the Open Access Law Model Publication Agreement and Copyright Licence, the Author grants the Publisher a 'royalty-free, worldwide, nonexclusive licence to publish, reproduce, display, distribute, and use the Article in any form', while the Author 'retains ownership of all rights under copyright in the Article, and all rights not expressly granted' in the agreement.

5.80 A distinctive feature of the Publication Agreement and Copyright Licence is that, under clause 1.1, the Author and Publisher agree that the Author may grant a CC copyright licence in the article to members of the public at large. Clause 1.1 allows the Publisher to indicate which one or more of four specified CC licences⁴⁸⁸ the publisher is willing to allow the Author to grant, by ticking one or more of the boxes. The Author then chooses one of the CC licence options ticked by the Publisher or may decide not to grant any CC licence.

5.81 The combination of a non-exclusive licence to publish and distribution under a CC licence has been adopted by many open access peer-reviewed science journals. Many of the open access journals published on the US National Institutes of Health's PubMed Central site are made available under this model. Copyright is retained by the author/s who license/s the journal to publish the article online and grant/s the public the right to use the article, usually under a Creative Commons Attribution Licence. Other examples are the journals in the Public Library of Science (PLOS)⁴⁸⁹, BioMed Central⁴⁹⁰ and the International Journal of Communications Law and Policy⁴⁹¹.

5.82 The Public Library of Science (PLOS) is a San Francisco-based non-profit publisher launched in 2000 with support from around 35 000 scientists and start-up funding from private foundations. The PLOS contains six journals,⁴⁹² all of which are peer-reviewed, open access⁴⁹³ scientific and medical journals containing articles which

⁴⁸⁸ (1) Creative Commons Attribution 2.5 License, which is incorporated herein by reference and is further specified <<http://creativecommons.org/licenses/by/2.5/leg.alcode>> at 16 July 2006.

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⁴⁸⁹ See <<http://www.plos.org/index.php>> at 16 July 2006.

⁴⁹⁰ See <<http://www.biomedcentral.com/home/>> at 16 July 2006.

⁴⁹¹ The 'Principles of Publication', clause 2, state that for purposes of publication in the IJCLP 'copyright rests with the author'. See <http://www.ijclp.org/basic/about_ijclp.html> at 16 July 2006.

⁴⁹² PLOS Biology, PLOS Medicine, PLOS Computational Biology, PLOS Genetics, PLOS Pathogens, and PLOS Clinical Trials.

⁴⁹³ The PLOS definition of 'open access' is at <<http://www.plos.org/oa/definition.html>> at 16 July 2006.

are freely accessible online and can be redistributed and reused (including commercially) under the Creative Commons Attribution Licence. The most successful of its six journals is PLoS Biology. PLoS operates on the basis of retention of copyright by authors (or their research institution). Authors are required to grant users an irrevocable licence to print, copy, or use the work in any lawful way, subject to the condition that proper attribution is given whenever the work is distributed or reproduced. The standard form of licence used in PLoS is the Creative Commons Attribution Licence, which it applies to all works it published, unless otherwise noted.⁴⁹⁴ A feature of the PLoS model is that the author, while retaining copyright, pays for publication.⁴⁹⁵ The reason for the so-called 'processing fee' model is explained as follows on the PLoS website:

It costs money to produce a peer-reviewed, edited, and formatted article for online publication, and to host it on a server that's accessible around the clock. This cost is small relative to the funding for the research project as a whole (usually around 1%), but it serves the crucial final step of disseminating a completed body of work to the scientific community. In many cases, authors already pay for publication in the form of page or color charges; we ask them, their institution, or their funding agency for a flat fee of \$1,500 to help cover the entire editorial and production process. Several major private funding sources have explicitly endorsed the open access model for publishing. For example, the largest private funding source for medical research in the U.S., Howard Hughes Medical Institute, has committed to supplementing its grants with additional money to cover publication in open-access journals such as *PLoS Medicine*. Each funded HHMI researcher receives up to US\$3000 every year for any open-access articles they produce. Your institution may have already agreed to cover all or part of the publication charge.

5.83 The same licensing model is used by BioMed Central.⁴⁹⁶ For example, the article, *An advanced expiratory circuit for the recovery of perfluorocarbon liquid from non-saturated perfluorocarbon vapour during partial liquid ventilation: an experimental model*, by K R Dunster et al, and published in BioMedical Engineering Online 2006, 5:7⁴⁹⁷ has the following copyright statement:

© 2006 Dunster et al; licensee BioMed Central Ltd.

This is an Open Access article distributed under the terms of the Creative Commons Attribution License (<<http://creativecommons.org/licenses/by/2.0>>), which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

SCRIPT-ed

5.84 The on-line law journal SCRIPT-ed⁴⁹⁸ has developed a publishing practice based on retention of copyright ownership by the author and the granting of a licence

⁴⁹⁴ <<http://medicine.plosjournals.org/perlsv/?request=get-static&name=license>> at 16 July 2006.

⁴⁹⁵ For a study on the Open Access Publishing model based on author pays, see the Wellcome Trust at <http://www.wellcome.ac.uk/doc_WTD003185.html> at 16 July 2006. See also, *Costs and business models in scientific research publishing* <<http://www.wellcome.ac.uk/assets/wtd003184.pdf>> and *Economic analysis of open access publishing* <http://www.wellcome.ac.uk/doc_WTD003181.html> at 16 July 2006.

⁴⁹⁶ See <<http://www.biomedcentral.com/home/>> at 16 July 2006.

⁴⁹⁷ doi:10.1186/1475-925X-5-7.

⁴⁹⁸ <<http://www.law.ed.ac.uk/ahrb/script-ed/index.asp>> at 16 July 2006.

to use the work. The SCRIPT-ed publication model provides for two alternatives. Firstly, the author may grant SCRIPT-ed the non-exclusive right to publish the work online. Secondly—in SCRIPT-ed's preferred arrangement—the author grants the same non-exclusive licence to both the journal itself and to end users (both of which fall within the definition of 'Users'⁴⁹⁹) under the SCRIPT-ed Open Licence ('SOL').⁵⁰⁰

Mark Lemley's Publication Agreement and Copyright Licence

5.85 Professor Mark Lemley of Stanford University, has drafted a model publication agreement which he uses when negotiating with law reviews.⁵⁰¹ In this agreement, the author expressly retains ownership of copyright in the article and all rights not expressly granted to the publisher under the agreement, including the non-exclusive right to reproduce, distribute, adapt, perform and display the article in any medium. The author grants the journal an exclusive right to publish the article in print form for an initial period of six months, as well a non-exclusive right to publish, reproduce, distribute and use the article which lasts for the duration of the copyright. For clarity, the licence expressly states that the rights retained by the author allow the author to make and distribute copies in the course of teaching and research, to post the article on personal or institutional web sites and in other open access digital repositories and to make derivative works from the article.

5.86 Key clauses in this agreement are:

Clause 1.1:

The Author grants to the Journal the nonexclusive right to publish, reproduce, distribute, and use the Article in any form, either separately or as part of a collective work, including but not limited to the nonexclusive right to publish the Article in an issue of the Journal, copy and distribute the individual reprints of the Article, authorize reproduction of the entire Article in another publication, and authorize reproduction and distribution of the Article or an abstract thereof by means of computerized retrieval systems (such as Westlaw, Lexis and SSRN). The Author retains ownership of the copyright in the Article, and all rights not expressly granted in this Agreement.

Clause 1.2:

In addition to the nonexclusive rights granted above, the Journal shall have the exclusive right to print publication of the Article for a period beginning when this Agreement is executed and ending six (6) months after publication of the work in the Journal.

Clause 1.3:

The Author grants to the Journal the power to assign, sublicense or otherwise transfer

⁴⁹⁹ User is defined as 'the person who reads, copies, issues copies of the work, translates, displays, performs or broadcasts the Work'.

⁵⁰⁰ The SCRIPT-ed Open Licence (SOL) is available at

<<http://www.law.ed.ac.uk/ahrb/script-ed/sol.htm>> at 16 July 2006 and is reproduced at the end of this chapter (hereinafter SCRIPT-ed Open Licence). The SCRIPT-ed Open Licence is copyright of the AHRC Research Centre for Studies in Intellectual Property and Technology Law (the Centre), and it is distributed under its own terms and conditions.

⁵⁰¹ Available on Open Access Law <<http://www.openaccesslaw.org/contracts/LemleyAgreement.doc>>.

any and all rights granted under this Agreement, provided the Journal does not modify the Article without permission from the Author.

Clause 1.4:

The Journal agrees to properly affix the author's copyright notice to all reproductions of the Article, and not to modify the Article or permit it to be modified without the Author's permission.

Clause 2.1:

The Author retains ownership of the copyright in the Article, and all rights not expressly granted in this agreement, including the nonexclusive right to reproduce, distribute, adapt, perform and display the Article in any medium. These retained rights allow the Author to make and distribute copies in the course of teaching research, to post the Article on personal or institutional Web sites and in other open-access digital repositories, and to make derivative works from the Article.

Michigan State Law Review Publication Agreement

5.87 The Michigan State University College of Law's law review has developed an agreement described by Dan Hunter on the Open Access Law website⁵⁰² as 'a model of parsimony, and fairness.....probably the shortest, clearest and best [law review publication agreement] I've ever seen.' The Michigan State Law Review Publication Agreement (reproduced below) was drafted by Brian Saxe, the law review's senior articles editor, following consultations with various journals and research of contracts and blogs. The Publication Agreement is distributed under a Creative Commons attribution (BY) licence.

5.88 The Michigan State Law Review Publication Agreement is short (one page), expressly stating that copyright in the article remains with the author and that nothing in the Agreement is to be construed as an assignment of copyright ownership to the law review (clause 1). The author grants the law review a licence to print, publish, post and distribute the article in any medium, which specifically includes but is not limited to the rights to: authorise the electronic reproduction of the article by LexisNexis and Westlaw; authorise others to reproduce the article for non-commercial purposes and use an abstract or portion of the article in any authorised reproduction of the article (clause 3). The author authorises the law review to edit and revise the article prior to publication, with the proviso that the article must be acceptable to both the author and the law review prior to publication (clause 5). Any reproduction of the article (including, but not limited to, its publication, posting or excerpt in print or on the Internet) is required to give attribution to the article's original publication in the law review, by including a citation in the form: 'Originally published in [year] MICH. ST. L. REV. [start page]' (clause 2). The author warrants that he has the right to licence the article to the law review and has not made any agreement that would conflict with the Publication Agreement, that the article has not previously been published, in whole or in part, that the article does not infringe the copyright or property rights of another person, that the article does not contain matter that is defamatory, violates another person's rights of privacy or publicity or is otherwise

⁵⁰² <<http://www.openaccesslaw.org/openaccesslaw/contracts/index.html>> at 16 July 2006.

unlawful and that the author will indemnify and hold harmless the Michigan State University College of Law and the law review against any damages, losses or expenses incurred as a result of the author's breach of any of these warranties (clause 5).

Lucie Guibault Licence to Publish

5.89 This short form of Publishing Agreement⁵⁰³ is interesting in that it contains a preamble explaining the allocation of rights effected by the agreement. The Preamble states:

- Considering that this agreement concerns the production and distribution of scholarly and/or scientific works
- Considering that it is in the general interest to grant maximum access to scholarly and/or scientific works without compromising quality or academic freedom, especially when such works are financed by public resources
- Considering that the Publisher wishes to receive financial compensation for his contribution in the publication of the scholarly and scientific work
- Considering that in the so-called 'subscription model', a balance should be achieved between granting maximum access to scholarly and/or scientific works and granting financial compensation for the publication of these works
- This agreement, therefore, reflects this balance.

5.90 The feature of this licence is that, while based on retention of copyright by the author, it describes at some length the rights licensed by the author to the publisher and the rights retained by the author. The rights licensed to the publisher are described in Clause 2:

1. Upon Acceptance, the Author grants to the Publisher a sole licence for the full term of the copyright in the Article to perform with respect to the Article certain copyright related acts having an economic or commercial objective.
2. The sole licence mentioned in [Clause 2.1] encompasses the right for the Publisher:
 - a. to reproduce (or authorise others to do so) the Article, in whole or in part, and to communicate the Article to the public (or authorise others to do so) in print and/or digital form, whether or not in combination with the works of others, for example the making available to the public via internet or any other network, as part of a database, on-line or off-line, for use by third parties;
 - b. to translate the Article (or authorise others to do so) into other languages and to communicate the translation of the Article to the public (or authorise others to do so);

⁵⁰³ This agreement, drafted by Lucie Guibault of the Institute for Information Law at the University of Amsterdam, is available on the SURF web site. See http://www.surf.nl/copyrighttoolbox/download/licence_en.pdf at 11 August 2006.

- c. to create adaptations, summaries or extracts of the Article or other derivative works based on the Article and exercise all of the rights in such adaptations, summaries, extracts and derivative works;
- d. to include the Article, whether in translation or as adaptation or summary, in whole or in part in a computerised database and to make this database available to third parties;
- e. to include the Article, in whole or in part, whether in translation or as adaptation or summary, in a reader or compilation;
- f. to rent or lend the Article to third parties;
- g. to reproduce the Article by means of reprography (or authorise others to do so), notwithstanding the limitations in the law.

The publisher may transfer the ‘exploitation rights’ to a third party, provided the third party fulfils the publisher’s obligations under the Agreement (clause 8).

5.91 Clause 3 sets out, in detail, the rights retained by the author. The retained rights include rights to use the article for educational or instructional purposes, dissemination, preservation, future reuse and personal use. The agreement does not affect the author’s moral rights (clause 8). The rights retained by the author include the following rights with respect to the Article (clause 3):

Educational or instructional use

1. To reproduce the Article, in whole or in part, and to communicate it to the public, whether in print and/or digital form, whether as part of a reader or a compilation, for use in education or research within the Author’s own institution, provided this use pursues no direct or indirect commercial advantage.

Dissemination

2. To grant the Author’s own institution the authorisation to upload the Article onto the institution’s closed network (eg. intranet system); and to grant the Author’s own institution the authorisation to upload, after an embargo period of a maximum of six (6) months from the date of publication of the journal in which the Article is published, unless it is clear that the Publisher agrees to a shorter term, the Article to publicly accessible institutional and/or centrally organized repositories, provided that this is not for direct or indirect economic or commercial advantage and that a link is inserted to the Article on the Publisher’s website.

Preservation

3. To grant to the Author’s own institution the authorisation to reproduce the Article for the purpose of preventing it from deteriorating, or if the original is currently in an obsolete format or the technology required to use the original is unavailable, for the purpose of ensuring that the Article continues to be available for education and research purposes.

Future reuse

4. To reuse whole or part of the Article in a dissertation, compilation or other work, provided that such use pursues no direct or indirect economic or commercial

advantage. For any commercial reuse of the Article, the Author undertakes to obtain the Publisher's consent.

Personal use

5. To present the Article at a meeting or conference and to hand out copies of the Article to the delegates attending the meeting provided that all such use pursues no direct or indirect economic or commercial advantage.

For every form of (re)use of the Article as described in the above paragraphs, the Author or the Publisher undertakes to always include the complete source (at least the Author's name, the title and the number of the Publication, and the name of the Publisher), unless this is impossible.

Indiana Law Review's Copyright and Publishing Agreement

5.92 The Publishing Agreement used by the Indiana Law Review is based on retention of copyright by the author and the grant of a non-exclusive, irrevocable licence to the publisher.⁵⁰⁴ Like the Lucie Guibault Licence to Publish discussed above (at paragraphs 5.89 to 5.91), the Indiana Law Review's Copyright and Publishing Agreement commences with a fairly lengthy preamble explaining the approach taken to the allocation of rights between the parties. The preamble states:

The publishing industry has grown increasingly complex in recent years, particularly with the expansion of new technologies for the delivery of information. In order to better manage the rights associated with your Article, and to provide optimal access to it, we believe that you, the Author, should hold the copyright to your Article, but that you should grant us, the *Indiana Law Review*, appropriate rights to use your Article for the benefit of the scholarly community. We believe that this arrangement will properly serve our shared interest in reaching the largest readership possible. We also believe that by securing certain rights in the Article, we will be better able to disseminate your Article through research databases, on the internet or CD-ROM, and by other means that will exist in the years to come.

Clause 1 reserves copyright to the author:

1. You [the author] shall retain the copyright and all other literary rights in and to the Article. This Agreement shall in no way limit your right to:

- a. Reproduce, distribute, display, and transmit copies of the Article for your own personal, professional, or educational purposes, provided that each copy includes appropriate credit to the *Indiana Law Review* as the original published source of the Article.
- b. Publish all or part of the Article in subsequent works of your own, such as a new article on the same subject or a book of which you are an author, provided that you credit the *Indiana Law Review* as the original published source of the relevant material.

⁵⁰⁴ <<http://copyright.iupui.edu/iulawrevagree090204.pdf>> at 2 August 2006. The following clauses of this Agreement have been reproduced with permission of the IUPUI Copyright Management Center.

Clause 3 describes the rights granted to the publisher:

3. Although you will remain the copyright owner, you grant to the *Indiana Law Review* acting on behalf of the Trustees of Indiana University the irrevocable, nonexclusive rights to:

- a. Reproduce, publicly distribute and display, and transmit the Article or portions thereof in any manner, including but not limited to journals, as part of collective works, as reprints, and through any medium now in existence or developed in the future including but not limited to print, electronic and digital media, computerized retrieval systems, and other formats. The *Indiana Law Review* may exercise these rights directly or by means of third-party information providers, including but not limited to Lexis and Westlaw or third-party publishers and printers.
- b. Adapt, translate, and format the Article as the *Indiana Law Review* sees appropriate.
- c. Grant permission to third parties to reproduce and distribute the Article for educational or research uses, provided that the *Indiana Law Review* requests of the third party that: (i) the author and *Indiana Law Review* are identified on each copy; and (ii) proper notice of copyright is affixed to each copy.
- d. Use the author's name and likeness in promoting the Article or the *Indiana Law Review*.
- e. The Author grants the above rights without claim of royalties or other compensation.

3. *Author assigns copyright partially to publisher but retains (reserves) part of the copyright*

5.93 As personal property, copyright can be transferred by assignment (s 196(1) *Copyright Act*). An assignment of copyright may be total or partial, in that it can be limited in any way, including one or more of the following:

- to apply to one or more of the classes of acts that the copyright owner has the exclusive right to do (which may include a class of acts that is not separately specified in the *Copyright Act* as being comprised in the copyright but falls within a class of acts that is so specified)
- to apply to a place in or part of Australia
- to apply to part of the period for which the copyright is to subsist (s 196(2)).

5.94 For any assignment of copyright (whether total or partial) to be effective, it must be in writing and signed by or on behalf of the assignor (s 196(3)).

5.95 Under this model, based on the splitting of copyright interests among the parties as envisaged by s 196(2), the author assigns copyright partially to the publisher but retains (or 'reserves') certain key rights required to enable him to control certain

uses of the article, eg. to enable the author to self-archive the article or to deposit it in a digital repository.

5.96 This model underlies the so-called SPARC Author Addendum (or simply, SPARC Addendum)⁵⁰⁵ developed by Professor Michael Carroll of Villanova Law School for the Scholarly Publishing and Academic Resources Coalition (SPARC).⁵⁰⁶ The SPARC Addendum is a set of clauses intended for inclusion by an author in a standard Publication Agreement in which copyright is assigned to the publisher, in order to limit what would otherwise be a general transfer of copyright, by excluding from the transfer certain distribution rights which are reserved to the author. In particular, the SPARC Addendum reserves to authors certain key rights, in particular, the right to post their articles in digital repositories.⁵⁰⁷

5.97 The substantive clauses of the SPARC Addendum are as follows:

The parties agree that wherever there is any conflict between this Addendum and the Publication Agreement, the provisions of this Addendum are paramount and the Publication Agreement shall be construed accordingly.

Notwithstanding any terms in the Publication Agreement to the contrary, AUTHOR and PUBLISHER agree as follows:

1. Author's Retention of Rights. In addition to any rights under copyright retained by Author in the Publication Agreement, Author retains: (i) the rights to reproduce, distribute, publicly perform, and publicly display the Article in any medium for non-commercial purposes; (ii) the right to prepare derivative works from the Article; and (iii) the right to authorize others to make any non-commercial use of the Article so long as Author receives credit as author and the journal in which the Article has been published is cited as the source of first publication of the Article. For example, Author may make and distribute copies in the course of teaching and research and may post the Article on personal or institutional Web sites and in other open-access digital repositories.

2. Publisher's Additional Commitments. Publisher agrees to provide to Author within 15 days of first publication and at no charge an electronic copy of the published Article in Adobe Acrobat Portable Document Format (.pdf). The Security Settings for such copy shall be set to 'No Security.'

3. Publisher's Acceptance of this Addendum. Author requests that Publisher demonstrate acceptance of this Addendum by signing a copy and returning it to the Author. However, in the event that Publisher publishes the Article in the journal identified herein or in any other form without signing a copy of the Addendum, Publisher will be deemed to have assented to the terms of this Addendum.

⁵⁰⁵ Version s 2.1 of the SPARC Addendum is available at http://www.arl.org/sparc/author/docs/AuthorsAddendum2_1.pdf at 2 August 2006.

⁵⁰⁶ See: <http://www.arl.org/sparc/> at 16 July 2006.

⁵⁰⁷ See: <http://www.arl.org/sparc/author/addendum.html> and http://www.arl.org/sparc/author/docs/AuthorsAddendum2_1.pdf at 16 July 2006. For a guide to the SPARC Author Addendum, see SPARC, 'Author Rights' at <http://www.arl.org/sparc/author/addendum.html> at 2 August 2006.

5.98 In January 2006, SPARC and Science Commons announced they have teamed up to enhance the functionality of the SPARC Addendum; Science Commons is developing a machine-readable version of the SPARC Addendum in a language called 'Resource Description Framework' (or RDF) which will be readable by Internet search engines.⁵⁰⁸

5.99 Science Commons, through its Scholar's Copyright Project,⁵⁰⁹ has also developed three Author Addenda. Like the SPARC Addendum the Science Commons Addenda are short amendments (one page) that authors attach to the copyright transfer Publishing Agreements they typically enter into with publishers. The Addenda ensure, at a minimum, that academic authors retain enough of the copyright rights to be able to archive their work on publicly accessible digital repositories. Each Science Commons Addendum ensures the freedom to use scholarly articles in teaching, conference presentations, lectures, other scholarly works, and professional activities.⁵¹⁰

5.100 There are three Science Commons Author Addenda:

- the OpenAccess-CreativeCommons 1.0 Addendum reserves the right for the author to post the published version (for example, as a .pdf file) immediately and to grant others a Creative Commons "Attribution NonCommercial" license to use the article
- the OpenAccess-Publish 1.0 Addendum reserves the right for the author to post the published version immediately upon publication
- the OpenAccess-Delay 1.0 Addendum reserves the right for the author to post the author's final manuscript version immediately and the published version six months after publication.

5.101 Later in 2006, Science Commons will release:

- a web-based tool for use by academic authors to generate the Addendum of their choice with all form fields automatically filled in
- plain English versions of the Addenda (similar to the Creative Commons 'Commons Deed' copyright documents)
- machine-readable versions of the Addenda to enable advanced software usage of the Addenda, database tracking and empirical evidence gathering.⁵¹¹

5.102 The approach of partially reserving copyright to enable further distribution by the author is central to the Open Access Guidelines published by the Deutsche

⁵⁰⁸ See SPARC <<http://www.arl.org/sparc/announce/011706.html>> at 15 June 2006.

⁵⁰⁹ See Science Commons <http://sciencecommons.org/literature/scholars_copyright> at 2 August 2006.

⁵¹⁰ See Science Commons <http://sciencecommons.org/literature/scholars_copyright> at 2 August 2006.

⁵¹¹ See Science Commons' Scholars Copyright Project <http://sciencecommons.org/literature/scholars_copyright> at 15 June 2006. See also the FAQ at <<http://sciencecommons.org/literature/authoraddendafaq>> at 15 June 2006.

Forschungsgemeinschaft (DFG)⁵¹² in January 2006.⁵¹³ The DFG Open Access Guidelines, which will be incorporated into every research funding approval provide as follows:

When entering into publishing contracts scientists participating in DFG-funded projects should, as far as possible, permanently reserve a non-exclusive right of exploitation for electronic publication of their research results for the purpose of open access. Here, discipline-specific delay periods of generally 6-12 months can be agreed upon, before which publication of previously published research results in discipline-specific or institutional electronic archives may be prohibited. [emphasis added]

4. *Author assigns copyright to publisher but obtains an express licence back from publisher to further reproduce and distribute, on terms determined by publisher*

5.103 The author may assign copyright in its entirety to the publisher, while the publisher grants the author a licence to do specified acts in relation to the published article.

5.104 The prevalence of the copyright assignment model is apparent from the survey of publishers conducted by the UK SHERPA (Securing a Hybrid Environment for Research Preservation and Access) project. The information about publishers' practices on the SHERPA website⁵¹⁴ shows that the majority obtained a transfer of copyright from the author. The SHERPA website provides a useful overview of publishers' practices, with a primary focus on whether or not they permit authors to self-archive or further distribute pre-prints and post-prints. The SHERPA summaries concentrate on publishers who control the ongoing use of the article, whether through an assignment of copyright or the grant of an exclusive licence. In this sense the summaries do not aim to distinguish between publishers who require authors to assign copyright and those who publish on the basis of a licence from the author. Further, the summaries do not analyse whether assignments are of the author's entire copyright or only part of it and, where the author licenses the publication of the material, the kind of licence granted by the author to the publisher.

5.105 While SHERPA provides a very useful guide to publishers' policies, the situation regarding the precise scope of permissions granted to authors to self-archive and further distribute published articles remains complex, as pointed out by the European Commission in the 2006 report, *Study on the economic and technical evolution of the scientific publication markets in Europe*.⁵¹⁵

In July 2005, the JISC-funded SHERPA website registered 116 publishers' copyright policies towards self-archiving, covering 8560 journals; 67% of these publishers allow authors to self-archive post-prints (ie. final draft post-refereeing), 5% permit archiving of pre-prints only (ie. pre-refereeing), while 28% do not authorize self-

⁵¹² German Research Foundation.

⁵¹³ DFG, *Information for Researchers* No. 4, 30 January 2006

<http://www.dfg.de/en/news/information_science_research/other_news/info_wissenschaft_04_06.html> at 16 July 2006.

⁵¹⁴ <<http://www.sherpa.ac.uk/>> at 2 July 2006.

⁵¹⁵ European Commission, Directorate-General for Research, 62.

archiving. While publisher policies have become more permissive over time, authors still have to check the publisher's policy for each article to be self-archived. Many variations appear among permissions regarding the version which may be deposited (the exact usage of the terms pre-print and post-print can vary), the type of archive allowed (self-archiving may be allowed in institutional repositories but not in subject-based archives), the delay before public access can be provided to the archived article. Furthermore, the SHERPA database is covering only a proportion of the 2,000 existing publishers (though major ones) and of the estimated 17,700 scholarly journals, so that the picture is actually more complex and currently far from complete.

5.106 In formulating the SHERPA summaries some degree of reliance has been placed on the policies issued by publishers. Such policies represent to the public at large the publisher's practices. In some cases, eg. where the publisher's policy states that authors are permitted to self-archive, or make the published article available in an institutional or disciplinary repository, the publisher may be going beyond what has been expressly stated in their standard, written publishing agreements which provide for assignment of copyright by the author but are silent as to any rights the author may have to further use or distribute the published article. In this case, the question arises as to whether the general statement of policy can be regarded as unilaterally varying the express terms of the existing publishing agreements with authors. The more likely situation is that the publishers' policy statements are merely a representation which, if acted on by authors, cannot be disavowed by publishers (doctrine of estoppel). Essentially, the publisher is indicating that it will not enforce its rights as copyright owner, if the author makes use of the published article in the manner described by the publisher in its policy statement.

5.107 While the publishers' policy statements have retrospective effect in relation to existing contracts, it would be expected that new contracts would be drafted to expressly reflect the published policy. That is, the publishing agreement would contain express terms clearly defining the scope of the permission granted to authors to be able to make the published article (and pre-publication versions) available on a self-archived website or in an institutional or disciplinary repository. The terms of such licence should be expressly set out in the publishing agreement. The question which arises here is the extent to which publishers' policy statements regarding self-archiving etc. are being reflected in the express terms of publishing agreements entered into since the publishers announced their policy revisions?

5.108 Another issue is the extent to which a publisher's policy statement made in one jurisdiction (eg. the UK) can be considered to apply to authors who reside in a different jurisdiction. For example, an Australian author may submit an article to a UK journal which publishes the article in the UK. The publisher has announced in the UK that authors are permitted to self-archive and deposit a copy of the published article in a digital repository, and has published an item to that effect on its UK-hosted website. To what extent can the author, in Australia, rely on that web-published statement as granting him the necessary rights to be able to permit his university's digital repository to make the article available online in digital form, in the absence of any express terms in the publishing agreement dealing with the author's rights to further distribute the article? Can the author and his institutional repository rely on the UK publisher's statement, made in the UK and published on a UK-hosted website as providing a licence that is sufficiently clear and broad enough in scope to preclude any liability arising?

5. *Author assigns copyright entirely to publisher, with an implied licence to self-archive or deposit the article into an institutional or disciplinary repository*

5.109 Many publishers require the author to assign copyright and, while the question of the author's rights to self-archive or deposit the article (in pre- or post-print version) is not expressly addressed in the Publishing Agreement, the circumstances may give rise to an implied licence to the author to use the article in this way. While there may be circumstances which can be relied upon to support the existence of an implied licence, there will inevitably be uncertainty about the terms and extent of any such licence.

6. *Author assigns copyright entirely to publisher*

5.110 Under the traditional model of academic publishing, the author assigns the whole copyright to the publisher in exchange for having the article or work published. Few, if any rights are licensed back to the author.

5.111 In the context of pursuit of Open Access objectives, this option is the least suitable. It minimises the author's control over the published article, while maximising the publisher's ability to prohibit or impose restrictions on further distribution and educational uses of the published work, without consulting the author.

Proposed actions

5.112 *The OAK Law project will undertake the following activities:*

- *conduct a survey of academic authors to obtain information on matters including:*
 - *authors' awareness of the different models of Publishing Agreements*
 - *authors' understanding of the legal implications of different models of Publishing Agreements (specifically their impact on enabling open access to published materials)*
 - *authors' experience with publishers when negotiating Publishing Agreements*
 - *whether they have a preference for certain kinds of Publishing Agreements.*

Surveying authors' knowledge of Publishing Agreements and experience in dealing with publishers is likely to provide a more comprehensive and accurate perspective on current academic publishing practices than a survey limited only to publishers. The information obtained will be valuable in developing model Publishing Agreements, toolkits and training materials.

- *conduct a survey of academic journal publishers to obtain information on their policies and practices relating to open access to academic and research material. Such a survey would involve:*
 - *collecting copies of publishers' standard Publishing Agreements*
 - *collecting any policy statements issued by publishers on open access to published materials*
 - *ascertaining publishers' attitudes towards and practices relating to variation of the terms of standard Publishing Agreements, in response to author requests, eg. by inclusion of clauses reserving rights to the author.*
- *collect and review Publishing Agreements of major publishers of Australian academic and research output, in order to:*
 - *ascertain the principal models adopted to allocate copyright interests between authors and publishers*
 - *undertake a detailed analysis of the rights of authors and publishers in relation to published academic and research materials.*
- *Based on the results of the survey of academic journal publishers and the survey of Publishing Agreements, the OAK Law project will develop an online, searchable database of information about Publishing Agreements and publishers' open access policies and practices (the OAK List), accessible by authors, copyright administrators and repository managers in Australia and overseas.*

The OAK List should contain:

- *information on the particular copyright allocation model/s used by the major publishers of Australian academic and research output*
- *copies of publishers' standard Publishing Agreements (with publisher permission)*
- *information on whether publishers permit variation of standard Publishing Agreements upon author request*
- *summaries of rights allocations between authors and publishers in standard Publishing Agreements, covering matters such as:*
 - *whether copyright is assigned (and if so, in whole or in part) to the publisher*
 - *whether copyright is retained by the author and publication occurs under a licence granted by the author (and if so, whether the licence is exclusive or non-exclusive)*
 - *what rights, if any, are expressly reserved by the author*

- *the rights exercisable by the publisher, with specific descriptions of the publisher's rights in relation to further reproduction, electronic communication, commercial use etc.*
- *the rights exercisable by the author, with specific descriptions of the author's rights in relation to further reproduction, electronic communication, non-commercial use etc.*
- *Based on the results of the surveys of academic authors, academic and journal publishers and Publishing Agreements, the OAK Law project will develop the following materials:*
 - *lists of the rights held by authors and publishers respectively in open access systems, varying according to the extent to which open access to materials is provided*
 - *a set of model Publishing Agreements based on the various models of allocation of copyright rights between author and publisher, designed to facilitate open access practices, for use by Australian academic authors, copyright administrators, repository managers etc.*
 - *a set of standard clauses to be used by authors and publishers, in conjunction with standard Publishing Agreements, to achieve an appropriate allocation of rights to facilitate open access to published academic and research materials.*
- *The OAK Law project will liaise with, and review model Publishing Agreements and contractual clauses developed by, organisations in Australia and overseas, eg. Science Commons, JISC-SURF, Commonwealth and State government research bodies (eg. CSIRO and primary industries departments) to ensure compatibility with the set of model Publishing Agreements and clauses developed in the OAK Law project.*
- *The OAK Law project will develop a web-based copyright toolkit consisting of the model Publishing Agreements and clauses, accompanied by checklists and user-friendly explanatory documentation, designed and tested to ensure suitability for use as a practical tool for the management of copyright in materials produced by Australian academic authors.*

D. Author – digital repository (Repository Deposit Licence)

5.113 The relationship between the author (or another party who owns copyright in the work, such as the author's employer or the publisher to which copyright has been assigned) and the digital repository in which a copy of the article is deposited is governed by the terms of the **Repository Deposit Licence** between the parties.

5.114 Depending on whether and, if so, the extent to which, copyright has passed from the author to another party (employer, publisher etc), the Repository Deposit Licence will be entered into by the administrator of the digital repository and the author, the author's employer or the publisher. If the repository is an institutional

repository or disciplinary repository established by the author's employing institution, the parties to the Repository Deposit Licence will be the author and their employer.

5.115 Repository Deposit Licences play an important role in establishing the respective rights and obligations of the depositing party and the digital repository. Parties depositing articles into repositories where they can be viewed, copied, etc either by members of the general public or participants in a qualified community (eg. an e-research group), must be able to warrant to the repository that they have the rights to authorise it to make the copyright material available for the intended uses. In particular, the party making the deposit (whether the author of the article or another party to whom ownership of copyright has passed, eg. employer or publisher) must be able to grant to the repository manager all the rights that the repository manager needs to be able to exercise in hosting the article and making it available for viewing, copying, downloading etc, by persons who have access to the repository. Specifically, this means that the Repository Deposit Licence should include an express licence by the author (or other copyright owner) to the repository to be able to engage in acts including, as appropriate, reproduction, publication, and electronic communication (making the material available on a website or transmitting it to the public).

5.116 Surprisingly, many e-print repositories do not enter into formal agreements with authors who deposit their works because such agreements are thought to discourage authors from depositing. In a 2000 survey of e-print repository practices, the RoMEO project found that about 32% of respondents took it on trust that the author had the right to deposit the work without explicitly asking them to confirm that they held all necessary rights⁵¹⁶. However, a 2005 report commissioned by SHERPA on deposit licences for e-prints emphasised the value of such licences in establishing a formal relationship between the repository and authors depositing their works into digital repositories. It concluded that:

[d]eposit agreements should be considered an essential part of an e-print repository's operation. For the repository, it provides a formal framework that defines what the repository can and cannot do, making it easier to manage the e-print in the long-term while helping to reduce its legal liabilities. For the author, it provides reassurance that the repository is not taking ownership of their work, and makes them aware of what type of service the repository is providing.⁵¹⁷

5.117 The matters addressed in the Repository Deposit Licence may include:

- *permissions granted by author (or other copyright owner) to digital repository*
 - grant of a non-exclusive licence to the digital repository
 - extent of rights granted to digital repository eg. to reproduce, distribute the deposited material (including the abstract) worldwide in print and electronic format in any medium
 - retention by author of rights to make use of the current and future (revised) versions

⁵¹⁶ The RoMEO study is referred to in Gareth Knight, *Report on a deposit licence for E-prints*, at p. 7; *Arts & Humanities Data Service*, 21 June 2004, at p. 1.

<http://www.sherpa.ac.uk/documents/D4-2_Report_on_a_deposit_licence_for_E-prints.pdf> at 16 May 2006 (hereinafter Knight, *Deposit Licence Report*).

⁵¹⁷ Ibid.

of the deposited work

- rights granted to digital repository to translate the deposited work (without changing the content) to any medium or format for the purpose of preservation
 - requirement for citation to published version to be included and to be clearly visible
 - author's rights to provide updated versions of the work
 - conditions under which the repository administrators can remove the deposited work
 - rights granted to digital repository to copy the deposited work for purposes of security, back-up and preservation.
- *access to work by other parties*
 - basis on which work is to be made available to other users and institutions
 - rights of other parties to access, use and further distribute the work.
- *representations and warranties by the author (or copyright owner) to repository administrators*
 - representation by author of authority to enter into the Repository Deposit Licence
 - representation by author of right to grant the rights to the digital repository as stated in the Repository Deposit Licence
 - where the deposited work has been sponsored or supported by another organisation, a representation by the author that obligations required by the agreement with such sponsor regarding use of the work have been fulfilled
 - warranty by author that the work is original and, to the best of his or her knowledge, does not infringe any other party's copyright
 - representation that, where the deposited work contains material for which the author does not hold copyright, the author has obtained the unrestricted permission of the copyright owner to grant the digital repository administrator the rights required by the Repository Deposit Licence and that any third party owned material is clearly identified and acknowledged within the text or content of the deposited work.
- *responsibility for enforcement of IP*
 - whether administrators of digital repository have any obligations to take legal action on behalf of the author (or copyright holder) in the event of breach of IP rights in the deposited work.

5.118 An example of a Repository Deposit Licence is the DSpace Non-exclusive Deposit Licence used by the MIT Libraries DSpace digital repository.⁵¹⁸ Only

⁵¹⁸ See <<http://libraries.mit.edu/dspace-mit/build/policies/license.html>> at 16 May 2006. Another example is the Non-exclusive Distribution Licence on the University of Toronto's T-Space repository,

materials that meet the criteria set out in MIT's Content Guidelines are eligible for deposit in MIT's DSpace: the material must be produced, submitted or sponsored by MIT faculty, education or research oriented, be in digital form and complete and ready for distribution and the author (or copyright owner) must be willing and able to grant MIT the right to preserve and distribute the work via the digital repository.⁵¹⁹

5.119 The copyright management model used in the MIT Libraries' DSpace repository is premised on retention of copyright by the authors who deposit works into the repository. In depositing material into MIT's DSpace, the author is not required to assign copyright. The MIT DSpace copyright management scheme is based on two distinct licensing elements:

- the DSpace Non-exclusive Deposit Licence (compulsory)
- Creative Commons licences for public distribution (optional).

5.120 Each author (or copyright owner) who deposits material for inclusion in MIT's DSpace is required to enter into the DSpace Non-exclusive Deposit Licence, a click-through agreement between the author (or copyright owner) and MIT. The author (or copyright owner) grants to MIT a non-exclusive licence to reproduce, translate⁵²⁰ and/or distribute the deposited work (including the abstract) worldwide in electronic format.⁵²¹ The author (or copyright owner) also grants MIT the right to translate the deposited work into any medium or format for the purpose of preservation and permits MIT to keep more than one copy of it for purposes of security, back-up and preservation. The author (or copyright owner) is required to represent that the deposited work is the original work of the author or that he has the right to grant to MIT the rights contained in the Licence and that the deposited work does not, to the best of his knowledge, infringe any other party's copyright. If the deposited work contains material for which the author (or copyright holder) does not hold copyright, he is required to represent that he has obtained the unrestricted permission of the copyright owner to grant MIT the rights required by the Licence and that any third party owned material is clearly identified and acknowledged in the text or content of the deposited work. Where the deposited work is based upon work that has been sponsored or supported by an organisation other than MIT, the author (or copyright owner) is required to represent that he or she has fulfilled any right of review or other obligations required by such contract or agreement.

5.121 When submitting material to DSpace, the author is also given the option of choosing a CC licence which is to apply to the material. Note that the CC licence is an Author Distribution Agreement (see paragraph 5.127 below) between the author and end users who access MIT's DSpace whereas the DSpace Non-exclusive Deposit Licence is a Repository Deposit Licence between the depositing author (or copyright owner) and MIT. Unless the author chooses to apply a CC licence in relation to the

see <<https://tspace.library.utoronto.ca/policies/license.jsp>> at 16 May 2006. See also the Sample e-print licence developed by the SHERPA project, in Knight, *Deposit Licence Report*.

⁵¹⁹ See Content Guidelines for DSpace at MIT

<<http://libraries.mit.edu/dspace-mit/build/policies/content.html>> at 16 July 2006. See also

<<http://libraries.mit.edu/dspace-mit/about/faculty-faq.html#copyright>> at 16 July 2006.

⁵²⁰ 'Translate' is used in the sense of translation of the may translate the submission to any medium or format for the purpose of preservation.

⁵²¹ See <<http://libraries.mit.edu/dspace-mit/build/policies/license.html>> at 16 July 2006.

deposited work, the only express terms governing the reproduction, use and distribution of the work are those contained in the click-through Deposit Licence.⁵²²

Proposed actions

5.122 *The OAK Law project will:*

- *Conduct a review of digital repository practices, with a focus on the terms of Repository Deposit Licences entered into with academic authors (or other copyright owners) on submission of copyright works to digital repositories. The review should consider:*
 - *the rights granted by authors (or other copyright owners) to the digital repositories*
 - *the rights of other parties to access, use and further distribute the deposited work*
 - *the representations and warranties required by repositories from academic authors (or other copyright owners) on the deposit of copyright works into the repository*
 - *responsibility for enforcement of copyright in materials included in digital repositories.*
- *Draft some template Repository Deposit Licences, as models for use by repositories in creating their own licences, together with guidelines for use, including instructions on ensuring that all appropriate rights are secured from parties depositing materials into repositories.*
- *Develop procedures to be followed in situations where it is claimed that material made available in a digital repository infringes another party's copyright ('notice and take down' procedures).*

E. Digital repository – end users

5.123 It is necessary for a digital repository to determine the basis on which repository content may be accessed and re-used by end users. The Repository Deposit Licence between the author (or publisher) and the repository should address the extent to which the deposited material can be made available to other users and institutions and should grant an express licence to the repository to enable the repository to do all acts required to make the material available for access, use and/or further distribution by end users. The legal means by which end users are conferred rights to access and re-use materials in the repository is the **Repository Distribution (End User) Agreement** between the repository and end users. The Repository Distribution (End User) Agreement grants rights to end users to access and re-use the deposited material that are consistent with (and do not extend beyond) the licence granted to the repository by the author (or publisher) under the Repository Deposit Licence.

⁵²² See <<http://libraries.mit.edu/dspace-mit/about/faculty-faq.html>> at 16 July 2006.

5.124 End users may be individual members of the public or members of a specific academic community with defined access rights. The terms and conditions governing access to and use of material in the repository should be clearly displayed on the repository web site and brought to the attention of end users so they understand that their use of the repository and materials in it is subject to those terms and conditions. In particular, any limits on the rights of end users to copy and further distribute the material in the repository should be stated. The terms and conditions need to be expressed in a manner that is readily understood by members of the relevant academic community and/or general public; they should not require legal knowledge to understand.

5.125 To ensure that repository users agree to abide by the terms and conditions of access and use, particularly where restrictions are to be imposed on further use or distribution of material in the repository (whether generally or for specific articles), they should be required to enter into a click-wrap Repository Distribution (End User) Agreement. A click-wrap web site agreement involves end users first viewing the terms and conditions governing access to and use of the materials in the repository, and clicking an 'I accept' or 'I agree' button or icon to indicate that they assent to those conditions before they are able to obtain access to and use articles in the repository. Where restrictions apply and the repository will not permit access unless end users have agreed to be bound by the terms and conditions of access and use, end users who do not accept the terms and conditions should be given the opportunity of declining (by clicking a 'I decline' or 'I do not agree/accept' button), in which case they will not be permitted to continue to access the repository or download material from it. In cases where few, if any, restrictions are imposed on access to and use of the materials in the repository, it will suffice if a the Repository Distribution (End User) Agreement is in browse-wrap form or if the terms and conditions are available by clicking on hypertext links at the bottom of the repository web site pages. In the browse-wrap form of agreement, the end user is required to view the terms and conditions but is not required to click on a button to indicate assent. Whether a click-wrap or browse-wrap agreement is used or whether the terms and conditions are simply made available through hyperlinks at the end of the page will depend on the extent to which restrictions apply to access to the repository and use of materials contained it. Where it is essential to obtain assent by end users to comply with restrictions on access and use, the click-wrap format should be used for the Repository Distribution (End User) Agreement.⁵²³

Proposed Action

5.126 *The OAK Law project will draft some template Repository Distribution (End User) Agreements, as models for use by repositories in creating their own Agreements, together with guidelines for use on repository websites to ensure that end users are provided with notice of, and agree to comply with, the terms and conditions of use of the material in the repository.*

⁵²³ A similar approach to that described in this paragraph is advocated by Richard Jones, Theo Andrew and John MacColl in *The Institutional Repository*, Chandos Publishing, 2006, 152 – 154.

F. Author/Publisher – end users

5.127 Where the article is distributed by the author or publisher (or another copyright holder), the rights of end users are governed by the terms of the Distribution Agreement. If the author has assigned copyright to a publisher, the rights of end users will be determined by the terms of the licence granted to end users by the publisher. However, in cases where the author has retained copyright wholly or partially, it may be the author who directly authorises end users to use the article (**Author Distribution Agreement**).

5.128 An example of an author-end user agreement is the SCRIPT-ed Open Licence ('SOL')⁵²⁴ used by the SCRIPT-ed online law journal which takes the form of a non-exclusive licence granted by the author to 'Users'.⁵²⁵ Users are given the right to disseminate the original and unmodified work, provided it is not done for commercial purposes.⁵²⁶ SCRIPT-ed prefers to publish under the SOL, but leaves open the option for the author to choose any other form of open access licence, such as a Creative Commons licence.

The SOL declares:

This Work is offered under the terms and conditions of the SCRIPT-ed Open Licence (the Licence). The Author retains all assignable IP rights over the Work, and grants the User the rights hereby stated. By using the Work, the User explicitly accepts to be bound by these terms and conditions.

Clause 2 (Grant of Licence) states:

The Author hereby grants the User the rights to copy, issue copies of the Work to the public, translate, display, perform and broadcast the Work for strictly non Commercial Use; unless in doing so the User infringes any of the conditions included in the Licence.⁵²⁷

Proposed Action

5.129 *The OAK Law project will develop guidelines for use by authors where the rights of end users to use an article in a repository are determined and granted directly by the author, including examples of existing Author Distribution Agreements.*

⁵²⁴ See SCRIPT-ed Open Licence (SOL).

⁵²⁵ *User* is defined as 'the person who reads, copies, issues copies of the work, translates, displays, performs or broadcasts the Work'.

⁵²⁶ See <<http://www.law.ed.ac.uk/ahrb/script-ed/policies.asp>> at 16 July 2006. Clause 4 deals with Modification and Clause 5 deals with Adaptations.

⁵²⁷ *User* is defined as 'the person who reads, copies, issues copies of the work, translates, displays, performs or broadcasts the Work'; *Commercial Use* is defined as 'any reproduction of the work distributed to the public for the purpose of monetary reward by any means of exploitation'.

G. Copyright collecting society – digital repository and end users

5.130 Much of the administration of copyright in the educational context in Australia occurs pursuant to **Educational Statutory Licences** administered by copyright collecting societies such as the Copyright Agency Limited, which collect fees from educational institutions as compensation for educational use of copyright materials.

5.131 Part VB of the *Copyright Act*, 'Reproducing and Communicating Works, etc.',⁵²⁸ establishes statutory licences for educational institutions⁵²⁹ which permit them to reproduce works that are in hardcopy form⁵³⁰ and to reproduce and communicate works that are in electronic form⁵³¹ for educational purposes, provided they have entered into an arrangement with a relevant copyright collecting society for the payment of equitable remuneration.⁵³² Specifically, the statutory licence permits the reproduction and communication of the whole or part of periodical articles in electronic form, for the educational purposes of the institution which is making the reproduction or communication or another educational institution, subject to the requirement for payment of equitable remuneration.⁵³³

5.132 In establishing a system to enable access to academic and research materials in online repositories, it is necessary to consider how such materials will be treated under the statutory licence for reproduction and communications of works in electronic form under Division 2A of Part VB of the *Copyright Act*. In particular, it is necessary to consider whether liability for payment of remuneration to a copyright collecting society continues to apply in the situation where an educational institution has been expressly or impliedly licensed by a publisher to reproduce and communicate an electronic copy of a journal article in an online institutional or

⁵²⁸ Ss 135ZB – 135ZZH *Copyright Act*.

⁵²⁹ S 10 *Copyright Act*, defines 'educational institution' as including:

- (b) a university, a college of advanced education or a technical and further education institution;
- (c) an institution that conducts courses of primary, secondary or tertiary education by correspondence or on an external study basis;
- (d) a school of nursing in relation to which a notice published under subsection 10A(4) is in force;
- (e) an undertaking within a hospital, being an undertaking:
 - (i) that conducts courses of study or training in the provision of medical services, or in the provision of services incidental to the provision of medical services; and
 - (ii) in relation to which a notice published under subsection 10A(4) is in force;
- (f) a teacher education centre in relation to which a notice published under subsection 10A(4) is in force;
- (g) an institution in relation to which there is in force a notice published under subsection 10A(4) that includes a declaration that the principal function of the institution is the provision of courses of study or training for one of the following purposes:
 - (i) general education;
 - (ii) the preparation of people for a particular occupation or profession;
 - (iii) the continuing education of people engaged in a particular occupation or profession;
 - (iv) the teaching of English to people whose first language is not English.

⁵³⁰ Division 2 of Part VB, ss 135ZGA – 135ZM *Copyright Act*.

⁵³¹ Division 2A of Part VB, ss 135ZMA – 135ZME *Copyright Act*.

⁵³² Ss 135ZJ(1)(a) and 135ZMC(d) *Copyright Act*.

⁵³³ S 135ZMC *Copyright Act*.

disciplinary repository but the permission is silent as to whether a royalty is payable. Since the Educational Statutory Licence exempts from infringement the reproduction and communication of materials by educational institutions for education purposes, subject to payment of remuneration to a copyright collecting society, the question is whether the obligation to pay remuneration for the use of the copyright work still remains when a licence to use the work is granted expressly or impliedly by the copyright owner. If the obligation to pay remuneration continues in force unless expressly excluded by the terms of the licence to use the material, this will have implications for the drafting of Publication Agreements.

Proposed actions

5.133 *The OAK Law project will:*

- *Review the operation of the Educational Statutory Licences under Part VB of the Copyright Act, specifically with regard to the requirement to pay equitable remuneration to a copyright collecting society for reproduction and communication of works in electronic form, taking into account the proposed amendments announced by the Attorney General in 2006 designed to clarify the relationship between the Educational Statutory Licences and other generally-applicable exceptions and limitations to copyright.*
- *Review the effect of licences (express or implied) granted by publishers to educational institutions to reproduce and communicate published materials in online repositories and whether the obligation to pay equitable remuneration continues to apply unless expressly excluded.*
- *Review the terms of Publishing Agreements to ascertain whether, in granting rights to educational institutions to reproduce and communicate copyright materials in online repositories, they effectively exclude the requirement to pay equitable remuneration to a copyright collecting society.*

APPENDIX

QUT's e-print repository policy⁵³⁴

Policy F/1.3 E-print repository for research output at QUT	
Contact Officer	Associate Director (Information Resources), Library
Approval Date	25/03/2006
Approval Authority	University Academic Board
Date of Next Review	01/07/2009

1.3.1		Application
1.3.2		Policy
1.3.3		Responsibility
1.3.5	Operational	Guidelines
Modification History		

1.3.1 Application

QUT staff and post-graduate students produce research and scholarly output as a contribution to their discipline and/or as part of scholarly discourse. A significant proportion of this is intended for publication for the general purpose of recognition and impact. The following policy applies to this process, only where such output is not intended for commercialisation or individual royalty payment or revenue for the author or QUT. In effect it applies to the corpus of refereed research literature, conference proceedings, and other non-refereed output, as contributed by QUT to the outside world.

1.3.2 Policy

Material which represents the total publicly available research and scholarly output of the University is to be located in the University's digital or "E print" repository, subject to the exclusions noted. In this way it contributes to a growing international corpus of refereed and other research literature available on line, a process occurring in universities worldwide.

The following materials are to be included:

- refereed research articles and contributions;
 - at the post-peer review stage (the accepted draft - also referred to as the postprint);
- or
- at the pre-peer review (preprint) stage, with corrigenda added following peer review if necessary.
- un-refereed research literature, conference contributions, chapters in proceedings, etc (the accepted draft).

⁵³⁴ See <http://www.mopp.qut.edu.au/F/F_01_03.html> at 16 July 2006.

- theses as prepared for the Australasian Digital Theses (ADT) process.

Access to these contributions will be subject to any necessary agreement with the publisher.

The material is to be organised in the repository according to the same categories used for the reporting of research to DEST (see Office of Research and Research Training Web Site).

Material to be commercialised, or which contains confidential material, or of which the promulgation would infringe a legal commitment by the University and/or the author, should not be included in the repository.

1.3.3 Responsibility

Uploading of material to the E-print repository is the responsibility of authors and researchers, as advised and supported by the University Library. Responsibility for management of the repository rests with the University Library.

Where authors or researchers maintain home pages, links should be provided to the article or document which has been submitted to the University E-print repository.

1.3.5 Operational Guidelines

Guidelines specifying the lodgement points and the process to be followed for lodging materials in the E-print repository are available from the University Library. Guidance on Copyright arrangements and standards for publishers is available from the University Copyright Officer. The Director, Library Services will report annually through the Deputy Vice-Chancellor (Technology, Information and Learning Support) to University Research and Innovation Committee and the Office of Research on the status of the E-print repository.

Modification History

Date	Sections	Source	Details
25.03.06	All	University Academic Board	Revised policy (endorsed by University Research and Innovation Committee 01.03.06)
26.09.03	All	University Academic Board	New policy (endorsed by University Research and Development Committee) - effective from 01.01.2005

Chapter 6

Electronic theses and dissertations

Introduction

6.01 This chapter provides an overview of the copyright management issues that arise with the digitisation of theses and dissertations to form electronic theses and dissertations (ETD). The chapter will consider the legal status of theses and issues around the ownership of copyright and intellectual property (IP) in theses, the pre-digitisation distribution of theses, the digitisation process of theses, copyright management issues for electronic theses and dissertations and conclude with protocols for the practical handling of ETD. The main premise of the chapter is that cutting edge research, should be widely disseminated especially when it is publicly funded.⁵³⁵ There are very strong public policy demands for the widest possible dissemination of PhDs and other dissertations and theses. This helps the promotion of research in science and the humanities: to advance beyond the known requires the researcher to know what is known.⁵³⁶

6.02 As part of the policy development process outlined in the previous chapter Universities and research funders need to closely consider the benefits of open access to ETD. The following objectives should be considered in developing a policy regarding the online availability⁵³⁷ of ETD:

- promoting the generation and dissemination of knowledge
- promoting the interests of the educational institutions
- promoting original cutting edge research
- promoting the interests of the student
- promoting the open access to research to other researchers and the broader community
- promoting access to publicly funded knowledge.

⁵³⁵ See generally: Peter Suber, 'Open Access to ETD' *SPARC Open Access Newsletter* 2/7/06 <<http://www.earlham.edu/~peters/fos/newsletter/07-02-06.htm> at 13 July 2006> at 13 July 2006; Appendix [B.1].

⁵³⁶ As embodied in the saying, 'If I have seen further it is only by standing on the shoulders of giants'. Sir Isaac Newton expressed this in a letter to Robert Hooke, February 5, 1675/1676, quoted in Robert Merton, *On the Shoulders of Giants: A Shandean Postscript* 31 (1965).

⁵³⁷ It is assumed that the ETD, through ethics approvals and other processes, has been cleared for release in terms of privacy, security and confidentiality. See Appendix [B.2].

6.03 Currently, 15 Australian Universities have policies requiring compulsory deposit of ETD⁵³⁸ while at several other Universities deposit of ETD is optional.⁵³⁹ Some Universities provide only metadata or a catalogue about ETD and are yet to embrace a model of allowing open access.⁵⁴⁰ This chapter assesses the copyright issues on the assumption that the ETD has been made available for open access to the public.⁵⁴¹

1. Ownership principles – the legal status of theses

Copyright

Theses are subject matter protected by copyright

6.04 Theses fall within categories of subject matter which can be protected by copyright, namely literary works. As outlined in chapter 2 of this Report, there is no exhaustive definition of a literary work within the *Copyright Act*.⁵⁴² In the context of theses, the term ‘literary work’ will include any work which is expressed in either print or written form.⁵⁴³

6.05 The term ‘literary’ does not prescribe that the work must reach any particular standard of literary style or merit, ie. there is no quality requisite; simply that it must be original.⁵⁴⁴ In short, theses and dissertations will automatically be protected by copyright, with the rights vesting in the author who has created them. It should also be noted that a thesis may consist of more than simply literary works or dramatic, musical or artistic works.⁵⁴⁵ For example, sound recordings and cinematograph films are now common in theses in some disciplines. These audiovisual materials may also contain more than one layer of copyright. Therefore, a thesis may consist of a literary

⁵³⁸ Universities requiring compulsory deposit of ETD are: Curtin University, University of Western Australia, Murdoch University, Swinburne University of Technology, Queensland University of Technology, Griffith University, University of Queensland, RMIT University, University of Ballarat, University of Wollongong, University of Western Sydney, Australian Catholic University, University of Canberra, James Cook University and Bond University.

⁵³⁹ Universities with optional deposit policies are: Australian National University, LaTrobe University, University of Sydney, Australian Defence Force Academy, Southern Cross University, Adelaide University, University of South Australia, Edith Cowan University, University of Newcastle, University of Technology Sydney, Central Queensland University, Melbourne University, Tasmania University, Victoria University, Flinders University, Deakin University, Macquarie University. Universities which have not yet joined the ADT Program are: Charles Darwin University, Charles Sturt University, University of New England, Notre Dame University, Australian Graduate School of Management.

⁵⁴⁰ For a discussion of this issue see: Arthur Sale, ‘The impact of mandatory policies on ETD acquisition’ (2006) April *D-Lib Magazine* <<http://www.dlib.org/dlib/april06/sale/04sale.html>> at 13 July 2006;

Arthur Sale, ‘Unifying ETD with open access repositories’, in Tony Carnevali (ed.), *Proceedings 8th International Electronic Theses and Dissertations Symposium*, Sydney, Australia, 2005 <<http://eprints.comp.utas.edu.au:81/archive/00000202/>> at 13 July 2006 (hereinafter, ‘Sale, *Unifying ETD with OA*’).

⁵⁴¹ For an example of this consider the QUT model: Appendix [B.1] [B.2] [B.5] [C.1].

⁵⁴² S 10(1) *Copyright Act*; see also chapter 2 of this report (part 2, para 2.13).

⁵⁴³ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 608.

⁵⁴⁴ Fitzgerald and Fitzgerald, *Intellectual Property in Principle*, 97.

⁵⁴⁵ S 31 *Copyright Act*.

work together with an audiovisual component. For example, the underlying rights in the script or any sound recording may co-exist alongside the copyright in the film. A more detailed discussion of the background to copyright law is given in chapter 2 to this Report.

Ownership of copyright in theses

6.06 Subject to any express agreement to the contrary (such as an agreement assigning copyright to the university or a third party), PhD students will own copyright in the original expressions in their theses. Any agreement to assign copyright to the university or a third party should generally be made at the time of enrolment, or at a time before the student commences work on their thesis. However, in the great majority of cases the bound copy of a student's thesis will be owned by the student who created it. This position reflects the basic rule of copyright as stated in s 35(2) of the *Copyright Act* which provides that the author of a literary, dramatic, musical or artistic work will be the subsequent owner of any copyright subsisting in that work. Similarly, in relation to audiovisual works, under ss 97 and 98 of the *Copyright Act* the maker of the sound recording or cinematograph film will, subject to any agreement to the contrary, be the owner of any copyright subsisting in the recording or film.

6.07 Where a student is receiving a scholarship or there has been a significant investment made towards the student's thesis, the investor may seek to obtain ownership of copyright in the thesis.⁵⁴⁶ In this situation, it is most likely that the awarding institution or the organisation that has made the investment (ie. contributed to the student's scholarship) will then hold some (if not all) of the copyright in the student's thesis.

6.08 Earlier research has been published on copyright issues relating to works created in the university environment.⁵⁴⁷ For example, in 1998 Ann Monotti identified four discernible models of university policy in relation to student IP ownership.⁵⁴⁸ However, apart from employees who are engaged in thesis work as part of their employment, or perhaps students funded under a particular grant scheme, the copyright in the thesis vests in the student subject to any specific agreements between the parties.

Special cases involving licensing or assigning copyright in theses

6.09 The Queensland University of Technology's (QUT) student IP ownership policy provides that the University does not automatically claim ownership of all intellectual property created by students during the course of their studies. In some cases a student may elect, or be required, to assign ownership of their IP to QUT. This will generally occur where the student created the IP using more extensive QUT

⁵⁴⁶ Monotti, Ann and Ricketson, Sam, *Universities and Intellectual Property: ownership and exploitation* (2003) Oxford University Press, Chapter 7 (hereinafter 'Monotti and Ricketson, *Universities and Intellectual Property*').

⁵⁴⁷ Monotti and Ricketson, *Universities and Intellectual Property*; Ann Monotti, 'Universities and the Validity of their Claims to Student Intellectual Property Rights' 24(1) 1998 *Monash University Law Review* 176 (hereinafter 'Monotti, *Universities and Student IP*').

⁵⁴⁸ Monotti, *Universities and Student IP*.

resources than are normally provided to students, or where the work has been created by a team involving at least one QUT staff member.

6.10 Paragraph 8.1.4(c)(i) of the QUT Intellectual Property Policy states:

QUT has no automatic right to intellectual property created by students during the course of their study at QUT. However, where student creators assign intellectual property rights to QUT, this policy will apply to them no less favourably than it applies to QUT staff. QUT may seek to have a student assign intellectual property to QUT where:

- there is a substantial use of QUT resources beyond which is normally provided for their course of study or research
- the intellectual property is created by a team, of which the student is part, involving at least one QUT staff member.

Performers' rights

6.11 Another type of right which may arise in the case of some theses and dissertations, in particular those in the area of creative industries and performing arts, is performers' rights. Previously under the *Copyright Act* performers had quite limited rights and did not obtain copyright in the sound recordings of their performances.⁵⁴⁹ These rights were generally limited to the right of a performer to take action against any unauthorised broadcast, transmission to the public, or recording of a performance. Unauthorised recordings of performances are commonly referred to as bootlegged recordings and these provisions are colloquially known as the anti-bootlegging provisions. These rights only applied to performances which took place after 1 October 1989 (the date at which the amendments for performers came into effect).⁵⁵⁰ A 'performance' includes a performance of a literary, dramatic or musical work (whether or not in copyright) or a performance of a dance, circus or variety act or expression of folklore.

6.12 However, as a result of the Australia-United States Free Trade Agreement (AUSFTA), Australia has been required to comply with a number of treaties including the *WIPO Performances and Phonograms Treaty* (WPPT)⁵⁵¹. The WPPT requires that performers enjoy the rights of reproduction, distribution, rental, and making available of sound recordings of their performances. The *US Free Trade Agreement Implementation Act 2004* (Cth) has made significant changes to performers' rights under the *Copyright Act*.

6.13 These changes include extending the current ambit of performers' rights by granting performers' new economic rights in the form of ownership of copyright in the sound recordings of their live performances.⁵⁵² As a result of these changes, the person at the time of the recording who owned the record (being the person who owned the master recording on which the record was made) and the performer who

⁵⁴⁹ Fitzgerald and Fitzgerald, *Intellectual Property in Principle*, 124.

⁵⁵⁰ Pt XIA *Copyright Act*.

⁵⁵¹ See <<http://www.wipo.int/treaties/en/ip/wppt/index.html>> at 13 July 2006.

⁵⁵² S 22(3A) *Copyright Act*. See ss 22 (3B) – (3C).

performed the performance are now co-owners of the copyright in equal shares in the sound recording of the live performance.⁵⁵³ It is important to note that these rights are assignable and that, under an agreement, performers may assign their share of the copyright to the original copyright owner in the sound recording or to a third party. The normal employment provisions under the *Copyright Act* will also apply — for example, copyright in a performance done in the course of employment will be owned by the employer. It should also be noted that provisions have been introduced to prevent performers claiming compensation for infringement of copyright in a sound recording⁵⁵⁴ and for infringement of performers' rights arising from the same event.⁵⁵⁵

6.14 In addition to new economic rights for performers, these AUSFTA-related copyright amendments also extended the existing performers' rights. In addition to the rights to authorise recording and broadcasting of the performance, and the right to prevent the knowing copy, sale, distribution or importation of unauthorised recordings, performers now also have the personal right to authorise the communication of a performance and to prevent the knowing communication of unauthorised recordings of their performances.⁵⁵⁶

Moral rights

6.15 In addition to copyright attaching to a work, it is also necessary to consider how PhD students and researchers could have moral rights in their theses. Moral rights are personal rights belonging to the author or creator of the copyright work, which exist independently from the economic rights mentioned above.⁵⁵⁷ As mentioned in chapter 2⁵⁵⁸, the *Copyright Act* recognises three types of moral rights:

1. the right of attribution of authorship⁵⁵⁹
2. the right not to have authorship falsely attributed⁵⁶⁰
3. the right of integrity of authorship.⁵⁶¹

6.16 The first of these moral rights, the right of attribution of authorship involves the right to be identified as the author of the work if any 'attributable acts' are done in respect of the work.⁵⁶² The second moral right provides the author of the work the

⁵⁵³ S 97(2A) *Copyright Act*. See also ss 100AA-100AH.

⁵⁵⁴ Under s 85(1) and as distinct from performers protection, in order to prevent double dipping.

⁵⁵⁵ S 248J(4), (5) *Copyright Act*.

⁵⁵⁶ S 248G *Copyright Act*.

⁵⁵⁷ Fitzgerald and Fitzgerald, *Intellectual Property in Principle*, 118.

⁵⁵⁸ See Section 8 (paras 2.123-2.134).

⁵⁵⁹ S 193 *Copyright Act*, involving the right to be identified as the author of the work if any 'attributable acts' are done in respect of the work.

⁵⁶⁰ S 195AC *Copyright Act*. Under s 195AG(1) it is an act of false attribution for a person to knowingly deal with an altered work or reproduction of an altered work as if it were the unaltered work or reproduction of an unaltered work of the author. An insubstantial alteration is not covered by this provision: S 195(2) *Copyright Act*.

⁵⁶¹ S 195AQ *Copyright Act*, involving the right not to have the work subjected to derogatory treatment which would demean the creator's reputation.

⁵⁶² S 193 *Copyright Act*.

right not to have authorship of the work falsely attributed.⁵⁶³ The third moral right of integrity involves the right not to have the work subjected to derogatory treatment which would demean the creator's reputation.⁵⁶⁴ It should also be noted that moral rights in respect of a work only apply in relation to a substantial part of the work and, therefore, in instances where a substantial part has not been reproduced, this will not be an issue.⁵⁶⁵

6.17 As mentioned above, Australia needs to accede to the WPPT as a condition of complying with the AUSTFA. In addition to providing for economic rights for performers, the WPPT also requires member countries to provide moral rights protection for performers under their national law. The *US Free Trade Agreement Implementation Act 2004* (Cth) provides that once Australia accedes to the WPPT, the new moral rights provisions for performers will come into effect. Performers' moral rights will largely mirror the moral rights of creators in works and films and will include the right of attribution of performership, the right not to have performership falsely attributed and the right of integrity of performership. However, these changes are yet to come into effect, as they are contingent upon Australia's obligations under the WPPT entering into force.

2. A history of the distribution of theses

The pre-digitisation of theses

6.18 Prior to the digitisation of theses they were predominantly distributed in hard copy form, usually a bound copy, which would then be deposited in the library of the degree awarding institution, and perhaps that of the external assessor's institution. Theses and dissertations have also been distributed in microfilm and microfiche prior to the introduction of digitisation. Generally, these media would also be held in the library of the relevant institution. In some cases, copies of theses and dissertations are also held in the various state libraries and the National Library of Australia (NLA). The core problem prior to digitisation of theses was that, in the majority of cases theses were not published on a commercial basis. This made it extremely difficult to locate and access theses in many cases, as they were held at the library of the institution where the degree was awarded, with access limited to personal inspection of the hard copy within the library. In addition, most institutions and libraries maintained their own individual index listing the completed theses for their own collection only.

6.19 Prior to the digitisation of theses, the thesis service that libraries could provide was necessarily limited. For example, the NLA currently does not receive a copy of every thesis awarded by an Australian university so, accordingly, is unable to provide a thesis service. Instead, it recommends that the relevant institution where the thesis was completed be consulted in order to obtain access to the required theses or

⁵⁶³ S 195AC *Copyright Act*. Under s 195AG(1) it is an act of false attribution for a person to knowingly deal with an altered work or reproduction of an altered work as if it were the unaltered work or reproduction of an unaltered work of the author. An insubstantial alteration is not covered by this provision: S 195(2) *Copyright Act*.

⁵⁶⁴ S 195AQ *Copyright Act*.

⁵⁶⁵ S 195AZH *Copyright Act*.

dissertations.⁵⁶⁶ However, it does maintain and can provide access to a number of theses catalogues.⁵⁶⁷ In contrast, the British Library provides a thesis service, which is known as the British Thesis Service.⁵⁶⁸ This service provides full text access to over 170 000 doctoral theses dating from the 1970s to today, with most UK universities making their students theses available on the service. This collection of theses is held in either paper bound copies or on microfilm. The service also makes available for sale the majority of theses in the collection, through either microfilm copies or bound paper copies.

The digitisation of theses

6.20 With the growth of computer usage over the last 20 years we have seen the gradual development of the notion of submitting a thesis or dissertation in digital form into an electronic or digital repository.

Networked Digital Library of Theses and Dissertations

6.21 The initial concept of electronic theses and dissertations (ETD) was born at a 1987 meeting in Ann Arbor, Michigan arranged by University Microfilms (UMI) and attended by representatives of Virginia Polytechnic Institute and State University (hereinafter called 'Virginia Tech'), University of Michigan, SoftQuad, and ArborText. Following this initial meeting, in 1992 the Coalition for Networked Information, Virginia Tech, the Council of Graduate Schools, and UMI announced the project 'The Capture and Storage of Electronic Theses and Dissertations'. Furthering this in 1994 Southeastern Universities Research Association (SURA)⁵⁶⁹ funded a workshop at Virginia Tech to develop plans for the digitisation of ETD. The outcome of this workshop was that Adobe's Portable Document Format (PDF) and the Standard Generalised Markup Language (SGML) were selected for representation and archiving of ETD. Following this in January 1996 Virginia Tech was awarded a three year federal grant from the Department of Education to create the Networked Digital Library of Theses and Dissertations (NDLTD).⁵⁷⁰

Virginia Polytechnic Institute and State University

6.22 Since 1994, Virginia Tech has been requiring students to submit their theses as PDF files.⁵⁷¹ Under this digitisation project, once a student's thesis has been converted into a PDF file, they are then required to submit it either via website submission, by file transfer protocol or on a storage medium. The theses and

⁵⁶⁶ National Library of Australia, *Theses* (2006).

<<http://www.nla.gov.au/apps/eresources/action/item?id=1484&loaditem=true>> at 30 June 2006.

⁵⁶⁷ For example, the National Bibliographic Database; Dissertations Academic Australia or the Australian Libraries Gateway.

⁵⁶⁸ The British Library, *British Thesis Service* (2006).

<<http://www.bl.uk/services/document/brittheses.html>> at 30 June 2006.

⁵⁶⁹ Southeastern Universities Research Association (2006) <<http://www.sura.org/home/index.html>> at 30 June 2006.

⁵⁷⁰ Networked Digital Library of Theses and Dissertations (2006) <<http://www.ndltd.org/>> at 30 June 2006.

⁵⁷¹ Virginia Polytechnic Institute and State University, *Digital Library and Archives* (2006)

<<http://scholar.lib.vt.edu/theses/>> at 30 June 2006.

dissertation is then reviewed for errors and formatting and once it passes the publication requirements the theses is then catalogued by the library and it is placed on the electronic bookshelf for ETD. The online catalogue can then be searched with links to the web electronic theses and dissertation resource.

6.23 Virginia Tech has also developed tools to enable students to submit their ETD both in SGML and PDF documents. It has also been heavily involved in the development and implementation of a distributed digital library system so that electronic theses and dissertations from participating institutions can be accessed easily. Subsequent projects, including the Australasian Digital Thesis Program (ADT Program)⁵⁷², have also made a significant contribution to the development of the digitisation of theses and dissertations.

The Australasian Digital Theses Program

6.24 The ADT Program establishes a distributed database of digital versions of theses produced by postgraduate students at Australasian universities, which is made available on the Internet. The aim behind the ADT Program is to provide access to, and to promote, Australasian research to the international community through the reproduction of theses on the ADT database.

6.25 The initial ADT Program was first developed in 1997–98 as a research project under the Australian Research Council — Research Infrastructure Equipment and Facilities Scheme grant. This concept was based on an initiative of seven Australian universities: the University of New South Wales (lead institution), the University of Melbourne, the University of Queensland, the University of Sydney, the Australian National University, Curtin University of Technology, Griffith University, and was developed in association with the Council of Australian University Librarians. The ADT Program was then further developed in 1998–1999 by the seven original university project partners. In July 2000 the ADT Program was then extended to all other Australasian universities.

6.26 The ADT Program was established in order to improve access to, and enhance the transfer of, research data contained in theses through the provision of full text theses available on the Internet. The retrieval of these theses has been significantly enhanced through the inclusion of metadata tags attached to the theses, which enable a higher weighting by more advanced search engines. The ADT Program was also designed to provide a new approach for the depositing and archiving practices of theses, given that students often rely on digital technology when preparing their theses.

6.27 The ADT Program consists of two key components:

1. the digitisation of student theses as part of the deposit process
2. the digitisation of a number of existing pre-digitisation theses.

6.28 Given that it is the responsibility of each individual institution to maintain an archived copy of the theses, every member of the ADT Program is required to host

⁵⁷² Australasian Digital Thesis Program (2006) <<http://adt.caul.edu.au/>> at 30 June 2006.

their own theses on a server located within the university. However, every member uses an identical database configuration, standards and metadata, ensuring compatibility with all electronic theses contained in the ADT Program. All electronic theses are in Adobe Acrobat PDF format, which ensures that the data is independent of the platform on which it was created on and which is considered to be the standard format in electronic publishing. The PDF format also ensures that the user is able to access a high quality version which may be printed.

3. Copyright management issues for electronic theses and dissertations

Overview

6.29 With the increasing trend towards the promulgation of research findings electronically, there has been a concomitant increase in the number of Australasian academic institutions that have ‘put online’ electronic versions of dissertations and theses. At a basic level, the mechanics of this process are simple: obtain ETD from students as they submit them and put hypertext links to these electronic versions on a web site. However, the management of this process is a little more complex. This chapter addresses the legal issues that must be faced by those who wish to disseminate ETD. To build protocols for managing the legal aspects involved in making ETD available online, it is necessary to consider the issues from the perspective of each of the following four distinct stakeholders:

1. **The student.** As the contributor of original material, the submitting student will have intellectual property (IP) rights in most, if not all of the content. This will include copyright, but may also have patent issues arising (eg. containment of pre-patent disclosure).⁵⁷³
2. **The supervisor.** Depending on the discipline, there may be some content of the thesis that is directly or co-contributed by the student’s supervisor. This may give IP rights to the supervisor and/or the supervisor’s employer, the relevant academic institution.
3. **University, granting agency and industrial partner.** Universities, granting agencies and industrial partners typically have IP rights agreements and policies that may govern some of the ETD content.
4. **ETD disseminating institution (Repository).** Institutions that have a repository of ETD need clarification of IP rights ownership. What is the status of the repository? (Is it a publisher?); what are the permissions required for cited materials and are there any exemptions available (such as fair dealing for research or study, or criticism or review)? There may also be tortious issues arising in rare circumstances (such as defamation or passing off).

⁵⁷³ Publication prior to the filing of a patent will usually result in the inability to get the patent, as the invention would no longer be ‘novel’. There are now some provisions for grace periods.

6.30 Adopting the perspective of each of these stakeholders, the management of IP rights in ETD needs to be considered at a fine level of granularity. Taking this approach, numerous questions arise, including:

1. How to manage licensing of distribution from parties 1 - 4 above?
2. How is the whole work in the thesis and dissertation to be regarded (ie. is it entirely an original work of the student or does it contain third party or other contributions)?
3. Is this discipline dependent?
4. How to manage cited materials?
5. How to manage contributions by others? (eg. technical photos, cite charts etc.)
6. How to manage derivative works?
7. How to manage confidential information (eg. pre-patent materials)?
8. Liability and risk management?
9. What protocols should be adopted?

6.31 The focus of this chapter is on the development and implementation of copyright management practices in relation to ETD. The key objective of copyright management in this context is to ensure that the ETD repository has appropriate authorisation to be able to legally carry out all the acts involved in putting the ETD online. In other words, the ETD repository must be granted a licence (preferably in written form) by the copyright owner — usually by the author of the thesis — authorising the ETD repository to reproduce and communicate or otherwise disseminate the thesis via the Internet. Where third party copyright material is included in the ETD, it will be necessary to ensure that appropriate ‘clearances’ (ie. permissions) have been obtained to use that material in the ETD, unless permission is not required under law.

6.32 The following discussion examines some of the more challenging copyright issues that ETD repositories will face and concludes by summarising the licensing regime needed to ensure compliance with copyright law.

Publishing

6.33 Issues facing ETD repositories may include whether the repository is a publisher or a ‘re-publisher’ of the thesis for the purposes of copyright, defamation, confidential information (trade secrets) and privacy issues. For example, datasets from primary research and interviews may contain personal information about the respondents and research may have been undertaken under a Non-Disclosure Agreement. Furthermore, datasets are likely to be protected by copyright.

6.34 In assessing whether the thesis would be considered to be ‘published’ once it is included in the repository, it should be noted that there are many different legal definitions of the words publish, publisher, and publication: the taxonomy is context

dependent. For the purposes of copyright law, the *Copyright Act* does not define publisher or re-publisher. Instead, s 29 offers an inclusive (ie. non-exhaustive) definition of publication, stating (in s 29(1)) that works and subject matter are deemed to be published in specified circumstances but that certain other dealings with copyright materials will not be regarded as publication (s 29(3)). Further, s 29(4) provides that a publication which 'is merely colourable and is not intended to satisfy the reasonable requirements of the public' is not to be regarded as amounting to publication for the purposes of the Act. A literary, dramatic, musical or artistic work (or an edition of such a work) is deemed to have been published if reproductions of the work or edition have been supplied, by sale or otherwise, to the public (s 29(1)(a)). While the *Copyright Act* does not define 'reproductions' (as a noun), some light is thrown on its interpretation by s 21(1A) which provides that where a work is reproduced by conversion into or from a digital form, 'any article embodying the work in such a form is taken to be a reproduction of the work'.

6.35 Thus, where a thesis in hard copy form is digitised and made available online in an ETD repository where it can be accessed and downloaded by members of the academic and research community, it is arguable that it would be deemed to have been published on the basis of the operation of s 29(1)(a). Taking this approach, it can be argued that the 'reproduction' is supplied to the public by means of one or more computer servers in which the digital form of the thesis is stored. If the ETD is readily accessible by members of the relevant academic and research community, the publication would be regarded as bona fide in the sense that it meets the reasonable requirements of the public and is not 'merely colourable'. On the other hand, where only a small number of hard copy theses were distributed within a restricted group, the thesis could be regarded as being unpublished if distribution did not meet the reasonable requirements of the public, which in this case would comprise that section of the academic community which would be interested in obtaining a copy of the thesis. Nevertheless, the fact that only a relatively small number of hard copies of a thesis had been distributed would not necessarily mean that it could not be considered as having been published if that number was in fact sufficient to meet the demand of the relevant public.

6.36 The deemed publication provision has a much narrower scope of operation in relation to cinematograph films (s 29(1)(b)) than for Part III works. 'Copy' (as a noun) is given a similar meaning to 'reproduction' (as a noun), that is, 'any article or thing in which the visual images or sounds comprising the [cinematograph] film are embodied' (s10(1)). However, publication is only deemed to occur if copies of the cinematograph film have been sold, hired, or offered or exposed for sale or hire to the public. While it is arguable that copies of film-based ETD are supplied to the public when they are made available for access in an ETD repository, the absence of any commercial dealings in the way of sale, hire, etc. means that it is not possible to rely on the deemed publication provision.⁵⁷⁴ Since ETD consisting of moving images (and attracting copyright protection as cinematograph films) will not have the benefit of the deeming provision, it will be necessary to consider whether non-commercial distribution of film ETD from ETD repositories where they can be accessed by members of the academic and research community can amount to publication.

⁵⁷⁴ S 29(1)(b) *Copyright Act*.

6.37 It can be argued that, particularly where film ETD can be not only viewed but also downloaded from an ETD repository and that this access is provided for non-commercial purposes to members of the relevant academic and research community, such dissemination would amount to publication in that it enables members of the relevant section of the public to obtain copies of the film.

6.38 The term ‘communicate’ is defined in s 10 of the *Copyright Act* as to:

...make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter, including a performance or live performance within the meaning of this Act.

6.39 It is, therefore, clear from this definition that by placing a theses or dissertation on a server that is accessible by the public, the repository will have communicated the work and thereby have exercised one of the copyright owner’s exclusive rights.⁵⁷⁵ The scope of the communication right will be examined at greater length in paragraphs 6.80 – 6.82 below.

Paper theses to digital theses

6.40 Where any paper thesis is converted to a digital thesis (p2ETD) a number of copyright issues may arise. These include scanning the thesis without permission of the copyright owner, which will breach copyright.⁵⁷⁶ Under the *Copyright Act* there is no inherent right to digitise paper based theses without the permission of the copyright owner or the existence of a licence. Such digitisation of paper based theses to electronic versions will most likely infringe the copyright owner’s exclusive rights in the work, for example through reproduction or communication of the work.⁵⁷⁷

6.41 There is also the issue that scanning and digitising third party materials could involve the exercise of any copyright subsisting in these materials. In this situation it would be practically impossible for a repository to know what copyright permissions or privileges existed and, if necessary, clear the rights to copy and communicate the third party content.

6.42 The main problem with retroactively distributing electronic versions of paper based theses is the difficulty in getting the permission of the author. Obtaining such permissions would be expensive. One suggested option is to adopt a risk management approach and engage in the digitisation and digital archiving process anyhow given that the risk of copyright infringement proceedings commencing is low.⁵⁷⁸

⁵⁷⁵ Andrew Christie and Eloise Dias, ‘The New Right of Communication in Australia’ (2005) 27 *Sydney Law Review* 237.

⁵⁷⁶ Ss 31, 101 *Copyright Act*. See further, Hudson and Kenyon, *Copyright and Cultural Institutions*, 129.

⁵⁷⁷ Ss 31, 101 *Copyright Act*.

⁵⁷⁸ See Hudson and Kenyon, *Copyright and Cultural Institutions*, 50. Arguably, authors of theses would be happy to have their thesis distributed. The greatest risk of copyright infringement would arise if the student assigned the copyright in their thesis to a third party, such as a publisher, and the publisher sought to take action against the repository for breach of their reproduction and communication rights.

6.43 Another problem with older theses is that even if the author is located, it is unlikely that the author will invest much time or money in establishing that use of any third party content copied is permitted or indeed engages in resolving any of the issues that may arise. Therefore, considerable caution needs to be taken when dealing with the authors of paper based theses and a more specialised licence agreement may be needed.

6.44 Other issues include orphan works which are copyright works where it is difficult or even impossible to identify or find the copyright owner. Use of an orphan work without the permission or a licence from a copyright owner is still an infringement of copyright in Australia despite the difficulties in identifying and/or locating the copyright owner. This problem can arise due to a range of factors such as the age of the material or its unpublished status, the fact that the work may be anonymous, the uncertain status of the chain of title to a work because of multiple transfers of title or due to a range of underlying rights holders, or because a company or organisation that owned the copyright is now defunct. In many cases, the costs of finding all authors may exceed the actual risks in being sued for copyright infringement, given that copyright owners of these materials are in most cases not actively exploiting their copyright.⁵⁷⁹

4. Third party copyright in electronic theses and dissertations

6.45 A high proportion of ETD will contain third party materials, in the form of quotes of text passages, drawings, photographs, reproductions of paintings, video and sound clips and so on. It is essential for ETD repositories to develop and implement strategies to avoid incurring liability (whether through an action for copyright infringement or through a request for payment of equitable remuneration to a copyright collecting society) due to the unauthorised use of any third party copyright materials included in ETD.

Third party content

6.46 Third party content will typically consist of copyright material which is owned by someone other than the ETD author. This is generally original copyright material which is either not owned by the author of the theses or dissertation or any other contributors to the theses or dissertation.⁵⁸⁰ Problems for repositories will arise where third party content is reproduced in the theses or dissertation without the copyright owner's permission. Repositories should not simply assume that the theses or dissertations consist only of original material, as in practice theses and dissertations regularly include third party content, whether it be text, diagrams, pictures or other works. Furthermore, if the copyright owner of the third party content has given permission for the work to be used, repositories must ensure that the terms of such

⁵⁷⁹ See United States Copyright Office, *Report on Orphan Works* (2006)

<<http://www.copyright.gov/orphan/>> at 13 July 2006.

⁵⁸⁰ Problems will also arise in some disciplines where input into the theses or dissertation may include material that is copyright of the university (for example, a technician takes a photograph of a gel as laboratory work undertaken as part of their employment), or of other students (for example, a fellow student may contribute some code to another student's computer programming thesis).

permission are not only confined to use in the original theses or dissertation but extend to reproducing or communicating the content for the purposes of digitisation and public access via the repository.

6.47 There are a number of options available to a repository in order to mitigate the risk of copyright infringement in relation to third party content for born digital theses and dissertations.

These include:

1. Ensuring that ETD candidates are provided with sufficiently extensive information and, if necessary, practical training on the basic principles of copyright law, so they understand when they can use third party content in their thesis without permission (ie., an insubstantial part or a substantial part which can be used because of the operation of the fair dealing or other exception to infringement) and when they will need to obtain permission ('clearance') from the copyright owner to use third party content and how to obtain permission.
2. Requiring the ETD candidate to be responsible for identifying all third party content included in the thesis, determining which third party content they require permission to use and obtaining all necessary licences (typically a non-exclusive, perpetual licence) from the owners of such third party content, which must be broad enough to permit the thesis containing the third party material to be reproduced and communicated via the Internet (whether by the student, the university or the disciplinary repository).
3. Requiring the ETD candidate to 'self manage' any third party content which is not authorised for digital distribution.

6.48 ETD candidates should be given an introductory session regarding third party content as part of their initial induction. This session should emphasise the importance of not only citation and the risk of plagiarism in failing to adequately cite material but also the importance of obtaining adequate copyright permissions where required. Unfortunately the task of determining when an ETD candidate requires permission to use the third party content is not an exact science. As discussed below copyright law does not require permissions where an insubstantial amount of a third party copyright work is involved or where an exception such as fair dealing applies. However the operation of both these doctrines is very fact specific. The best that can be done is to provide ETD candidates with clear examples of what the courts have decided in the past so they have a practical understanding of what material they can use and when they should seek permission.

6.49 The rights of owners of third party copyright material will potentially be infringed by storing or reproducing that material in an ETD repository or communicating or making it available for access to the public by loading it onto a server. Other exclusive rights of the copyright owner could also be implicated. It should also be noted that the act of communication will occur even before the ETD is downloaded by the user as the thesis is communicated the moment it is made

available for access from the repository. It is, therefore, essential that the necessary permission or a licence be obtained from the copyright owner of the third party content before making the work available for access to the public.

6.50 Assuming that there has been a reproduction or communication of third party content within an ETD, it is then necessary to consider whether such reproduction or communication will amount to a substantial part and whether the defence of fair dealing may apply.

A substantial part

6.51 Copyright is infringed where a person (other than the copyright owner or exclusive licensee) does any of the acts within the copyright owner's exclusive rights in relation to the copyright material, without the licence or authorisation of the copyright owner and where no defence or exception to infringement applies.⁵⁸¹ Infringement can occur where the unauthorised acts relates to the whole of or a substantial part of the copyright material.⁵⁸² Importantly, if the act relates to an insubstantial part of the copyright material, there is no infringement of copyright even if the act is undertaken without the permission of the copyright owner. To state the principle another way, copyright law permits anyone to use an insubstantial part of a copyright-protected work or other subject matter.

6.52 For example, in relation to a literary, dramatic or musical work the copyright owner has the exclusive right to reproduce the work in a material form, to publish the work, perform the work in public, to communicate the work to the public and to make an adaptation of the work.⁵⁸³ In the context of a sound recording the copyright owner has the exclusive right to make a copy of the sound recording, to cause the recording to be heard in public, to communicate the recording to the public and to enter into a commercial rental arrangement in respect of the recording.⁵⁸⁴ In relation to a cinematograph film, the copyright owner has the exclusive right to make a copy of the film, to cause the film to be seen or heard in public and to communicate the film to the public.⁵⁸⁵ If any of these acts falling within the copyright owner's exclusive rights are done without a licence or authorisation, the question which immediately arises for consideration is whether the act/s has involved a substantial part of the copyright material. In the context of ETD, the specific question will typically be whether a substantial part of a copyright work or other subject matter owned by a third party has been reproduced or communicated without authorisation.⁵⁸⁶

⁵⁸¹ Ss 36(1), 101(1) *Copyright Act*.

⁵⁸² S 14(1) *Copyright Act*.

⁵⁸³ S 31(1)(a) *Copyright Act*.

⁵⁸⁴ S 85(1) *Copyright Act*.

⁵⁸⁵ S 86 *Copyright Act*.

⁵⁸⁶ S 14(1) *Copyright Act* provides that:

In this Act, unless the contrary intention appears:

- (a) a reference to the doing of an act in relation to a work or other subject-matter shall be read as including a reference to the doing of that act in relation to a substantial part of the work or other subject-matter; and
- (b) a reference to a reproduction, adaptation or copy of a work shall be read as including a reference to a reproduction, adaptation or copy of a substantial part of the work, as the case may be.

6.53 This raises the issue of what is meant by ‘a substantial part’. The general test for a substantial part was stated by Lord Pearce in *Ladbroke (Football) Ltd v William Hill (Football) Ltd*⁵⁸⁷ as ‘whether a part is substantial must be decided by its quality rather than its quantity.’ This test was affirmed by Mason CJ in *Autodesk Inc v Dyason (No 2)*⁵⁸⁸ who held that ‘in determining whether the quality of what is taken makes it a ‘substantial part’ of the copyright work, it is important to inquire into the importance which the taken portion bears in relation to the work as whole: is it an essential or material part of the work?’. The High Court approved Mason’s CJ statement in *Data Access Corporation v Powerflex Services Pty Ltd*⁵⁸⁹ where it was held that ‘in determining whether something is a reproduction of a substantial part of a [copyright work], the essential features of the [work] should be ascertained by considering the originality of the part allegedly taken.’ The High Court referred to the definition of substantial part again in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd*⁵⁹⁰. In this case Kirby J explained that a small portion in quantitative terms may constitute a substantial part having regard to its materiality in relation to the work as a whole.⁵⁹¹ More recently in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)*⁵⁹² it was held that whether a part taken is a substantial part or not, involves an assessment of the importance of the part taken to the work as a whole.⁵⁹³ The tests for substantiality also vary from media to media and work to work.

6.54 These tests for determining whether a part can be considered to be ‘substantial’ for the purposes of s 14(1) of the *Copyright Act 1968* need to be applied where third party material is to be included (eg. in the form of extracts or quotes) in a thesis. The author of a thesis or dissertation may do any of the acts within the third party copyright owner’s exclusive rights (typically involving an exercise of the reproduction and communication rights), without authorisation, if they relate to an insubstantial part of the third party copyright material. When considering the question of whether a substantial part of a third party work has been used, it is also important to bear in mind that the position is further complicated by the potentially wide variety of materials which may be included in theses and dissertations. Thus, the question as to whether a substantial part of a third party copyright work has been included in a thesis or dissertation will need to be assessed in the light of the different kinds of copyright materials (eg. text, artistic works, diagrams, audiovisual works) that may be included (as extracts, quotes or illustrations).

6.55 In practice the delineation of what is a substantial part will be of critical importance as many of the potential copyright issues arising in relation to third party content can be solved at this point.⁵⁹⁴ Questions of potential infringement and the

⁵⁸⁷ [1964] 1 WLR 273, 293.

⁵⁸⁸ (1993) 176 CLR 300, 305.

⁵⁸⁹ (1999) 45 IPR 353, [84].

⁵⁹⁰ (2004) 78 ALJR 585.

⁵⁹¹ *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 78 ALJR 585, 605; see also McHugh ACJ, Gummow and Hayne JJ, 589; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* [2005] FCAFC 53 (Sundberg, Finkelstein and Hely JJ, 26 May 2005) [50].

⁵⁹² [2005] FCAFC 53 (Sundberg, Finkelstein and Hely JJ, 26 May 2005) [52].

⁵⁹³ *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 78 ALJR 585, 589, 605; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* [2005] FCAFC 53, [12], [50]-[52]; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2005] HCA Trans 842 McHugh and Kirby JJ.

⁵⁹⁴ The notion of a substantial part is also relevant to the infringement of moral rights: s 195AZH *Copyright Act*.

necessity to obtain clearances to use third party copyright materials can be avoided where insubstantial parts of third party materials are used in an ETD. The need for very clear and practical guidance on all copyright issues (but this one in particular) to be communicated to the ETD candidate at the earliest possible point in their candidature is of utmost importance. A good start to articulating a practical guide to 'what is a substantial part' is provided in the current information sheet written by Margaret Robertson (Copyright Officer at QUT and Griffith University).⁵⁹⁵

Fair dealing

6.56 Copyright is not infringed by dealings with copyright materials that are considered to be 'fair'. The *Copyright Act 1968* provides for a range of fair dealing uses of copyright materials which operate as a limitation on the rights of copyright owners by providing that a fair dealing does not constitute an infringement of copyright. The Act provides for fair dealings for four classes of purpose:

- research or study (ss 40 and 103C)
- criticism or review (ss 41 and 103A)
- reporting news (ss 42 and 103B)
- judicial proceedings or professional advice (ss 43 and 104).

6.57 Unlike the fair use provision in s 107 of the US *Copyright Act*, the Australian fair dealing provisions only offer a defence to infringement where the purpose for which the copyright material is dealt with falls within one of the four categories listed above. However, provided the dealing with the copyright material is done for one or more of the specified purposes, it may involve an unauthorised exercise of any of the exclusive rights of the copyright owner, eg. reproduction, adaptation, publication and electronic communication. While the provisions of the *Copyright Act 1968* relating to fair dealing for the purposes of research or study (ss 40 and 103C) set out specific guidance on whether a dealing with copyright material by way of reproduction or copying is fair (ss 40(2)–(4), 103C(2)(e)), these provisions do not affect the overall operation of the fair dealing scheme which envisages that the dealing may involve the exercise of any (one or more) of the copyright owner's exclusive rights.

6.58 One issue worth noting is that there is judicial comment suggesting that it may not be possible to assert that use of copyright material is justified as a fair dealing for the purposes of 'criticism or review' if the material being used has not previously been published. In *The Commonwealth of Australia v John Fairfax & Sons Ltd*, Mason J stated:

There is another possible approach to the concept of 'fair dealing' as applied to copyright in Government documents, viz that a dealing with unpublished works which would be unfair as against an author who is a private individual may nevertheless be considered fair as against a government merely because that dealing promotes public knowledge and public discussion of government action.

⁵⁹⁵ See Appendix [B.6]. Students should also be advised to consider whether hypertext linking can be employed as a substitute for the incorporation of larger amounts of third part content. On copyright and hypertext linking see: *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972.

As the use of quotes and extracts from unpublished materials (eg. a document describing research laboratory results or an unpublished research paper), is common in PhD dissertations, the applicability of the fair dealing exemptions to unpublished materials is a matter requiring careful consideration and further investigation.⁵⁹⁶

6.59 The fair dealing provisions in the *Copyright Act* do not remove liability for the infringement of moral rights and therefore, the personal rights of the creator of attribution (and right against false attribution) and integrity apply irrespective of any fair dealing exceptions.

For the purpose of research or study

6.60 A fair dealing with a Part III work, an adaptation of a literary, dramatic, musical or a Part IV audio-visual work will not infringe copyright if it is done 'for the purpose of research or study': ss 40(1) and 103C(1).⁵⁹⁷ The terms 'research' or 'study' are not defined in the *Copyright Act*, however, in *De Garis v Neville Jeffress Pidler*⁵⁹⁸ Beaumont J held that term 'research' within the meaning of s 40 of the *Copyright Act* is intended to have its ordinary dictionary meaning:

25. According to the Macquarie Dictionary, "research" may be defined as -
 "1. diligent and systematic enquiry or investigation into a subject in order to discover facts or principles: research in nuclear physics..."

6.61 There is no doubt that the activities of students engaged in research leading to the production of a thesis, when using third party copyright materials, would be considered to be for the purpose of 'research' or 'study'. What is less clear is whether the activities of the student in disseminating the results of their research by themselves or the universities in disseminating the results (eg. in making reproductions or in making an ETD available by electronic communication) can be considered as being done for the purposes of 'research' in the sense that the term is used in the Act. The law on this point is unclear. The *Copyright Act* provides no guidance and the meaning of 'research' in the context of the activities of universities has not been judicially considered.

6.62 It is arguable that, in the present day academic context, the concept of research encompasses a much broader range of activities than simply an enquiry or investigation by an individual researcher into a subject to discover facts or principles. The very notion of a networked knowledge society and economy fuelled by super computing in which the dissemination of knowledge is critical to development suggests that any concept of research in a modern society must include the dissemination of results. Furthermore, the inherent cumulative and increasingly collaborative nature of research along with the notion that research is verified through a public process of peer review makes it difficult to deny that dissemination is a core part of research.

⁵⁹⁶ See further: Ss 51, 52, 110A *Copyright Act*.

⁵⁹⁷ Fitzgerald and Fitzgerald, *Intellectual Property in Principle*, 168.

⁵⁹⁸ *De Garis v Neville Jeffress Pidler* (1990) 18 IPR 292, 298 (hereinafter *De Garis*).

6.63 This broader understanding of what research entails is reflected in the definitions proposed by international and national science organisations. For example, the OECD definition states:

Research and experimental development comprises creative work undertaken on a systematic basis in order to increase the stock of knowledge, including knowledge of man (sic), culture and society, and the use of this stock of knowledge to devise new applications.⁵⁹⁹

6.64 DEST has also defined ‘research’ in broad terms:

The essential characteristic of research activity is that it leads to publicly verifiable outcomes which are open to peer appraisal.

Research and experimental development comprises:

- Creative work undertaken on a systematic basis in order to increase the stock of knowledge, including knowledge of humanity, culture and society, and the use of this stock of knowledge to devise new applications.
- Any activity classified as research and experimental development is characterised by originality; it should have investigation as a primary objective and should have the potential to produce results that are sufficiently general for humanity's stock of knowledge (theoretical and/or practical) to be recognisably increased. Most higher education research work would qualify as research and experimental development.

Research includes pure basic research, strategic basic research, applied research and experimental development.

Activities that support research such as:

- provision of professional, technical, administrative or clerical support and/or assistance to staff directly engaged in research and experimental development;
- management of staff who are either directly engaged in research and experimental development or are providing professional, technical or clerical support or assistance to those staff;
- activities of students undertaking postgraduate research courses; development of postgraduate research courses; and
- supervision of students undertaking postgraduate research courses.

Activities that do not support research should be excluded. Such activities may include:

- preparation for teaching;
- scientific and technical information services;
- general purpose or routine data collection;
- standardisation and routine testing;

⁵⁹⁹ <<http://www.oecd.org>> at 13 July 2006.

- feasibility studies (except into research and experimental development projects);
- specialised routine medical care;
- commercial, legal and administrative aspects of patenting, copyright or licensing activities; or
- routine computer programming, systems work or software maintenance (research and experimental development into applications software, new programming languages and new operating systems would normally meet the definition of research).⁶⁰⁰

6.65 As well, a recent decision of the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*⁶⁰¹ interpreting s 29 of the Canadian *Copyright Act*⁶⁰² (a fair dealing provision similar to s 40) suggests the definition of research ‘must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained’ and that it is ‘not limited to non-commercial or private contexts’.⁶⁰³ ‘The purpose of the fair dealing exception’ [s 29] is to ‘ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works’.⁶⁰⁴

6.66 Once it is established that the purpose for using third party copyright materials is research or study, the next step is to consider whether the use made of the material for that purpose is fair. Unfortunately, the *Copyright Act* does not provide generally applicable guidance on how to approach the question of whether the use made of the copyright material is fair. Specific guidance is provided, in the form of a set of factors to be considered in ascertaining whether a use is fair, in relation to:

- reproduction or adaptation of a literary, dramatic, musical or artistic work or an adaptation of a literary, dramatic or musical work
- any dealing with an audio-visual item.⁶⁰⁵

The following is list of relevant factors to be taken into account in these instances for determining whether the use is fair:

- (a) the purpose and character of the dealing
- (b) the nature of the copyright material
- (c) the possibility of obtaining the copyright material within a reasonable time at an ordinary commercial price
- (d) the effect of the dealing upon the potential market for, or value of, the copyright material

⁶⁰⁰ <<http://www.dest.gov.au/NR/rdonlyres/31E56473-5E4F-4163-A497-40A41DE77F36/1419/specs2004crc.rtf>> at 14 July 2006. See generally

<http://www.dest.gov.au/sectors/research_sector/>.

⁶⁰¹ [2004] 1 S.C.R. 339; 2004 SCC 13 (CanLII); (2004) 236 D.L.R. (4th) 395; (2004), 30 C.P.R. (4th) 1; (2004), 247 F.T.R. 318 <<http://www.canlii.org/ca/cas/scc/2004/2004scc13.html>> at 13 July 2006.

⁶⁰² (R.S., 1985, c. C-42), section 29 provides: ‘Fair dealing for the purpose of research or private study does not infringe copyright’.

⁶⁰³ [2004] 1 S.C.R. 339 at [51].

⁶⁰⁴ Ibid at [63].

⁶⁰⁵ ‘Audio-visual’ item is defined in s 100A as a sound recording, a cinematograph film, a sound broadcast or a television broadcast.

(e) where part only of the copyright material is reproduced or copied, the amount and substantiality of the part copied in relation to the whole of the copyright work.

6.67 In other words, these five factors are to be taken into account in determining whether a reproduction of a Part III work is fair or whether any use (whether in the form of copying, broadcasting or communicating) of an audio-visual item is fair. Where the third party copyright material being used is a Part III work (which will be the case for the great majority of theses) it will be necessary to apply the five fair dealing factors to determine whether use of the material by means of reproduction is a fair dealing. For uses of the third party copyright material that involve the exercise of the exclusive rights other than reproduction, (eg. electronic communication), the *Copyright Act* provides no guidance as to the basis on which this assessment is to be conducted.

For the purpose of criticism or review

6.68 Under ss 41⁶⁰⁶ and 103 of the *Copyright Act* a musical or literary work or a sound recording may be fairly dealt with, without infringing copyright for the purposes of criticism or review.⁶⁰⁷ Again, the *Copyright Act* does not define 'criticism' or 'review', although it has been held that the words are of 'wide and indefinite scope which should be interpreted literally.'⁶⁰⁸ In *Warner Entertainment Co Ltd v Channel 4 Television Corp PLC*⁶⁰⁹ Henry LJ stated that the question to be answered in assessing whether a dealing is fair or not is 'is the [work] incorporating the infringing material a genuine piece of criticism or review, or is it something else, such as an attempt to dress up the infringement of another's copyright in the guise of criticism'.

6.69 The 'criticism or review' exception was considered in *De Garis v Neville Jeffress Pidler*⁶¹⁰, where Beaumont J held that:

39. The Macquarie definition of "criticism" includes the following:

- '1. The act or art of analysing and judging the quality of a literary or artistic work, etc.: literary criticism.
- 2. The act of passing judgment as to the merits of something...
- 4. A critical comment, article or essay; a critique.'

⁶⁰⁶ S 41 *Copyright Act*:

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and a sufficient acknowledgement of the work is made.

⁶⁰⁷ Fitzgerald and Fitzgerald, *Intellectual Property in Principle*, 171; *Copyright Act* ss 41, 103A; *TCN Channel Nine Pty Ltd v Network Ten Ltd* (2001) 50 IPR 335, [66].

⁶⁰⁹ (1993) 28 IPR 459, 468.

⁶¹⁰ *De Garis*, 292. The relevant issue in this case was whether the activities of the respondent, a press clipping and media research bureau, who supplied photocopies of published material for a fee could be classified as being for the purposes of 'research' or 'study', or 'criticism' or 'review' under ss 40 and 41 of the *Copyright Act*. The Court held that the activities were not for the purposes of 'research' or 'study' or 'criticism' or 'review', and were in fact for the commercial purposes of ordinary trade. Furthermore, any potential fair dealing by the customer was not relevant, rather it was the purpose for which the respondent was to use the material: [27]-[29].

40. In my opinion, 'criticism' in the context of s 41 is used in these senses. It has been held that criticism of any kind, and not only literary criticism, is within the provision (see *Sillitoe's Case*, above, at p 559).

41. The Macquarie definition of 'review' includes the following:

'1. A critical article or report, as in a periodical, on some literary work, commonly some work of recent appearance; a critique...'

42. In my opinion, 'review' is used in s 41 in this sense.

6.70 Further in the Explanatory Memorandum to the *Copyright Amendment Bill 1986* it was explained that:

Section 103A will permit fair dealing with an audio-visual item for the purpose of genuine criticism or review, whether of that or another audio-visual item or of a work. A 'sufficient acknowledgment' of the item must be made. Existing s 41, and the proposed s 103A, have their basis in common law, which provided that a dealing would not be defensible as criticism or review if one person's material were used by another only to his or her own benefit. The purpose of this fair dealing defence is to allow use of parts of materials to carry out the criticism or review which is ordinarily expected or sought by the copyright owner, and which provides information and comment for possible consumers and audiences.⁶¹¹

6.71 The issue of what will amount to 'criticism or review' was also considered in *TCN Channel Nine Pty Limited v Network Ten Pty Limited*⁶¹² where Conti J at first instance (endorsed on appeal by the Full Federal Court) summarised the principles in relation to fair dealing as:

- (i) Fair dealing involves questions of degree and impression; it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept;
- (ii) Fairness is to be judged objectively in relation to the relevant purpose, that is to say, the purpose of criticism or review or the purpose of reporting news; in short, it must be fair and genuine for the relevant purpose, because fair dealing truth of purpose;
- (iii) Criticism and review are words of wide and indefinite scope which should be interpreted liberally; nevertheless criticism and review involve the passing of judgment criticism and review may be strongly expressed;
- (iv) Criticism and review must be genuine and not a pretence for some other form of purpose, but if genuine, need not necessarily be balanced;
- (v) An oblique or hidden motive may disqualify reliance upon criticism and review, particularly where the copyright infringer is a trade rival who uses the copyright subject matter for its own benefit, particularly in a dissembling way; "the path of criticism is a public way";

⁶¹¹ Explanatory Memorandum, *Copyright Amendment Bill 1986* (Cth) para 26 which introduced ss 103A and 103B of the *Copyright Act* to the House of Representatives of the Australian Parliament, as cited in *TCN Channel Nine Pty Ltd and Others v Network Ten Pty Ltd* 50 IPR 335.

⁶¹² [2001] FCA 108; [2001] FCA 841.

- (vi) Criticism and review extends to thoughts underlying the expression of the copyright works or subject matter;...⁶¹³

Fair dealing and ETD

6.72 In the context of ETD, the most relevant of the fair dealing provisions are those which exempt from infringement dealings with copyright materials for the purposes of ‘research or study’ and ‘criticism or review’.⁶¹⁴ It is clear from the judicial consideration of the meaning of these terms⁶¹⁵ that an individual student engaged in activities involving the use of third party copyright material in the course of researching and writing a thesis would be able to establish that their acts are for the purposes of ‘research or study’ or ‘criticism or review’.

6.73 It is clear from the wording of ss 40 and 41 that the fair dealing provisions can be raised as a defence to copyright infringement in relation to an act of communication. Furthermore, there does not seem any doubt that a student can rely on the fair dealing provisions to communicate copyright material for the purposes of ‘research or study’ or ‘criticism or review’. The only doubt raised here is whether any act of communication⁶¹⁶ by the university can be regarded as being for the purposes of ‘research or study’ or ‘criticism or review’?⁶¹⁷

6.74 If the university can successfully argue that it is simply a part of or extension of the student’s activities and merely a conduit for dissemination then there is a likelihood that a court may accept an argument that the university in communicating the ETD is doing so for the purpose of research or study or criticism or review. For what other purposes is the university engaging in this activity? Is it to promote the university as a commercial entity or is it to disseminate a product of research or review?

6.75 In the old hard copy world the student reproduced copies of the thesis usually through a copying service, supplied them to the university and they were placed on the library shelf. History tells us that no one has ever questioned in the hard copy world the act of the thesis copying service in terms of copyright infringement and the applicability of the fair dealing provisions. If anyone had successfully argued that the thesis copying service could not rely on the fair dealing provisions then the thesis would never have been copied or made available for others to read. It seems odd that a similar activity cannot be undertaken with the same degree of legal certainty in the digital environment, especially when technology neutrality is seen to be a key part of

⁶¹³ *TCN Channel Nine Pty Limited v Network Ten Limited* [2001] FCA 108 [66], also see [16]-[17]; See also *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146.

⁶¹⁴ Ss 40-43, 103A, 103B, 103C, 104 *Copyright Act*.

⁶¹⁵ *De Garis*, 298; *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339, 2004 SCC 13; *Warner Entertainment Co Ltd v Channel 4 Television Corp PLC* (1993) 28 IPR 459, 468; *TCN Channel Nine Pty Limited v Network Ten Limited* [2001] FCA 108 [66], also see [16]-[17]; see also *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146.

⁶¹⁶ If the university is not regarded as undertaking an act of communication but rather authorising an act of communication then the issue will stand or fall on the basis of the student’s ability to rely on the defence.

⁶¹⁷ See generally: *De Garis v Neville Jeffres Pidler Pty Ltd* (1990) 189 IPR 292; *cf. CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339.

our legal framework.⁶¹⁸ In *CCH Canadian Ltd. v. Law Society of Upper Canada*⁶¹⁹ the Supreme Court of Canada explained that when library staff made copies of legal materials they did so for the purpose of research ‘although the retrieval and photocopying of the legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process’.⁶²⁰ Dissemination of research is very much part of the modern research process and the university is merely helping this to happen. As the Supreme Court explained a restrictive interpretation of the fair dealing provisions ‘could result in undue restriction of users’ rights’.⁶²¹

Argument 1: The student’s act of research or study or criticism or review includes dissemination of the end product and the university in communicating the ETD is part of that process.

6.76 If this argument for the university based on its function as a conduit for dissemination cannot be sustained then the argument for the operation of the fair dealing provisions must focus solely on the nature of the activity being undertaken by the university. In particular, it is unlikely that the university would be able to avail itself of the fair dealing defence for purposes of criticism or review, although such a purpose may well underlie the student’s use of the third party material. However, it is arguable that current concepts of ‘research’ (and, possibly, ‘study’) are sufficiently broad to encompass the dissemination of research outputs by means such as making ETD available for access through web-based repositories. To restrict the concepts of ‘research’ and ‘study’ to the narrow range of activities associated with collecting, reading, summarising and extracting parts of the material may unjustifiably limit the operation of this fair dealing provision. In the digital, networked environment in which research and study now occur and in which research and teaching processes are iterative and collaborative, communicating research findings to an online audience of colleagues and commentators is considered an integral part of the research and teaching process.

Argument 2: The University in communicating the ETD is engaged in an act of research broadly defined.

Management approaches

6.77 The kinds of third party materials included in ETD will cover a wide range, from the traditional forms protected under Part III of the *Copyright Act*⁶²² to digital materials protected under Part IV of the Act (eg. multimedia works, digital images and sounds).

⁶¹⁸ Consider ss 11(6), 12(6) *Electronic Transactions Act* (1999) (Cth).

⁶¹⁹ [2004] 1 S.C.R. 339, 2004 SCC 13 (CanLII); (2004), 236 D.L.R. (4th) 395; (2004), 30 C.P.R. (4th) 1; (2004), 247 F.T.R. 318.

⁶²⁰ Ibid at [64].

⁶²¹ Ibid at [54].

⁶²² That is, literary, dramatic, artistic and musical works and adaptations of literary, dramatic and musical works.

6.78 The use of third party copyright materials in ETD will typically involve acts within the scope of the copyright owner's exclusive rights to reproduce⁶²³ or make a copy⁶²⁴ and to communicate to the public⁶²⁵.

Exercise of the reproduction/copying right

6.79 Incorporation of third party materials into the new copyright work created by the student, ie. the ETD, whether in the form of a quote of a passage of text from a literary work, inclusion of a diagram or samples of digital images or sounds, will involve the exercise of the reproduction or copying right. Where an ETD is born digital, it will be the student (rather than the university) who does the initial reproduction and copying of the third party material although the consequences of any further reproduction or copying made by the repository need to be considered. Note that, in the case of a thesis submitted by the student in hard copy form, the reproduction right will be exercised by the university when it converts the work from hard copy into digital format.⁶²⁶

Exercise of the communication right

6.80 Making an ETD available on a repository website where it can be accessed by users involves an exercise of the communication right, which encompasses making copyright material available online or electronically transmitting it.⁶²⁷ The question which arises in relation to ETD is whether the act of communicating the ETD via the repository's web site is done by the student or the repository. In practice, the answer to this question may depend on the arrangements in place between the student and the repository, as described in the Deposit Licence entered into by the student and the repository at the time the ETD is deposited. In a system which is designed so that the ETD is uploaded to the repository directly by the student, it may be that only the student engages in an act of communication. However, in the situation where the student provides the repository with the ETD and authorises the repository to make the ETD available online but all further steps required to make the ETD available online at the repository's web site are carried out by the repository, it is likely to be the case that the act of communication is done by the repository.

6.81 The only guidance provided by the *Copyright Act* is found in s 22(6) which states that 'a communication...is taken to have been made by the person responsible for determining the content of the communication'. The question which arises is whether it is the repository or the student who is the 'person responsible for determining the content of the communication'.⁶²⁸

6.82 Due to the intimate connection the university has with the inception, completion and then uploading of the thesis there is strong argument that it has either

⁶²³ For Part III works.

⁶²⁴ For Part IV subject matter.

⁶²⁵ 'Communicate' is defined in s 10(1) as meaning to 'make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise)'.

⁶²⁶ *Copyright Act*, s 21(1A).

⁶²⁷ *Copyright Act*, s 10(1).

⁶²⁸ See further *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 at [70]-[76].

undertaken an act of communication or authorised such an act.⁶²⁹ If the university has undertaken the primary act of infringement (in other words if it actually undertook the infringing act, namely communication) then liability accrues regardless of fault subject to the exceptions already highlighted. If the university has merely authorised the act of communication then a number of ‘fault based’ factors will need to be considered including the power to prevent the act, the relationship between the university and the infringer (student) and whether the university took reasonable steps to avoid the act (including complying with any industry codes of practice). Regardless of which argument is correct, due to the university’s close connection with the thesis, its risk of liability for communicating the thesis must be carefully managed.

Safe harbour provisions

6.83 As explained the University is either engaged in the act of communicating the ETD or assisting such communication. Amendments to the *Copyright Act* introduced as a result of the AUSFTA limit the liability (by way of limiting remedies available) for certain acts performed by intermediaries.⁶³⁰ These new provisions apply to ‘carriage service providers’ and provide for a ‘safe harbour’ from liability in defined circumstances. They are commonly called the ‘ISP safe harbour provisions’ and are modelled on similar provisions in the US *Digital Millennium Copyright Act 1998* (DMCA). These new provisions limit the remedies available against carriage service providers for copyright infringements that occur on their systems, as long as they comply with certain conditions.

6.84 There is currently some uncertainty as to whether universities may take advantage of this scheme. This uncertainty relates primarily to whether universities fall within the definition of ‘carriage service provider’, which for the purpose of the safe harbour provisions is drawn from the highly technical definition provided by the *Telecommunications Act 1997*. From 1997 to 2001 a determination by the then Minister for Communications, Information Technology and the Arts, Mr Richard Alston, under s 95 of the *Telecommunications Act* effectively excluded universities from being carriage service providers by stating that services provided by tertiary education institutions in connection with their research, educational and administrative functions were not carriage services. Since this determination was allowed to lapse, the general opinion seems to be that universities are nevertheless excluded from being carriage service providers because they do not provide their services ‘to the public’, as required by s 88 of the *Telecommunications Act*.⁶³¹ In late 2005 the Attorney General’s Department commenced a review of the scope of the safe harbour scheme which, among other things, sought comments on this issue. In making a submission to that Review the AVCC explained:

⁶²⁹ For this reason it would seem unlikely that the university could rely on ss39B, 112E *Copyright Act* which state that merely providing facilities to make or facilitate the making of a communication is not, without more, an authorisation of copyright infringement: *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 at [97]–[99]; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 at [418]. In relation to moral rights see s 195AVB *Copyright Act*.

⁶³⁰ Ss 116AA–AJ Part V Division 2AA *Copyright Act*.

⁶³¹ See generally: DEST, ‘Limitation on Remedies Available Against Carriage Service Providers Under Part V Division 2AA of the *Copyright Act*’ Submission by the Department of Education, Science and Training to the Attorney General’s Review, October 2005.

As the regime currently stands, only carriage service providers (within the meaning of the Telecommunications Act) can obtain the protection of the safe harbour regime. As most universities are not engaged in supplying a carriage service to the public but rather to their immediate circle (as that term applies under the Telecommunications Act) they do not qualify to take advantage of the safe harbour regime.⁶³²

6.85 The Government is yet to announce the findings of this review. Until that point in time we must assume that Universities even if they could satisfy the condition for enlivening the safe harbour provisions cannot take advantage of them because they are not carriage service providers.

6.86 One other suggestion is that any potential infringement of third party content by the University in the ETD process could be covered by the statutory educational licences which allow certain acts on the basis of equitable remuneration. Whether this is the case raises a number of difficult legal questions which deserve closer consideration. However, it is important to keep in mind that the statutory licences do not require remuneration where there is a fair dealing or use of an insubstantial part and as such close scrutiny of the material is the sensible starting point.

Compliance Strategy

6.87 In light of the foregoing analysis it is clear that universities are subject to the risk of copyright liability for the communication of ETD and as such need to put in place workable and effective compliance mechanisms. Described below is a five (5) step compliance strategy. While on its face this strategy may seem time intensive and onerous, the task of implementing it is far less daunting if an appropriate approach is adopted.⁶³³ The sensible way to approach these steps is to have the ETD candidate self manage the process from the very first day of their candidature. To achieve this, the ETD candidate could be required to keep a 'Copyright Compliance Table' (Table) (which could be incorporated in an e-diary or e-portfolio commonly used in many universities or potentially embedded in the metadata of an ETD though machine readable 'tags') of the third party copyright material utilised in the ETD. (See Appendix E, example E.1) Based on materials or training provided to the student through their candidature, support from their supervisor and in difficult cases the University, the student would be asked to record all third party copyright materials included in the thesis, to make an assessment of the copyright status of these materials and to note this in their Table on a continuous basis. Where a permission is required they would be expected to seek and obtain that permission and record it in their Table. This management process in itself would be an excellent tool for assisting students to develop life long learning skills in the increasingly important life skill of copyright management. At the time of submission the student would meet with the relevant University officer, present their table and explain how they have utilised third party

⁶³² AVCC 'Safe Harbour Regime: Review of the Scope of Part V Division 2AA of the *Copyright Act*' Submission by the AVCC to the Attorney General's Review, October 2005. <<http://www.avcc.edu.au/documents/publications/policy/submissions/AVCC-SafeHarbourSubmission-OCT05.pdf>> It seems commonly accepted that the University of Queensland is the only Australian university that currently falls within the definition of 'carriage service provider': AVCC, 'University IT Systems: Managing Liability for Transmitting, Caching, Hosting and Linking to Copyright Material' (2004) 2 <http://www.flinders.edu.au/isd/copyright/AVCC_resource_paper.pdf>.

⁶³³ Note, in light of the analysis in this report, universities will need to assess arguments concerning the application of copyright exceptions (such as fair dealing) and if necessary seek legislative amendments.

content in the thesis and the steps they have taken to ensure that the ETD is copyright compliant. On being satisfied that the Table has been genuinely maintained by looking at the thesis the University would then have made a considerable effort to comply with copyright law.

6.88 In managing these situations the following steps are suggested:

1. **Identify all third party copyright materials** included in the ETD.
2. **Is there a substantial part?** Examine each item of third party copyright content included in the ETD to assess if its inclusion involves the exercise of acts (eg. reproduction, adaptation) in relation to a substantial part of the third party copyright content; where only an insubstantial part of any item of third party content is used, there is no need to take further steps as use of an insubstantial part is not an infringement and does not need to be authorised by the copyright owner. Establishing guidelines for what is a substantial part is integral to the risk management process. It is not possible to provide absolute and firm guidelines for all situations, but it must be understood that any figures stated in the guidelines will essentially become the de facto rule.
3. **Is there a fair dealing?** If a substantial part of an item of third party copyright content is included in the ETD, consider whether use of that part is justified under one or more of the fair dealing provisions.
4. **Does any other exception to copyright infringement apply?** For example it is not an infringement of copyright to take a photo of a sculpture or work of artistic craftsmanship that is on permanent public display,⁶³⁴ so if a student includes an image of a work in a public place there is no need to obtain permission from the owner of copyright in the publicly displayed work. A list of these kinds of miscellaneous exceptions which are relevant to the education sector should be compiled. A dated but useful starting point for understanding these exceptions is found in the Copyright Law Review Committee's (CLRC) reports, *Simplification of Copyright Act 1968 Part 1* (1998) and *Copyright and Contract* (2002) (chapter 3 and Appendix D).
5. **Permission requested?** If after going through these steps there is still uncertainty about whether the use of the third party content in the thesis is authorised, a request should be sent to the copyright owner specifying the third party materials which are to be included in the thesis and the use to be made of that material and seeking express permission for such use; any licence obtained for the use of third party content must be broad enough to permit the thesis to be reproduced in digital form and communicated online (whether by the student, the university or a disciplinary repository). Since there will be doubt about whether the reproduction and communication of some materials included in theses is permissible, in some cases there will be no option but to seek express permission.

⁶³⁴ S 65 Copyright Act.

6.89 If, after going through the above steps it is apparent that there are significant problems being experienced in obtaining copyright clearances for materials or determining with any certainty what is covered by fair dealing, it would be necessary to identify the kinds of materials that are causing the problem and to look at the reasons why. If those problems cannot be overcome by adopting a copyright and risk management approach, and it is considered to be important that ETD containing those third party materials be made available online, a case will need to be made for a specific amendment to permit the use of the third party copyright material for that purpose.

6.90 The OAK Law project is keen to work with University officers in this area to ensure compliance procedures can be easily and efficiently implemented. To this end the OAK Law Project will seek to meet with University officers dealing with ETD management issues as soon as practicable.

Suggestions for reform

6.91 The analysis of the operation of the provisions shows that a case can be made for changes within the current structure of the fair dealing provisions which would enable the universities to more confidently make ETD available. These are:

1. Define 'research' in terms that are sufficiently broad to include dissemination by publicly funded universities of their students' research output (in hard copy or electronic format).
2. Confirm that a disseminator acting with the permission and in furtherance of or as part of the fair dealing purpose of the author of research or study or criticism or review can rely on the fair dealing exceptions in communicating that material: see further *CCH Canadian Ltd. v. Law Society of Upper Canada*⁶³⁵.
3. Extension of the five factors which currently apply in assessing whether there has been a fair use by means of reproduction of a Part III work or by means of any act (including communication) of an audio-visual item so that they also apply to other uses (in particular, communication) of a Part III work: see further the CLRC, *Simplification of Copyright Act 1968 Part I* (1998).

6.92 It would be stifling to innovation if the ETD could not be communicated via the Internet yet could be placed on a shelf in hard copy in a library. Such an interpretation of the law would not be conducive to the development of the kind of innovation system required to promote a vibrant knowledge society. In an era where knowledge is of paramount economic, social and cultural significance such an interpretation would seem out of touch. Proposed amendments to the *Copyright Act* 1968 that were recently announced by the Attorney-General tend to reinforce the notion that access to knowledge is a real consideration in determining the proper scope of copyright law.⁶³⁶

⁶³⁵ [2004] 1 S.C.R. 339, 2004 SCC 13 (CanLII); 2004, 236 D.L.R. (4th) 395; (2004), 30 C.P.R. (4th) 1; (2004), 247 F.T.R. 318.

⁶³⁶ Philip Ruddock (Attorney-General) 2006, *Major Copyright Reforms Strike Balance*, media release, Parliament House, Canberra, 14 May.
<http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Q

5. Risk

6.93 As various forms of copyright can subsist in an ETD and that the inclusion of ETD in digital repositories can involve an exercise of the copyright owner's exclusive rights, repositories will need to assess the risk of having an ETD program in terms of assessing the likelihood of liability for copyright infringement or for authorising copyright infringement.⁶³⁷

6.94 Focusing upon the risk of 'paying' for copyright infringement, we can come up with some form of risk matrix, where 'P' represents 'the possibility':

- P_s of being sued
- P_i of infringement
- P_d of damages/costs
- \$ likely award

6.95 Accordingly, analysing this risk matrix it is possible to come up with a formula for risk assessment in relation to assessing economic risks as:

$$R = P_s \times P_i \times P_d \times \$$$

6.96 The evaluation of such risks is vital, even though of uncertain accuracy. Any risk may be mitigated or met with an effective 'take down policy', and other techniques to minimise liability (such as a process for the student to reflect upon and state that they have complied with the law), that can reduce the overarching risk for a repository. It is noted that there will be always some risk: the task is to minimise the risk of infringement, liability and cost. It is also important to note that not all risks are economic risks or can easily be assessed as having a monetary value. For example, there are also potential 'costs' to an institution or repository in terms of loss of reputation in having a claim brought against them.

Licensing

6.97 As outlined in chapter 2 (paras 2.92-2.99), a licence is a 'permission' or authorisation from the copyright owner to use the copyright material by dealing with it in ways which fall within the copyright owner's exclusive rights. A licence can be exclusive or non-exclusive and may be granted in express terms by the copyright owner or arise by implication. In general, repositories will be seeking to rely on non-exclusive licences from owners of copyright in theses which they seek to place in the repository. When considering licensing issues in relation to ETD it is necessary to be aware of the four types of licences listed below.

quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006> at 13 July 2006; see also the discussion of proposed new exceptions in paras 2.80-2.84.

⁶³⁷ On authorisation see: ss 36, s 39B, 101, 112E *Copyright Act*; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242; *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972.

Deposit licence

6.98 A deposit licence between the owner of copyright in the ETD and the ETD repository is required in order give certainty to repositories, in terms of what rights they have to store, manage and organise the ETD stored within the repository. Deposit licences are also a vital means for repositories in establishing a formal contract with the depositor, reassuring the depositor that the repository is not claiming rights in their work and most importantly reducing the repository liability if a thesis or dissertation is found to have infringed copyright. The licence could also contain terms that reduce repository liability though disclaimers and indemnities.⁶³⁸

End user licence

6.99 The end user, ie. the person who downloads a thesis, should be clearly informed about the specific activities of use and re-use that are permitted — under what is termed an End User Licence. For example, this would typically include activities such as browsing (reading on screen); downloading and printing; or possibly downloading and distributing copies in class. To ensure that end users are clearly informed of the uses they are permitted to make of ETD, it is recommended that a standard, though flexible, protocol be adopted for end user licensing. For example, a straightforward approach would be for the ETD holder to license end users under one of the standard open content licences such as the Creative Commons (CC)⁶³⁹ or AEShareNet licence.

Creative Commons licences

6.100 The owner of copyright in the ETD may choose to license end users of the thesis under one of the CC licences. Importantly, licensing work under a CC licence does not mean giving up the copyright in the ETD. Instead, it means offering some of the copyright owner's rights to users, but only under certain conditions.⁶⁴⁰

6.101 Some have argued that this type of licence and dissemination can hurt the potential for a commercial work to be produced from the thesis, but increasingly we are seeing examples of where this is not the case. Works can be commercially published and at the same time made available under a CC licence (eg. Michael Geist (ed.) *In the Public Interest: The Future of Canadian Copyright Law*, (2005) Irwin Law, is published as a book at \$50 or you can download the chapters CC licensed online from <http://www.irwinlaw.com/books.cfm?series_id=3&pub_id=120>). A thesis is typically quite different in form from a book, and increasingly publishers will be asked to accommodate the view that making the thesis available 'for free' will not ruin a commercial opportunity to publish the work, and may in fact enhance it.⁶⁴¹

⁶³⁸ An example of a current deposit licence can be found in Appendix [C.1] and [D.1].

⁶³⁹ See by way of example: Oleg Evnin's CC licenced Caltech doctoral thesis at <<http://resolver.caltech.edu/caltechetd:etd-06072006-174745>> at 13 July 2006.

⁶⁴⁰ For more information on Creative Commons see <<http://www.creativecommons.org/>> at 13 July 2006; Brian Fitzgerald, 'Creative Commons: accessing, negotiating and remixing online content' (2005) *ON LINE Opinion* <<http://www.onlineopinion.com.au/view.asp?article=3379>>, posted April 26th 2005; Brian Fitzgerald and Ian Oi, 'Free Culture: Cultivating the Creative Commons' (2004) *Media Arts and Law Review* <eprints.qut.edu.au/archive/00000122/01/fitzgerald.pdf>.

⁶⁴¹ See further Appendix [A.1] and [B.3].

Third party licence

6.102 As explained at length above, where third party copyright content is included in the ETD it is necessary to confirm that rights to use the content have been granted by the third party copyright owner (in the absence of any exemption or exclusion from copyright infringement).⁶⁴²

Publisher licence

6.103 A licence between the publisher and the ETD repository will be crucial where an ETD candidate has already assigned the copyright in all or part of their thesis, such as where they have had an article published prior to submitting the electronic thesis and dissertation.

6. Protocols for the handling of theses⁶⁴³

Practical guidelines

ETD Candidate

6.104 In relation to ETD candidates the following practices are recommended for handling theses:

⁶⁴² For a current example see Appendix [B.4].

⁶⁴³ For an idea of current protocols employed see: Appendix. See generally: Charles W. Bailey, Jr., 'Electronic Theses and Dissertations: A Bibliography' (2005) *DigitalKoans* <<http://www.escholarlypub.com/digitalkoans/2005/07/08/electronic-theses-and-dissertations-a-bibliography/>> at 13 July 2006; Charles W. Bailey, Jr., 'ETD Policies and Procedures at ARL Institutions' (2005) *DigitalKoans* <<http://www.escholarlypub.com/digitalkoans/2005/07/21/etd-policies-and-procedures-at-arl-institutions/>> at 13 July 2006; Joan K. Lippincott, 'Institutional Strategies and Policies for Electronic Theses and Dissertations' (2006) *Educause Center for Applied Research Bulletin* <<http://www.educause.edu/LibraryDetailPage/666?ID=ERB0613>> at 13 July 2006 <http://www.earlham.edu/~peters/fos/2006_06_18_fosblogarchive.html#115092901136590442> at 13 July 2006; Gail MacMillan, 'Do ETD Deter Publishers? Does Web availability count as prior publication?: A report on the 4th International Conference on Electronic Theses and Dissertations' (Caltech, 2001) 62(6) *College and Research Libraries News* 620 <<http://scholar.lib.vt.edu/staff/gailmac/publications/pubrsETD2001.html>> at 13 July 2006; Arthur Sale, 'The impact of mandatory policies on ETD acquisition' (2006) April *D-Lib Magazine* <<http://www.dlib.org/dlib/april06/sale/04sale.html>> at 13 July 2006; Sale, *Unifying ETD with OA*; Nancy H. Seamans, 'Electronic theses and dissertations as prior publications: what the editors say' (2003) *Library Hi Tech*, March <<http://www.ingentaconnect.com/content/mcb/238/2003/00000021/00000001/art00006.jsessionid=4g9lr4xw0wj0.alice>> at 13 July 2006; Brian Surratt, 'ETD release/access policies in ARL Libraries: a preliminary study', presented at the *2005 ETD conference* in Sydney, Australia, September 30, 2005. <<http://adt.caul.edu.au/etd2005/papers/055Surratt.pdf>> at 13 July 2006; C.Jewell, W.Oldfield and S.Reeves' University of Waterloo electronic theses: issues and partnerships' (2006) 24 *Library – Hi – Tech* 183 <www.emeraldinsight.com/0737-8831.htm>.

- *Each institution should ensure that, from the time students first enrol in a program leading to the production of a thesis, they are made aware of the legal issues and procedures to be followed to secure permissions to enable the thesis to be made available online upon completion. Information about the relevant legal issues and procedures should be conveyed to students by means of:*
 - *easy to read (non-legalistic) guidelines and FAQs, which are made available in hard copy form and/or on the university's website*
 - *face-to-face practical training sessions, to be offered on a regular basis, in which students are able to obtain guidance on specific issues.*
- *All ETD candidates should be provided with information and training on the following matters before they commence writing up their thesis:*
 - *institutional IP policy and policy regarding online availability of theses*
 - *legal issues, particularly basic principles of copyright law so that ETD candidates have a practical understanding of when they are authorised to use third party copyright materials without obtaining permission (.e. an insubstantial part is used or where use is permitted by the operation of an exception to infringement such as fair dealing) and when they will be required to obtain permission from the copyright owner*
 - *the circumstances in which express licences for inclusion of third party copyright material will be required, and a practical understanding of how to obtain all such permissions*
 - *available options for licensing the repository to make the thesis available online.*
- *Where an ETD includes a substantial part of one or more third party copyright materials and such use is not exempted from infringement by the operation of the fair dealing provisions or another specific exclusion, ideally, each student should be individually responsible for obtaining all copyright clearances necessary for the material to be included in the thesis, using a standard form copyright request letter drafted so as to obtain permission for the full scope of use required, including reproducing the material in digital form and making the material available online.*
- *All third party copyright material included in the thesis and the authority to use it should be identified by the student. In the future the use of 'tags' to enable automated handling of permissions should be considered, so that permission records can be harvested.*
- *Where permissions to use the material have not been obtained at the time of submission of the thesis to the ETD, the student can be requested to permit the removal of the (non-cleared) materials (which they have identified). (Imposition of such a condition is not unreasonable given that most ETD*

students have been working on their thesis for at least three years and have had this period to obtain copyright clearances.)

- *Students should be required to provide a reliable means of contact following completion of their thesis, so that they can be contacted if any issues should arise.*
- *Adaptations should be acknowledged as such in any figure captions.*
- *Students should be required to include keywords to aid the repository in creating the metadata for each ETD.*

Repository

6.105 *In relation to repositories the following is recommended:*

- *Repositories should be provided with clear guidelines as to the steps they need to take to ensure they are authorised to make ETD available online, so as to minimise the risk of action being taken against the repository for infringing, or authorising the infringement of, copyright.*
- *Standard protocols and workflow processes should be developed for use by repositories which cover:*
 - *obtaining permissions from each thesis candidate which are sufficiently broad to authorise the repository to reproduce and communicate the ETD*
 - *procedures to be followed where a student author has been unable to, or has not yet, obtained all permissions necessary to enable the repository to reproduce and communicate the entire ETD online.*
- *Clearly worded forms should be used to ensure ease of processing.*

End user

6.106 *In relation to end-users the following practices are recommended:*

- *The end user of the ETD should be made aware of the licence terms, as discussed above (eg. a Creative Commons licence), on which they are able to access ETD and any restrictions placed on the item (such as cultural restrictions).*
- *A notice placed by the repository excluding liability and explaining the access/use conditions may also be useful in ensuring user understanding and mitigating liability.*

Implementation and proposed actions

6.107 The OAK Law project will work in consultation with ADT repositories to:

- *Survey and review current policies and practices highlighting and analysing any significant workflow problems in relation to copyright.*
- *Audit a representative sample of ETD deposited in ADT repositories to obtain some empirical evidence on the proportion of ETD containing third party copyright material, the extent to which substantial/insubstantial use is made of third party material and whether there are discernible variations in practice among different disciplines regarding the extent and kind of third party copyright materials included in ETD.*
- *Develop materials for use in training all students undertaking thesis programs about the legal requirements and procedures to be followed to ensure that they secure and record all permissions required to be able to make the completed thesis available online.*

These materials will include:

- *easy-to-read guidelines on key copyright concepts and principles (idea/expression distinction, copyright subject matter, exclusive rights, substantial part, infringement, exceptions and limitations (especially fair dealing), moral rights) and FAQs, to be made available in hard copy and on a student resources website*
- *guides for staff delivering face-to-face practical training sessions, at stepped levels of expertise, for students in thesis programs*
- *practical guidelines on obtaining copyright clearances for third party material to be included in their thesis*
- *standard form letters and requests to be used by students in seeking copyright clearances for material to be included in their thesis and obtaining all permissions required for the thesis to be made available online*
- *explanation of the various models of copyright licensing under which the thesis can be licensed to the repository and end users, for use by students who retain ownership of copyright in their thesis.*
- *Develop guidelines for use by repositories containing:*
 - *an explanation of practical measures that can be taken to ensure that they are authorised to make ETD available for access online*
 - *standard protocols and workflow processes designed for use by repositories in making ETD available online to minimise the risk of copyright infringement and breach of other laws.*

Appendix

Overview of ETD policy and framework materials

The following is a sample of policy and framework documents in relation to ETD.

A. Australasian Digital Theses (ADT) Program

ADT homepage: <<http://adt.caul.edu.au/standards/copyright/>>

[A.1] Example 1

ADT guidelines on copyright, access restrictions and implication for later commercial publication

B. Queensland University of Technology

[B.1] Example 1

Queensland University of Technology Student Rules

[B.2] Example 2

Queensland University of Technology Requirements for Presenting Theses

[B.3] Example 3

Information for Postgraduate Research Students on the Australasian Digital Thesis Program

[B.4] Example 4

Template QUT non-exclusive licence agreement for inclusion of third party copyright material in ETD

[B.5] Example 5

Requirement for Presenting Theses at QUT

[B.6] Example 6

Copyright Guidelines for Research Higher Degree Candidates for Submission of Theses to the Australasian Digital Thesis Program

C. Swinburne University of Technology

[C.1] Example 1

Access to Thesis

D. National Library of Canada

[D.1] Example 1

Licensing forms for National Library of Canada

E. Draft Copyright Compliance Table

[E.1] Example 1

A. Australasian Digital Theses (ADT) Program

[A.1] Example 1

ADT guidelines on copyright, access restrictions and
implication for later commercial publication

Prepared by: Alex Byrne, UTS; Tony Cargnelutti & Kerrie Talmacs, UNSW
[January 2004]

Please Note: These notes are intended as guidelines only for institutions and individuals participating in the ADT Program. Copyright and other access issues are determined by the local institution.

Recently, a number of Australian universities have mandated, or are in the process of mandating, digital thesis submissions to the ADT Program. Formal institutional specific digital submission requirements will be formulated as a consequence, including copyright, plagiarism and other access restriction guidelines.

- **Benefits of Digital Theses**

Doctoral theses are expected to make an original contribution to scholarship and should ideally be available to other researchers and subject to contestation. Programs such as ADT enhance this availability.

The experience in all academic libraries is that very few hard copy theses are ever consulted and fewer still consulted frequently. The ADT experience on the other hand is that digital theses are consulted frequently and from over 100 countries – some have led to jobs or research projects. There is thus the possibility of major benefits to the graduates.

In universities well advanced in their use of the ADT students do appreciate the benefits of the program and are very happy to post their theses after acceptance.

Quote: ‘..I thought you'd be happy to know that a guy from the US has actually read my thesis via the ADT and is also trying to use the modelling program

that I wrote during my PhD. So I guess the ADT really is working, in terms of getting UNSW theses to a wider readership...'

Dr. Matt Boreland
UNSW, Centre for Photovoltaic Engineering
Toyota Technological Institute
Semiconductor Laboratory

- **Access Restrictions**

Extended or permanent restrictions on access to theses are incompatible with the principle of making contributions to scholarship available to other researchers. There are some circumstances in which parts of theses must be permanently restricted, eg. sacred, secret, commercial-in-confidence and national security content. Protocols are usually provided to enable essential access with appropriate safeguards (eg. consultation with authorized authorities). In some circumstances (such as retention of priority for patent applications), restriction for a period of up to three years may be necessary.

It is best practice to place sections that need to be restricted in an appendix wherever possible so that access to the main argument and findings may be preserved while protecting confidential data.

Restriction of access to theses in whole or part is supported by the ADT software but this feature should only be used in conformity with existing policies on restriction as have long been applied to printed theses.

- **Implications for Later Commercial Publication**

Provision of access to theses via the ADT or similar systems does not constitute prior publication in a scholarly sense but could have a priority in relation to patents. However, there may be specific findings that would be better reported first in journal articles. A temporary restriction would enable such publication while preserving the principle of scholarly access.

There is some evidence, eg. surveys by Association of Learned and professional Society Publisher (UK) and Project ROMEO, that more and more publishers have accepted self-archiving. ALPSP found that just under half permitted self-archiving of preprints (more common with large publishers), more than half (55%) permitted self-archiving of the published version.

This is similar to the ROMEO results. see: Project Romeo

Other related links from: NDLTD Copyright Issues

Although the surveys relate to articles that may be derived from theses, there should be no problems for the theses themselves. However, in the case of key findings that the author may wish to keep confidential, ADT allows for restricted access for a sufficient period to enable publication

For the small number of theses that might be turned into books, there is again no problem since

(a) they are highly unlikely to be published in the original form without significant revision

(b) the digital thesis could be embargoed for a period if necessary

- **Copyright**

If theses contain content subject to copyright held by others - publishers, individuals, institutions, commercial concerns - then it is up to the individual to seek clearance or permission. If permission is not obtainable, or if theses are formally restricted for reasons of patents, etc...a simple flexible mechanism is available to cope with this.

Source: <<http://adt.caul.edu.au/standards/copyright/>>.

B. Queensland University of Technology

[B.1] Example 1

Queensland University of Technology student rules

Rule 49(1) of the Queensland University of Technology Student Rules provides ‘for students undertaking the doctor of philosophy degree, university academic board must specify general requirements for:

- (c) submission and examination of the thesis.’

[B.2] Example 2

Queensland University of Technology requirements for presenting theses

The Queensland University of Technology Requirements for Presenting Theses stipulate:

- 9. Submission of Final Thesis Requirement – Submission of final higher degree research theses to the Research Students Centre should normally be in two formats one final bound and one electronic.

9.2.3. Restrictions

Electronic theses are made available to the world via the Australasian Digital Theses (ADT) database. Full text theses documents are available in PDF and may be viewed, downloaded and printed, but cannot be altered. While it is normally mandatory for all students to provide an electronic version of their thesis, as far as the nature of the content allows, it is acknowledged that there may be constraints on these materials being made available publicly through the Australasian Digital Thesis Program for a range of reasons. Students are encouraged to review their thesis with their supervisor and/or other specialist staff of the University to assist them in preparing a case to present to Research Degrees Committee requesting restrictions to access or other special arrangements in relation to the format of the document. (For further details refer to Section 6 above).

In addition to this the Queensland University of Technology permission request letter for students to send provides that ‘Theses published at QUT are made digitally available on the World Wide Web for public access via the Australasian Digital Theses (ADT) database which is our national repository of theses in Australia.’

B. Queensland University of Technology

[B.3] Example 3

Information for postgraduate research students on the Australasian Digital Thesis Program

Introduction

The Australasian Digital Theses (ADT) program has been designed to promote and increase access to the research output of Australian higher degree research students.

ADT was initially developed by a group of seven Australian universities, and is based on the work of the Networked Digital Library of Theses and Dissertations (NDLTD) and the Virginia Polytechnic Institute, and uses a Web form to allow students to deposit their thesis electronically in PDF, to be accessible via both a local university interface, and the National ADT Database. About 500 Australian theses are now available on ADT.

QUT Thesis Requirements

Students and their supervisors should note the following amendments to the QUT Thesis Requirements approved by the University to accommodate the introduction of the ADT Program:

All higher degree research theses should normally be provided in electronic format at the time of submitting the final bound thesis. The electronic copy deposited with the Research Students Centre should include:

- a single digital copy on CD-ROM
- email contact details for the candidate and principal supervisor(s) should the library need to make contact to discuss issues related to the loading of the thesis to the ADT database
- written proof of copyright permission if required
- written proof of faculty agreement to embargo the thesis if required

Student requests to embargo a thesis must be supported by the appropriate Faculty authority in writing. Embargos can normally be for no more than two years.

On request from the Faculty, Theses by Creative Works and Theses by Publication are exempt from inclusion the ADT database, though all candidates are encouraged to submit their abstracts for inclusion.

Electronic theses are made available to the world via the Australasian Digital Theses (ADT) database. Fulltext theses documents are available in PDF and may be viewed, downloaded and printed, but cannot be altered. While it is normally mandatory for all candidates to provide an electronic version of their thesis, as far as the nature of the content allows, it is acknowledged that there may be constraints on these materials being made available publicly through the Australasian Digital Thesis Program for a range of reasons. Candidates are encourage to review their thesis with their supervisor and or other specialist staff of the University to assist them in preparing a case to present

to Research Degrees Committee requesting restrictions to access or other special arrangements in relation to the format of the document.

For Further Information:

If you would like to view the ADT or learn more about it please visit:

<<http://www.library.qut.edu.au/adt/about.jsp>>

Or contact your Liaison Librarian for further information.

ADT/Copyright

Here is some guidance on copyright implications of ADT at QUT:

1. PUBLICATION - A thesis uploaded to the ADT site is thereby published electronically. However, this is unlikely to affect its subsequent chances of publication in print *or electronic form*, as it will most likely require extensive revision for publication as a book or article.
2. Publication on the ADT site does not restrict the author's ability to publish elsewhere. Permission to publish elsewhere, or otherwise deal with the thesis is not required to be obtained from the ADT.
3. OWNERSHIP OF COPYRIGHT IN THE THESIS- Publication on the ADT site has no effect whatsoever on the ownership of the copyright in the thesis. This remains with the author until he/she transfers it to another entity.
4. INCLUSION OF THE WORKS OF OTHERS - If a student has reproduced someone else's copyright work in the thesis, it must be correctly referenced. In addition to referencing, permission to reproduce it must be obtained from the copyright owner if the thesis is published on the ADT site *or elsewhere*. Note that diagrams and photographs are copyright works in themselves. The QUT Copyright Guide deals with this matter in detail
5. A THESIS CONTAINING PREVIOUSLY PUBLISHED ARTICLES - If a candidate has previously published parts of their thesis as journal articles, they will need to determine who owns the copyright in those articles. If this copyright is held by another ie. *they have signed over the copyright to the journal publisher*, then they must obtain clearance before publishing on the ADT site.

SUMMARY. Submission of a thesis to the ADT project is highly unlikely to disadvantage the author, in either submitting the work to other databases, or in presenting the work for print publication. Contribution of theses to the ADT enhances the intellectual commons, and makes the works accessible to other workers in the field. If theses are accessible, they are more likely to be found and cited by other researchers.

QUT Copyright Officer, 2006

B. Queensland University of Technology

[B.4] Example 4

Template QUT non-exclusive licence agreement for inclusion of third party copyright material in ETD

<http://www.tils.qut.edu/copyrightguide/files/ADT_copyright_owner_request.doc>

Copyright holder details

Date

Your details

Dear [Copyright holder name],

My name is [your name]. I am completing a [Masters / PhD / Professional Doctorate] thesis at the Queensland University of Technology (QUT), Australia.

Theses published at QUT are made digitally available on the World Wide Web for public access via the Australasian Digital Theses (ADT) database which is our national repository of theses in Australia. See URL: <<http://adt.caul.edu.au/>>.

My thesis includes the following copyright material:

[description of work and source]

from the following works for which you hold the copyright:

[description of source]

I wish to seek from you a limited, non-exclusive licence, for an indefinite period to include these materials for which you hold the copyright, in the digital copy of my thesis to be made available on ADT. Your works will of course be fully and correctly referenced.

Please sign below if you agree.

I _____ agree to permit the non-exclusive licence for an indefinite period to include the above materials for which I am copyright owner, into your thesis for inclusion in ADT.

Position

Date

Yours sincerely,
[your name]

B. Queensland University of Technology

[B.5] Example 5 – Requirements for Presenting Theses

Requirements for Presenting Theses

<http://www.research.qut.edu.au/downloads/StudentCenter/present_rqts.pdf>

In the QUT nine page booklet on ‘Requirements for Presenting Theses’, there is included the following information on copyright permissions:

Copyright materials incorporated in theses can only be reproduced in the ADT database with proof of written permission from the copyright holder (author or publisher as relevant to the work). It is acknowledged that in the case of thesis by publication, it may not be possible to reproduce the published works in ADT. The student is responsible for seeking and obtaining signed and dated written proof of permission from copyright holders to digitally reproduce copyright material on the ADT database. Students should use the ‘Permission to reproduce copyright material’ on the ADT’ form that can be found at:

<http://www.research.qut.edu.au/downloads/ADT_copyright_owner_request.doc>.

Additionally, the booklet informs the student that the electronic copy deposited with the Research Students Centre should include written proof of copyright permission if required.

Where no written proof of permission is provided, the Library will remove the copyright material leaving reference to the copyright source before loading the thesis on the ADT database.

B. Queensland University of Technology

[B.6] Example 6

QUT

Copyright guidelines for research higher degree candidates for submission of theses to the Australasian Digital Thesis Program

Prepared by Margaret Robertson, University Copyright Officer,
18 March 2004, amended 25 February 2005

These guidelines cover the particular issues for submission of theses to the Australasian Digital Thesis (ADT) program. For a general introduction to copyright, consult the *QUT Copyright Guide*.

<<http://www.tils.qut.edu.au/about/copyright.jsp>>

Meaning of 'copyright materials'

In these guidelines, 'copyright materials' means any text, diagram, chart, table, image, computer program, musical notation, sound recording, film/video, broadcast, or any other work or subject matter, that you have reproduced in your thesis, the copyright in which is owned by someone other than yourself.

If you have reproduced a copyright computer program, you are bound by the conditions of the licence under which you acquired it as to whether you can include it in the ADT database.

Background on copyright

The *Copyright Act* 1968 gives copyright protection to 'works' and 'subject matter other than works'.

'Works' are:

- literary works (including computer programs)
- dramatic works
- musical works (notated music)
- artistic works.

'Subject matter other than works' are:

- cinematograph films, which includes videos
- sound recordings
- broadcast signals
- published editions of works, which refers to the layout and typography of printed works

The *Copyright Act* 1968 grants certain exclusive rights to copyright owners. Two of these rights that are involved in the ADT program are:

- The right to reproduce the work in a material form
- The right to communicate the work to the public

In putting a student thesis online through the ADT program, QUT and ADT are exercising these exclusive rights so they must be sure to have the permission of the copyright owner. You as the PhD candidate own the copyright in your original work contained in your thesis but you have given QUT permission to communicate your work to the public via the ADT program as that is a requirement of thesis submission. If you have reproduced the whole or a substantial part of other people's works in your thesis, then QUT needs to be assured that those copyright owners have also granted permission for their work to be reproduced and put online as part of an ADT thesis.

When do I need to get permission?

If you deal with works in any of the ways exclusively reserved to the copyright owners without their permission, you infringe their copyright. To avoid infringement, you will need to get permission to reproduce and communicate someone else's work in your thesis.

You do not need to get permission if:

- the copyright has expired;
- OR
- the amount does not constitute a 'substantial part' of the work copied;
- OR
- a special exemption applies.

When does copyright expire?

Copyright in published works lasts for the life of the creator plus 70 years, as a general rule. You do not need to get permission to reproduce works no longer in copyright.

The term of copyright under Australian law was extended from life plus 50 to life plus 70 years as from 1 January 2005. Material out of copyright on 1 January 2005 stays out of copyright.

However, a recent reprint of an out-of-copyright work may have new typography and layout. If you are reproducing such a work as a facsimile of the printed page, be careful about the copyright in the published edition. The published edition copyright lasts for 25 years after the end of the first year of publication. If you are simply quoting the words in your thesis, the question of the published edition does not arise.

Special conditions apply to unpublished works. If you have quoted unpublished material, you should seek advice from the University Copyright Officer.

Is there an exception for fair dealing?

In certain circumstances, the *Copyright Act* allows you to exercise the rights of the copyright owner without permission and without payment. For instance, it is not an infringement to make a 'fair dealing' of a reasonable portion of a work for the purpose of 'research or study' (s40) or 'criticism or review' (s41).

If you as a student reproduced reasonable portions of copyright material in your thesis submitted for examination, you were operating under the exemption of fair dealing for research or study. For research or study, the Act defines a reasonable portion to be, in broad terms, 10% or one chapter of a book, or one article from a periodical. When QUT/ADT communicates the thesis to the public by means of the ADT database, the purpose of their reproduction and communication is not research or study. Therefore, they can not claim the defence of fair dealing on that ground, in the event of an action for infringement.

In some cases, QUT/ADT might be able to claim a defence to infringement on the grounds that the reproduction of a work within your thesis is for the purpose of criticism or review, and it is fair. The relevant section of the Act is as follows:

Fair dealing for purpose of criticism or review (s41)

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and a sufficient acknowledgement of the work is made.

To claim this exemption, you must submit the work or quoted extract to direct critical analysis, not simply use it for illustration or enhancement.

What is a substantial part of a work?

The Act states that infringement occurs if you deal with the whole or a 'substantial part' of the work. Unfortunately, the Act does not define a 'substantial part'. Case law has established that a 'substantial part' may be any part that is important, distinctive, or recognizable, and not necessarily substantial in terms of length. It is a matter of both quality and quantity. It depends on the circumstances of each case whether a part is so important that permission is needed to reproduce it. The purpose of the use may also be relevant; if you are using the part for a commercial purpose or to include in a competing work, it is more likely you will need permission.

Do not confuse the concept of a 'substantial part' with the 'reasonable portion' permitted under the fair dealing for research or study provision. A 'substantial part' will be much less than the 'reasonable portion' permitted for research or study.

Substantial part of a literary, dramatic or musical work

To assist you decide whether your quotation constitutes a substantial part of the quoted work, the following guidance is offered.

Text

For the purposes of the ADT program, your quotation is probably not substantial if you quote no more than 400 words in a single continuous extract, and no more than 600 words in total, from any single scholarly monograph or other full-length non-fiction book, so long as the total does not amount to more than 1% of the work quoted. This rule of thumb applies only to quotations from scholarly monographs and other full-length non-fiction books.

For all other texts, such as works of fiction, plays, poems, essays, periodical articles, conference papers, research papers, song lyrics, and tables, you

should make an assessment yourself as to whether your quotation would be a substantial part of the work. If in doubt, err on the side of caution, and seek permission.

Musical works

For musical compositions, you should make an assessment as to whether your quotation would be a substantial part of the work. If in doubt, err on the side of caution, and seek permission.

Substantial part of an artistic work

This is how the *Copyright Act 1968* defines an artistic work (s10):

(a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;

(b) a building or a model of a building, whether the building or model is of artistic quality or not; or

(c) a work of artistic craftsmanship to which neither of the last two preceding paragraphs applies;

but does not include a circuit layout within the meaning of the Circuit Layouts Act 1989.

An image of any kind falls under this definition, whether of artistic merit or not. Each image constitutes an artistic work in itself. For example, a page of a book with six anatomical illustrations, contains six separate copyright works. If you have reproduced the whole or a substantial part of any copyright image in your thesis, you will need to obtain permission.

If you have taken a photograph yourself of an original work of art created by someone else, you may own the copyright in the photo, but you do not own the copyright in the original work of art. In these cases, you must get permission from the copyright owner to make your photograph available online. The copyright owner is usually the artist, not the owner of the physical object. Even if the artist permitted you to take the photo, check that the permission included the right to put it online.

There are some exceptions to the last paragraph –

- buildings and models of buildings
- sculptures and works of artistic craftsmanship permanently located in a public place or in premises open to the public

You do not need the copyright owner's permission to photograph or make a painting or drawing of works that fall into these categories, nor do you need permission to publish or communicate your picture.

Substantial part of a film/video, sound recording or broadcast signal

This is a very difficult area to judge. You must obtain permission for the inclusion of any extract in your thesis.

C. Swinburne University of Technology

[C.1] Example 1

Access to Thesis

Swinburne Graduate Research School

Access to Thesis

This form is available to download from: <http://www.swin.edu.au/research/postgrad.htm>.

Procedure: Masters by Research, PhD and Professional Doctorate students must lodge this form with **two bound copies** of their thesis together with **one electronic copy** to the Swinburne Graduate Research School.



1. Candidate Details

Family
name:

Given
name(s):

Email
address:

Faculty:

Supervisor:

Full title of
degree:

Title of
thesis:

	Title:	Student ID:
	Preferred Name(s):	

2. Public Access to Thesis

Swinburne University of Technology ('Swinburne') makes both print and electronic forms of all theses immediately available for public access UNLESS the author requests Swinburne to restrict access.

If you wish access to your thesis to be restricted, please complete the following:

☐

I request Swinburne to restrict all access to my thesis (both print and electronic) for a period of _____ months / years (please delete one)

Note: Access cannot be restricted for more than 2 years without prior approval from the Swinburne Research Higher Degrees Committee.

3. Keywords

Please nominate at least four (4) *keywords* which best describe the subject of your thesis for the purpose of library cataloguing and indexing. Please note that some disciplines have their own thesaurus for this purpose.

4. Declaration by Candidate

Note: Swinburne will make your thesis available online. If you have included copyright material which does not belong to you (eg: pictures, tables, graphs, substantial amounts of text), you must **either** obtain permission to include that material or omit it from the electronic version of your thesis. Please include a notation where material has been removed. Contact the Copyright Office for assistance (9214-5664) or visit <http://www.swin.edu.au/copyright> for further details. Note that this **does not** apply to the printed version of your thesis.

- I warrant that the electronic version of my thesis, as provided, does not infringe the copyright of any person.
- I give Swinburne permission to reproduce and communicate the electronic version of my thesis in perpetuity in all forms of media, now or hereinafter known.
- I certify that the electronic version of my thesis, as provided, is a **direct equivalent of my printed thesis**, subject to any exclusions made for copyright reasons.

Candidate's Signature:		Date:	
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D. National Library of Canada

[D.1] Example 1

Licensing forms for National Library of Canada

<http://www.nlc-bnc.ca/obj/s4/f2/frm-nl59-2.pdf>


Library and Archives Canada
Theses Canada
Published Heritage Branch
395 Wellington St.
Ottawa, On.
K1A 0N4
Canada

theses@lac-bac.gc.ca

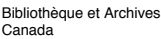
tel. (819) 953-6221

fax. (819) 997-2395


toll-free number, 1-866-578-7777, not applicable outside North America.



Library and
Archives Canada



Bibliothèque et Archives
Canada



THESES NON-EXCLUSIVE LICENSE

LICENCE NON EXCLUSIVE DES THÈSES

Surname / Nom de famille	Given Names / Prénoms
Full Name of University / Nom complet de l'université	
Faculty, Department, School / Faculté, département, école	
Degree for which thesis was presented / Grade pour lequel cette thèse a été présentée	Date Degree Awarded / Date d'obtention du grade
Date of Birth. In many cases it is essential to include information about year of birth in bibliographic records to distinguish between authors bearing the same or similar names. It is optional to supply your date of birth. If you choose to do so please note that the information will be included in the bibliographic record for your thesis.	Date de naissance. Dans bien des cas, il est essentiel de connaître l'année de naissance des auteurs afin de pouvoir faire la distinction entre des personnes qui ont le même nom ou des noms semblables. Vous avez le choix de fournir votre date de naissance. Si vous choisissez de la fournir veuillez noter que l'information sera incluse dans la notice bibliographique de votre thèse.
Thesis Title / Titre de la thèse	

EXAMPLE

<p>In consideration of Library and Archives Canada making my thesis available to interested persons, I,</p> <p>hereby grant a non-exclusive, for the full term of copyright protection, royalty free license to Library and Archives Canada:</p> <p>(a) to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell my thesis (the title of which is set forth above) worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats;</p> <p>(b) to authorize, sub-license, sub-contract or procure any of the acts mentioned in paragraph (a).</p> <p>I undertake to submit my thesis, through my university, to Library and Archives Canada. Any abstract submitted with the thesis will be considered to form part of the thesis.</p> <p>I represent and promise that my thesis is my original work, does not infringe any rights of others, and that I have the right to make the grant conferred by this non-exclusive license. If third-party copyrighted material was included in my thesis, I have obtained written copyright permission from the copyright owners to do the acts mentioned in paragraph (a) above for the full term of copyright protection.</p> <p>I retain copyright ownership and moral rights in my thesis, and may deal with the copyright in my thesis, in any way consistent with rights granted by me to Library and Archives Canada in this non-exclusive license.</p> <p>I further promise to inform any person to whom I may hereafter assign or license my copyright in my thesis of the rights granted by me to Library and Archives Canada in this non-exclusive license.</p>	<p>Considérant le fait que Bibliothèque et Archives Canada désire mettre ma thèse à la disposition des personnes intéressées, je,</p> <p>accorde par la présente à Bibliothèque et Archives Canada, une licence non exclusive et libre de redevance, et ce, pour toute la période protégée par mon droit d'auteur afin de :</p> <p>(a) reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre ma thèse (dont le titre est indiqué ci-dessus) partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats;</p> <p>(b) autoriser, accorder une sous-licence ou une sous-traitance, ou engager toute mesure mentionnée à l'alinéa (a).</p> <p>Je m'engage à ce que ma thèse soit remise à Bibliothèque et Archives Canada par mon université. Tout résumé analytique soumis avec la thèse sera considéré comme faisant partie de celle-ci.</p> <p>Je déclare sur mon honneur que ma thèse est mon œuvre originale, qu'elle n'empiète pas sur les droits de quiconque et que j'agis de plein droit en accordant cette licence non exclusive. Si le document d'une tierce personne étant protégé par un droit d'auteur est inclus dans ma thèse, j'aurai préalablement obtenu une permission écrite des détenteurs du droit d'auteur pour faire les actes mentionnés dans le paragraphe (a) ci-dessus, et ce, pour toute la période protégée par le droit d'auteur.</p> <p>Je conserve la propriété du droit d'auteur et des droits moraux qui protègent ma thèse, et je peux disposer du droit d'auteur de toute manière compatible avec les droits accordés à Bibliothèque et Archives Canada par les présentes.</p> <p>Je promets également d'informer toute personne à qui je pourrais ultérieurement céder mon droit d'auteur sur ma thèse ou à qui je pourrais accorder une licence, des droits non exclusifs accordés à Bibliothèque et Archives Canada par les présentes.</p>
Signature	Date

DRAFT

Part 5 –

Conclusion and summary

‘...the path forward.....’

Conclusion and summary

7.01 The forward work plan for the OAK Law Project has been outlined in this Report. This will result in the development of Four (4) Work Packages to be undertaken over the next 6-12 months.

Copyright Management for Open Access

- **Work Package One (1) – Policies, Procedures & Agreements**

Develop template guidelines for open access policies that can be considered for adoption within university and research institutions

Survey the existing policies of funding institutions towards open access and develop model policies based on international developments

Survey researchers about their understanding of, attitudes towards and experience with publishing agreements

Develop or recommend model publishing agreements and addenda that facilitate open access

Develop or recommend model agreements that can assist the copyright management of open access repositories.

- **Work Package Two (2) – OAK List**

Develop a detailed list (OAK List) of the attitudes of publishers relating to open access as evidenced in the terms of publishers' agreements. The OAK List aims to be interoperable with the UK based SHERPA List

- **Work Package Three (3) – ETD**

Provide more support to ETD Repositories through developing guides for students about self managing copyright issues and assisting the repositories in terms of copyright management protocols and licences

- **Work Package Four (4) – OCL - Legal Issues**

Examine open content licensing issues such as those relating to implementation, jurisdiction and compatibility.

7.02 The OAK Law Project is keen to work with institutions and people managing copyright across the Australian academic and research sector and will endeavour to

tap into existing networks and structures to gain insights and feedback as these Work Packages progress. Furthermore, we will continue to present and attend at relevant national and international conferences, work with the other DEST funded SII projects and associated JISC projects, convene workshops and promote the output of our research through the OAK Law website.

7.03 What has been presented in this Report is an action agenda for reinforcing access to knowledge. Building on the enormous amount of work that has already been done by many dedicated individuals across the country, we aim to provide the guidance that will promote the adoption of more effective and cutting edge copyright management frameworks.

Part 6 –

Author Biographies

PROFESSOR BRIAN FITZGERALD**BA (Griff) LLB (Hons) (QUT) BCL (Oxon.) LLM (Harv.) PhD (Griff)****Head of Law School, QUT Brisbane Australia****Email: bf.fitzgerald@qut.edu.au****Website at:****<http://www.law.qut.edu.au/about/staff/lstaff/fitzgerald.jsp>**

Brian is a well-known intellectual property and information technology lawyer. He has published articles on Law and the Internet in Australia, the United States, Europe, Nepal, India, Canada and Japan and his latest (co-authored) books are *Cyberlaw: Cases and Materials on the Internet*, *Digital Intellectual Property and E Commerce* (2002); *Jurisdiction and the Internet* (2004); *Intellectual Property in Principle* (2004). Over the past five years Brian has delivered seminars on information technology and intellectual property law in Australia, Canada, New Zealand, USA, Nepal, India, Japan, Malaysia, Singapore, Norway and the Netherlands.

In October 1999 Brian delivered the Seventh Annual Tenzer Lecture - Software as Discourse: The Power of Intellectual Property in Digital Architecture - at Cardozo Law School in New York. Through the first half of 2001 Brian was a Visiting Professor at Santa Clara University Law School in Silicon Valley in the USA. In January 2003 Brian delivered lectures in India and Nepal and in February 2003 was invited as part of a distinguished panel of three to debate the Theoretical Underpinning of Intellectual Property Law at University of Western Ontario in London, Canada. During 2005 Brian has presented talks in Germany, India and China and was a Visiting Professor in the Oxford University Internet Institute's Summer Doctoral Program in Beijing in July 2005. He is also a Chief Investigator in the newly awarded ARC Centre of Excellence on Creative Industries and Innovation and a Project Leader for the DEST funded Open Access to Knowledge Law Project OAK Law Project, looking at legal protocols for open access to the Australian research sector.

His current projects include work on intellectual property issues across the areas of Copyright and the Creative Industries in China, Open Content Licensing and the Creative Commons, Free and Open Source Software, Research Use of Patents, Science Commons, e-Research, Licensing of Digital Entertainment and Anti-Circumvention Law. Brian is a Project Leader for Creative Commons in Australia. From 1998-2002 Brian was Head of the School of Law and Justice at Southern Cross University in New South Wales, Australia and in January 2002 was appointed as Head of the School of Law at QUT in Brisbane, Australia.

DR ANNE FITZGERALD**Adjunct Professor****QUT School of Law****Email:** am.fitzgerald@qut.edu.au**Websites at:****<http://www.ip.qut.edu.au>****<http://www.oaklaw.qut.edu.au>**

Anne is a recognised expert in the field of intellectual property law, which is demonstrated through her contributions to research, publication, training, teaching and professional practice. Anne has specialised for the past 15 years in intellectual property law, in particular its application to information technology. During this time she has gained extensive practical experience in intellectual property and technology contracting and recent hands on experience negotiating, drafting and advising on information technology and biotechnology contracts for the Queensland Government.

Anne has conducted extensive research in these fields, resulting in the publication of several books, numerous articles and book chapters on intellectual property law (particularly as it applies to digital technologies), and electronic commerce law. Since 1991, she has taught courses in the areas of intellectual property and e-commerce law to students in law, biotechnology, information technology, multimedia and electronic commerce courses, as well as to information technology professionals, writers and designers. Each year since 2003 she has taught the Intellectual Property Law course offered by Macquarie University's School of Law as a summer intensive and since 2004, she has been the co-coordinator (with John Stonier) of the Patents and Commercialisation course in the Master of Laws program at QUT Law School. Anne teaches in the undergraduate Internet Law and E-commerce Law and Technology Contracts courses offered at QUT Law School and has taught in the Cyberlaw course in Southern Cross University's summer law school program since 1998.

Anne was an initiator of the *Going Digital* series of seminars on legal aspects of e-commerce, multimedia and the Internet which were held in Brisbane, Melbourne and Hobart in 1997 and 1998 in association with QANTM Australia Co-operative Multimedia Centre. The project culminated in the publication of *Going Digital: Legal Issues for Electronic Commerce, Multimedia and the Internet* (Prospect Media, now LexisNexis/Butterworths) in August 1998. A second, completely revised, edition of the book, *Going Digital 2000: Legal issues for e-commerce, software and the internet* was published in February 2000.

PROFESSOR MARK PERRY**LLB (Hons) (Man), BCSE (NCC), DipComSci (Auck), MJur (Distinction)(Auck),
Barrister (LSUC)****QUT School of Law****Faculty of Law & Science, The University of Western Ontario, Canada****Email: m.perry@qut.edu.au****Websites at:****<http://www.oaklaw.qut.edu.au>****<http://www.csd.uwo.ca/~markp/>**

Mark Perry is internationally known for his research into the interface between law and new technologies, in particular in intellectual property and software licensing. He has published in this field in Australia, Canada, Germany, Japan, New Zealand, the United Kingdom, and the United States. He has presented to audiences in these and other countries, usually as an invited speaker. Recent publications, not listed below, include a new chapter on Technology Law for the reference work Butterworths' looseleaf *Electronic Business Law*.

Mark is a Barrister and Solicitor of the Law Society of Upper Canada, a Faculty Fellow at IBM's Center for Advanced Studies, a correspondent for the Computer Law and Security Report, and a member of the International Association for the Advancement of Teaching and Research in Intellectual Property, the Institute of Electrical and Electronics Engineers, the Intellectual Property Institute of Canada, and the Association of Computer Machinery (ACM) and a committee member of the ACM Special Interest Group of Computers in Society. He is a reviewer for multiple granting societies and associations.

Mark's research focuses on the nexus of law and science, particularly in the area of autonomic computing system development and legal aspects of software licensing. This background, combined with his experience both developing software and licensing models gives Mark a unique perspective on researching and teaching in the Free and Open Source Software area.

SCOTT KIEL-CHISHOLM**BBus (Hons) (QAC) LLB (Hons) BCom (Griffith)****Project Manager, The OAK (Open Access to Knowledge) Law Project****Email: s.kielchisholm@qut.edu.au****Website at: <http://www.oaklaw.qut.edu.au>**

Scott completed his Articles of Clerkship with Blake Dawson Waldron Lawyers in 2001, after working in the Insurance, Projects, Intellectual Property and Communications and Corporate Advisory practice groups. He then travelled to Silicon Valley, California USA and upon his return, Scott commenced work in the Litigation practice group of McInnes Wilson Lawyers, concentrating on the defence of professional indemnity claims. In 2004, Scott joined the Commercial Litigation practice group of Home Wilkinson Lowry Lawyers which provided broader litigation experience in project management contracting, retailing, construction, manufacturing and franchising. In an effort to progress a career in intellectual property law, Scott commenced work with Colavitti Lillas Lawyers before becoming Project Manager of The OAK (Open Access to Knowledge) Law Project. Scott is presently undertaking his Master of Laws specialising in intellectual property law at The University of Queensland.

ERIN DRISCOLL**B Soc Sci (Hons) & LLB (UNSW)****Legal Officer, Australian Film Commission****Email: e.driscoll@qut.edu.au**

Erin has significant expertise in copyright law and policy, and has previously worked for the Attorney-General's Department and the National Museum of Australia. She was also a member of the secretariat supporting the Copyright Law Review Committee in its inquiry into the relationship between Copyright and Contract in 2002.

In addition to her part-time position on the OAK Law Project, Erin is currently an in-house lawyer for the Australian Film Commission (AFC), primarily providing legal support for the National Film and Sound Archive which is a part of the AFC.

Since 2003 Erin has also chaired the Copyright in Cultural Institutions Group (CICI), which is a working group of copyright and intellectual property managers across Australia, with membership including the Australian Digital Alliance, Australian Film Commission, National Museum of Australia, National Archives of Australia and National Gallery of Australia. In May this year CICI, together with the Australian Libraries Copyright Committee hosted a major forum on orphan works (copyright works where there is difficulty in tracing or locating the copyright owner) at which Erin presented a paper on risk management approaches to dealing with the problem of orphan works."

DILAN THAMPAPILLAI**QUT School of Law****Email: d.thampapillai@qut.edu.au****Website at: <http://www.ip.qut.edu.au>**

Dilan Thampapillai is a specialist in intellectual property law and has recently joined the Law Faculty at the Queensland University of Technology after working for three years with the Attorney-General's Department in Canberra.

Dilan has a Master of Laws degree (LLM) from Cornell University where he specialised in intellectual property. Dilan has a Master of Commerce from the University of Sydney and a BA and LLB from the Australian National University.

Dilan has also studied on a non-degree basis at Harvard University and at the National University of Singapore and was admitted to practise as a solicitor in the Australian Capital Territory in June 2003. Dilan is a researcher with Professor Brian Fitzgerald as part of the Open Access to Knowledge Law Project (OAKLAW). Dilan has published papers on peer to peer copyright infringement, copyright in the digital era and law and medicine.

JESSICA COATES**Project Manager****Creative Commons Clinic****ARC Centre - Creative Industries & Innovation****Email: j2.coates@qut.edu.au****Websites at: <http://www.cci.edu.au/ccc>****<http://www.creativecommons.org.au>**

Jessica Coates is the Project Manager of the Creative Commons Clinic, a program of the ARC Centre of Excellence for Creative Innovation at Queensland University of Technology. The Clinic aims to further the implementation of the international open content licensing movement, Creative Commons, through the promotion of Creative Commons research and usage in Australia.

Jessica joins the Clinic on secondment from the Commonwealth Department of Communications, Information Technology and the Arts (DCITA), where she has spent most of the last decade as a copyright and communications policy officer. At DCITA, Jessica worked primarily in the Intellectual Property Branch, where she took a major role in the development and implementation of recent copyright reform, including the Digital Agenda Amendments and the Australia-United States Free Trade Agreement. Whilst with DCITA, Jessica also worked on the ABC and SBS policy with the National Broadcasting Section and on IT usage by museums with the Collections Development Branch.

Jessica has a Bachelor of Laws from the Australian National University, and is currently undertaking a Masters in e-Law with Melbourne University.

Part 7 – References

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Index

Access to Knowledge (A2K)...4.02-4.03, 4.32

A2K Treaty...4.26-4.31

AEShareNet...1.23, 4.38, 6.99

Archiving...1.04, Appendix 2 (Chapter 1), 2.62, 2.69, 2.82, 2.86, 2.111, 2.115, 3.25, 4.05-4.06, 4.09, 4.13, 4.14-4.15, 4.31-4.33, 4.39, 4.46, 5.02-5.133, 6.11, 6.26-6.29, 6.42
AUSFTA...2.31-2.32, 2.40, 2.57, 2.80-2.84, 2.89-2.90, 2.109-2.110, 2.112-2.113, 2.116, 2.118, 2.138-2.139, 3.07, 3.10, 3.12, 3.21, 6.12-6.14, 6.83

Australian Law Reform Commission (ALRC)...3.26, 3.67, 5.32, 5.34

Author

Assignment of copyright...see Copyright; Assignment
 Collecting society...5.130-5.133
 Copyright...see Copyright
 Distribution Agreement...5.127-5.129
 Electronic Theses and Dissertations...see Electronic Theses and Dissertations
 Employment Agreements...5.39-5.49
 End users...5.123-5.133
 Legal relationships...5.11-5.12
 Licence of copyright...see Copyright; Licences
 Publishing Agreements...5.11, 5.50-5.112
 Repository Deposit Licence...5.113-5.122
 Self-archiving...4.05-4.07, 5.02, 5.07, 5.16, 5.28-5.29, 5.48, 5.52, 5.61, 5.67, 5.71-5.72, 5.107

Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)...2.08, 2.136, 3.08, 3.34, 3.49
Blogs...1.14, 4.04

Copyright Agency Limited (CAL)...2.103, 5.12

Copyright

Assignment...2.92-2.95
 Carriage service providers...2.89-2.90
 Collecting Society...2.100-2.103, 5.12, 5.130-5.133, 6.45
 Commercialisation...1.05, 5.15, 5.33, 5.36
 Communication...6.38-6.39, 6.80-6.82
 Compulsory licensing...2.99-2.103
 Crown copyright...2.35, 2.45-2.49, 2.99, 2.111
 Databases...3.04-3.07
 Defences...2.69-2.90
 Duration...2.29-2.35
 Electronic theses and dissertations...6.04-6.17
 Exclusive rights...2.50-2.52
 Expression...2.23
 Fair dealing...2.71-2.84, 6.56-6.78
 Infringement...2.53-2.68
 ISP liability...2.89-2.90
 Licences...2.92-2.103
 Management...5.119, 6.01, 6.31, 6.87-6.92
 Material form...2.24
 Moral Rights...2.129-2.139, 6.15-6.17
 Originality...2.25-2.27
 Orphan works...2.119-2.123
 Ownership...2.36-2.49, 6.06-6.08
 Performers' rights...2.125-2.128, 6.11-6.14
 Remedies...2.91
 Statutory licensing...2.99-2.103
 Subject matter other than works...2.15-2.19
 Technological Protection Measures...see Technological Protection Measures
 Works...2.11-2.14

Creative Commons

Electronic Theses and
Dissertations...6.99-6.101
Licences...1.23, 1.24-1.26, 1.31,
3.70, 4.38-4.39, 4.41, 5.52, 5.77,
5.80, 5.82, 5.87, 5.100, 5.119,
5.121, 5.128, 6.99-6.101, 6.106
Professor Lawrence Lessig...1.24,
4.39

Databases

Canada...3.37-3.43
Copyright protection in
Australia...3.12-3.26
European Union...3.44-3.58
Licensing...3.22-3.25
Sui generis right...3.50-3.53, 3.63-
3.66
Technological Protection
Measures...3.21
Third party content...3.06
Trade Related Aspects of
Intellectual Property Rights
Agreement (TRIPS)...3.10
United Kingdom...3.59-3.66
United States...3.27-3.36

**Department of Education, Science
and Training (DEST)...5.30, 5.33,
5.35, 5.48, 6.64, 7.02****Digital Repositories...4.04, 4.07,
5.52, 5.67, 5.85, 5.96-5.97, 5.99, 5.106,
5.113-5.133, 6.97-6.98****Digital Rights Management
(DRM)...2.104, 4.29, 4.32****Distribution agreement...5.12, 5.123-
5.126****Electronic Rights Management****Information (ERMI)...2.117-2.118****Electronic Theses and Dissertations
(ETD)**

Carriage Services Providers...6.83-
6.86
Communication right...6.80-6.82
Copyright...6.04-6.17, 6.29-6.44
Digitisation...6.20-6.26
Fair dealing...6.56-6.78
Libraries...6.18-6.19
Licensing...6.97-6.103
Moral rights...6.15-6.17
Paper theses...6.40-6.44
Performer's rights...6.11-6.14

Publishing...6.33-6.39

Repositories...see Digital
Repositories

Reproduction right...6.79

"safe harbour provisions"...6.83-
6.86

Third party content...6.45-6.92

**Employment Agreement...5.12, 5.39-
5.49****End user agreement...See Repository
Distribution (End User) Agreement
e-Research...1.20-1.21****Free and Open Source****Software...see Open Source; Software****Funding agreement...5.14-5.38****Government material...2.35, 2.45-
2.49, 2.99, 2.111, 5.30, 5.38,****Grid computing...1.20-1.21****Intellectual Property**

AUSFTA...2.31-2.32, 2.40, 2.57,
2.80-2.84, 2.89-2.90, 2.109-2.110,
2.112-2.113, 2.116, 2.118, 2.138-
2.139, 3.07, 3.10, 3.12, 3.21, 6.12-
6.14, 6.83

Australian Law Reform

Commission...3.26, 3.67, 5.32,
5.34

Copyright...see Copyright

Patents...1.05, 2.04, 4.28-4.29,
4.31, 5.33, 5.40

University policies...6.09-6.10,
6.29-6.107

Joint Information Systems**Committee (JISC)**

RoMEO...1.04, Appendix 2

(Chapter 1), 4.06, 5.116

SHERPA...1.04, Appendix 2

(Chapter 1), 4.06, 5.22, 5.104-
5.112, 5.116, 5.118

SURF partnership...1.04,
Appendix 2 (Chapter 1), 5.74,
5.112

Licences

Author Distribution

Agreement...5.127-5.129

Creative Commons...1.23, 1.24-
1.26, 1.31, 3.70, 4.38-4.39, 4.41,
5.52, 5.77, 5.80, 5.82, 5.87, 5.100,
5.119, 5.121, 5.128, 6.99-6.101,
6.106

- Educational statutory licence...5.12, 5.130-5.133
- GNU Licences...4.38-4.39, 4.41
- Open content...see Open Content Licensing
- Repository deposit licence...5.113-5.122, 6.98
- Repository distribution licence...5.123-5.126
- Science Commons...1.27-1.28, 5.76-5.83, 5.100-5.102, 5.112
- Statutory licensing...2.99-2.103
- Third party licence...6.102
- Mashups**...1.14
- Moral rights**...2.129-2.139, 4.44-4.45, 6.15-6.17
- Open Access**
 - A2K Treaty...4.26-4.31
 - AEShareNet...see AEShareNet
 - Archiving...1.04, Appendix 2 (Chapter 1), 2.62, 2.69, 2.82, 2.86, 2.111, 2.115, 3.25, 4.05-4.06, 4.09, 4.13, 4.14-4.15, 4.31-4.33, 4.39, 4.46, 5.02-5.133, 6.11, 6.26-6.29, 6.42
 - Berlin Declaration...4.08, 4.12-4.14, 4.43, 5.01, 5.25
 - Bermuda Principles...1.19, 5.01
 - Bethesda Statement...4.10-4.11, 4.43, 5.01
 - Budapest Open Access Initiative...5.01, 4.09
 - Creative Commons...see Creative Commons
 - Declaration on the Right to Development...4.24
 - Developing countries...4.24-4.25
 - Employment agreements...5.12, 5.39-5.49
 - Free Software Foundation...4.41
 - Free and Open Source Software...see Open Source; Software
 - Funding institutions/universities...5.01-5.133
 - German Open Access Guidelines...5.25-5.27
 - Human rights...4.19-4.23
 - JISC...see Joint Information Systems Committee
 - Journals...1.31, 4.01, 4.05-4.09, 4.31-4.32, 4.49, 5.02-5.04, 5.14-5.29, 5.42, 5.54, 5.59, 5.67, 5.76-5.98, 5.105, 5.108, 5.112, 5.128, 5.132
 - Knowledge landscape...1.02-1.05, 1.08, 1.29-1.30, 4.01-4.03
 - OAK List...5.112
 - OECD Declaration on Access to Research Data from Public Funding...4.15
 - Open Content Licensing...see Open Content Licensing
 - Open Source Software...see Open Source; Software
 - Proposed Paris Accord...4.32
 - RCUK Position Statement on Access to Research Outputs...5.20-5.21
 - RCUK 2006 Position Statement...5.21-5.24
 - Repositories...see Repositories
 - Research institutions...4.07, 5.01-5.133
 - Science Commons...1.27-1.28, 5.76-5.83, 5.100-5.102, 5.112
 - Self-archiving...4.05-4.07, 5.02, 5.07, 5.16, 5.28-5.29, 5.48, 5.52, 5.61, 5.67, 5.71-5.72, 5.107
 - Universities...see Open Access; Funding institutions/universities
 - WSIS Declaration of Principles – Building the Information Society: A Global Challenge in the New Millennium...4.33-4.34
 - WSIS Tunis Agenda for the Information Society...4.34
- Open content licensing**
 - AEShareNet...1.23, 4.38, 6.99
 - Copyright...4.41-4.42
 - Creative Commons...4.38-4.39
 - GNU Licences...4.38-4.39, 4.41
 - Moral rights...4.44-4.45
 - Types of...4.38
- Open source**
 - MySQL model...4.47
 - Red Hat model...4.47
 - Software...1.15-1.17, 4.32-4.33, 4.39, 4.46-4.49, 5.03-5.04

Organisation for Economic Cooperation and Development (OECD)...1.04, 4.15, 6.63

Paris Accord...4.32

Performers' rights...2.125-2.128, 6.11-6.14

Podcasts...4.04

Publishing

Juliet...5.22

OAK List...5.112

Publishing Agreements...5.50-5.112

RoMEO...1.04, Appendix 2 (Chapter 1), 4.06, 5.116

SHERPA...1.04, Appendix 2 (Chapter 1), 4.06, 5.22, 5.104-5.112, 5.116, 5.118

Publishing Agreements

Author-publisher

agreement...5.50-5.112

Indiana Law Review's Copyright and Publishing Agreement...5.92

Lucie Guibault Licence...5.89-5.91

Mark Lemley's Publication

Agreement...5.85-5.86

Michigan State Law Review

Publication Agreement...5.87-5.88

Science Commons Author

Addenda...5.100-5.102

Science Commons Open Access

Model...5.76-5.83

SCRIPT-ed...5.84

SPARC Addendum...5.96-5.98

Remix...see Mashup

Repositories

Digital Repositories...see Digital Repositories

DSpace...5.103, 5.118-5.121

e-Prints...1.21, 4.06, 5.03-5.04, 5.22, 5.39, 5.116, 5.118-5.120

Repository Deposit

Licence...5.113-5.122, 6.98

Repository Distribution (End User)

Agreement...5.123-5.126

Repository Deposit Licence...5.113-5.122, 6.98

Repository Distribution (End User)

Agreement.....5.123-5.126

Research

e-Research...see e-Research

Institution policies...4.15, 5.01-5.133

Publicly funded research...4.31,

Research Council of the United Kingdom...5.20-5.24

Universities...4.07, 5.01-5.133

Rights

Copyright...see Copyright

Human rights...see Open Access;

Human Rights

Safe harbour provisions...2.89-2.90, 6.83-6.86

Science Commons...1.27-1.28, 5.76-5.83, 5.100-5.102, 5.112

Self-archiving...4.05-4.07, 5.02, 5.07, 5.16, 5.28-5.29, 5.48, 5.52, 5.61, 5.67, 5.71-5.72, 5.107

Semantic Web...1.12-1.14, 1.28,

SHERPA Project...1.04, Appendix 2 (Chapter 1), 4.06, 5.22, 5.104-5.112, 5.116, 5.118

Software

Free Software Foundation...4.41

Open source software...see Open Source; Software

Technological Protection

Measures...See Technological Protection Measures

SURF...1.04, Appendix 2 (Chapter 1), 5.74, 5.112

Technological Protection

Measures...2.108-2.116, 3.12, 4.29

Trade Related Aspects of Intellectual

Property Rights (TRIPS)...2.04, 3.08-3.10, 3.58

Universities

Copyright...6.04-6.17, 6.45-6.90

Electronic Theses and

Dissertations...see Electronic

Theses and Dissertations

IP Policies...4.07, 5.39-5.49

ISP safe harbour provisions...6.83-6.86

Vodcasts...4.04

Web 2.0...1.14

Wikipedia...1.11, 1.14, 4.06, 4.37, 4.39

**World Intellectual Property
Organisation (WIPO)**...2.08-2.09,
2.138-2.139, 3.08-3.11, 4.02-4.03,
4.27, 6.12
**World Summit on the Information
Society (WSIS)**...4.33-4.34, Appendix
1 (Chapter 4)
**World Trade Organisation
(WTO)**...3.08-3.11
Zwolle Project...5.06, 5.10, 5.41, 5.54



The OAK Law Project aims to facilitate seamless access to knowledge and improve social, economic and cultural outcomes. This first report provides a concise overview of relevant aspects of copyright law, the concept of open access to knowledge, and open content models of copyright licensing. It maps out an action plan to enhance the management of copyright interests in research and academic outputs. The report encourages Australian research and funding institutions to consider their commitment to open access and articulate this in clear policies and copyright management frameworks.

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