

INTERNATIONAL PERSPECTIVES

Copyright and Contracts: the Use of Electronic Resources Provided by University Libraries

Abstract: Universities enter into contracts with publishers or providers of aggregated resources on behalf of university libraries to provide staff and students with access to material in electronic format for educational and research purposes. Following a brief review of twelve database provider contracts, our research demonstrates that Australian academics are potentially breaching the contractual terms and conditions of electronic resources when accessing, downloading and printing articles and other materials. They are covered for research purposes, but not for educational purposes.

Keywords: copyright; online services; information resources; University libraries; Australia

INTRODUCTION

With the growth of digital resources such as the internet, protection of copyright material is an even more crucial part of a number of important activities and industries. In the education sector, universities (and university libraries in particular) are providing staff and students with resources via the internet for educational and research purposes. Digital technologies create new revenue streams for copyright owners by allowing protected material to be sold, licensed and distributed via new mediums.¹ However, a change in the way information is being accessed may be leading to changes in the balance between the rights of copyright owners and those of users.²

Generally, in Australia, access to and reproduction of, copyright material is governed by the *Copyright Act 1968* (Cth) (the Copyright Act). Under copyright law, copyright owners of literary, dramatic or musical works are provided with exclusive rights to reproduce the work in material form, publish the work, perform the work in public, communicate the work to the public, make an adaptation of the work and, for computer programs or sound recordings, commercially rent the computer



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program or sound recording.³ However, there are also provisions within the Copyright Act that allow users of copyright material to reproduce and communicate copyright works without infringing the rights of copyright owners. The most applicable provisions for individual users and educational institutions are the fair dealing exceptions and the educational statutory licences, respectively.

Access to and use of electronic resources is also dealt with under contract law. In the higher education sector, universities enter into contracts with publishers or providers of aggregated resources on behalf of university libraries to provide staff and students with access to material such as academic journals, books, legal cases and opinions, research papers and theses in electronic format. These contracts can override the operation of the Copyright Act in respect of the use of electronic resources, particularly in the area of fair dealing.

This paper will not be presenting a position on the argument about whether it is right or wrong that contracts exclude or modify exceptions within the Act. Rather, the purpose is to examine whether university staff, could be potentially breaching the contractual terms

and conditions of electronic resources when accessing, downloading and printing articles⁴ and other materials, for educational and research purposes.

Generally, to protect themselves from copyright breaches, Australian university academics rely on the fair dealing exception of research and study or the educational statutory licences within the Act when using electronic resources such as aggregated journal/periodical repositories or publisher websites. Academics would usually access material in electronic form without giving any consideration to the terms and conditions governing the provision of each electronic resource.

This paper examines the educational statutory licences and, in particular, the provisions related to electronic versions of copyright materials and fair dealing exceptions for the purpose of study and research. The paper then appraises several contracts for electronic resources provided to staff and students of RMIT University to ascertain if there is a difference between what is allowed under the Copyright Act compared with a contract for the provision of electronic resources. Based on the review of terms and conditions provided, the paper determines whether contract clauses allow the fair dealing exceptions and educational statutory licences to be relied on for teaching and research activities.

RIGHTS OF ACADEMICS TO COPY OR COMMUNICATE WORKS

There are two sections in the Copyright Act under which works can be reproduced and/or communicated in the university environment without the prior permission of the copyright owner. The first is the educational statutory licensing scheme for universities (discussed below in section a) and the second is fair dealing (discussed in section b).

a. Educational Provisions

Educational institutions such as universities are provided with educational statutory licensing scheme provisions (Part VA and VB) within the Copyright Act. These provisions allow universities to “provide access to and use of copyright materials to their staff and students at a reasonable cost”,⁵ and enable copyright holders to receive remuneration for use of their copyright works via a collecting society.⁶

Part VB allows multiple copies to be made by or on behalf of, an educational institution for educational purposes⁷, provided that the institution has a current remuneration notice in force with a declared collecting agency such as the Copyright Agency Limited (CAL).⁸ Similarly, Part VA allows educational institutions to copy from radio and television for educational purposes as long as a remuneration notice is in place with a declared collecting agency.⁹ ‘Educational purpose’ is defined under the Act as occurring when “[a copy] is made or retained for use,

or is used, in connection with a particular course of instruction provided by the institution or [a copy] made or retained for inclusion, or is included, in the collection of the institution’s library”.¹⁰

In 2000, to update the Act to accommodate electronic material, Division 2A was introduced into Part VB of the Act.¹¹ Sections 135ZMA to 135ZME relate to the reproduction and/or communication of works in *electronic* form by educational institutions. These sections of the Act can be relied on if the reproduction or communication of a work, including an article from a periodical publication, is made from an electronic form of the work.¹²

Multiple reproductions and communications can be made from an electronic form of the work without infringing copyright if the amount copied or communicated is an insubstantial part of the work and the copying “or communication is carried out on the premises of an educational institution for the purpose of a course of study provided by” the institution.¹³ Under s.135ZMB, an insubstantial part is no more than two pages or one per cent of the total number of pages of the work.

Section 135ZMC allows multiple copies and/or communication of periodical articles in electronic form of one article in a periodical publication.¹⁴ Similar to s.135ZMB, the copying or communication must be undertaken by an educational institution, or on behalf of one, solely for the educational purposes of the educational institution, and a remuneration notice must be in force between a relevant collecting agency and the educational institution.¹⁵

Multiple reproductions and communications of whole or a part of a work (not including periodical articles) is allowed under s.135ZMD if the copying or communication is undertaken by an educational institution, or on behalf of one, solely for the educational purposes of the educational institution, and a remuneration notice must be in force between a relevant collecting agency and the educational institution.¹⁶ However, s.135ZMD states that if the work has been published separately, only a reasonable portion of work can be copied or communicated. Under s.10(2A) of the Act, a ‘reasonable portion’ for electronic forms of works means that no more than 10 per cent of the number of words in the work can be copied or, if the work being copied is divided into chapters, the number of words copied may exceed 10 per cent of the total number of words, provided only one chapter is copied.¹⁷

Section 135ZMDA covers the reproduction and communication by educational institutions of works within electronic anthologies.¹⁸ One copy or communication of all or part of a work in an electronic anthology is allowed, if the page content within the anthology cannot be changed and the work comprises 15 or fewer pages. The copying or communication must be undertaken by an educational institution or on behalf of one, solely for the educational purposes of the educational institution

and a remuneration notice must be in force between a relevant collecting agency and educational institution.¹⁹

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

b. Fair Dealing Exceptions

Individuals can use the fair dealing exceptions within the Copyright Act as a defence against a claim of copyright infringement. Sections 40 to 43²⁰ of the Act state that the use must be for the purpose of research or study, criticism or review, parody or satire, reporting news, judicial proceedings or professional advice by a lawyer, patent attorney or trademark attorney.²¹ For universities, the research and study exception is the most relevant. Unlike the phrase 'educational purpose' discussed earlier, neither research nor study is defined within the Act. In the 1990 case of *De Garis v Neville Jeffress Pidler Pty Ltd*,²² Beaumont J referred to the *Macquarie Dictionary* for the meaning of research and study. He found that research was defined as a diligent and systematic enquiry or investigation into a subject in order to discover facts or principles²³, and that study was defined as including "the application of the mind [in] the acquisition of knowledge, as by reading, investigation or reflection".²⁴

Generally, an academic writing a scholarly work such as a journal article or conference paper is considered to be undertaking research and most would consider the activity falling under the fair dealing exception of research and study. However, Ricketson and Creswell²⁵ would argue that a researcher can only rely on the fair dealing provisions while actually conducting a research enquiry or investigating a topic area and cannot do so when they are engaged in writing and publishing their research findings. In their opinion, only the former and not the latter activity falls within the scope of the dictionary meaning of research. Some Australian universities have taken the same approach as Ricketson and Creswell in defining research. For example, in the section on copyright and research activity in the Monash University copyright guide, it states that "a researcher can rely on ... 'fair dealing' for the use of third party content during the actual process of conducting research".²⁶ However "any publication or broad distribution of third party content embedded within research output may not be considered as 'fair dealing'".²⁷

Based on the definition of research used by Beaumont J in the *De Garis v Neville Jeffress Pidler Pty Ltd*²⁸ case and the interpretation of research by Ricketson and Creswell, research purpose relates to the activity of conducting a research enquiry or investigating a topic area, but not the dissemination of the research findings.

The *Copyright Amendment (Digital Agenda) Act 2000* extended the fair dealing exceptions to works in electronic form and clarified what constitutes a reasonable portion in relation to the amount of a work that can be copied or communicated for the purpose of research or study.²⁹ Section 40(2) provides guidance as to what matters should be taken into consideration in determining whether a use of a work for research or study is a fair dealing. These matters include the purpose and the character of the dealing, the nature of the work, the possibilities of obtaining the work within a reasonable time at a commercial price, the effect of the use on the potential market or value of the work and the amount and substantiality of the part copied in relation to the whole work.³⁰ Australian courts will examine "how the reproduction was used, the type of work involved, whether the work is available at a reasonable price, whether the economic interests of the copyright holder have been damaged and the amount of work that was reproduced."³¹

In circumstances where the work being reproduced is an article in a periodical publication, s.40(3) of the Act states that the reproduction of a whole article is taken to be a fair dealing if the article is reproduced for the purpose of research or study.³² For the purpose of s.40(3), an article must be a literary work or a dramatic or musical work and it must be a work in its own right as well as part of a larger compilation or collection (for example, as part of a periodical).³³ However, if the article is part of a database, the fair dealing exemption does not apply. It is necessary, then, to consider which electronic resources are considered databases. The issue of databases is discussed below in section d.

c. Other Jurisdictions

As US and UK companies are major providers of educational resources, in Australia, particularly in electronic format, it is worthwhile examining whether academics have similar rights to copy works in these jurisdictions. United States copyright law contains a range of specific fair use exceptions, similar to those in the Australian Act. However, the US 'fair use' exception in s.107 of the Copyright Act is broader than 'fair dealing' under the Australian Copyright Act. Section 107 provides as follows:³⁴

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

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

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

While this definition covers the four fair dealing uses contained in the Australian Act, the inclusion of the words 'such as' means that the four fair uses are provided as examples and are not the only uses accepted. What constitutes 'fair use' is thus left to the courts to assess. The courts have accepted that activities such as home taping of videos, the photocopying of scientific articles, and reverse engineering of computer programs can be fair use.³⁵

Under the US Copyright Act there are specific provisions³⁶ provided to non-profit educational institutions, which allow for copying by libraries for archiving and preservation and for electronic copying for distance education programs. However, these sections are very narrow and restricted in application. As the US Copyright Act does not contain educational statutory exceptions or any sections explaining what is considered a reasonable portion of copying of a journal or anthology, the key defence to an allegation of copyright infringement under US law therefore, is fair use. Multiple copying for classroom use is specifically mentioned as an example of fair use, depending on the circumstances mentioned above.

The US Copyright Office publishes a set of educational fair use guidelines prepared by publishers and the academic community.³⁷ These guidelines deal with photocopying and apply *inter alia* to the reproduction of copyrighted works for teaching in educational institutions and by libraries for the purposes of research and study.³⁸ Unlike the Australian Copyright Act, the US Act does not define the meaning of 'educational purpose'. However, educational institutions and non-profit organisations define 'educational purposes' as including "non-commercial instruction or curriculum-based teaching by educators to students at non-profit educational institutions, planned non-commercial study or investigation directed towards making a contribution to a field of knowledge, or presentation of research findings at non-commercial peer conferences workshops or seminars".³⁹

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

The Guidelines state that it is reasonable for a teacher to copy a chapter from a book or an article from a

periodical, if it is fewer than 2500 words or 10 per cent of the work, whichever is the smaller amount. While teachers can photocopy articles to hand out in class, the guidelines make clear that such copying cannot be used as an attempt to replace the use of textbooks within the course.⁴⁰

Similar to Australia, the UK has educational provisions within the Copyright Designs and Patents Act 1988.⁴¹ However, ss 32 (1) and (2A) of the UK Copyright Act⁴² exclude the copying of works for instruction via a reprographic process such as photocopying. Multiple copying for educational purposes requires a licence. Under this licence, which is issued and administered by the Copyright Licensing Agency (CLA),⁴³ an academic can copy "in any work, 5 per cent or one chapter, whichever is greater; in the case of a periodical, one article from any one issue; and in the case of a short story or poem not exceeding 10 pages in length, the whole of the short story or poem".⁴⁴

The UK also has similar fair dealing provisions to Australia. Sections 29 to 30 of the Copyright Designs and Patents Act 1988 provides that fair dealing for the purposes of non-commercial research and private study and for criticism, review and news reporting, provided that it is accompanied by a sufficient acknowledgement. Legal advice is not included, nor is parody and satire.

d. Databases

1. What is a Database?

Online databases have changed the way that publishers provide materials to libraries and users, and the way that researchers, students and academics locate and access these materials. Online subscriptions now represent 60 percent of most university library collections⁴⁵ and many publishers are now providing the majority of their resources online. The fair dealing sections of the *Copyright Act 1968* (Cth) allow an individual to copy a reasonable portion⁴⁶ of a published literary work in electronic form *except if it is part of an electronic compilation such as a database*.⁴⁷ This exclusion implies that no copying of materials held in a database is allowed. However, as noted earlier, staff in educational institutions are able to reproduce or communicate a work within an electronic anthology if the work occupies 15 or less pages of the anthology, the reproduction or communication is made by or on behalf of the institution, a remuneration notice is in place with a relevant collecting agency such as the Copyright Agency Limited and the reproduction or communication is made solely for the educational purposes of the institution.⁴⁸ It should be noted that the Copyright Act does not define the terms 'electronic anthology', 'electronic compilation' or 'database'.

The Directive of the European Parliament and of the Council on the Legal Protection of Databases provides a useful guide to how to identify a database, as specified in s.40 of the Copyright Act. It also provides useful

background information as many of the electronic resources used in university libraries are provided under terms and conditions that are not governed by Australian law. It is necessary, then, to understand how other jurisdictions deal with database protection. The European Court of Justice concluded that under the definition of article 1 §2 of the Directive, a database is “any collection of works, data or other materials [that can be separated] from one another without the value of their contents being affected”.⁴⁹ The collection must also be arranged in a manner that allows for the retrieval of each individual work.

2. Can the Electronic Resources in University Libraries be classified as Databases?

In Australia, the classification of electronic resources as databases or not, is essential to the application of reproducing and communicating works in electronic form. Sections 10(2A) and 40(5) of the Australian Copyright Act allow for reasonable portions of published literary and dramatic works in electronic form to be reproduced as long as the works are not computer programs or an electronic compilation such as a database.

Based on the interpretation of the definition of a database under the European Union Directive on the Legal Protection of Databases by the European Court of Justice, academic articles can be classified as independent works as they are capable of being separated from a periodical or a collection and maintaining their informative content or value. Electronic resources such as a periodical/journal repository or a publisher’s website, are arranged systematically and the search functions provided, enable users to retrieve each item within the collection individually. However, it is not clear whether all works within each electronic resource would be classified as independent works.

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

Section 40 does allow an individual to copy a reasonable portion of a non-database electronic resource and ss 10(2A) to (2C) clarify what constitutes a ‘reasonable portion’ in the electronic environment.⁵⁰ As noted earlier, under s.10(2A), an individual can make a reproduction of a part of a published literary or dramatic work (other than a computer program or electronic compilation such as a database) that is in electronic form, if the number of words copied does not exceed 10 percent of the number of words in the work or, if the work is divided into chapters, the reproduction is of the whole or part of one chapter.⁵¹ Because the types of electronic resources provided by publishers differ, one has to clarify the nature of the resource before deciding whether the Copyright Act applies or not. This is clearly an

unsatisfactory situation for all parties, so the use of contracts to cover the terms of use for electronic resources could be the best solution

e. What is Allowed by the Copyright Act?

The two most relevant areas of the Copyright Act are the statutory educational licence and the fair dealing provision. The former indicates that university staff can reproduce or communicate multiple copies of works existing in electronic form without infringing copyright, as long as the amount copied or communicated is an insubstantial part of a work⁵² or a reasonable portion of a work,⁵³ or, if it is a periodical article, the whole article, and the copying or communication is carried out on the premises of the university for educational purposes such as teaching. The latter indicates that, if the staff member is undertaking research or study, then the individual can reproduce a reasonable portion⁵⁴ of works that exist in electronic form, but this does not include multiple copies.

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

If university staff are using material held within electronic resources provided by publishers, staff may need to refer to the terms and conditions of each resource to ensure that their use of the material is allowable and not a breach of the contract entered into by the university and the electronic resource provider. Staff should not rely on educational statutory licences for copying and communicating for educational purposes and the fair dealing exceptions for research. These contracts, and their impact on the Copyright Act, are examined further below.

CONTRACTS

This section examines the role of contracts relating to the provision of electronic resources and their impact on both the educational statutory licences and fair dealing.

a. 2001 Copyright and Contract Review

The creation of new digital technologies has resulted in the regulation of copyright through the use of contracts rather than through the Copyright Act.⁵⁵ The Act permits this as it does not necessarily overrule the common law. While common law can be replaced or extinguished by statute, this intent should normally be

stated in the relevant legislation. Only in s.47H does the Act⁵⁶ exclude the operation of contract law. Section 47H states that “an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of subsection 47B(3), or section 47C, 47D, 47E or 47F has no effect”.^{57,58}

It would appear that traditional contract law principles apply to all other sections of the Act.

In response to the development of electronic commerce and related concerns over whether this growing area was ‘facilitating the use of contracts to set terms and conditions for access to and use of the copyright material’,⁵⁹ the Copyright Law Review Committee (CLRC) undertook a detailed review of the relationship between contract and copyright exceptions in 2001 to determine whether contracts were modifying or excluding the exclusive rights of copyright owners.⁶⁰ To date, this 2001 review is the most comprehensive study undertaken in the area of copyright and contracts in Australia.⁶¹

The 2005 *Fair Use and Other Copyright Exceptions* issue paper⁶² noted that the use of contracts considered by the CLRC in the earlier 2001 review were ‘relevant to the issue of possible new exceptions to meet the concerns about maintaining reasonable public access to copyright material in electronic form’.⁶³

The issue of copyright and contracts has not resurfaced as a major issue for users, universities and the government. Since the 2001 Copyright Law Review Committee review on the relationship between contract and copyright exceptions,⁶⁴ however, the issue of “whether the fair [dealing] exceptions [and the educational statutory licences] survive contractual restrictions remains a point of contention”.⁶⁵

The UK has recently considered this question of contracts and copyright law.⁶⁶ The British Library in particular has argued strongly against contract law being used to override copyright law, stating in a press release that ‘contract must not undermine copyright and without addressing this issue many existing and new exceptions will simply be over-ridden by contract law’.⁶⁷ To overcome this issue, the British Library (using the EU Database Directive and the Irish, Belgian and Portuguese Copyright Act as references) recommended the following draft legislation.⁶⁸

Permitted Acts in Relation to Contracts

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

The British Library also undertook an analysis of 100 randomly selected contracts offered to it to determine the impact of the terms on copyright law. It examined seven specific areas set out below in Table 1.⁶⁹

Two of the areas of analysis are particularly relevant to this paper: fair dealing and exceptions. With Fair Dealing, just under half the contracts studied removed the right, in different ways, to rely on the defence of fair dealing under the *Copyright Designs and Patents Act 1988*. Fifteen did not make any reference to a right to print, and a third did not allow or were silent on downloading or copying material.⁷⁰

An examination of the exceptions from UK copyright law or copyright law in other jurisdictions, found that twenty-five contracts referred to copyright law, thirteen only to US law, eight to US and UK law, and four to both the US and applicable international law.

The British Library made no specific comments about its analysis and indicated that its purpose was merely illustrative of the type of contracts available.

b. Specific Terms and Conditions

This section examines some examples of the types of terms and conditions that Australian university libraries accept when providing staff and students access to electronic resources. It was beyond the scope of this paper to examine all terms and conditions of all the databases subscribed to by a university. In most cases, terms and conditions are not publicly available and database providers rely on universities to ensure that the terms are not breached by users. The authors asked the RMIT University Librarian for a selection of database provider contracts and received twelve examples.

The review of the twelve database provider contracts and discussion below, focuses on two areas that link back to the earlier examination of the rights of academics:

1. Under the contracts, are academics still able to rely on the defence of fair dealing in their research activities?, and
2. Are they able to undertake multiple copying for teaching purposes?

Table 2 provides a tabulated summary of the results from the review of the twelve database provider contracts.

DISCUSSION OF TERMS

This brief overview of twelve electronic database provider contracts reveals that the governing laws vary, with only three being Australia, five US law, two UK law, and two not stating the applicable law. Only one specifically refers to the US fair use exception. The majority allowed the use of the databases for personal, educational and research purposes. This means that there is no need for academics to argue fair dealing or fair use in respect of browsing, copying or reproducing material from the databases for research or personal internal use. While none of the contracts define what was meant by research, if Australian academics rely on the dictionary definition of research as a systematic enquiry or investigation into a

<i>Table 1 – The British Library’s Review of Contracts</i>						
Activity	Printing	Downloading and Electronic copying	Fair Dealing	Visually Impaired	Inter Library Loans	Exceptions
Does the licence permit archiving?	Is printing of the content allowed and if so how much?	Does the licence allow permanent downloading by the end user	Does the licence allow fair dealing as allowed for under the copyright Act?	Does the licence contain any provisions relating to the visually impaired	Can paper or electronic copies of resources be sent to other libraries?	Are any exceptions in UK or any other jurisdiction referred to?
Yes = 23 No = 19 Silent = 589	Yes = 81 No = 1 Silent = 15	Yes = 65 No = 12 Unclear = 2 Silent = 21	Yes = 53 No = 47	Yes = 2 Silent = 98	Yes = 14 No = 4 Silent = 82	Yes = 25 No = 75

subject in order to discover facts or principles, then they would not breach the terms and conditions of the electronic resources.

Less than half of the agreements specifically allow for multiple copying for educational purposes, or allow for electronic linking for e-reserves. This prohibition is the case with one agreement governed by Australian law, four governed by US law, and two agreements not stating the governing law (but is presumed to be US law). In Australia, this means that the educational statutory licence provisions in the Copyright Act cannot be relied upon. The US law does not have a similar statutory licence, as multiple copying is considered fair use. Again, the contract would apply to override fair use.

Our final analysis is that, while the categories of who are authorised users were very similar for all twelve agreements, the permitted uses differed greatly and it was necessary to read each contract to determine what was permitted. It is not safe to assume that all contracts have the same terms and conditions.

CONCLUSION

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

The review of the contracts for the provision of electronic resources revealed that less than half allowed for multiple copying of resources for educational purposes. The right to make multiple copies is provided either because the contract specifically allows it, or the contract states that the Australian Copyright Act or fair use under

US law applies. As the majority of the contracts reviewed did not allow multiple copying, potentially Australian academics are breaching the terms and conditions of the electronic resources being accessed for educational purposes.

If Australian academics are using material downloaded or printed from electronic resources for inclusion in research publications, then potentially they could be breaching the terms and conditions, as it could be argued that this does not fall within the dictionary meaning of research.

As it is not straightforward to find out the rights allowed under each contract, a larger review of contracts is needed to provide a clearer picture of whether electronic resources contracts do substantially exclude or modify exceptions available under the Act. What is clear is how difficult it is for universities to be aware of what each contract allows and how important it is to determine which law applies to the contract.

To conclude that Australian academics are breaching the terms and conditions of electronic resource, further interviews or surveys would need to be undertaken to determine how academics are actually using material from electronic resources. However, university staff and students need to be aware that terms and conditions for the use of electronic resources can differ from their rights as a user of copyright material under the Act.

To clarify the situation, terms and conditions need to define phrases such as ‘internal research’, ‘substantial portion’ and ‘unrelated third party’. There also needs to be increased awareness of the impact of contracts on both educational statutory licences and the fair dealing exceptions to ensure that universities and university staff (who are creators and users of copyright material) realise the potential risk of a loss of access to electronic resources or legal action being taken by electronic resource owners against the university and individuals for breach of contract.

Table 2 – Review of the Contracts and Terms of Use of the Electronic Database Providers and Publishers

Provider	Provider Type	Authorised Users	Permitted Uses	Activity				Governing Jurisdiction
				Printing	Downloading	Fair Dealing under the Copyright Act 1968 (Cth)	Multiple reproduction or communication under Part VB	
A	US Aggregated Electronic Resource Provider of articles, reports and theses from multiple disciplines and subject areas.	<ul style="list-style-type: none"> • Enrolled Students • Staff • Visiting Scholars • Walk-in users 	<ul style="list-style-type: none"> • Educational • Scientific • Research • Copying or distribution must be for internal or personal use as allowed under fair use or fair dealing 	√ (reasonable portion)	√ (reasonable portion)	×	×	US UK
B	Publisher of Australian law material including cases, commentaries, journal articles, and legislation.	<ul style="list-style-type: none"> • Employees • Students • Support Personnel of the provider or institution 	<ul style="list-style-type: none"> Internal purpose of: • Research or Study • Providing academic services to students 	√ (reasonable portion of a single copy)	√ (reasonable portion of a single copy)	√	√	Australia – NSW
C	Publisher of Australian law material including cases, commentaries, journal articles, and legislation.	<ul style="list-style-type: none"> • Individuals with a user name and password provided by the institution 	<ul style="list-style-type: none"> • Research • Study • Supplying educational services 	√ (insubstantial amount)	√ (insubstantial amount)	√	√	Australia – NSW

Continued

<i>Table 2 – Continued</i>								
Provider	Provider Type	Authorised Users	Permitted Uses	Activity				Governing Jurisdiction
				Printing	Downloading	Fair Dealing under the <i>Copyright Act 1968</i> (Cth)	Multiple reproduction or communication under Part VB	
D	Aggregated Electronic Resource Provider of articles, reports and theses from multiple disciplines and subject areas.	<ul style="list-style-type: none"> • Employees • Students • Registered patron • Walk-in Patrons • Other people affiliated with the institution • Excludes alumni 	<ul style="list-style-type: none"> • Internal use • Personal use • Non-commercial use • Uses allowed under the fair use doctrine 	√	√	×	×	US
E	Publisher of books and journals in multiple disciplines and subject areas.	<ul style="list-style-type: none"> • Teaching and research staff • Students • Members of the public registered to use the library • Other individuals authorised to use the library • Excludes non-scientific staff and students 	<ul style="list-style-type: none"> • Research • Teaching • Private Study 	√ (1 chapter or 1 article)	√ (1 chapter or 1 article)	×	×	England
F	Publisher of books and journals in multiple disciplines and subject areas.	<ul style="list-style-type: none"> • Faculty • Staff • Researchers • Independent contractors • Walk-in users 	Not Stated	√ (reasonable portion)	√ (reasonable portion)		×	No governing law stated

Table 2 – Continued

Provider	Provider Type	Authorised Users	Permitted Uses	Activity				Governing Jurisdiction
				Printing	Downloading	Fair Dealing under the Copyright Act 1968 (Cth)	Multiple reproduction or communication under Part VB	
G	Publisher of books and journals in the field of chemistry and related science fields.	<ul style="list-style-type: none"> • Employees • Contractors • Teaching staff • Students 	<ul style="list-style-type: none"> • Personal scholarly use • Personal research use • Personal educational use 	√ (individual items such as articles or book chapters)	√ (individual items such as articles or book chapters)	×	×	US – District of Columbia
H	Aggregated Electronic Resource Provider of images for the arts, architecture, humanities, and sciences disciplines.	<ul style="list-style-type: none"> • Staff • Students • Visiting researchers • Visiting lecturers • Walk-in users • Alumni 	<ul style="list-style-type: none"> • Non commercial educational use • Non commercial scholarly use 	√	√	×	×	US – State of New York
I	Publisher of US law material including cases, commentaries, journal articles, and legislation.	<ul style="list-style-type: none"> • Students • Faculty • Walk-in users 	<ul style="list-style-type: none"> • Non commercial educational use • Non commercial research use 	√ (single copies of excerpts)	√ (single copies of excerpts)	√	×	Australia - Victoria
J	Aggregated Electronic Resource Provider of reviews, abstracts and bibliographic information for literature in the field of mathematical science.	<ul style="list-style-type: none"> • Employees • Faculty • Staff • Students • Authorised walk-in users 	<ul style="list-style-type: none"> • Personal use • Personal scholarly research • No commercial purposes 	√	√	×	×	US – State of Rhode Island

Continued

Provider	Provider Type	Authorised Users	Permitted Uses	Activity				Governing Jurisdiction
				Printing	Downloading	Fair Dealing under the Copyright Act 1968 (Cth)	Multiple reproduction or communication under Part VB	
K	Publisher of books, conference proceedings, and journals in the field of computing and related information technology fields.	<ul style="list-style-type: none"> • Students • Faculty • Registered users • Employees • Authorised walk-in users 	<ul style="list-style-type: none"> • Personal Use • Sharing material among authorised users • Teaching • Electronic reserve • Use of material in course packs (if no fee is charged) 	√	√			No governing law stated
L	Publisher of books and journals in multiple disciplines and subject areas.	<ul style="list-style-type: none"> • Faculty members • Students • Researchers • Staff members • Librarians • Employees • Contactors • Walk-in users 	<ul style="list-style-type: none"> • Personal Use • Scholarly, educational or scientific research • Internal business use • Use of material (with appropriate acknowledgement) in scientific, scholarly or educational works • Share material with a colleague for scholarly, educational or scientific research or professional use 	√ (single copies of individual articles or items)	√ (single copies of individual articles or items)	×	×	England Wales

Footnotes

- ¹ Attorney General Department. (2005) *Fair use and other copyright exceptions: An examination of fair use, fair dealing and other exceptions in the digital age*. [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~FairUselssuesPaper050505.pdf/\\$file/FairUselssuesPaper050505.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~FairUselssuesPaper050505.pdf/$file/FairUselssuesPaper050505.pdf) at 7 April 2008.
- ² Copyright Law Review Committee. (2002) *Contract and copyright*. [2.02] <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWPDD516F2DE964EF5ACA25735A001E5106>; at 5 February 2010; See Selvadural, Niloufer and Islam, Md Rizwanul. (2010) Reproduction and communication of internet material by educational institutions: The need for clarity and certainty. *Australian Intellectual Property Journal* 21(1), 31–41.
- ³ Attorney General Department. (2005) *Copyright law in Australia: A short guide*. [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~Copyright+Law+in+Australia+-+A+Short+Guide+-+June+2005.pdf/\\$file/Copyright+Law+in+Australia+-+A+Short+Guide+-+June+2005.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~Copyright+Law+in+Australia+-+A+Short+Guide+-+June+2005.pdf/$file/Copyright+Law+in+Australia+-+A+Short+Guide+-+June+2005.pdf) at 22 April 2010.
- ⁴ Under s.115 of the Act an article includes a reproduction or copy of a work or other subject matter being a reproduction or copy in electronic form.
- ⁵ Wiseman, Leanne. (2001) *Digital copying in the academy: the new Australian educational copying licence*. 8 http://www.ukcle.ac.uk/copyright/c_in_e01.html at 4 February 2008.
- ⁶ Ibid.
- ⁷ Educational purpose is defined under s 10(1A) of the *Copyright Act 1968* (Cth)
- ⁸ Shelly, Marita. (2008) Commercial activities and copyright in Australian universities. *Education and the Law* 20(3), 175–191; Australian Vice-Chancellors' Committee (AVCC) and the Australian Committee of Directors and Principles Limited. (1990) *Copyright: A guide for higher education institutions to the Copyright Act 1968, as amended including the 1989 amendments*. Sydney, AVCC.
- ⁹ Ibid.
- ¹⁰ *Copyright Act 1968* (Cth), s.10(1A).
- ¹¹ *Copyright Amendment (Digital Agenda) Act 2000* (Cth).
- ¹² *Copyright Act 1968* (Cth), s.135ZMA.
- ¹³ *Copyright Act 1968* (Cth), s.135ZMB.
- ¹⁴ Two or more articles in the periodical can be copied if the articles relate to the same subject matter.
- ¹⁵ *Copyright Act 1968* (Cth), s.135ZMC.
- ¹⁶ *Copyright Act 1968* (Cth), s.135ZMC.
- ¹⁷ *Copyright Act 1968* (Cth), s.10(2A).
- ¹⁸ This section does not apply to articles within periodical publications.
- ¹⁹ *Copyright Act 1968* (Cth), s.135ZMDA.
- ²⁰ Refer to ss 103A – 103C for fair dealing exceptions related to subject matters other than works, for example, audio-visual items.
- ²¹ *Copyright Act 1968* (Cth), ss 40–43.
- ²² 95 ALR 625.
- ²³ *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625, Beaumont J, 629.
- ²⁴ Ibid, Beaumont J, 630.
- ²⁵ See Ricketson, Staniforth and Creswell, Christopher. (2002) *The law of intellectual property: Copyright, designs & confidential information*. 2nd edition revised. Sydney, Law Book Co.
- ²⁶ Monash University. (n.d.) *Copyright and research activity*. <http://www.copyright.monash.edu.au/research/#thirdparty> at 12 May 2011.
- ²⁷ Ibid.
- ²⁸ 95 ALR 625.
- ²⁹ Attorney General. (2000) *Copyright reform: Copyright amendment (digital agenda) act*. [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~xxcopyfactsheet.pdf/\\$file/xxcopyfactsheet.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~xxcopyfactsheet.pdf/$file/xxcopyfactsheet.pdf); at 31 March 2010.
- ³⁰ *Copyright Act 1968* (Cth), s 40(2).
- ³¹ Shelly, Marita. (2008) Commercial activities and copyright in Australian universities. *Education and the Law* 20(3), 175–191, 183 para-phrasing Ricketson, Staniforth and Creswell, Christopher. (2002) *The law of intellectual property: Copyright, designs & confidential information*. 2nd edition revised. Sydney, Law Book Co.
- ³² *Copyright Act 1968* (Cth), s.40(3).
- ³³ Ricketson and Creswell. above n 25, [11.41].
- ³⁴ 17 US Code §107
- ³⁵ See *Sony Corporation of America, et al v Universal City Studios, Inc, et al* (1984) 464 US 417, 78 LE2d 574, 104 S Ct 774; *American Geophysical Union v Texaco Inc* 802 F Supp 1 (SDNY 1992); 60 F.3d 913 (2nd Cir. 1994); *Sega Enterprises Ltd. v Accolade Inc.* 977 F.2d 1510 (9th Cir. 1992); *Sony Computer Entertainment, Inc v Connectix Corporation* 203 F.3d 596 (9th Cir. 2000).
- ³⁶ 17 U.S.C. §§ 108 and 110 (1) and (2).
- ³⁷ United States Copyright Office. *Circular 21: Reproduction of copyrighted works by educators and librarians*. <http://www.copyright.gov/circls/circ21.pdf> at 30 October 2011.

³⁸ Ibid, 1.

³⁹ Stanford University Libraries. (2010) *Copyright and fair use overview*. http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter7/index.html at 12 May 2011; Public Counsel Law Centre. (2010) *Copyright and fair use basics for nonprofits*. <http://www.publiccounsel.org/tools/publications/files/fairuse.pdf> at 12 May 2011

⁴⁰ United States Copyright Office. above n. 37, 6.

⁴¹ See Copyright Designs & Patents Act 1988, ss.32 to 36A.

⁴² Copyright Designs & Patents Act 1988,

⁴³ Permitted Acts. (n.d.) *Copyright toolkit*. <http://copyrighttoolkit.com/permitted.html#photocla> at 19 June 2011.

⁴⁴ Ibid.

⁴⁵ Based on the RMIT University 2008 Library Annual Report <http://mams.rmit.edu.au/edszfd6su8gl.pdf> at 24 June 2011.

⁴⁶ For literary works in electronic form, a reasonable portion is 10 percent of the number of words in the work.

⁴⁷ *Copyright Act 1968* (Cth), s.40.

⁴⁸ *Copyright Act 1968* (Cth), s.135ZMDA.

⁴⁹ European Court of Justice 9 November 2004, Case C-444/02 (*Fixtures Marketing Ltd v Organismos Prognostikon Agonon Prodofairu (OPAP)*), ECR 2004, para 32.

⁵⁰ Melissa De Zwart, (2003) Seriously entertaining: The panel and the future of fair dealing. *Media & Arts Law Review* 8 (1), 1–17, 6.

⁵¹ *Copyright Act 1968* (Cth), s.10(2A).

⁵² No more than two pages or one per cent of the total number of the pages. If the work has no pages, then no more than one percent of the total number of words can be reproduced or communicated.

⁵³ If the work is has been published separately.

⁵⁴ One periodical article is considered a reasonable portion as is 10 percent of the total number of words in the work.

⁵⁵ Strategic Advisory Board for Intellectual Property Policy. (2010) *The relationship between copyright and contract*. <http://www.ipogov.uk/ipresearch-relation-201007.pdf> at 24 November 2011

⁵⁶ Copyright Law Review Committee. (2002) *Contract and copyright*. 3 <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWPDD516F2DE964EF5ACA25735A001E5106> at 5 February 2010.

⁵⁷ *Copyright Act 1968* (Cth), s.47H.

⁵⁸ Sections 47B to 47F relate to computer programs and include making a copy of a program for the purpose of studying the ideas and functions of the program, making a backup copy of a program or making a reproduction of a program to correct errors or for security testing.

⁵⁹ Shelly, Marita. (2008) Commercial activities and copyright in Australian universities. *Education and the Law* 20(3), 175–191, 183.

⁶⁰ Copyright Law Review Committee. above n.56, [6.01].

⁶¹ Strategic Advisory Board for Intellectual Property Policy. above n.55, 118.

⁶² Attorney General Department. above n.1, 8.

⁶³ Ricketson and Creswell. above n.25, [11.41].

⁶⁴ Copyright Law Review Committee. above n.56, [6.01].

⁶⁵ Strategic Advisory Board for Intellectual Property Policy. above n.55, 16.

⁶⁶ See Strategic Advisory Board for Intellectual Property Policy. above n.55.

⁶⁷ British Library. (2009) *Copyright for education and research: Golden opportunity or digital black hole?* <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=564> at 24 November 2011; See British Library. (2008) *Digital is not different say 93% of UK researchers*. <http://pressandpolicy.bl.uk/Press-Releases/Digital-is-not-different-say-93-of-UK-researchers-337.aspx> at 24 November 2011.

⁶⁸ British Library. (2009) *Copyright for education and research: Golden opportunity or digital black hole?* <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=564> at 24 November 2011.

⁶⁹ British Library. (n.d.) *Analysis of 100 contracts offered to the British library*. <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=691> at 6 February 2011.

⁷⁰ Strategic Advisory Board for Intellectual Property Policy. above n 55; See <http://www.bl.uk/ip/pdf/ipmatrix.pdf>

Biographies

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