

Appendix A: Intellectual property issues

Fiona Macmillan

Copyright Director

Asia Pacific Intellectual Property Law Institute

Murdoch University

A.1 The purpose and scope of copyright

- 1.1. In order to understand the operation of copyright law it is necessary to have some appreciation of the rationales which govern its operation. Two distinct rationales are usually posited and, although neither fully explain the content and operation of copyright law, there is value in attempting to view copyright law from the perspectives which they confer.
- 1.2. One rationale, usually known as the public benefit or utilitarian rationale, has it that copyright is granted in order to encourage innovation in cultural, artistic and scholarly endeavour because such innovation is essential to the process of social and economic development which, in turn, benefits society as a whole.
- 1.3. The other rationale, usually known as the natural rights rationale, asserts that copyright is based upon giving creators of cultural, artistic and scholarly works their just and natural reward for the production of such works.
- 1.4. Current copyright law is far more dependent on the utilitarian rationale than upon the natural rights rationale.¹ In the United States, which is a highly influential jurisdiction in terms of the normative development of this area of law, the utilitarian rationale is exclusively prescribed as the basis of copyright law.
- 1.5. Nevertheless, while theoretically distinct, the two rationales have a tendency to merge. This tendency is based on the notion that what one

¹ See Macmillan, "Legal Policy and the Limits of Literary Copyright" in Parrinder & Cherniak (eds), *Textual Monopolies: Literary Copyright and the Public Domain* (1997).

is given by law (under the public benefit rationale) one must have deserved to have been given (under the natural rights rationale).² This gives rise to the misconception that the purpose of copyright law is to reward creative endeavour. Rather the purpose of copyright law should be regarded as the encouragement of creative endeavour.

- 1.6 Copyright law's method of encouragement is to give an economic right to those who have invested some creative work labour or skill to prevent others from using that work in certain ways. In order to strike a balance between the rights of creators and the interest of the general public in ensuring access to the work and thereby promoting the economic and social benefit said to result from the production of creative works, the economic interests in copyright are subject to certain exceptions. These are discussed in para 4.4.
- 1.7 There are a number of areas of creative endeavour in which the grant of an economic right in the nature of copyright cannot clearly be regarded as the primary motivation to intellectual creation. Amongst these areas may be included the production of works of scholarship by university academics. With very few exceptions, the financial rewards derived from the copyright in such works are negligible. Rather, motivations for creation may include the desire to contribute to the scholarly community and career advancement based upon publication record. While this does not preclude the need to settle the issue of copyright ownership and exploitation, it does suggest that there may be methods, other than the grant of copyright, to reward innovators in the online tertiary educational environment. In this respect attention should also be given to the issue of the moral rights of creators (see para 5).
- 1.8 Notwithstanding the foregoing observations, for the purposes of this report it is noted that there is a perception that the production of online teaching materials may generate a more lucrative market than the production of traditional scholarly works with an accompanying concern about the equitable distribution of the profits from copyright exploitation.

² See Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' (1993) 68 *Chicago-Kent Law Review* 841.

A.2 Protectable subject matter

2.1 Introduction

2.1.1 Copyright protection arises automatically once a work has been committed to material form. The concept of material form includes the process of electronic storage.³ However, copyright can only reside in a work which falls within one of the classes of protectable works within the *Copyright Act 1968*. It is also possible that a protectable work may incorporate other underlying protectable works.

2.1.2 In the online environment there are a number of different types of protectable works which are relevant to copyright protection or licensing. The following paragraphs identify these works and explain their relevance. (The issue of the ownership of copyright in these works is dealt with in para 3.) It should be noted that in the case of each of these types of works unauthorised reproduction or use of the work in online materials will be a breach of copyright unless the reproduction is subject to an exception. (Exceptions are discussed in para 4.4.)

2.2 Literary works

2.2.1 Any written text is capable of being a copyright work. This includes text written for the purpose of online teaching materials.

2.2.2 The copyright in such works lasts for at least fifty years from the author's death.

2.3 Artistic works

2.3.1 The *Copyright Act* protects a number of different types of works within the general category of the visual arts. Protected works relevant in the online environment, are paintings, sculptures, drawings, engravings, photographs and, possibly, models of buildings.

2.3.2 Such works may be created for the purpose of an online educational package or they may be reproduced for this purpose.

2.3.3 The copyright in such works, other than photographs, lasts for at least fifty years from the author's death.

2.3.4 The copyright in photographs lasts for fifty years from the year of first publication.

³ See *Copyright Act 1968* (Cth), ss 22 & 10(1).

2.4 Musical works

- 2.4.1 Musical works are protected by copyright, irrespective of whether they have been committed to material form by being written in the form of musical notation or by being recorded in any way. (Note that the words of songs are protected as a literary work.)
- 2.4.2 As with the other types of protectable works mentioned, such works may be created for the purpose of an online educational package or they may be reproduced for this purpose.
- 2.4.3 The copyright in such works lasts for at least fifty years from the death of the author.

2.5 Sound recordings

- 2.5.1 Any type of recordings of any sounds are protected by copyright.
- 2.5.2 Such works may be created for the purpose of an online package or reproduced as part of such a package.
- 2.5.3 The copyright in sound recordings lasts for fifty years from the year of first publication.

2.6 Computer programs

- 2.6.1 Computer programs⁴ are protected by copyright law as literary works. Accordingly the same basic rules apply to their creation and use as apply to the creation and use of other literary works (see para 2.2). Amongst other things, this means that a computer program may not be used to run an online package without the authorisation of the copyright owner.
- 2.6.2 The *Copyright Amendment (Digital Agenda) Bill* proposes certain changes to the protection of computer programs. These are discussed in para 4.7.

2.7 Films

- 2.7.1 The aggregate of visual images and sounds generated by playing video/computer games involving computer generated images are

⁴ A computer program is defined in the *Copyright Act 1968* (Cth), s 10(1) as meaning 'an expression in any language, code or notation, of a set of instructions (whether with or without related information) intended, either directly or after either or both of the following:

- (a) conversion to another language, code or notation;
 - (b) reproduction in a different material form;
- to cause a device having digital information processing capabilities to perform a particular function'.

⁵ See *Sega Enterprises Ltd v Gottlieb Pty Ltd* (1996) 35 IPR 161; *Galaxy Enterprises Pty Ltd v Sega Enterprises Ltd & Avel Pty Ltd* (1997) 37 IPR 462.

capable of being protected under copyright law as a film. This suggests that it may be the case that the aggregate of the visual images and sounds generated by at least some types of interactive multimedia teaching packages are capable of being protected under copyright law as films. This matter is, however, subject to some controversy and must be regarded as unsettled under Australian law.

2.7.2 The copyright in films lasts for fifty years from the year of first publication.

2.8 Compilations

2.8.1 Compilations of computer programs or compilations expressed in words, figures or symbols are protected as literary works under copyright law. (On the protection of literary works, see para 2.2.)

2.8.2 This means that, under certain circumstances, the compilation of other people's works in an online teaching package may attract copyright protection. It appears that this will be the case where the compiler has exercised 'skill, judgment and labour'.⁶ Compilations made on the basis of a distinctive or original perspective would appear to fall within the scope of this concept.

2.9 Adaptations

2.9.1 As discussed in para 4.1.3, to adapt someone else's copyright work without authorisation amounts to an infringement of the copyright in that work unless the act of adaptation is subject to an exception.

2.9.2 Although it is not clearly settled under Australian law, it appears to be the case, however, that where the adaptation involves the contribution of new material by the adaptor, a new copyright interest may arise in the adaptation. Thus the adaptation of a work may involve both an infringement of copyright and the creation of a new copyright work.

2.9.3 The type of new copyright work created will depend upon the nature of the adaptation. However, in the online educational context the work is likely to fall within one of the above categories. The duration of copyright will depend upon the type of work.

⁶ *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273.

A.3 Ownership of copyright

- 3.1 Position at general law
- 3.1.1. The *Copyright Act* provides that the first owner of copyright in a work is the author of the work. In relation to literary, dramatic, musical and artistic works, the author of the work is the creator of that work.
- 3.1.2 However, the *Copyright Act* makes two qualifications to this principle which are relevant in the present context. One of these qualifications provides that the issue of ownership of a copyright work can be altered by agreement. The relevance of this matter will be considered in para 3.3.
- 3.1.3 The second important qualification to the general principle on ownership laid down by the Copyright Act is that where a literary, dramatic, musical or artistic work is made by an author 'in pursuance of the terms of his or her employment by another person under a contract of service' then the copyright in the work will belong to the employer. In assessing how this applies to copyright works created by academics employed by universities it is necessary to have regard to the case law which interprets the meaning of the above-quoted expression in the *Copyright Act*.
- 3.1.4 In relation to university academics employed under a normal contract of employment, this question is unresolved. While such academics will be properly regarded as being employed under a contract of service, the question of the scope of that contract of employment is unclear. In other words it is not clear that academic authors are employed to create copyright works and can, therefore, be regarded as creating them in pursuance of the terms of their employment as required by the *Copyright Act* (see para 3.1.3). There is, however, a very considerable body of legal opinion to the effect that, apart from explicit contractual provisions, academics retain the copyright in the material which they create.
- 3.1.5 An area of case law in which the position is much clearer relates to people who are not university employees, but might be better characterised as external contractors (that is, employed to complete a specific and defined task). In the university online environment, where copyright works are created by external contractors then, provided there is no contractual stipulation to the contrary, they retain the

7 *Copyright Act 1968* (Cth), s 35(6)

8 See Ricketson & Richardson, *Intellectual Property: Cases, Materials & Commentary* (2nd ed, 1998), 352-3.

copyright in their work. The only exception to this proposition is in relation to commissioned photographs, portraits or engravings. The copyright in these items will, subject to any contractual provision to the contrary, belong to the commissioner.

- 3.1.6 In the case of sound-recordings, the first owner of copyright in the sound recording is the person who owns the item upon or in which the sound recording is first made. The exception to this proposition is that where the sound recording is made in pursuance of a commission, the commissioner owns the copyright. In the university online environment, it may well be that where online materials are developed for teaching using university resources, that any sound recording made for these purposes is made on or in an item (eg disk, tape etc) which is owned by the university. In this case, the copyright in the sound recording will belong to the university. Further, where an external contractor makes a sound recording for the purposes of an online teaching package, it will be necessary to consider whether this is created pursuant to the terms of a commission. If so, then if the university is the commissioner it will own the copyright.
- 3.1.7 In the case of films, the first owner of copyright in the film is the person who makes the arrangements necessary for making the film. Like sound recordings this is subject to an exception in favour of commissioned works. In the university online environment, the maker of a film (which may include the sounds and images produced by an interactive multimedia package, see para 2.7) will nearly always be an individual who will, therefore, retain copyright in the film, unless the film is made pursuant to a commission.
- 3.1.8 Finally, it should be noted that the copyright in any work can be assigned or licensed to any other person.

3.2 Joint authorship

- 3.2.1 As is evident from the foregoing discussion, it may very well be the case that a number of different copyright works, created and owned by a number of different people, are comprised in one online teaching package.
- 3.2.2 Where the contribution of each author is separate and identifiable then either the copyright owner of each work must authorise by licence the exploitation of the work, or the ownership in all the copyright works must be assigned to one entity.
- 3.2.3 In the present context this means, for example, that where a computer program is necessary in order to run a package then the entity which

wishes to exploit or use the package must obtain a licence or assignment from the entity which owns the copyright in the program.

- 3.2.4 In the case of collaborative research between individuals at two or more universities which produces an online package it will be necessary to do the following: first, identify the different copyright works which make up the package; secondly, identify the owners of each copyright work; thirdly, ensure that all copyright owners authorise use or exploitation of the package. Where any of the copyright works which make up the package or the putting together of the package itself (on the basis that it will be protected as a compilation, see para 2.8) are the result of collaboration in which the contribution of each collaborator is not separate and distinct then the authorisation of all relevant copyright owners will be necessary.
- 3.2.5 The issue of whether individual creators or collaborators or their respective university employers are the owners of the copyright in any particular work making up an online package may be determinable by reference to their university statute.
- 3.3 Effect of university statutes
- 3.3.1 University statutes on intellectual property generally purport to operate on the basis that their provisions are implied into the contracts of employment of staff members. This method of incorporation seems relatively uncontroversial in relation to staff members whose current contract of employment was entered into after the passing of the relevant statute. However, in relation to staff members whose contract of employment was entered into prior to the passing of the intellectual property statute, an argument may exist (depending on the precise wording of the contract of employment) that any attempt to incorporate the provisions of the intellectual property statute into the contract of employment amounts to a unilateral alteration to the contract of employment which is unenforceable. Notwithstanding, this issue the following paragraphs treat the relevant university statutes as if they constitute part of the contract between the university and its employees.
- 3.3.2 Four university statutes, available online, were considered in order to determine their impact on the question of the ownership of copyright in online teaching materials. These universities were: Curtin University of Technology, Edith Cowan University, Murdoch University and the University of South Australia.
- 3.3.3 The intellectual property statutes of Murdoch University and the University of South Australia make a distinction between the copyright

existing in 'conventional scholarly output' by academic staff members and the copyright existing in other works produced for the purposes of the university. Murdoch University waives any copyright it might otherwise have in conventional scholarly output. The University of South Australia claims that it will not normally exercise ownership rights over conventional scholarly output, except that it claims the right to use such work for university teaching and research purposes.

- 3.3.4 Under the dichotomy in Murdoch University's statute between conventional scholarly output and teaching materials, it seems more likely than an online teaching package would fall within the latter characterisation. It is noted that there is arguably a difference between 'teaching materials' and the substantial original and creative effort which may be put into the creation of an online teaching package. Nevertheless the concept of teaching materials seems to be quite wide. In the situation where an academic staff member produces teaching materials, including an online teaching package, not for the purpose of the university but for the purposes of commercial exploitation it is arguable that such material falls outside the concept of teaching materials in the statute. Nevertheless, it may still fall within the ambit of intellectual property in relation to which the university is claiming ownership where the university has contributed 'resources, facilities, apparatus, supervision, salary or other funding'.
- 3.3.5 The University of SA policy is less detailed on these issues than the Murdoch policy. It asserts ownership over intellectual property produced by university activities of staff members and activities 'which use the University's name or letterhead, University staff, equipment, facilities, materials, accommodation or intellectual property without proper reimbursement to the university', subject to the rider that it will not enforce ownership in relation to conventional scholarly output. University activities include teaching and curriculum development, collaborative research, commercial research and consultancies. So far as online teaching packages are concerned, the most likely conclusion is that the intellectual property rights in those packages will be owned by the university.
- 3.3.6 Edith Cowan University (ECU) claims copyright in intellectual property 'created by staff in the course of their employment'. The ECU policy further states it will not assert ownership of the 'copyright in books, articles, lectures or other written work' other than such works specifically commissioned by the university, nor will it assert ownership in 'computer-related work' other than computer programs. It does, however, assert ownership of the copyright in 'lecture notes, courses, radio broadcasts, audio visual material and multimedia material

specifically commissioned by the University'. The fact that ECU does not assert ownership in computer-related work, other than computer programs and does not appear to assert ownership in multimedia works which have not been specifically commissioned by the university may lead to the conclusion that the university will not assert copyright in at least some online teaching packages which have not been specifically commissioned. However, there are two reasons for viewing such a conclusion with caution. First, as already mentioned, the ECU policy has a general catch-all provision asserting copyright in all intellectual property created in the course of employment. (Admittedly, the precise meaning of the expression 'course of employment' is uncertain.) Secondly, an online teaching package may contain underlying copyright works such as the text of lectures, which is copyright material in which the university is clearly asserting its copyright interest. In a case such as this, even if the university does not own the overall copyright in the package a licence may be needed from the university in order to exploit the package as a whole.

- 3.3.7 Curtin University asserts the ownership of copyright in all copyright work developed by staff members in the course of their duties. However, the policy provides that 'in order to encourage staff members to consider publication of their original work through commercial publishing houses, the University will generally assign its interests in such copyright to the staff members concerned provided the use of such copyright for teaching purposes is safeguarded'. Consistently with this approach, the University suggests that it will 'adopt a liberal attitude to the inclusion of course material in any text books which staff members may wish to write in their own time at their own expense'. It is not clear whether the same liberal approach would apply to the inclusion of university teaching materials in an online teaching package. While one would have thought such inclusion would be in the spirit of the policy, it is not strictly within its text.
- 3.3.8 Each of the four universities considered here has provisions concerning equitable remuneration to staff who are creators of works giving rise to intellectual property rights in the event that the university decides that it wishes to commercially exploit intellectual property in which it is asserting ownership.
- 3.3.9 The ECU intellectual property policy provides that if the university does not intend to seek intellectual property protection the 'originator' may seek a licence to exploit the intellectual property from the university. This provision does not appear to relate to copyright, as the copyright material arises automatically. Murdoch University has a similar provision. Thus, it seems that neither the ECU policy nor the Murdoch

Statute contain any provision requiring the university to permit commercial exploitation by a staff member who has created a copyright work in circumstances where the university asserts ownership of the intellectual property but declines to engage in commercial exploitation. This also appears to be the case in relation to the University of SA.

- 3.3.10 Consistently with its intellectual property policy, Curtin University staff members may apply to the university to have the copyright in course materials or other copyright rights produced by them in the course of their duties assigned to them. However, where the copyright works in question are commercially exploited the university and staff member must agree on apportionment of revenue.

A.4 Exclusive rights of copyright owner

- 4.1 Content of exclusive rights
- 4.1.1 The owner of copyright has certain exclusive rights, to prevent others from doing, without authorisation, certain acts in relation to the copyright work or a substantial part of it.
- 4.1.2 Copyright holders have a number of different exclusive rights, depending upon the nature of the copyright work in question. Thus, to copy a film or sound recording or a substantial part thereof without authorisation will be an infringement of the copyright in that work. Likewise, amongst other things, to reproduce in any material form (which includes digital or electronic reproduction) or to publish a literary, musical or artistic work or a substantial part thereof will be an infringement of the copyright in that work.
- 4.1.3 It is also the case that to adapt another's copyright literary or musical work without authorisation will amount to a copyright infringement. In relation to literary works, adapting the work includes translating it. In relation to computer programs, an adaptation means creating 'a version of the work (whether or not in the language, code or notation in which the work was originally expressed) not being a reproduction of the work'.⁹ In relation to a musical work, an adaptation means an arrangement or transcription of the work.
- 4.1.4 This means that, for example, the amalgamation and modification of computer programs for the purposes of the creation of an online package will, if it is done without the consent of the copyright owner of the computer program, be likely to amount to an infringement of the copyright in the programs either because it amounts to a

reproduction of a substantial part or because it amounts to an adaptation of a substantial part. It seems that this is the case even if the amalgamated or modified work gives rise to a new copyright work (see para 2.8).

- 4.1.5 The issue of whether a substantial part of a copyright work has been taken so as to result in an infringement is assessed on the basis of a qualitative rather than a quantitative test. In a nutshell, if an identifiable part of the work has been taken then it will probably be regarded as the taking of a substantial part. This will be so even if it is only a very small part of the work in quantitative terms.
- 4.1.6 In relation to a compilation, however, these principles mean that it will often be necessary to take a quantitatively significant part of a compilation in order to infringe the copyright in the compilation itself. The work, labour and skill of the compiler, as such, must be annexed before copyright in the compilation is breached (even though the copyright interests in the individual copyright works which make up the compilation may be breached by taking a small but substantial part of any of them without authorisation). This is relevant where a copyright interest is being asserted in an online package on the basis that it is a compilation within the meaning of the definition of literary work (see para 2.2).
- 4.1.7 Other exclusive rights of the copyright holder include, at present, the right to broadcast the copyright work and the right to transmit it to subscribers to a diffusion service. While potentially important in the context of online delivery, these exclusive rights have not been considered in this paper. The reason for this is that the government intends to remove these rights and replace them with a new right of communication to the public. As this new right is part of the government's intended reforms to deal with copyright in the digital environment, it is considered in para 4.2.
- 4.2 The digital environment
- 4.2.1 The *Copyright Amendment (Digital Agenda) Bill 1999* is intended to amend the present Copyright Act in order to deal with issues arising in copyright law as a consequence of digitisation and the new communication technologies. The Bill was released for public comment on 26 February 1999 and is presently being redrafted to take into account the submissions made.

⁹ Copyright Act 1968 (Cth), s 10(1)

- 4.2.2 In the Exposure Draft and Commentary to the Bill the government claims that the aim of the reforms in the Bill 'is to ensure that copyright law continues to promote creative endeavour whilst allowing reasonable access to copyright material on the Internet and through new communications technology'. This is said to be 'a key component of the Government's overall commitment to encouraging the growth of the information economy'.¹⁰
- 4.2.3 The centrepiece of the reforms is a new exclusive right of communication to the public, which subsumes the exclusive rights to broadcast and to transmit to subscribers to a diffusion service.
- 4.2.4 This new right will apply to literary, dramatic, musical & artistic works, and to sound recordings, films, and broadcasts. The right is not intended to be technology-specific, but by virtue of the new definition of 'communicate', it only applies to electronic transmission or making available online. Also, as a consequence of a new definition of 'to the public' it gives exclusive rights to the copyright holder in relation to transmissions intended for the public either in Australia or outside Australia.
- 4.2.5 This new right of communication to the public will make it clear that, for example, any unauthorised uploading of material to the web, or any unauthorised digitisation of the material for the purpose of communicating it to the public, will be a breach of copyright in the material and all its constituent parts. It is already clear that unauthorised downloading of copyright material on the web by printing it out or by copying it to disk will be an infringement of copyright.
- 4.2.6 The exceptions to the right of communication to the public are intended to reflect the balance already struck in the Act between owners and users of traditional print material.¹¹ The exceptions which are likely to be relevant in the context of online teaching packages are discussed in para 4.4.
- 4.2.7 The *Copyright Amendment (Digital Agenda) Bill* also contains certain provisions designed to improve the protection of computer software. These amendments include the following:
- A more comprehensive definition of computer program. Under these proposed amendments a computer program will be defined to mean 'a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result'.*

¹⁰ *Digital Agenda Copyright Amendments: Exposure Draft and Commentary* (February 1999), para 4.

A clarification of existing law to make it clear that a conversion of a computer program from source code to object code, and vice versa, will be a reproduction of that program and therefore an infringement of the copyright in it.

Incidental copying for normal use (eg. copying onto the hard disk of a computer) of the program will not be an infringement.

4.2.8 Finally, it should be noted that there is a perception that copyright interests, especially in the context of the digital environment are not able to be adequately enforced. As a consequence of this the Attorney General's has recently announced the establishment of an enquiry into copyright enforcement.

4.3 Linking

4.3.1 The issue of whether unauthorised linking to another Internet site amounts to a copyright infringement is an unsettled question under Australian copyright law.

4.3.2 Concerns have been raised that linking to another site, with or without authorisation, may implicate the entity establishing the link in breaches of other rights which occur on the linked site. The most obvious areas of concern here are liability for copyright infringements on the linked site and liability for defamatory material appearing on the linked site.

4.4 Relevant exemptions

4.4.1 The *Copyright Act* provides that the rights of copyright holders are subject to certain exemptions. These exemptions allow for royalty free copying without the need for any authorisation from the copyright owner.

4.4.2 In the context of the creation of online teaching packages, the exemptions most likely to be relevant are the fair dealing exemptions for research and study and, possibly, for criticism or review, and the exemptions for educational institutions. These exemptions will also apply with some modifications under the new right of communication to the public (see paras 4.2.3–4.2.5).

4.4.3 The fair dealing exceptions allow the taking of parts of a work for specific purposes (including those mentioned in para 4.4.2), subject to a wide range of limitations. In particular, these limitations mean that substantial amounts of a work in quantitative terms cannot usually be taken under these exemptions and that any use of the work or the

¹¹ *Ibid*, para 30.

portion of it taken cannot interfere with the legitimate market of the copyright holder.

- 4.4.4 In the online teaching environment these restrictions will be likely to mean that copying of other copyright works which is done for the purpose of creating a teaching package will almost never be able to fall within the research and study exception as this exception only applies where the copying is done for such purposes by the person doing the research and study (that is, the student).
- 4.4.5 There is some scope for the operation of the fair dealing exemption for criticism and review, however where material is being copied for the purposes of creating an online package to be commercially exploited the amount taken without authorisation from another copyright work would have to be small in proportion to the work as a whole and in proportion to contents of a package as a whole. Further, acknowledgement of the source of the work copied is required. Short quotations, for example, would be likely to fall within the exemption provide.
- 4.4.6 Inclusion of extracts of copyright literary, dramatic, musical and artistic works in collections for use by places of education will not amount to copyright infringement in certain limited cases. It is not clear whether this would apply to inclusion of extracts in online teaching packages since to fall within the exception the extracts must be contained in a book, sound recording or film. An online teaching package may very well not fall within any of these characterisations.
- 4.5 Licensing
- 4.5.1 The foregoing discussion has shown that in most cases use of other copyright work in the creation of an online teaching package will require the payment of royalties under existing statutory licensing schemes or will need to be licensed separately.
- 4.5.2 Part VB of the *Copyright Act* allows reproduction in certain cases for the purpose of using copyright works in educational institutions subject to the payment of royalties. These provisions do not relate to all types of copyright works and, at their broadest, only encompass reproduction from literary, dramatic, musical and artistic works. It should be noted, however, that they do not relate to any type of reproduction or infringing use of a computer program. This means, for example, that where a computer program is sought to be used in developing an online package a licence must be sought.
- 4.5.3 The *Copyright Amendment (Digital Agenda) Bill* proposes to clarify the application of Part VB of the Copyright Act to activities undertaken in the digital environment. Accordingly it is proposed that

the statutory licence in Part VB be extended to allow: first, the electronic copies of copyright works presently falling within in Part VB for the purposes of educational institutions; and secondly, the communication of copyright works presently falling within Part VB to students in electronic or digital form.

- 4.5.4 Where reproduction of copyright works for the purpose of developing an online teaching package does not fall within the statutory licence scheme for copying in educational institutions then it will be necessary to obtain a licence for that copying. Depending on the type of copyright work in question and the intended use of it, it may be possible to obtain a licence under one of the collective licensing schemes operated by the copyright collecting societies. Where this is not possible then it will be necessary to seek an individual licence.
- 4.5.5 Under commission from the Imago Cooperative Multimedia Centre, the Asia Pacific Intellectual Property Law Institute is currently designing a guide to the licensing of copyright material for use in multimedia works. Once this guide is complete it will be accessible from the Asia Pacific Intellectual Property Law Institute Website
<<http://wwwlaw.murdoch.edu.au/apipli/>>.

A.5 Moral rights

- 5.1 It is expected that Australia will introduce its delayed moral rights legislation during the course of this year.
- 5.2 This legislation will give the authors of copyright literary, dramatic, musical and artistic works and the producers and directors of films the following moral rights:
- the right to be known as the author of a work (the right of attribution);
 - the right not to have works of which they are not the author falsely attributed to them (the right against false attribution);
 - the right to object to certain derogatory distortions, mutilations or alterations to the work (the right of integrity of authorship).
- 5.3 These rights will be enjoyed by the creators of copyright material which is used in online teaching packages. It also seems to be the case that moral rights will be enjoyed in relation to the overall online teaching package if it can correctly be regarded as a compilation (see para 2.8) or (more dubiously) if the images it generates can be regarded as a film (see para 2.7).

- 5.4 The moral rights have the same duration as the copyright interest in the relevant work.
- 5.5 The moral rights may be waived (in return for economic benefit or not). They may not, however, be assigned.

A.6 Offshore and jurisdictional issues

- 6.1 As a general proposition the jurisdiction where the act of infringement of a copyright interest takes place is the jurisdiction in which copyright must be enforced. It is usually that jurisdiction's copyright law which will apply.
- 6.2 It should be noted, however, that due to the very high level of internationalisation of copyright law it is not generally a problem for an Australian citizen or resident to enforce their copyright in another jurisdiction. For the same reason, there is also substantial similarity in the content of copyright law internationally. Nevertheless, the international copyright community is still in the process of formulating a response to the problems for copyright posed by the digital environment. This means that, notwithstanding the conclusion of a new treaty,¹² there is likely to be a period during which national laws on copyright in the digital environment lack harmony.

¹² The WIPO Copyright Treaty 1996.