

# THE INTERSECTION OF COPYRIGHT AND PLAGIARISM AND THE MONITORING OF STUDENT WORK BY EDUCATIONAL INSTITUTIONS

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*One of the many roles of an educational institution is to instruct its students in the ethical rules of plagiarism. Plagiarism and copyright infringement are often confused but plagiarism is an ethical rather than a legal rule. Plagiarism encompasses a much wider range of misconduct so that an act of plagiarism does not necessarily amount to copyright infringement. In recent times the areas of plagiarism and copyright infringement have begun to intersect in a new manner in the educational context. This is a result of the use by educational institutions of plagiarism detection software and commercial plagiarism detection services. This paper discusses the two different forms of misconduct: plagiarism and copyright infringement. It then looks at the development of new electronic tools to monitor plagiarism by students. It explores the rights of property (copyright) of those whose work has been subject to this scrutiny and examines appropriate procedures to take account of these property rights.*

## I INTRODUCTION

Among the many tasks of an educational institution is to instruct its students in the ethical rules of plagiarism. With the Internet making available a wealth of material to ‘cut and paste’ there has been what appears to be a significant increase in instances of plagiarism. The talk about growing plagiarism is not only in the academic world but also in the popular press.<sup>1</sup> In this discussion plagiarism is often confused with copyright infringement but plagiarism is an ethical rather than a legal rule and it encompasses a much wider range of misconduct. There are instances where plagiarism and copyright infringement overlap but a case of plagiarism does not necessarily constitute copyright infringement and in some instances where plagiarism would not be found, copyright infringement may arise.

With the increased interest in plagiarism, educational institutions have come under pressure to give closer scrutiny to student work. In order to meet this demand, when student numbers have also increased, educational institutions have turned to computer software to assist in the process. While plagiarism detection software purports to be a much faster and more accurate method to monitor student work, a question arises about the increased risk of the monitoring processes intersecting with copyright infringement. Do the new electronic tools being developed for plagiarism detection risk infringing the property rights, in the form of copyright, of those

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whose work is subject to surveillance? If so, what steps must the educational institutions take in order to avoid any copyright infringement problems?

This paper discusses the two forms of misconduct: plagiarism<sup>2</sup> and copyright infringement. It looks at the developing electronic mechanisms used to monitor plagiarism in educational institutions and explores the rights of property (copyright) of those whose work has been subject to this scrutiny. The paper examines the appropriate procedures to recognise and take account of these property rights.

## II WHAT IS PLAGIARISM AND IS IT DIFFERENT FROM COPYRIGHT INFRINGEMENT?

### A *Plagiarism*

‘Plagiarism’ derives from the Latin ‘plagiarius’ which originally referred to a kidnapper, but later was used to refer to ‘a literary thief’.<sup>3</sup> As Stearns explains, plagiarism is ‘the intentional appropriation of the creative output or scholarship of another without attribution’.<sup>4</sup> *The Macquarie Dictionary* defines plagiarism as ‘the appropriation or imitation of another’s ideas and manner of expressing them, as in art, literature, etc., to be passed off as one’s own’.<sup>5</sup>

While a general definition of the term is easy to find, as Briggs points out ‘what counts as plagiarism’ varies ‘from discipline to discipline’.<sup>6</sup> Plagiarism is generally understood as encompassing: the deliberate copying of another’s work without attribution; the resubmission by a student of work done in one course for credit in another course (referred to as ‘self-plagiarism’);<sup>7</sup> use by an academic of an earlier piece of his or her own work in a subsequent publication without an indication that use is being made of the prior work (also self plagiarism<sup>8</sup>); the unintended failure of students to appreciate appropriate referencing conventions<sup>9</sup> and where there is ‘attribution without copying’ (ie ‘reverse plagiarism’).<sup>10</sup>

An example of a detailed definition of plagiarism appears in the University of Sydney Policy and Procedure *Student Plagiarism: Course Work*:<sup>11</sup>

#### 5. Plagiarism

- (1) Plagiarism for the purpose of this Policy and Procedure (which applies to students enrolled in course work degrees) means presenting another person’s Work as one’s own Work by presenting, copying or reproducing it without Acknowledgement of the Source.
- (2) Plagiarism includes presenting Work for assessment, publication, or otherwise, that includes:
  - a. sentences, paragraphs or longer extracts from published or unpublished Work (including from the Internet) without Acknowledgement of the Source; or
  - b. the Work of another person, without Acknowledgement of the Source and presented in a way that exceeds the boundaries of Legitimate Cooperation.
- (3) Plagiarism can be negligent (Negligent Plagiarism) or dishonest (Dishonest Plagiarism).

‘Work’ and ‘Acknowledgement of the Source’ are defined:

#### 4. Definitions

In this Policy and Procedure:

Acknowledgement of the Source means identifying at least:

- a. the author or person who owns the Work; and

- b. the place from which the Work or part of the Work was sourced.

...

Work means ideas, findings or written and/or published material.

In Stearns' view an intentional taking is required for plagiarism to be found and a 'genuinely accidental' taking does not constitute the wrong.<sup>12</sup> However the University of Sydney policy reflects a readiness to encompass a wider definition that includes 'Negligent Plagiarism', that is, 'innocently, recklessly or carelessly' using the unacknowledged work of others as well as 'Dishonest Plagiarism', that is, 'knowingly' so doing.<sup>13</sup>

There are different views about the nature of the harm caused by plagiarism. For Dursht, the damage caused by plagiarism is the failure of the original author to receive the credit that is due. This explains why a finding of plagiarism does not depend upon the taking of a certain threshold amount of another's material and why the use does not have to affect 'the market value of the plagiarised work'.<sup>14</sup> Green recognises that the failure to credit the author affects the author's commercial interests and can lead to economic losses such as the loss of 'grants and scholarships, tenure and promotion'.<sup>15</sup> The emphasis in the American plagiarism literature on the loss of attribution of the original author reflects in part that country's lack of a comprehensive moral rights regime that would otherwise provide a remedy where the copyright work of an author is used without attribution.<sup>16</sup>

Stearns characterises the harm done by plagiarism as much wider: 'All writers and scholars may be disadvantaged by the unfair headstart that plagiarists gain over those who do not plagiarise. The public as a whole may be deceived, defrauded, or misinformed'.<sup>17</sup> Green also points to the harm caused to the publisher of the plagiarist's work.<sup>18</sup> An example of the wider harm inflicted is that involved in self plagiarism. Here the readership rather than other authors is harmed.<sup>19</sup> Readers are expecting the work presented to them is different from what has appeared in the author's earlier works. Stearns contrasts this wider harm from plagiarism with the much narrower economic interests of the copyright owner, but as with Dursht's comments, this view reflects the lack of moral rights protection in the US and does not apply with equal force in Australia where a comprehensive moral rights regime is in place.<sup>20</sup>

Before leaving this introductory section on the meaning of plagiarism, it is important to note that plagiarism has not always been so widely condemned. Stearns refers to early writers such as Shakespeare who were 'copious and enthusiastic borrowers, imitating language, forms, and sources found in classical writings, myths, and legends'.<sup>21</sup> The late eighteenth century saw the emergence of notions of individuality and the expectation that an author would transform the earlier material upon which they relied by a 'creative process'.<sup>22</sup> Some dispute this view of history<sup>23</sup> but whatever view you take, today, while recognising that modern creators build upon the work of those who have gone before them, the rules of plagiarism require the borrowing from earlier material to be acknowledged.

## B *Plagiarism and Copyright Compared and Contrasted*

Plagiarism and copyright are often confused. They have several elements in common. Both are concerned with the creative process and matters of originality and authorship. Both seek to prevent free riding on the work of others.<sup>24</sup> However plagiarism 'is not a legal term' and 'it does not necessarily constitute a violation of copyright law'.<sup>25</sup> It is 'an ethical wrong'.<sup>26</sup> An instance of plagiarism may or may not constitute an infringement of copyright.<sup>27</sup>

Copyright on the other hand is a set of legal rules. It is a mechanism intended to encourage the making and dissemination of creative works. It does this by granting a property right.<sup>28</sup> Copyright grants a bundle of exclusive economic rights (eg to reproduce, publish, perform, communicate to the public, make an adaptation<sup>29</sup>) to an identified owner (eg the author of a work or his or her employer, or the maker of other subject matter)<sup>30</sup> of certain categories of copyright material (works: literary, dramatic, musical and artistic; and other subject matter: sound recording, cinematograph film, broadcast and published edition: Parts III and IV of the *Copyright Act 1968* (Cth)) for a limited term.<sup>31</sup>

The exclusive rights granted by copyright are attracted not under any process of registration but automatically provided certain criteria are satisfied. The work must be original, in a material form (any form of storage, whether visible or not) and there must be a relevant connecting factor (eg the author is an Australian citizen or resident, the work was first published in Australia or the making of the subject matter took place in Australia).<sup>32</sup> Copyright material originating overseas is protected in Australia under the *Copyright Act 1968* (Cth) pursuant to various international copyright treaties to which Australia is a party.<sup>33</sup> Copyright infringement occurs when someone other than the copyright owner does an act in relation to all of the copyright material or a substantial part of it, which falls within the exclusive rights of the copyright owner, without the owner's permission and without a defence available in the circumstances.<sup>34</sup>

The grant of exclusive rights by copyright is intended as an incentive to the owner either to exploit the rights directly or to license others to do so. In the absence of exclusive rights, their works would be freely exploitable by others who take no part in the creative process (free riders).

The bundle of economic rights has more recently been added to by the introduction of a smaller bundle of moral (personal) rights granted to the author of a copyright work: the right to be attributed as author of the work, the right not to have authorship of the work falsely attributed and the right of integrity of authorship (ie the right not to have the work subjected to derogatory treatment).<sup>35</sup> The rights are personal to the individual author and are not generally assignable.<sup>36</sup>

There are four main areas relevant to considering the intersection of plagiarism and copyright: originality, authorship, ownership and infringement.

## 1 *Originality*

The principles of plagiarism and copyright law both seek to protect the original work of creators. Copyright, like plagiarism, does not demand that the author exercise a degree of creativity in the sense of 'first to invent', that is, novelty in the patent law sense. Under the principles of plagiarism and the law of copyright it is understood that creators, to a certain extent, will rely and build upon the work of those who go before them ('If I have seen further, it is by standing on the shoulders of giants' - attributed to Sir Isaac Newton).

In copyright law the necessary threshold contribution (originality) is set at a relatively low level. For a work to attract copyright protection it must be original.<sup>37</sup> Originality for this purpose does not require that the author be the first to create or the first to come up with the idea.<sup>38</sup> It means merely that the material emanates from the author and has not been copied from an existing work.<sup>39</sup> Copyright is said to be about the originality of expression of the idea. Skill and labour must be expended by the author,<sup>40</sup> that is, 'sweat of the brow'. Take, for example, an article about an historic event. Even though there may be many individual authors who have researched and written about a particular event, provided each author expresses the ideas in their own words, even if they take some of the information and ideas from various other sources, each article will

attract copyright protection. In the case of other subject matter, the requirement of originality is not made express in the *Copyright Act 1968* (Cth), but it is said to be implied from the relevant definitions.<sup>41</sup>

Originality in some copyright works is not found just in the drafting of the words in the text. For literary works there is also recognised an originality in the collection and arrangement of material. So, for example, an author might gather together a number of historical documents which are well and truly outside the copyright term. The considered collection and arrangement of the out of copyright works will attract a new copyright to the collection, provided skill and labour is expended by the author. In such circumstances the scope of infringement will be limited to the copying of all or important elements of the arrangement, and not the copying of individual out-of-copyright works from the collection.<sup>42</sup>

## 2 *Authorship*

For plagiarism, an author may be the originator of a written work or the originator of an idea.

Although the same general principles with respect to authorship apply under both plagiarism and copyright, copyright law has a narrower notion of authorship. For copyright, authorship is related to the principles of originality and infringement. The author of a work is said to be the person who expresses the idea in a material form.<sup>43</sup> Someone who merely supplies ideas or information and does not have a hand in actually expressing the ideas, is not regarded as an author for copyright purposes. The same applies to a 'mere amanuensis' who merely transcribes dictation of the work from the author.<sup>44</sup> There will be joint authorship (ie more than one author for a particular copyright work) where two or more creators together produce the material but only where the contribution of each author is not separate from the contribution of the other.<sup>45</sup> Where each author's contribution can be identified, rather than together being regarded as joint authors of the one work, each author will be regarded as the author of their identifiable contribution. Unlike copyright works (eg a literary work), subject matter other than works (eg a sound recording) do not have an author but a maker. The maker is essentially the investor (the party that owned the equipment on which the master copy was made or who undertook all the arrangements necessary to produce the first copy) and is more often a corporate entity rather than an individual (eg a record company for sound recordings or a film production company for cinematograph film).<sup>46</sup>

## 3 *Ownership and Enforcement*

Plagiarism recognises the hurt done to the author whose work is plagiarised but it does not rely solely upon that author enforcing any right against the alleged plagiarist. Plagiarism may have consequences for the plagiarist (eg in his or her employment) irrespective of any complaint or other action taken by the original author. The act of plagiarism may not be authorised by the author of the plagiarised work consenting to the lack of attribution.

Copyright, on the other hand, relies upon a copyright owner asserting property rights in the copyright material against the alleged infringer. This principle is made more complex by the distinction in copyright law between ownership of copyright and authorship. In the case of the economic rights attracted under copyright law (eg the exclusive right to reproduce the work in a material form), the author of the copyright material is not necessarily the owner of the rights and therefore in a position to use copyright law to object to the use of the material by another without permission.

The *Copyright Act 1968* (Cth) provides a set of default rules to determine the ownership of copyright material where there is no agreement to the contrary between the relevant parties.<sup>47</sup> For the most part the ownership of copyright in works begins in the hands of the author.<sup>48</sup> Take for example an essay written by a student. The student, as author of the literary work, will generally own copyright. If the author is an employee and has created the material as part of their job, then the copyright rests in the hands of the employer.<sup>49</sup> So copyright in course materials or exam papers written by academic staff as part of their contract of service will generally be owned by the employing institution. There are special rules for Crown copyright that would affect the ownership of materials created in institutions such as state schools.<sup>50</sup> The ownership of other subject matter (eg a sound recording) generally starts in the hands of the maker.<sup>51</sup>

The moral rights provided for in the *Copyright Act 1968* (Cth) are very different in this regard. In the case of moral rights (eg the right to be attributed as the author of the work), the rights are regarded as personal to the individual (not corporate) author and are not assignable to others.<sup>52</sup>

#### 4 *Infringement*

Plagiarism and copyright infringement share two recent trends in common. The first is that digital technology and the Internet make both easier to commit.<sup>53</sup> The second is changed 'attitudes to misappropriation' of others' works.<sup>54</sup> Material appearing on the Internet is seen by many as somehow in the 'public domain' and no longer requiring attribution.<sup>55</sup> In the same way that 'many people believe there is nothing wrong with pirating computer software or MP3 files', they are now 'less inclined to believe that plagiarism itself is morally wrong'.<sup>56</sup>

There are significant differences between breach of the ethical rules of plagiarism and the legal rules about copyright infringement.

In the case of plagiarism, the copying of text or an idea without attribution of the author will fall foul of the rule.

The question of copyright infringement is more complicated.

##### (a) *Infringement: Economic Rights*

Infringement of the economic rights of the copyright owner arises when someone other than the owner, without the permission of the owner, uses the copyright material in one of the ways over which the owner has been granted exclusive rights,<sup>57</sup> for example by reproducing or communicating (making available online or electronically transmitting) to the public the material or making an adaptation of a work and the use is not excused under the defences or statutory licences in the *Copyright Act* (Cth). Direct infringement of copyright occurs without the need to prove intention.<sup>58</sup> The rules of plagiarism by contrast, generally assume there is consent from the original author to the use of the material provided attribution occurs.<sup>59</sup>

In the case of reproduction of copyright material the test of infringement is based on objective similarity between the copyright work and the alleged infringing material and a causal link, that is, the alleged infringer has copied from the copyright material and not created the second work independently.<sup>60</sup> To make an adaptation of a work means: to turn a literary work into a dramatic work (eg novel to a screenplay) or vice versa; in the case of a computer program, to make a version of the work that is not a reproduction; a translation of a literary work or a picture version of it; and a new arrangement or transcription of a musical work.<sup>61</sup>

Generally there will be no infringement of copyright when what is reproduced is the bare idea or underlying information, as opposed to the way the ideas or information are expressed (referred to as the idea/expression dichotomy).<sup>62</sup> For copyright purposes, provided what is used from the copyright material is the bare idea or information and not the expression of the idea or information, there is no infringement. However as Learned Hand J has said, referring to the idea/expression dichotomy: ‘Nobody has ever been able to fix that boundary and nobody ever can.’<sup>63</sup> This is a key difference between plagiarism and copyright infringement. The rules of plagiarism require ideas as well as words taken from other authors to be attributed.<sup>64</sup>

In some circumstances the line drawn in copyright between idea or information and expression may not be easily determined. This is primarily due to the issue of substantial part. Infringement occurs not only when a whole copyright work has been reproduced or communicated to the public, but also when a substantial part of it has been reproduced or communicated to the public.<sup>65</sup> The term ‘substantial part’ is not defined in the *Copyright Act 1968* (Cth). For their part, in determining whether a substantial part has been taken, the courts have applied a qualitative test not just a quantitative one.<sup>66</sup> In this way any important part of the copyright material will constitute a substantial part, even though it may only be a small part. Plagiarism, by contrast, does not depend upon a finding of a certain amount of copying either quantitatively or qualitatively.

The finding of copyright infringement, when a substantial part of a work is taken, creates a fairly wide scope for copyright infringement, at least in relation to copyright works. For works, infringement is not only constituted where, for example, the words of a literary work are used by another without permission. Infringement of copyright in a literary or dramatic work may also occur where developed characters and a series of dramatic events are reproduced from the copyright work.<sup>67</sup> Similarly, the copyright in a work resulting from historical research may be infringed by a fictional work which relies very heavily on the earlier historical work. An example of this is *Ravenscroft v Herbert & New English Library Ltd*<sup>68</sup> where material from *The Spear of Destiny*, a semi-historical work about the spear that allegedly pierced Christ’s side during the Crucifixion, was used in a later work of fiction, *The Spear*.<sup>69</sup> Another example is *Harman Pictures NV v Osborne*<sup>70</sup> where material from the book *The Reason Why*, about the events of the Crimean War surrounding the Charge of the Light Brigade, was used in the film script for a feature film *The Charge of the Light Brigade*.<sup>71</sup> In these instances of copyright infringement it is not so much the protection of the expression of the idea, as the protection of the skill and labour in seeking out the primary sources and creating the researched work. In this context copyright infringement comes very close to the rules of plagiarism.

For other subject matter, infringement is more limited in the sense that it concentrates particularly on the form of the copyright material. For example, for a sound recording to be infringed, what must be copied is the aggregate of the sounds on the tape (eg a sound-alike album will not infringe the sound recording copyright of the imitated sound recording).<sup>72</sup>

#### *(b) Infringement: Moral Rights*

From December 2000, copyright was expanded to include personal rights as well as economic rights. The so-called ‘moral rights’<sup>73</sup> are intended to protect the personal connection between the author and the copyright material created. For this purpose the definition of work is extended so that it includes the four categories of works (literary, dramatic, musical and artistic) as well as film.<sup>74</sup> It is in the area of moral rights that copyright and plagiarism are mostly closely aligned.

The personal nature of moral rights means they are exercisable by the author of the copyright material irrespective of the ownership of the economic rights. The rights are conferred only on individuals<sup>75</sup> and they are not assignable to others as are the economic rights.<sup>76</sup>

The moral rights comprise the right to have the authorship of the work attributed to the relevant author,<sup>77</sup> not to have it falsely attributed to another,<sup>78</sup> as well as the right of integrity (the right not to have the work subjected to derogatory treatment).<sup>79</sup> So, for instance, where a copyright work (or a substantial part of it) is reproduced, the author has the right to be identified in accordance with the moral rights provisions ('any reasonable form of identification' that is 'clear and reasonably prominent').<sup>80</sup> Where another person's name has been inserted or affixed to the work in a way so as to imply falsely that he or she is the author, the true author may obtain various civil remedies.<sup>81</sup>

Infringement of moral rights is excused where the action is reasonable. There is an inclusive list of factors that must be taken into account in determining the reasonableness of the conduct.<sup>82</sup> Otherwise the author's consent is required to excuse the conduct.<sup>83</sup>

The moral rights in relation to attribution and false attribution are very similar to the rules of plagiarism. The only differences are the application of the defence of reasonableness and the possibility of obtaining the consent of the author to the act in breach of the moral right.

#### *(c) Defences to Infringement*

There are some limits to the infringement of the economic rights in copyright material. A number of defences under the *Copyright Act 1968* (Cth) permit what would otherwise amount to infringing acts in relation to the economic rights, for example a fair dealing with a copyright work may occur where the dealing is for the purpose of research or study<sup>84</sup> or for the purpose of criticism or review.<sup>85</sup> These are in effect 'free' uses. The defences in some, but not all cases, require an acknowledgement of the author in order to excuse the otherwise infringing conduct,<sup>86</sup> but even in the case of s 40 (fair dealing for research or study), where attribution is not required, a lack of attribution may be a relevant factor in determining whether the dealing is 'fair' (see the list of inclusive factors in s 40(2), eg the character of the dealing). This is a very different position to that taken in plagiarism, where the acknowledgement of sources is always required. On the other hand, copyright infringement, unlike plagiarism, may not be avoided merely by the attribution of the source material. Even if the material is properly referenced, where for example a reproduction or a communication to the public takes place without permission and outside the terms of any defence, infringement of copyright will arise.

In addition to the defences to infringement of copyright, there are a number of statutory licences that permit use of copyright material, but unlike the defences, these are uses for which the copyright owner is remunerated (eg Parts VA, VB statutory licences for educational institutions).

#### *(d) Infringement and Term*

The rights of the copyright owner do not continue indefinitely. At the end of the copyright term the material falls into the public domain and may be used by others without permission and without attribution. The out of copyright work is "free for the taking" by subsequent authors'.<sup>87</sup> This is not the case for plagiarism. As Stearns puts it: 'Copying from any source qualifies as plagiarism, even if the source has been in existence for centuries'.<sup>88</sup>



Having outlined the nature of plagiarism and copyright, and clarified the differences between the two principles, the next section of the paper looks at one aspect of the intersection between the two areas, the use of plagiarism detection software and services.

### III MONITORING PLAGIARISM: ARE PROPERTY RIGHTS IN THE FORM OF COPYRIGHT INVOLVED?

#### *A The Monitoring of Student Work for Plagiarism*

Part of an educator's job is to instruct students in the proper conduct of their studies, including the appropriateness of acknowledging the sources of information they use. Teachers have been monitoring student work for plagiarism for a long time. Until recently this was achieved in ways that had few copyright implications. A teacher reading the hardcopy version of work submitted by a student and comparing it against other published books and articles raised no copyright infringement problem as no copy was made. It was a time consuming task, especially if the student work was handwritten.

This basic picture has been gradually complicated through the adoption of new technology. Photocopying technology enables a teacher to photocopy a student's work so that others may share the task of monitoring for plagiarism. The widespread use of electronic communications technology means that students are now often required to submit an electronic version of their work and a copy of the work can far more easily be made and sent to others, for example via email, for monitoring.

A significant change in monitoring practice has come with the development of software that enables a faster, more accurate and much wider comparison of the submitted work with material available on the Internet. There is a variety of proprietary software packages used to monitor plagiarism. As part of their operation it would appear inevitable that a reproduction will be made of the submitted student works and other acts constituting an infringement of copyright may also occur.

While there is a significant amount of research about plagiarism in general and how plagiarism detection may be administered in educational institutions,<sup>89</sup> there is relatively little discussion about the copyright implications of using plagiarism detection software. The discussion in this paper about the copyright issues involved in the use of plagiarism detection software is general in nature. The reason is that the technical detail of the various systems will vary, as will the available information about how they operate.

An example of plagiarism detection software is TURNITIN. Its owners claim the software translates the words and characters in a student essay into digital footprints.<sup>90</sup> James, McInnes and Devlin explain the method:<sup>91</sup>

The technology used is called 'document source analysis.' It uses a set of algorithms to make a digital footprint of any text document, and then compares it against Internet sources and against an in-house database. Results are compiled into an 'originality report' which colour-codes and underlines text passages showing similarities to other sources, and gives the URLs of the sources.

The proprietors of TURNITIN claim that no copyright infringement is involved in their processes.<sup>92</sup> Another example of this type of software is SafeAssignment. The owners of that

software explain their technique as ‘utilising [an] innovative artificial intelligence module that actually comprehends the content of each processed document’.<sup>93</sup>

### B *Are Copyright Rights Involved?*<sup>94</sup>

Clearly acts such as reproduction and/or communication to the public of a student’s copyright work without the permission of the student would constitute infringement of copyright unless there is a defence to excuse the use or a statutory licence applies in the circumstances. To make a photocopy (hardcopy reproduction) of a student’s essay without permission would potentially infringe copyright. The essay would constitute a literary work,<sup>95</sup> the whole work will be used, so there is no issue of substantial part,<sup>96</sup> and the reproduction will be in a material form.<sup>97</sup> To make an electronic copy (reproduction) of a hardcopy essay (eg by scanning) would also potentially constitute infringement.<sup>98</sup> To take an electronic copy submitted by the student and email (or otherwise transmit) it to other staff or to a server, where it is available to others for processing, would potentially constitute infringement (in the case of the email, communication to the public by the sender and reproduction by the receiver) even accepting that some intermediate electronic reproduction and communication may be excused under the *Copyright Act 1968* (Cth).<sup>99</sup>

Without detailed technical information about the precise use made of students’ copyright works by plagiarism detection software it is difficult to determine in particular cases whether copyright infringement will occur. However, even where services claim not to reproduce the copyright work, one could argue that part of the end product of the process, for example a copy of an essay with colour-coded highlighting of parts of texts identifying plagiarised words or groups of words (depending upon the copyright works from which the words or groups of words were taken), may constitute a reproduction of a substantial part of the essay and arguably constitute a reproduction of a substantial part of the plagiarised works, and thus constitute infringing use.

Even if the original uploading of student work in digital form was undertaken by the students themselves, and therefore is done with their consent, any communication of the work to a database (even one offshore) where the work is made available for and is accessed by staff of the plagiarism detection service, would arguably constitute an infringement by way of communication to the public unless excused. The term ‘to the public’ in the context of communication of copyright material is defined to include ‘the public within or outside Australia’.<sup>100</sup> ‘To the public’ is generally regarded as meaning a communication in a context other than domestic or quasi-domestic. A communication to employees as part of their public life in a commercial setting would be regarded as ‘to the public’.<sup>101</sup> It is not the individual nature of the communication that takes it outside the definition of ‘to the public’, as seemingly ‘individual’ circumstances have been held to fall within the term.<sup>102</sup>

Without more detail on the technical aspects of the use of student work by plagiarism detection services it is also difficult to determine whether an adaptation of a work is made and therefore an infringement of copyright occurs if this is done without consent. One issue in this regard would be the change from a text work to a set of algorithms and whether this amounted to a translation or is otherwise an adaptation within s 10.

Some have argued that if any potential infringing acts take place offshore (there are some US-based plagiarism detection services) there is no infringement of Australian copyright law as the relevant sections refer to acts taking place in Australia.<sup>103</sup> What would then need to be considered is the further issue of infringement of copyright under US law, a matter for the US legislation. Australian copyright materials will be protected in the US under US law by virtue of

the US provisions applying the relevant international agreements to which the US and Australia are parties.<sup>104</sup>

In circumstances where the use made of copyright material has not been consented to by the copyright owner and is not otherwise excused by a defence, an infringement of copyright takes place. The primary infringer is the party undertaking the acts which fall within the exclusive rights of the copyright owner, for example, reproduction of students' work. An educational institution that sanctions or approves the reproduction and/or communication to the public of its students' material by another party without the students' permission, would potentially be subject to infringement proceedings for its authorisation of the infringing acts.<sup>105</sup>

## IV MONITORING PLAGIARISM: DEALING WITH COPYRIGHT RIGHTS

### *A Excusing Infringement by Consent/Licence*

There will be no infringement of copyright where the copyright owner has given permission for the relevant acts. The grant of the permission (licence) of the copyright owner may be express or implied.

#### 1 *Express Consent*

Where the copyright owner has expressly consented to the use, there is no infringement of copyright.<sup>106</sup> There is no requirement that the express permission be in writing,<sup>107</sup> so the oral permission of the copyright owner is sufficient. There is no particular form of words required to constitute an express licence, so provided that the permission is clear, no infringement will occur when what is done falls within its terms.

In many circumstances educational institutions promulgate a myriad of policies and other rules to which students are deemed to agree by virtue of their enrolment. It would be a matter of looking at the detail of these procedures and rules in order to determine whether consent to certain plagiarism detection practices that would otherwise constitute infringing acts has been obtained from enrolled students.

In some cases express consent is obtained when each assessment task is submitted by students. An example of a proforma express consent from a student for a submitted assignment appears in the TURNITIN Australian Legal Document:<sup>108</sup>

I declare that this assignment is original and has not been submitted for assessment elsewhere, and acknowledge that the assessor of this assignment may, for the purpose of assessing this assignment:

- . Reproduce this assignment and provide a copy to another member of faculty, and/or
- . Communicate a copy of this assignment to a plagiarism checking service (which may then retain a copy of the assignment on its database for the purpose of future plagiarism checking).

The obtaining of this type of permission from students has been subject to criticism. In the letters to the editor column of *The Australian* a postgraduate student association representative highlighted the 'lopsided nature of the university-student relationship' and the 'unconscionable' nature of '[f]acilitating the commercial exploitation of these unequal relationships against student copyright'.<sup>109</sup> Some students at the University of Newcastle reportedly launched a petition 'to

scrap the use of Turnitin on the grounds that the company is unfairly profiting from students' work, and using it to police other students'.<sup>110</sup>

Once express consent has been obtained, no infringement of the economic rights of a copyright owner occurs where copyright material is used by another within the terms of the express consent. In a similar fashion, consent from the author can also excuse what would otherwise constitute breach of the moral rights of the author. So, for instance, if the consent of the author is obtained to the attribution of the author's work to another party, there is no question of infringement of moral rights. This can lead to a very different result in terms of plagiarism and copyright infringement for the one set of circumstances.

Take for example a case reported in *The Australian*.<sup>111</sup> A young woman was claiming damages for injuries suffered when a racehorse escaped onto a busy roadway and collided with a motor vehicle in which she was travelling. During the proceedings the issue of her academic achievements at the time was put at issue. Following the accident and while apparently suffering from injuries sustained from it, the woman was able to achieve good academic results in her first year studies at university. Her response to this evidence was to claim the good academic marks were obtained only because her brother and a friend wrote the assessment tasks and permitted her to submit the work as her own. Whilst it is clearly an example of plagiarism, the consent of the brother and friend avoids any question of copyright infringement.

Another example of this difference between copyright infringement and plagiarism can be seen in the context of self-plagiarism. Self-plagiarism occurs if a student or an academic submits work where the work has already been submitted or presented before. Here the copyright owner is not infringing copyright (as it is their own work) but the rules of plagiarism have been breached because, without indicating otherwise, the representation is made that this is new work submitted for the purposes of the particular course or seminar or publication.

## 2 *Implied Licence*

Where students have had explained to them the plagiarism policy and monitoring mechanisms used by the educational institution at which they are enrolled, and each student has agreed expressly to the use, there is no infringement of copyright. What is more likely to have occurred, at least in the recent past, is that an express licence has not been obtained. Can a licence be implied in these circumstances?

A licence from the copyright owner to do an act that would otherwise constitute infringement may be implied. The implied licence arises in a number of ways. First, it may arise from the circumstances in which the copyright owner deals with the copyright material.<sup>112</sup> An implied licence may also arise in relation to particular classes of contract.<sup>113</sup> So, for instance, where a client engages an author to create a copyright work, the client may not be the copyright owner (unless the contract so provides), but the client will have the benefit of an implied licence, that is, a permission from the copyright owner to use the copyright material: 'in the manner and for the purpose in which and for which it was contemplated between the parties that it would be used at the time of the engagement'.<sup>114</sup> This principle has been applied in relation to architects' plans, where the contract of engagement did not deal with the issue of copyright ownership.<sup>115</sup> An implied licence has also been held to arise where its inclusion has been necessary to give 'business efficacy' to the arrangement between the relevant parties.<sup>116</sup> In this way certain uses of copyright material may be impliedly licensed where a trade custom has developed in respect of the usage.<sup>117</sup>

An implied licence is not a free use. The scope of the permitted use, including the question of remuneration, would be a question of fact in the circumstances. What is clear is that an implied licence will be excluded by express terms to the contrary or having regard to the particular circumstances.<sup>118</sup>

It is arguable that students have generally been made aware of the issue of plagiarism. Even though the particular plagiarism policy and monitoring mechanisms may not have been brought to their attention explicitly, it is most unlikely any student has avoided all references to the issue of plagiarism and practices of monitoring for it, either in class or in course outlines. In the absence of express instructions about the institution's policy and monitoring practices, but bearing in mind the general understanding of students in relation to marking practices, there would be an arguable case for an implied licence from each student to use the copyright material submitted for marking purposes. The real question is the scope of the implied licence.

When a student submits his or her work for marking, it would be understood that the marker could undertake the task by carrying out all appropriate acts, including checking the references. There would arguably be an implied licence to photocopy a hardcopy assignment so that the examiner and the examiner's colleagues would be able to manually check the submitted work in the case of uncertainty or double marking for quality control where there are large classes with multiple markers and also where the student has disputed and/or appealed the mark. The implied licence would have arisen from the general practice. It would arise unless there is an agreement to the contrary or the particular circumstances indicate otherwise.

The scope of the implied licence would be limited to those acts which are generally understood to be necessary to undertake the task of marking. Without more, it would not extend to the teacher reproducing the student assignment as an example in a textbook they are writing. Falling outside the licence would be the copying of the assignment for posting on a notice board, either a real one or a virtual (online) noticeboard. A student would generally expect to be asked for their permission for such further use. A case probably falling within the implied licence would be copies made for the purpose of quality assurance for accreditation of the educational institution.

It is more difficult to argue the implied licence that has arisen based on past, generally known marking practices, encompasses the electronic copying and communicating to the public that takes place as part of the operation of recently developed plagiarism software tools. The increasing adoption of assignment submission practices that utilise such software may in time have an effect on the implied licence but it would be difficult to argue a wider implied licence short of the wholesale adoption of such methods across the majority of educational institutions (contrast the TURNITIN advice which argues for a wider implied licence).<sup>119</sup>

Where the use of plagiarism detection software requires the students themselves to submit their work, it is arguable the consent of the students may be implied from their actions, but again the real question is the extent of the permission, that is, the scope of the licence. There would arguably be an implied licence to undertake acts reasonably necessary to perform the task of plagiarism detection. This would cover reproductions such as scanning the copyright material so it can be compared against submitted work from other students relating to the task, and against works otherwise available for comparison, for example, works accessible on the Internet from which students may have been tempted to draw without appropriate attribution.

There is a much more difficult question about the scope of the implied licence beyond these basic tasks necessary for the monitoring of the particular papers submitted for a particular assessment task. Could it be implied that the students give permission for the archiving of their

material for the purposes of later comparison? If so, what are its limits? Do students impliedly license the reproduction to be used for later comparisons in relation to the particular course, or all other courses in the current academic year within the school or college, faculty or university or in any following year? SafeAssignment *Product Overview* states that '[e]very student-submitted paper is thoroughly matched against his or her institution's database to prevent peer-to-peer cheating'.<sup>120</sup>

Not all plagiarism detection software retains the copies within a database for later use—for example, Copycatch and Eve2 do not, but TURNITIN does.<sup>121</sup> Do students impliedly license a copy to be retained by the owner of the commercial software for use in that school or university or other universities nationally or internationally that make use of the software? TURNITIN is said to be used in over 51 countries and to receive over 20,000 papers per day.<sup>122</sup>

It is probably the case that an implied licence would not extend this far. It is one matter for a student to permit the use of his or her work for the purposes of the educational institution in which they are enrolled, and a very different matter for it to be used by a commercial organisation. It may be possible to argue that plagiarism detection services are acting merely as the agent of the university in this regard but the commercial nature of the subsequent use of students' work would appear to take their conduct outside the scope of the implied licence.

A number of factors militate against a finding of an extended implied licence. The first is the objections already made by a number of student organisations. The objection of students to the inclusion of their work in the TURNITIN database where it will thereafter be commercially exploited by a private company, was voiced when the University of Melbourne sought to introduce the service.<sup>123</sup> It is the saving of whole works not only to carry out the immediate task, but to create and add to a database of works that is a crucial issue. Buckell reported that Melbourne University was negotiating with TURNITIN representatives to have students' work removed from the database 'after a few years'.<sup>124</sup> A postgraduate student representative indicated that students were still opposed: 'But the notion that a private company can take a student's work, put it in a database and commercially exploit it without recognition is disturbing'.<sup>125</sup> In at least one instance in the US, an educational institution (University of California at Berkeley) has reportedly declined to use a particular plagiarism service because of this practice.<sup>126</sup>

TURNITIN representatives dispute the claim that value arises from the collection of student works. They are reported as arguing that the system relies upon the student work being translated into digital fingerprints and the value is 'not in the collection of words and characters in an essay, but in the series of numbers derived from the essay once we transform those works and characters into digital fingerprints'.<sup>127</sup> They argue '[w]e don't harm the free-market value of the work—a student can take their Macbeth essay to the market and make millions'.<sup>128</sup>

Secondly, what is used by the plagiarism detection service is invariably unpublished copyright material. Whereas the commercial use of unpublished copyright material will be a matter for the parties to decide in the case of an express licence, the unpublished nature of the works will no doubt be a significant matter in determining the scope of any implied licence as well as the application of the defences to infringement. Unpublished copyright works have been recognised as having a particular importance and vulnerability in copyright law. One of the exclusive rights of the copyright owner in relation to a work is to publish the work for the first time, that is, to make copies available to the public.<sup>129</sup> In addition, it has been recognised that an important factor in determining the availability of defences to infringement such as a fair dealing for criticism or review, has been whether the work has been published. Different implications arise from an author making a choice to introduce his or her work into the marketplace where it will ordinarily

be criticised and reviewed.<sup>130</sup> While it is probably the case that the use of student work by a plagiarism detection service would not constitute publication (s 29 requires reproductions of the work to be supplied to the public), the particular vulnerability of the unpublished work once it is in digital form, would arguably have an impact on the application of the fair dealing defences.

### B *Excusing Infringement by Way of Defence*

Short of obtaining the permission of individual students to acts that would otherwise constitute infringement of copyright, and in circumstances where a licence cannot be implied, is there any argument that a defence might be available to the educational institution and the plagiarism detection service?

There are a number of particular defences that apply in the educational context.<sup>131</sup> None appears to be applicable in the context of plagiarism detection.

There are also some defences which apply generally. The most important of these are the fair dealing defences. The defences permit uses that amount to a fair dealing with a work or audio-visual item (sound recording, film or broadcast: s 100A) for certain specified purposes, for example research or study (ss 40, 103C) and criticism or review (s 41, 103A). Would an educational institution and a plagiarism software service be able to rely on the fair dealing defences in order to reproduce and communicate to the public student owned copyright material for plagiarism detection purposes?

Australian courts have generally interpreted the fair dealing purposes by reference to the dictionary definitions of the terms.<sup>132</sup> They have also required the relevant purpose to be that of the party undertaking the use.<sup>133</sup>

The dealing must also be fair. This is a 'question of degree' and will depend on matters including the nature of the use. For the educational institution the issue would be whether its use of student work fell within any of the permitted purposes and whether it was fair. For the plagiarism detection service, there would be a problem in arguing the defence where a commercial use of copyright works is involved (less likely to be fair). Like the media monitor in *De Garis*, while the client's purpose may fall within the relevant provisions (research or study, criticism or review) the commercial organisation's purpose might not be seen as doing so. Depending upon which defence was being relied upon, that is, research or study or criticism or review, a further requirement of appropriate acknowledgement may also be required before the defence may be relied upon.

The US has a much wider open-ended fair use exception in s 107 of the *Copyright Act 1976* (US). The application of that section to excuse from infringement the use of students' work by plagiarism detection services has not been determined by any court and there are arguments both in favour and against its application in the circumstances.<sup>134</sup>

### C *Statutory Licences*

Another way in which uses such as reproduction and communication to the public of copyright material may be excused is through the statutory licence provisions. They enable the use of copyright material without the copyright owner's permission but they include a framework under which remuneration is paid to the copyright owner. The system operates by way of record-keeping or surveys and in conjunction with the work of two copyright collecting societies (Copyright Agency Ltd for text and artistic works and Screenrights for off-air taping from radio

and television). While the statutory licence provisions were introduced so that educational institutions could provide third party owned copyright material to students, it is arguable that the work of students would also fall within its terms (e.g., s 135ZL-hardcopy and s 135ZMD for works in electronic form). The educational institutions could argue that the use was ‘solely for the educational purposes of the institution’.<sup>135</sup> However, in the circumstances there will be a question whether the commercial plagiarism detection service in using the works for purposes other than educational purposes (i.e., commercial purposes), but with the consent of the educational institution, would fall within the provisions or whether, due to its involvement, the protection afforded under the statutory licence would be ‘taken never to have applied’ to the making or communication of the copy.<sup>136</sup>

While the statutory licence provisions might protect the educational institution from liability for infringement, the use would be a remunerated use. It would be a matter for students to join the relevant collecting society in order to benefit financially from the uses made of their work.

## V CONCLUSION

Educational institutions play a key role in instructing their students in the ethical rules of plagiarism. The perceived increase in instances of plagiarism has put pressure on educational institutions already under stress from larger student numbers. To meet this need new technologies have been developed to deal with the large volume of materials to monitor and the wealth of information readily available (e.g., on the Internet) against which it must be compared.

In this public discussion about plagiarism there has often been some confusion between plagiarism and copyright infringement. The ethical rules of plagiarism and the law of copyright have a number of key features in common. They are both concerned to ensure against the free riding by authors on the creative works of others. More so in Australia than the US (which lacks a general moral rights regime), the two areas also seek to ensure the appropriate attribution to an author when the author’s work is used by another. However, there are important differences between the two areas.

While traditional methods of plagiarism detection had few copyright implications, the development and application of plagiarism detection software bring the increased potential for acts of copyright infringement. In order to meet this situation, closer consideration must be given to the copyright rights involved and attempts made to obtain appropriate consents from the rights owners.

The main area of contention to date has not been the operation of the software as such, but rather the attempts by some commercial plagiarism detection services to archive student material (or its algorithm equivalent) so that they are able to use the material in later comparisons and thereby receive a commercial advantage. While in the short term the answer in copyright law might be to obtain express consent to such uses of student work, this leads to yet other issues including the inequality of bargaining power between students and their educational institutions which may impact upon the validity of the grant of permission.

Bearing in mind the main service providers involved so far in the area, there are also important issues about the cross-border operation of copyright law.

The intersection of plagiarism and copyright will no doubt provide educational institutions with increasing challenges in the future.



## ENDNOTES

1. Justin Norrie, 'Stop it, school cheats – there's nowhere to hide', *Sydney Morning Herald* (Sydney), 27-28 August 2005, 1.
2. In discussing plagiarism the authors are mindful of the problem recognised by Green that '[O]ne cannot write on the subject ... without a certain nagging sense of paranoia about the originality of one's ideas and the scrupulousness of one's citations!' S Green, 'Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights' (2002-3) 54 *Hastings Law Journal* 167, 180.
3. Laurie Stearns, 'Copy Wrong: Plagiarism, Process, Property, and the Law' (1992) 80 *California Law Review* 513, 517.
4. Ibid 514.
5. Macquarie University *The Macquarie Dictionary* (2<sup>nd</sup> revised ed, 1987) 1301.
6. Robert Briggs, 'Shameless! Reconceiving the Problem of Plagiarism' (2003) 46(1) *Australian Universities Review* 19.
7. Lisa Maruca, 'The Plagiarism Panic: Digital Policing in the New Intellectual Property Regime' (Paper presented at the AHRB Copyright Research Network 2004 *Conference on New Directions in Copyright*, June 30, 2004 1, 3) <<http://www.copyright.bbk.ac.uk/contents/conferences/2004/download/maruca.pdf>> at 24 January 2005.
8. Ronald Standler, 'Plagiarism in Colleges in USA' (2000) 1, 24 <<http://www.rbs2.com/plag.htm>> at 28 June 2005.
9. Briggs, above n 9, 22.
10. Green, above n 2, 174.
11. University of Sydney, 'Student Plagiarism: Course Work', University of Sydney Policy and Procedure, 15 February 2005 1.
12. Stearns, above n 3, 532.
13. University of Sydney, above n 11, 3.
14. Jaime Dursht, 'Judicial Plagiarism: It may be Fair Use but is it Ethical?' (1996-7) 18 *Cardozo Law Review* 1253, 1265-6, 1293.
15. Green, above n 2, 188.
16. Ibid 206. Limited protection is available to visual artists under the *Visual Artists Rights Act 1990* (USA).
17. Stearns, above n 3, 534.
18. Green, above n 2, 189.
19. Stearns, above n 3, 543-4.
20. Moral rights are discussed in the following section of the paper.
21. Stearns, above n 3, 517.
22. Ibid 517-8.
23. Green, above n 2, 177.
24. Ibid 175.
25. Stearns, above n 3, 514.
26. Dursht, above n 14, 1255.
27. Ibid 1281.
28. *Copyright Act 1968* (Cth) s 196.
29. *Copyright Act 1968* (Cth) ss 31, 85-88
30. *Copyright Act 1968* (Cth) ss 35, 97-100.
31. For works, generally 70 years after the year of the author's death and for other subject matter generally 70 years after the year of publication, *Copyright Act 1968* (Cth) ss 33, 93-96.
32. *Copyright Act 1968* (Cth) ss 10, 32, 89-92.
33. *Copyright Act 1968* (Cth) ss 184-188.
34. *Copyright Act 1968* (Cth) ss 14, 36, 101.
35. *Copyright Act 1968* (Cth) Part IX (introduced in 2000).

36. *Copyright Act 1968* (Cth) ss 190, 195AN.
37. *Copyright Act 1968* (Cth) s 32.
38. *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.
39. *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 55 IPR 1.
40. *Ibid.*
41. James Lahore and Warwick Rothnie, *Lahore Copyright and Designs*, 2006, para 10,165.
42. *Macmillan & Co Ltd v Cooper* (1923) LJ PC 113.
43. *Donoghue v Allied Newspapers Ltd* [1938] Ch 106.
44. *Ibid.*
45. A work of joint authorship: *Copyright Act 1968* (Cth) s 10.
46. See *Copyright Act 1968* (Cth) ss 22, 97-100.
47. *Copyright Act 1968* (Cth) s 35(3).
48. *Copyright Act 1968* (Cth) s 35(2). But see some special cases, for example, employed journalists *Copyright Act 1968* (Cth) s 35(4).
49. *Copyright Act 1968* (Cth) s 35(6).
50. *Copyright Act 1968* (Cth) Part VII Division 1.
51. *Copyright Act 1968* (Cth) ss 97-100.
52. *Copyright Act 1968* (Cth) ss 190, 195AN. Special provisions apply in respect of co-authorship agreements for film: s 195AN(4),(5). There are also provisions relating to the giving of the author's consent to acts that would otherwise be in breach of the moral rights provisions: ss 195AW, 195AWA.
53. Green, above n 2, 194.
54. *Ibid.*
55. *Ibid.*
56. *Ibid.*
57. *Copyright Act 1968* (Cth) ss 36, 101.
58. *Francis Day & Hunter Ltd v Bron* [1963] Ch 587. Contrast indirect infringement, ie subsequent commercial dealings with infringing articles where intention is relevant, see eg s 37.
59. Green, above n 2, 202.
60. *Autodesk Inc v Dyason* (1992) 22 IPR 163.
61. *Copyright Act 1968* (Cth) s 10.
62. Lahore and Rothnie, above n 41, para 34,105 quoting *Hollinrake v Truswell* [1894] 3 Ch 420.
63. Quoted by Jacob J in *Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd* (1994) 29 IPR 25, 39.
64. Stearns, above n 3, 525.
65. *Copyright Act 1968* (Cth) s 14.
66. *Hawkes & Son (London) Ltd v Paramount Film Service Ltd* [1934] Ch 593.
67. *Zeccola v Universal City Studios Inc* (1982) 67 FLR 225: the novel and screenplay for *Jaws* was found to be infringed by the film *Great White*.
68. [1980] RPC 193.
69. Lahore, above n 41, para 34,260.
70. [1967] 2 All ER 324.
71. Lahore, above n 41, para 34,260.
72. *CBS Records Australia Ltd v Telmak Teleproducts (Aust) Pty Ltd* (1987) 72 ALR 279.
73. *Copyright Act 1968* (Cth) Part IX, ss 189-195AZQ.
74. *Copyright Act 1968* (Cth) s 189. The *Berne Convention for the Protection of Literary and Artistic Works* (1886) under which the obligations in relation to moral rights arise, extend the rights to 'literary and artistic works' which include film (Articles 2, *6bis*).
75. *Copyright Act 1968* (Cth) s 190.
76. *Copyright Act 1968* (Cth) s 195AN.
77. *Copyright Act 1968* (Cth) s 193.
78. *Copyright Act 1968* (Cth) s 195AC.

79. *Copyright Act 1968* (Cth) s 195AI.
80. *Copyright Act 1968* (Cth) ss 195, 195AA.
81. *Copyright Act 1968* (Cth) s 195AD.
82. *Copyright Act 1968* (Cth) ss 195AR, 195AS. Eg industry practice or the context in which the work is used.
83. *Copyright Act 1968* (Cth) ss 195AW, 195AWA.
84. *Copyright Act 1968* (Cth) s 40.
85. *Copyright Act 1968* (Cth) s 41.
86. See, eg, fair dealing for criticism or review: *Copyright Act 1968* (Cth) s 41.
87. Mark Lemley, 'Rights of Attribution and Integrity in Online Communication' (1995) *J.Online L. article 2*, 1, 2.
88. Stearns, above n 3, 526.
89. There is an extensive literature on the reasons why students plagiarise, eg Roger Bennett, 'Factors Associated with Student Plagiarism in a Post-1992 University' (2005) 30(2) *Assessment & Evaluation in Higher Education* 137 and the ways in which educational institutions manage the issue of plagiarism, eg Justin Zobel and Margaret Hamilton 'Managing Student Plagiarism in Large Academic Departments' (2002) 45(2) *Australian Universities Review* 23.
90. Emanuella Grinberg, 'Student wins battle against plagiarism-detection requirement', CNN.com 21 January 2004, 2 <<http://www.cnn.com/2004/LAW/01/21/ctv.plagiarism/index.html>> at 4 March 2005.
91. R James, C McInnes and M Devlin, 'Plagiarism detection software: How effective is it?' excerpt from *Assessing Learning in Australian Universities: Ideas, strategies and resources for quality in student assessment*, Centre for the Study of Higher Education, Melbourne University 1, 3 <<http://www.cshe.unimelb.edu.au/assessinglearning/docs/PlagSoftware.pdf>> at 2 March 2005.
92. Grinberg, above n 90.
93. *SafeAssignment Product Overview* 2005, 1 <<http://www.safeassignment.com/product.html>> at 25 August 2005.
94. There is a wealth of research about the ownership of copyright in works created in the educational context. See for example the work of A Monotti: A Monotti, 'Ownership of Copyright in Traditional Literary Works within Universities' (1994) 22 *Federal Law Review* 340; A Monotti 'Allocating the Rights in Intellectual Property in Australian Universities: An Overview of Current Practices' (1999) 27 *Federal Law Review* 421; A Monotti 'Maximising the benefits from intellectual property in universities: awareness of our rights and obligations' (2000) 43(2) *Australian Universities Review* 23; A Monotti, 'University Copyright in the Digital Age: Balancing and Exploiting Rights in Computer Programs, Web-based materials, Databases and Multimedia in Australian Universities' [2002] *EIPR* 251; A. Monotti with S Ricketson, *Universities and Intellectual Property: Ownership and Exploitation* (2003). This paper concentrates not on copyright ownership, but on some of the consequences of ownership on the processing of student work by plagiarism detection software.
95. *Copyright Act 1968* (Cth) s 10.
96. *Copyright Act 1968* (Cth) s 14.
97. *Copyright Act 1968* (Cth) s 10.
98. *Copyright Act 1968* (Cth) s 21(1A)
99. See *Copyright Act 1968* (Cth) ss 43A, 111A (temporary reproductions made as part of the technical process of making and receiving a communication); *Copyright Act 1968* (Cth) ss 43B, 111B (temporary reproductions made as a necessary part of a technical process of use).
100. *Copyright Act 1968* (Cth) s 10.
101. *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 25 IPR 157, a case about the public performance of musical works in an employment context.
102. For example broadcasts via a mobile phone network: *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 38 IPR 294.
103. *Copyright Act 1968* (Cth) ss 36, 101: '... does in Australia or authorizes the doing in Australia'. Arguably

- the ‘in Australia’ refers to the ‘doing’, not to the ‘authorises’, as acts of authorisation overseas would constitute a breach of the copyright owner’s exclusive rights under ss 36 and 101 if they result in acts of infringement in Australia: *ABKCO Music and Records Inc. v Music Collection International Ltd* [1995] RPC 657.
104. The *Berne Convention for the Protection of Literary and Artistic Works* (1886), the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (1995) and the *Australia-United States Free Trade Agreement* (2004).
  105. *Copyright Act 1968* (Cth) ss 36, 101; *University of New South Wales v Moorhouse* (1975) 133 CLR 1 and *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.
  106. *Copyright Act 1968* (Cth) ss 36, 101.
  107. Except in the case of an exclusive licence: *Copyright Act 1968* (Cth) s 10.
  108. TURNITIN *Australian Legal Document* ‘Legal advice from Blake Dawson Waldron’, 20 April 2004, 1, 3 <[http://www.turnitin.com/static/legal/legal\\_document.html](http://www.turnitin.com/static/legal/legal_document.html)> at 25 January 2005.
  109. Lachlan Williams, ‘Protecting Students’ Copyright’ *The Australian* (Sydney), Letters to the Editor, 31 March 2004, 33.
  110. Norrie, above n 1, 2.
  111. Drew Warne-Smith, ‘“No Injury” to horse crash woman’, *The Australian*, 20 April 2005, 7.
  112. Lahore, above n 41, para 26,000.
  113. Ibid.
  114. Staniforth Ricketson and Christopher Creswell, *The Law of Intellectual Property: Copyright, Designs & Confidential Information* (2006) para 14.435 quoting Jacobs J in *Beck v Montana Constructions Pty Ltd* (1963) 80 WN(NSW) 1578.
  115. Lahore, above n 41, para 26,010.
  116. Ibid para 26,000.
  117. Ibid.
  118. *Devefi Pty Ltd v Mateffy Perl Nagy Pty Ltd* (1993) 37 IPR 477.
  119. TURNITIN, above n 108, 4.
  120. SafeAssignment above n 93.
  121. Andrea Foster, ‘Plagiarism-Detection Tool Creates Legal Quandary’ (2002) 48(36) *The Chronicle of Higher Education*, A37.
  122. Maruca, above n 7, 17.
  123. Jim Buckell, ‘Plagiarism risk irks students’ *The Australian*, 17 March 2004, 35.
  124. Ibid.
  125. Ibid.
  126. Foster, above n 121.
  127. Grinberg, above n 90.
  128. Ibid.
  129. *Copyright Act 1968* (Cth) ss 29, 31(1)(ii); *Avel Pty Ltd v Multicoin Amusements Pty Ltd* (1990) 18 IPR 443.
  130. *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39.
  131. For example, a performance in class of a copyright work: *Copyright Act 1968* (Cth) s 28.
  132. *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292 and see the more recent case of *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112.
  133. In *De Garis v Neville Jeffress Pidler Pty Ltd*, a media monitoring organisation copying material on behalf of clients was held not to be able to have the benefit of the defence.
  134. Foster, above n 121.
  135. *Copyright Act 1968* (Cth) s 135ZL.
  136. *Copyright Act 1968* (Cth) s 135ZZH.