

USING THE INTERNET - LEGALLY

**Guidelines for Schools, TAFEs and System
Authorities in developing Internet policies**

Important Note

This kit has been prepared by Minter Ellison Lawyers for the MCEETYA Task Force on Copyright to provide general guidance on legal issues relevant to using the Internet to principals, teachers and students of educational institutions represented by MCEETYA. Specific legal advice should be sought on any particular factual situation.

The law relevant to Internet usage is continuously evolving, and whilst the law outlined in this kit is current as at March 2001, schools should ensure that they obtain up-to-date advice on the legal issues that are relevant to their Internet usage as they arise.

Importantly, this kit does not cover in detail the legal issues relevant to copying undertaken by school libraries and archives, as the law regulating usage of copyright materials by these bodies is complex. Nor does this kit deal with the rapidly expanding field of commercial transactions (e.commerce) on the Internet. Specific legal advice should be sought before engaging in commercial transactions over the Internet.

Schools are permitted to copy this document for free.

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1. PURPOSE OF THESE GUIDELINES

The purpose of these guidelines is to assist educational institutions in their understanding of the legal issues relevant to their use of the Internet. These guidelines are divided into the following sections:

- (a) *What is the Internet?* This section gives an overview of what the Internet is, and the features and functions it provides to users, such as the world wide web and e-mail.
- (b) *Overview of copyright.* As copyright issues are highly relevant to use of the Internet, it is important for staff and students to have a basic understanding of copyright. This section gives a general overview of what copyright is, what the law of copyright protects, the types of materials protected by copyright, who owns copyright, and Crown copyright. The issues of what constitutes copyright infringement, who is responsible for copyright infringement and some of the defences to copyright infringement are also covered. This section also looks at moral rights which have recently been introduced into Australian law, and the implications of moral rights for Internet users.
- (c) *Overview of trade marks.* Another area of legal protection relevant to using the Internet, is the law of trade marks. This section gives a general overview of the protection given to registered and unregistered trade marks, and what constitutes trade mark infringement.
- (d) *Browsing the web.* This section deals with the particular copyright issues relevant to educational users when browsing the web, and downloading and printing materials from the Internet, including the applicability of implied licences and the fair dealing defence, as well as the need for care when using so-called 'shareware' and 'freeware'.
- (e) *Creating a web page.* In creating web pages, schools users will use a variety of materials protected by copyright. This section outlines the steps school web page creators should follow to avoid infringing copyright, including finding out who owns the relevant copyright, and whether the material is still protected by copyright, considering any applicable defences, and obtaining the necessary permission or 'licence'. Legal issues relevant to linking, framing, and caching and the use of trade marks on web pages are discussed.
- (f) *Defamation on the Internet.* A person can be defamed through a communication published in an e-mail message, on a web page or on an Internet bulletin board. The speed at which, and the number of persons to whom, defamatory comments may be communicated in cyberspace outstrips that of ordinary communications. As 'cyberlibel' is a high risk area for schools, their staff and students, this section gives a general overview of the law of defamation, and the potential liability for defamation of educational institutions, their staff, and students.
- (g) *Offensive material on the Internet.* Another risk of Internet use which schools need to manage is access to possession and transmission of offensive materials. This section outlines the responsibility of schools and staff to protect students

from access to obscene, pornographic and other offensive materials, and the need to develop 'acceptable use' policies governing their staff and students' Internet use.

- (h) *Unlawful Discrimination and Harassment on the Internet.* This section outlines different types of unlawful discrimination and harassment in the context of communications on the Internet (such as e-mail and bulletin board publications), legal consequences of discrimination and harassment, and ways to minimise the risk of such conduct.
- (i) *Privacy issues and the Internet.* As the Internet is not a secure form of communication, this section outlines the types of information which schools need to take care not to make public, including through Internet publications.
- (j) *Issues for e-mail use.* As the various forms of unlawful conduct outlined in these guidelines may easily occur in e-mail publications, this section emphasises the need for schools to develop acceptable e-mail use policies for their staff and students. This section also discusses some aspects of e-mail technology, including the longevity of e-mail records and the fact that these records, if relevant, are required to be made available in any legal actions.
- (k) *Jurisdictional issues.* This section briefly deals with some of the complex legal issues that arise when generating content for publication on the Internet in one country which may offend the laws of many other countries where the content is accessed.
- (l) *Protecting intellectual property.* It is important that users of the Internet understand the basic measures which can be taken to protect intellectual property rights in the materials published on the Internet, as well as ensuring that the intellectual property rights of others are respected. This section briefly deals with the use of copyright notices, the proper use of trade marks, and some of the technological developments for making the content of schools' data more secure.
- (m) *Disclaimers and other notices.* The use and effectiveness of disclaimers, and other notices are examined in this section, and a sample disclaimer is provided.
- (n) *Frequently asked questions.* This section poses some of the frequently asked questions (FAQ's) about using the Internet, and provides the answers to these FAQ's.
- (o) *Flowchart.* This section contains a flowchart of the steps and enquiries which should be undertaken when using third party copyright materials from or on the Internet.

2. WHAT IS THE INTERNET?

The Internet is most simply described as a 'network of networks'. It consists of many different computer networks connected together through a global web of telecommunications links. A wide range of information, entertainment and software can be transmitted across these networks using common standards and 'protocols' for exchanging digital data. Anyone with a computer, a modem and a telephone line can link in to the Internet and take advantage of the features and functions that it supports.

The Internet is used to carry *electronic mail* (e-mail) messages between Internet users all over the world. Each person with an Internet e-mail address (for example fred@abcschool.edu.au) can send an e-mail message to any other person with an e-mail address. E-mail is commonly used on a one-to-one basis for sending text messages. However, it can also be used to send more sophisticated messages (incorporating text, images, sound, video, data, etc) to a larger number of recipients.

E.mail is sent over the Internet as small packages of data. Each package can consist of any one or more text files, pictures, computer programs, audio files and video files. The majority of e-mail consists of text messages. The sender of the e-mail addresses it to the recipient's specific e-mail address. When sent, the e-mail may travel through many different networks within the Internet until it finds the correct address. When the e-mail arrives at its destination, it is stored in the recipient's mailbox on his or her host computer.

The Internet is also the network on which the '*world wide web*' is built. The world wide web is a way of storing and transmitting information and other 'content' in a format that allows other users of the Internet to 'browse' that content in a simple and convenient way. Using standard 'browser' software (for example Netscape's Navigator or Microsoft's Internet Explorer), users can call up millions of 'web pages' by typing in or clicking on the web address for those pages (for example, www.abcschool.edu.au). The browser seeks out the particular 'web site' that hosts the desired page and the content of that page is then transmitted to the user's computer, where it usually appears as some combination of text, images, icons, video, sound and software. A page may also refer to other web pages by including 'hypertext links' (sometimes called 'hot links') to those other pages. These links are usually highlighted text or icons that contain details of a different web address. When a user clicks on the link, the 'target' page will automatically be called up on screen, saving the user the trouble of typing out the full web address.

The Internet blurs the traditional line between publishers, broadcasters and consumers. Unlike users of broadcast media, Internet users can control not only what they view, but when they view it. Internet users also have the ability, through e-mail and the establishment of personal web sites, to publish their own material to a global audience.

To date, the Internet has reflected a culture of free and open access to information, in part because of its origins as an academic and research network. It has been variously described as 'a giant copying machine', 'the celestial jukebox' and 'cyberspace'. However, the Internet's capacity for copying and transmitting information around the world at great speed and low cost does not mean that copyright and other laws can be ignored. With an ever increasing number of commercial users, and growing attention from government, there is now little question that the laws of the 'real world' apply as much on the Internet as anywhere else.

Anyone using the Internet should be aware that it is an open network. There is often little security to protect the messages and content as it is transmitted from one place to another. Accordingly, there is a risk that the content of those transmissions can be intercepted or interfered with by third parties such as hackers. For further discussion of the security aspects of the Internet, see 13.4-13.6 of these guidelines.

3. OVERVIEW OF COPYRIGHT

3.1 *What is copyright?*

Copyright is a form of personal property and is one of the 'intellectual' property rights which the law protects. In providing copyright protection, the law recognises and rewards the intellectual innovation, labour and skill involved in the creation of copyright materials. The *Copyright Act 1968* (Cth) ('**Copyright Act**') gives the owner of copyright a bundle of rights which *only* the owner can use or give permission to others to use.

3.2 *What types of materials are protected by copyright?*

The materials protected by copyright fall within two categories: '*works*' and '*subject matter other than works*'. The first category, '*works*', includes literary, dramatic, musical and artistic works. Copyright in '*works*' protects the interests of individual creators such as authors, lyricists, poets, composers, artists and photographers. The second category, '*subject matter other than works*' generally protects the interests of investors in copyright industries such as the recording, film, broadcasting (sound and TV) and publishing industries. Different exclusive rights apply to these materials depending on whether they are '*works*' or '*subject matter other than works*'.

The types of materials protected under these 2 categories are as follows:

'Works'

'*Works*' is a term of art used in the *Copyright Act* to describe a number of materials which are given copyright protection. They comprise:

- ◆ '*Literary works*' which includes books, reports, essays, song lyrics, instruction manuals, journal and magazine articles, poems, catalogues, tables, compilations, and computer programs.
- ◆ '*Artistic works*' which includes drawings, paintings, sculptures, cartoons, maps, photographs, plans, charts, engravings (whether or not the work is of artistic quality) and a work of artistic craftsmanship, such as handicrafts, wood carvings and jewellery.
- ◆ '*Musical works*' which includes musical scores, and compositions. Song lyrics are protected as literary works.
- ◆ '*Dramatic works*' which includes choreographies, scripts or scenarios for films, plays, shows, or pantomimes, and any other works intended to be performed.

'Subject matter other than works'

'*Subject matter other than works*' is another term of art used in the *Copyright Act* which covers:

- ◆ '*Cinematograph films*' which include films, videos, documentaries, advertisements, television programs and some computer games and multimedia products comprising moving pictures.

- ◆ 'Sound recordings' which includes audio recordings stored on vinyl records, compact discs, audio tapes and similar media.
- ◆ 'Broadcasts' which includes radio or television broadcasts, including pay television broadcasts.
- ◆ 'Published editions'. This subject matter protects the typographical arrangement of an edition and is separate from the copyright in any literary or artistic works contained in the edition. For example, there will be copyright in the arrangement of a published anthology of works or extracts.

3.3 *Can materials contain more than one type of copyright subject matter?*

A single item may contain a number of works protected by copyright. For example, a CD-ROM may contain various literary, musical and artistic works, as well as a cinematograph film. A music compact disc, for example, in addition to receiving protection as a 'sound recording' will contain a number of underlying works, such as musical scores (musical works), lyrics (literary works), and performances. A multimedia product could contain a vast number of different underlying copyright materials, including text, software and the overall compilation (protected as literary works), photographs, drawings and other graphic images (artistic works), music (musical works), scripts (dramatic works), recorded music clips (sound recordings), animation, film and video clips (cinematograph films) and performances. Identifying and managing each of these copyright materials is no easy task.

3.4 *Are there any formal requirements for copyright protection?*

In Australia, there is no system of copyright registration. Copyright protection automatically protects the original works and subject matter falling within the abovementioned categories once they are fixed in a material form; there is no need to apply for copyright protection. Nor, in the case of works is there any standard of artistic or literary merit which must be met for a work to attract copyright protection. A simple drawing by a child will be protected as an artistic work in the same way as an acclaimed masterpiece. It is, therefore, not possible or necessary formally to 'copyright' or 'take out' copyright protection for a publication.

As a result, in Australia there is no legal requirement for a publication to be marked with the © symbol or any other form of copyright notice. Nonetheless, as a practical way of reminding users that a work is protected by copyright, and as a deterrent to potential copyists, it is a common and sensible practice to include with all published copyright material the © symbol, the year of first publication and the copyright owner's name.

There are, however, some basic requirements for copyright protection in Australia to exist. They are:

- ◆ the material must be *original*. The standard of originality is reasonably low and requires that the work has not been copied from somewhere else and is the product of the author's own skill and labour; and
- ◆ the material must be *fixed in material form*. The *Copyright Act* defines 'material form' to include 'any form (whether visible or not) of storage from which the work or adaptation ... can be reproduced'. As a result, works

recorded in both visible form, for example written down on paper, or those recorded on magnetic tape, saved or recorded on computer disk or CD's are regarded as fixed in material form; and

- ◆ there must be a connecting factor to Australian law. There is a sufficient connecting factor if the material was created by a citizen or resident of Australia, or of an overseas country which is a signatory to certain international copyright conventions or if the material was first published in one of those countries. There is also a sufficient connecting factor with Australian law in respect of all materials created at the direction or control of the Commonwealth or State Crown or first published by the Crown.

3.5 *How long does copyright last?*

In most cases, copyright in a work lasts 50 years from the end of the year of the author's death. If there are joint authors, copyright continues 50 years after the death of the last joint author to die. Where a work is only published after the author's death, copyright protection continues until 50 years after the year of first publication.

Copyright in films and sound recordings lasts for 50 years from their date of first publication. Broadcasts are protected for 50 years after the year of making the broadcast.

Photographs taken before May 1969 are protected until 50 years after the year the photograph was taken. If taken during or after May 1969, copyright protection continues until 50 years after the year of first publication of the photograph.

The period of copyright is shorter in the case of copyright works created at the direction or control of, or first published by the Crown. Such Crown copyright expires in most cases 50 years from the date of first publication.

The copyright protection for published editions lasts only 25 years after first publication.

After copyright protection has expired, the material is referred to as being in the 'public domain'. In the case of materials published overseas, schools need to be careful not to assume they are public domain materials because the period of protection under the Australian *Copyright Act* has expired. This is because in some cases, under overseas copyright legislation, different periods of copyright protection may apply to these materials.

3.6 *What are the exclusive copyright rights?*

As noted above, copyright owners enjoy a bundle of exclusive rights in relation to protected copyright matter. Different exclusive rights apply to 'works' than to 'subject matter other than works'.

The exclusive rights for literary, dramatic, artistic and musical works are to:

- (a) reproduce the work in a material form. This covers a variety of forms of copying including copying by hand, photocopying, storage in computer retrieval systems, filming, recording and reproducing a hardcopy work in digital form;

- (b) publish the work. This means supplying copies of the work to the public for the first time;
- (c) perform the work in public. This includes both live and recorded performances. 'Public' means any performance that is outside the domestic situation. This right does not apply to artistic works;
- (d) communicate the work to the public. This covers any electronic transmission, including radio and television transmissions, and transmissions on the Internet;
- (e) make an adaptation of the work. The adaptation right covers translating a non-dramatic literary work into a dramatic form, a dramatic literary work into non-dramatic form, a literary work into another language, a literary work into a film and arranging or transcribing a musical work. The adaptation right does not apply to artistic works. The copyright owner has the same exclusive rights in relation to an adaptation as in relation to the original work;
- (f) enter into a commercial rental arrangement in respect of the work. This only covers commercial rental of a literary, dramatic or musical work reproduced in a sound recording and a computer program.

The exclusive rights for cinematograph films, sound recordings and broadcasts are to:

- (g) copy - that is, the right to make copies of the film, recording or broadcast;
- (h) cause it to be seen or heard in public- this is the right to cause a film or sound recording to be seen or heard in public;
- (i) communicate to the public - to communicate the film or sound recording to the public, and in the case of broadcasts, to re-broadcast it;
- (j) make a film of a television broadcast, or a copy of such a film;
- (k) make a sound recording of a sound broadcast, or a copy of such a recording;
- (l) make a facsimile copy of a published edition of a work; and
- (m) enter into a commercial rental arrangement in respect of a sound recording.

The following table broadly summarises the types of copyright materials and the main rights protected as the law currently stands.

Exclusive rights in different copyright materials

	literary dramatic & musical works	artistic works	sound recordings	cinematograph films	television & sound broadcasts	published editions
to reproduce or copy	3	3	3	3	3	3
to publish	3	3	7	7	7	7
to perform/cause it to be seen or heard in public	3	7	3	3	7	7
to communicate	3	3	3	3	3	7

to make an adaptation	3	7	3	7	7	7
to enter into a commercial rental arrangement	3 works stored on sound recordings & computer programs only	7	3	7	7	7
to do any of the above in relation to an adaptation	3	7	7	7	7	7

3.7 *The right to communicate*

The new right of communication was introduced by the *Copyright Amendment (Digital Agenda) Act 2000 ('CADA')*, and grants copyright owners the exclusive right to communicate copyright materials to the public electronically, regardless of the technological medium used.

In this way, the right of communication is technology-neutral, replacing the technology-specific broadcast and cable diffusion rights.

The right of communication covers both electronically transmitting material, for instance by e-mail, and making material available online.

Although it is defined separately in the *Copyright Act*, a broadcast is a type of communication delivered by a broadcasting service, which is a service for delivering radio and television programs but explicitly excludes Internet transmissions.

3.8 *First digitisation*

The *CADA* also clarifies that, subject to the statutory licence provisions, the copyright owner has the exclusive right to convert copyright material into electronic form. This is called “first digitisation”.

Infringement of copyright by converting copyright material into electronic form is made subject to harsher penalties than infringement by reproducing copyright material in non-digital form. It is argued that this is necessary because of the speed and ease of distributing material in electronic form, and the harm which might be done to the copyright owner’s commercial interests. The maximum penalties applicable to companies and individuals for these types of infringement are \$93,500 and \$60,500 respectively.

Otherwise, first digitisation is generally treated the same as a hardcopy or analogue reproduction under the Act. This means that:

- (a) the statutory licence provisions in Part VB of the *Copyright Act* for reproduction of hardcopy works, apply to the first digitisation of such works (see 3.19). In general terms, under the licence a school may reproduce:
 - 10 per cent or one chapter of a work that is separately published, or the whole work if it is not separately published or not readily available; and

- one article from a periodical, or more if the articles are on the same subject

Additionally, under the licence as it relates to communication of works in electronic form, a school may communicate an electronic reproduction of a work by:

- e-mailing the reproduction to students; or
 - making it available on a secure website;
- (b) first digitisation of an insubstantial part of a work is permitted on the same terms as is a hardcopy reproduction of an insubstantial part of the work (see 3.23); and
- (c) the library and fair dealing exceptions apply to the first digitisation of copyright material (see 3.22 and 3.24).

3.9 *Who owns copyright?*

Creators and users of copyright materials on the Internet need to know who owns copyright in any particular situation. For example, when using existing third party materials in creating a web site, schools must take care to obtain the rights to own, or at least to use that material from the true owner of those rights. For example, there is no point seeking an assignment or licence from the creator of the work, if the copyright in the work is owned by the creator's employer.

The *Copyright Act* contains a set of 'rules' on who owns copyright. These rules vary according to whether:

the copyright material is created by, or under the direction or control of the Crown in right of the Commonwealth or of a State;

- (n) the copyright material in question is a work or subject matter other than a work (see 3.2 above);
- (o) the work has been made pursuant to a creator's employment;
- (p) the copyright material is a commissioned portrait, engraving or photograph taken for private or domestic purposes (for example, a family or wedding photograph).

These rules can be varied by agreement.

3.10 *Crown copyright*

Special provisions apply to the Crown with respect to ownership of copyright. The *Copyright Act* provides that unless there is a contrary agreement about ownership, copyright is owned by the Crown if the work, film or sound recording is:

- (a) made by, or under the 'direction or control' of the Crown; or
- (b) first published by or under the 'direction or control' of the Crown.

Note that 'publication' in this context means making the material available to the public for the first time.

It is important to be aware that Crown copyright *does not* apply to pre-existing works, that is works, films or sound recordings which were already in existence prior to any arrangement with a government authority or agency.

Example *In return for payment, a web design company designs a web page for the Department of Education and scans existing photographs (from the company's photographic library) onto the web page. The Department will not automatically own copyright in the entire web page. Although the Department can claim ownership of copyright in that part of the web page specifically created under its direction or control, this will not extend to the photographs which were already in the company's photographic library. Do not assume everything created for the Department is made under the Crown's direction or control.*

3.11 *Who is the Crown?*

To be able to work out whether a work is subject to the provisions of Crown copyright outlined above, it is necessary to first know which entities and people are a part of the Crown. The State Departments of Education will usually be a part of the Crown in right of the relevant State, and each of their employees will usually be officers of the Crown.

State Departments of education oversee a large number of educational institutions and bodies associated with education. Many of these but not all of these are part of the Crown.

If an organisation is a part of the Crown, each of its employees are officers of the Crown. However, it is important to remember that students are not part of the Crown.

When relying on the provisions of Crown copyright in respect of a work which has been first published or created under the direction and control of an educational body other than a State Department of Education which is part of the Crown, you should be particularly careful to investigate the issue of ownership. Enquiries should be made as to who created the work and what arrangements were made in respect of ownership, so as to ensure that no agreement to the contrary has been made that would override Crown copyright.

3.12 *Ownership of copyright in works*

Subject to the Crown copyright provisions discussed above, the general rule is that copyright is owned by the author of a work. So for example, if a scriptwriter writes a script for a play, in the absence of any contrary agreement, the scriptwriter owns copyright in the script as a dramatic work. Taking another example, if a student writes an original computer software program the student will own copyright in the software.

The major exception to this rule is that copyright created by employees as part of their employment will automatically be owned by their employer, if created pursuant to their employment. As a result, the copyright in works of employed staff, scriptwriters, designers, illustrators, composers and programmers is, from the moment of its creation, owned by the person who employed them to produce that work.

Employed newspaper and magazine journalists, however, have a 'split' copyright ownership with their publisher employers. This 'split' of rights was recently changed by amendments to the *Copyright Act*. Publishers now own the digital/electronic copying rights and employee journalists retain ownership of photocopying and book publishing rights.

If a work is created by an independent contractor (rather than an employee), subject to the Crown copyright provisions discussed at 3.10 and 3.11, the copyright in that work is owned by the contractor, not the person who commissions the work. A written and signed assignment of copyright is generally required to transfer copyright ownership from an independent contractor to the client for whom they did the work.

3.13 *Ownership of copyright in photographs*

Prior to recent amendments to the *Copyright Act*, independent photographers were in the position that, even though they were not employees, the copyright in photographs commissioned to be taken by them for a fee (or other valuable consideration), was automatically owned by the person who commissioned the taking of the photograph. This has now changed, with the result that copyright in commissioned photographs *taken after 30 July 1998* remains with the photographer, except in relation to photographs commissioned for private or domestic use (in which case copyright still is owned automatically by the client). As a result, anyone who commissions photographs other than for private or domestic use, for example, for educational or commercial purposes, must now obtain an express transfer of copyright from the photographer if they wish to own the copyright. Otherwise, the photograph can only be reproduced for purposes agreed with the photographer.

The question of ownership of copyright in photographs is quite complex, depending on whether the photograph was taken before or after 1 May 1969, or before or after 30 July 1998, and whether the photograph was taken by or at the direction or control of the Crown, or by employee in the course of employment, or pursuant to an agreement for a fee, and for the purpose of private or domestic use. You should seek advice on the particular facts that apply to a photograph for which you need to establish the copyright owner.

3.14 *Ownership of copyright in sound recordings and films*

Unless the Crown copyright provisions discussed above apply, the copyright in films and sound recordings is owned by the 'maker' of the film or recording. The 'maker' of a film is the person who makes the necessary arrangements for the making of the film. In most cases, this will be the individual producer or production company. In the case of sound recordings, the 'maker' is the person who owns the physical record at the time the first record embodying the recording was produced. The following table can be used as a *general* checklist for identifying relevant copyrights as a starting point to finding out who is the owner of the various copyrights.

Pre-existing material	Copyrights to be considered =
Plays, choreography	<ul style="list-style-type: none"> • dramatic work owned by playwright, choreographer • underlying literary work from which play adapted
Books, journals, newspapers, other	<ul style="list-style-type: none"> • literary works owned by authors

Pre-existing material	Copyrights to be considered =
printed or text materials	
Photographs, designs, pictures, drawings	<ul style="list-style-type: none"> • artistic works owned by photographer, designer or artist
Sheet music	<ul style="list-style-type: none"> • musical work, dramatico-musical work (if lyrics and music)
Recorded music	<ul style="list-style-type: none"> • sound recording owned by record company • underlying musical work owned by composer
Film clips	<ul style="list-style-type: none"> • cinematograph film owned by film maker • underlying rights in film
Animation clips	<ul style="list-style-type: none"> • cinematograph film owned by filmmaker • underlying rights in film
Software	<ul style="list-style-type: none"> • computer program (a literary work under the <i>Copyright Act</i>) owned by the writer of the program

= Note that the original creator may not have been or may no longer be the holder of the copyright. Their employer, or the person who commissioned them to create the copyright material, (including the Crown) or a person or company to whom the creator has sold the copyright may own the copyright.

Consider also who owns any underlying copyright works comprised in the materials, for example the musical works which are contained in a sound recording.

3.15 *When is copyright infringed?*

Copyright is infringed when one or more of the copyright owner's exclusive rights is exercised in relation to a *substantial part* of the work or other subject matter without the copyright owner's consent or licence. The word 'licence' is just another term used to refer to the permission or consent of the copyright owner. Unauthorised copying of a substantial part of copyright material is unlawful, unless one of the defences under the *Copyright Act*, such as fair dealing, applies.

As noted above, a person does not have to use all of a work for infringement to occur. Unauthorised use of a 'substantial part' will suffice. In this context, substantiality is judged by reference to the quality and creative significance of the part used when considered in relation to the whole work. As a result, a part can be substantial even though it is not large in a quantitative or proportional sense. Indeed, a relatively small part of a work may be considered a substantial part. So, for example, a small but essential string of computer code, or the key melody bar of a musical score, if copied without permission can infringe copyright. In a United States case, the use in a magazine article of 300 words from Gerald Ford's 200,000 word autobiography was found to infringe copyright.

3.16 *Who is liable for copyright infringement?*

A person who does any of the acts which amount to copyright infringement is liable for the infringement. An employer may also be vicariously liable if employees infringe copyright in the course of their employment. It can also be an infringement to authorise another's infringing use of a work without the copyright owner's permission.

Under the *Copyright Act*:

- (a) the extent (if any) of the persons power to prevent the doing of the act;
- (b) the nature of any relationship between the person and the person who did the act; and
- (c) whether the person took any reasonable steps to prevent or avoid the doing of the act

are relevant to whether a person has authorised a copyright infringement.

Anyone who 'sanctions, approves or countenances' an infringement will be considered to have 'authorised' that infringement. Someone who controls the facilities used to copy, and who has knowledge that unauthorised copying is likely to occur and who fails to take steps within their power to prevent infringement, will themselves infringe copyright.

However, under the *CADA* a person who merely provides facilities for making a communication, including schools and Internet service providers , will not be taken to authorise copyright infringement merely because another person uses those facilities to breach copyright.

Example *A person who sets up a web site that invites users to download another person's copyright material without permission is at risk of liability for authorising any infringing copies made by users who access the site. As a result, apart from any liability for making an infringing copy on the web site in the first place, the owner of the site may be liable for authorising the copies made by other users.*

Example *A school permits its staff or students unrestricted access to photocopiers, facsimile machines, Internet and e.mail facilities, without appropriate warnings as to the limits imposed by copyright law on the type and amount of copying that can be undertaken lawfully. The school and possibly its teachers may be liable for authorising copyright infringements to occur.*

3.17 **Internet use policy**

As a result, schools need to develop an acceptable Internet use policy which makes it clear that staff and students must observe the legal requirements of Internet usage explained in these guidelines, and should monitor Internet usage for compliance with the policy.

To prevent a school, or the body administering it, being liable for authorising an infringement if reproductions are made on its photocopier, scanner, VCR, computer, etc., notices should be placed on all equipment where they can be easily seen before the equipment is used. The form of notice which should be used is **Attachment A** to these guidelines for reproduction of works and copying of published editions, and **Attachment B** for copying of audio-visual items.

Schools should also provide in-service training for staff, and supervise the use of their equipment. They might also consider providing copyright training for students, and

getting signed undertakings from students and staff that they will not use school equipment to infringe copyright.

3.18 *How might copyright owners license their copyright works?*

Unless one of the statutory defences such as fair dealing (see 3.24) applies, a person wishing to exercise one or more of the rights protected by copyright in relation to a protected work or other subject matter can only do so with the permission or licence of the copyright owner.

As noted above, a licence is simply a legal term for permission and can be given in various ways:

- (a) exclusively or non-exclusively;
- (b) expressly or impliedly;
- (c) in writing or orally;
- (d) informally, by a simple letter, or by way of a formal agreement;
- (e) compulsorily (by statute) or voluntarily;
- (f) individually or collectively; and
- (g) unconditionally or subject to restrictions and limitations.

Much of the copying in schools is done under a statutory licence (see 3.19 and 3.20).

An exclusive licence is a licence granted to one person and no others. An exclusive licensee is the only person with the right to use the material in the manner set out in the licence. Exclusive licences must be in writing and signed by the copyright owner. Non-exclusive licences, on the other hand, can be granted to any number of licensees at the same time. The rights of non-exclusive licensees are therefore not as strong as those of exclusive licensees.

An express licence is one granted by a positive act of the copyright owner. Implied licences, by way of contrast, arise where the circumstances are such that there is a clear implication that the copyright owner has authorised or granted permission for a work to be used in a particular way. For example, when a copyright owner makes a work available on a web site and no conditions of use are displayed at that site, it is generally accepted that there is an implied licence from the copyright owner that authorises users of the Internet to browse then work at that site.

Except in the case of exclusive licences, there is no need for a licence of copyright to be granted in writing. An oral licence of copyright is an effective way of authorising a use of a work. The only drawback is that oral licences will often be more difficult to prove or disprove if there is ever a dispute about the existence of the licence.

3.19 *Statutory licence under Part VB of the Copyright Act - reproducing and communicating works in electronic form*

Under the *Copyright Act*, articles contained in periodical publications, and other works, may be reproduced or communicated (or both) by a body administering an educational institution, or on its behalf, if:

- (a) a remuneration notice has been given;
- (b) the reproduction or communication is carried out solely for the educational purposes of the institution; and
- (c) the body complies with the various requirements relating to notices and, where applicable, records.

This statutory licence permits:

- (a) reproduction or communication of one article from a periodical publication, and more than one if the articles relate to the same subject matter;
- (b) reproduction or communication of 10 per cent of the words, or one chapter of, a separately published literary or dramatic work, or 10 per cent of a musical work, but:
 - (i) no more than this may be reproduced or communicated unless the work is not available in electronic form within a reasonable time at an ordinary commercial price; and
 - (ii) only one part of a work may be made available online at the same time;
- (c) reproducing or communicating the whole of a literary, dramatic or musical work which has not been separately published; and
- (d) reproducing or communicating the whole of an artistic work under the statutory licence.

Communication of a work in electronic form may include e-mailing the work, or caching it on a school's intranet. Where a work is communicated in electronic form, it must include a notice in the form of **Attachment C** to these guidelines. Reasonable steps must also be taken to ensure that the communication can only be received or accessed by persons entitled to receive or access it. This may involve, for instance, ensuring that the school's intranet is secure.

If a work is reproduced and the reproduction is communicated by being made available online, and the reproduction then remains available online for more than 12 months, the work is taken to have been reproduced and communicated a second time. It is taken to have been reproduced and communicated again at the end of each further 12 month period that the reproduction remains available online.

3.20 *Statutory licence under Part VA of the Copyright Act - copying and communication of broadcasts*

Under the *Copyright Act*, a copy of a broadcast may be made or communicated (or both) by or on behalf of a body administering an educational institution without infringing copyright in the broadcast, or the underlying works, if:

- (a) a remuneration notice is in force;
- (b) the copy or communication is made solely for the educational purposes of the institution;
- (c) the body complies with the various requirements relating to notices and, where applicable, records.

This covers copying a broadcast electronically, such as on CD or DVD, and communicating it electronically, for instance by making it available on a school's intranet or by e-mailing it.

Where a broadcast is communicated electronically, it must include a notice in the form of **Attachment D** to these guidelines. Reasonable steps must also be taken to ensure that the communication can only be received or accessed by persons entitled to receive or access it. This may involve, for instance, ensuring that the school's intranet is secure.

If a broadcast is copied and the copy is communicated by being made available online, and the copy then remains available online for more than 12 months, it is taken to have been copied and communicated a second time. It is taken to have been copied and communicated again at the end of each further 12 month period that the copy remains available online.

3.21 *What role do collecting societies play?*

It is often impractical for large users of different works to deal individually with each and every copyright owner. For owners and users alike, the cost of negotiating individual licences is often prohibitively high. To overcome this problem, different groups of copyright owners have, over the years, formed societies to manage the licensing of their works on a collective, rather than individual, basis. As a result, a copyright user can obtain a collective licence from a copyright collecting society which authorises it to use the works of all copyright owners represented by that society.

Collective licensing is often the only realistic licensing option when a significant volume of copyright material is to be used. Most compulsory licences are administered on a collective basis.

As noted above, collecting societies exist largely for reasons of efficiency. It is more efficient and cost effective to appoint a single society as the body responsible for collecting royalties for a large group of rights holders than to negotiate all permissions and royalties directly between individual rights holders and those who use their works.

The collecting societies currently operating in Australia include:

- (a) the Australasian Mechanical Copyright Owners' Society ('AMCOS'), which administers the right to make a recording (a 'mechanical copy') of musical works on behalf of composers and music publishers;
- (b) the Australasian Performing Right Association ('APRA'), which administers the rights to broadcast, transmit and perform in public on behalf of composers and music publishers;
- (c) Screenrights (the Audio-Visual Copyright Society Ltd) which administers the right to record and make off-air copies of broadcasts on behalf of producers of films and television programs;
- (d) Copyright Agency Limited ('CAL') which administers the right to make copies of published literary and certain other works on behalf of authors and publishers;
- (e) the Phonographic Performance Company of Australia ('PPCA') which administers the rights to broadcast, transmit and perform in public on behalf of record companies; and
- (f) Vi\$copy, which administers the right to make copies on behalf of visual and graphic artists.

The collecting societies play an important role, not simply in their collective licensing activities, but also through the assistance they can provide to users who need to locate a particular rights holder. Any enquiries about collecting societies should be first directed to the Copyright Manager of your Department of Education.

3.22 *The library exceptions for reproduction and communication of works in electronic form*

The existing library exceptions in the *Copyright Act* have been extended by the *CADA* to cover:

- (a) electronic reproduction of a work in hardcopy form; and
- (b) reproduction and communication of a work in electronic form.

However, where an electronic reproduction of a work is communicated, it must be accompanied by a specific notice in the form of **Attachment E** to these guidelines, and the reproduction held by the library must be destroyed as soon as practicable after the communication.

Additionally, a library may now make a work acquired in electronic form as part of its collection available online within its premises. This must be done in such a manner that users cannot, by using any equipment supplied by the library:

- (a) make an electronic reproduction of the work; or
- (b) communicate the work.

3.23 *Reproduction and communication of insubstantial parts of works in electronic form*

Separate from the statutory licence under Part VB of the *Copyright Act* (see 3.19), an insubstantial part (1 per cent or less) of a published literary or dramatic work may be reproduced or communicated (or both) if:

- (a) the reproduction or communication is carried out on the premises of an educational institution;
- (b) for the purposes of a course of study provided by it.

Unlike reproduction and communication under the statutory licence, this is not remunerable. However, the Act does not allow:

- (a) reproduction or communication of one insubstantial part of a work within 14 days of the reproduction or communication of another insubstantial part of the same work; or
- (b) making available online two insubstantial parts of a work at the same time.

3.24 *The fair dealing defence to copyright infringement*

In certain circumstances, the *Copyright Act* recognises that there is a public interest in allowing some people to use copyright material without seeking permission from copyright owners or their representatives. In those circumstances, although the use in question would normally be regarded as an infringement, the *Copyright Act* sets out a defence or exception that deems that use not to be an infringement.

The best known defence to copyright infringement is fair dealing (known as 'fair use' in the United States). The fair dealing provisions permit free use of copyright material in a number of situations. A person seeking to rely on a fair dealing defence must first show that he or she had acted with at least one of the following purposes:

- (a) research or study;
- (b) criticism or review;
- (c) reporting the news;
- (d) giving legal advice; and
- (e) participating in judicial proceedings.

If the dealing does not fall within one of these purposes, the defence will fail. If it does, the fairness of the dealing must then be considered. For researchers and students copying from a literary, dramatic or musical work, for the purpose of their own research or study, there are clear guidelines that deem the copying of 10% or one chapter of a book, or a single article from an issue of a journal, to be fair. In other cases, fairness is judged by reference to factors such as the:

- (a) purpose and character of the dealing;
- (b) nature of the material;

- (c) effect on the market for the material;
- (d) commercial availability of the material; and
- (e) amount and substantiality of the part used.

The line between fair dealing and infringement can be very difficult to draw. As an English judge once explained, 'when all is said and done, it must be a matter of impression'. For example, copying of materials which are sold for profit will *not* be for the purpose of research or study of staff and students.

A teacher's or student's use of copyright material will amount to a fair dealing for example, if a small amount of work is used for the purpose of criticism or review. Provided that a 'sufficient acknowledgment' is made, a fair amount of a work can be copied for the purpose of criticising or reviewing the work and its subject matter. However, given the uncertain scope of the defence, it is sensible to err on the side of caution if doubt exists as to the 'fairness' of a particular dealing.

3.25 *The temporary reproductions exception*

Under the Act, temporary reproductions made as part of the technical process of making or receiving a communication will not infringe copyright, provided the communication itself is not an infringement of copyright. This exception covers reproductions which are made when a person browses on the Internet.

However, things such as caching a web site onto a school's intranet are not likely to be sufficiently temporary for the exception to apply. If you want to do this, and it is not expressly permitted on the web site or covered by the statutory licence, you should contact the web site owner to seek permission (see 6.12).

3.26 *Circumvention devices and services*

The *Copyright Act* prohibits supplying circumvention devices and services. These are devices and services for the purpose of circumventing effective technological protection measures, for instance a password requirement for a web site.

However, the *Copyright Act* contains an exception which allows circumvention devices and services to be supplied:

- (a) to a person authorised in writing by a body administering an educational institution to make reproductions and communications under the statutory licence in Part VB of the *Copyright Act*;
- (b) for the purpose of making reproductions and communications under that statutory licence;
- (c) of material which is not readily available in a form which is not protected by a technological protection measure.

The same applies to supplying circumvention devices and services to the authorised officer of a library for the purpose of making reproductions and communications under the library exceptions.

3.27 *What are moral rights?*

As a result of the *Copyright Amendment (Moral Rights) Act 2000*, all creators of works, including authors, composers and artists, as well as directors, producers and screenwriters of films have moral rights in their works. These moral rights entitle individual creators:

- (a) to be acknowledged as the author of their materials, (*right of attribution*);
- (b) not to have their authorship falsely attributed (*false attribution right*); and
- (c) to object to any derogatory treatment of their materials which might harm their honour or reputation (*right of integrity*).

The Act does make provision for a work not to be attributed or for it to be altered where such actions are 'reasonable'. The Act sets out various criteria to assist in determining whether an action is reasonable. These include:

- (a) the nature of the work;
- (b) the purpose for which the work is used;
- (c) the manner in which the work is used;
- (d) the context in which the work is used;
- (e) any practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
- (f) any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
- (g) whether the work was made:
 - (i) in the course of the author's employment; or
 - (ii) under a contract for the performance by the author of services for another person.

There are two further criteria in relation to the right of attribution:

- (a) any difficulty or expense that would have been incurred as a result of identifying the author; and
- (b) if the work has two or more authors - their views about the failure to identify them.

Equally, there are two additional criteria in relation to the right of integrity:

- (a) whether the treatment was required by law or was otherwise necessary to avoid a breach of any law; and
- (b) if the work has two or more authors - their views about the treatment of the work.

Unlike the copyright owner's right to sell or license one or more of the bundle of exclusive rights comprised in the copyright, moral rights cannot be sold or licensed. Moral rights will be particularly important if schools create interactive multimedia products, where music or graphics can be manipulated and rearranged by the user. Care will need to be taken in creating such products where there is a risk that such use might amount to a derogatory treatment of the works to ensure that all holders of moral rights are aware of and have consented to the proposed use of their works.

In general, for all use of pre-existing materials, in addition to obtaining copyright clearances:

- (a) attribution of authorship should be included with any reproduction or use; and
- (b) any use, adaptation, manipulation or publication of the materials in a context which is potentially harmful to the creator's reputation, should first be authorised by the author, producer or director, as the case may be (who may be different to the owner of copyright in the materials).

Example *A teacher writes a learning program specifically for indigenous Australian students which draws on traditional sacred icons, spiritual teachings and cultural themes to motivate and inspire these students. The adaptation of the program for non-indigenous students in such a way that trivialises or fails to respect the special importance of these spiritual and cultural teachings to indigenous Australians could amount to a derogatory treatment of the program, and a contravention of the teacher's moral rights.*

4. OVERVIEW OF TRADE MARKS

4.1 What is a trade mark?

A trade mark is any word, symbol or other device which is used to distinguish one trader's products and services from those of others. The term 'brand' is often used for word marks, and symbols are often called 'logos'.

Trade marks may be used in relation to products (such as breakfast cereal, magazines, instructional guidelines) and services (such as educational, legal and transport services).

Examples of trade marks:

- (a) the shape of the Coca-Cola bottle for beverages
- (b) KODAK for film (products) and film processing (services)
- (c) MINTER ELLISON for legal services
- (d) the colour pink for insulation batts (products)
- (e) THE AGE for newspapers (products)
- (f) a 'crown' logo for hotel and casino services

- (g) XAVIER COLLEGE for education services

4.2 *Protection of trade marks*

Trade marks are often protected through registration under the *Trade Marks Act 1995* ('**Trade Marks Act**').

A valid registration of a trade mark gives the exclusive right to use the trade mark throughout Australia in respect of the products or services for which the mark is registered. In rare cases, a registration may be limited territorially, for example, to a particular state.

Exclusive rights in a trade mark can also be obtained outside the registration system. A person who has used a trade mark and acquired a reputation in the trade mark might be entitled to take action to prevent others from using the trade mark or any similar trade mark in the context of a commercial activity. These rights are recognised by section 52 of the *Trade Practices Act 1974* (and equivalent state legislation) which prohibit a person from engaging in misleading and deceptive conduct in the course of trade. The common law action of passing off can also be used to prevent others from misrepresenting the trade origin of their products or services. Unregistered trade marks are sometimes referred to as 'common law' trade marks.

4.3 *Legal liability for trade mark infringement*

A registered trade mark is infringed by the use of the same trade mark, or any 'substantially identical' or 'deceptively similar' trade mark, in relation to:

- (a) the products and/or services for which the mark is registered; or
- (b) products or services similar or related to those for which the mark is registered, although it is a defence if the use of the infringing trade mark is unlikely to cause confusion.

Examples of deceptively similar trade marks:

- (a) *LEVI'S and REVISE*
- (b) *CADDY and CADBURY*
- (c) *LEGO and MEGO*
- (d) *MOO and MOOVE*

Examples of similar or related products and services:

- (a) *educational services and text books*
- (b) *cocoa and coffee*
- (c) *newspapers and magazines*
- (d) *computers and computer programming services*

4.4 *Consequences of trade mark infringement*

A person who infringes a registered trade mark will usually be obliged to cease use of the infringing mark and to pay damages or a proportion of the person's profits from use of the trade mark to the trade mark owner.

Example *Suppose the trade mark ULTIMO LEARNING is used by Smith, the operator of a correspondence school. The trade mark is registered for educational services. Jones publishes a series of text books under the name ULTIMA LEARNING SYSTEM. Use of this name would probably infringe the registration of ULTIMO LEARNING because text books are closely related to educational services, and ULTIMA LEARNING SYSTEM is deceptively similar to ULTIMO LEARNING. Unless Jones can prove that use of his mark is unlikely to cause confusion, Jones would have to stop using the name ULTIMA LEARNING SYSTEM, withdraw the text books from circulation, and pay damages or a percentage of profits from the sales to Smith.*

4.5 *Copyright in trade marks*

Trade marks which incorporate or comprise original logos, jingles, music, illustrations, photographs or other artistic and musical works may (but will not necessarily) also be protected by copyright under the *Copyright Act*.

If such trade marks are created by the Crown, for example by Department of Education employees, or are specially commissioned at the direction or control of the Crown using external graphic artists or composers, then the Crown is the copyright owner under the Crown copyright provisions (see 3.10).

However if the relevant work was not created specially for the Crown, but was already in existence, or the Crown did not direct or control its creation, the Crown would not automatically own the copyright in the mark. Permission would then be needed from the owner of copyright to use the logo, or other trade mark.

4.6 *Comparing company and business names with trade marks*

It is a common misconception that a company name or registered business name gives exclusive rights in the name, and that it is not possible for anyone else to adopt a similar name.

This is not always the case. Similar company names and registered business names are often permitted to co-exist. This is because, unlike the registered trade mark system, the systems of registering company and business names are not intended to give exclusivity over names.

The purpose of a business name registration is to enable people who deal with the business to identify the legal entity behind the business. It is a legal requirement that a person or company who conducts a business under a name, other than the person or company's own name, must register that name as a business name. Registration must be obtained in each state or territory in which the business is operated. However, a business name registration does not of itself give the right to prevent others from using the name, or a similar name.

A company or business name may function as a trade mark if used as an identifier in relation to products or services. It follows that the best way of securing exclusive rights in a company or business name is through registration of the name as a trade mark. It is also possible to obtain rights in a company or business name through use of the name (as outlined above), but registration of the name as a trade mark is preferable.

Example *Stramrad Pty Ltd conducts a business of retailing computer equipment under the name 'Stram Technology'. Stramrad Pty Ltd should register 'Stram Technology' as a business name, and register 'STRAM TECHNOLOGY' as a trade mark in respect of computer equipment and retail services to obtain exclusive rights to the name 'Stram Technology'.*

5. BROWSING THE WEB

Most content made available on web sites (including text, images, software, sound and film clips) is protected copyright material. Accordingly, when browsing the world wide web, copyright laws must be respected.

Copyright is infringed when a person makes unauthorised use or permits another person to make unauthorised use of any of the copyright owner's exclusive rights, including the right to make copies ('*reproduction right*') and the communication right (see 3.7).

Every time a user browses a web page, a copy of the content of that page is transmitted to and stored in the electronic memory ('**RAM**') of the user's computer. However, under the *Copyright Act*, the making of a temporary reproduction of a work in the course of browsing the Internet is not an infringement (see 3.25).

This will not apply where there is an express prohibition on browsing a particular site.

Example *A notice on a home page states that access to the site is only permitted in the case of persons over the age of 18 who agree to be bound by stipulated terms and conditions. This type of express notice cancels any implied general licence to browse. Any users not authorised to browse under the terms of the notice would be at risk of liability for copyright infringement if they ignored the notice and browsed beyond the home page.*

5.1 *Printing and downloading*

When an Internet user finds a web page with useful or entertaining information, they will often wish to print a hard copy (on paper) or possibly save a soft copy (on disk). These copies are 'reproductions' under copyright law.

It is arguable that an implied licence extends to cover personal copying from many public web pages. Copyright owners must be aware that Internet users often print personal or reference copies of the material they browse on the web. If those owners do nothing to warn users against that copying, there may be an implication that they consent to it. However, if the site contains a copyright notice stating that printing or down-loading without permission is not permitted, it is very unlikely that an implied licence will apply to that type of copying.

Copyright notices attached to web sites can also grant express permission to users of the site to make certain copies.

Example *A website notice could state that 'The content of this site may be copied and used by students and teachers on a non profit-basis for any educational purpose'. Under such a notice, students and teachers could browse the site, print copies of certain pages, and make those copies available in class for educational purposes, provided this is done on a non profit basis. An express licence such as this can give relevant users significantly broader rights to copy material than they have under any implied licences.*

School students may also be able to copy website materials by applying the fair dealing provisions of the *Copyright Act* (see 3.24). Under the fair dealing defence, copyright is not infringed when 'fair' copying occurs for certain defined purposes, including the purpose of research or study. When copying from books, 10% or one chapter will be 'fair'. When copying from periodical publications such as newspapers, magazines and journals, one article per issue will be 'fair'. In other circumstances, the fairness of a dealing depends on a number of factors, including the purpose or character of the copying, the nature of the material, the substantiality of the part copied and the effect of the copying on the market for the material.

If a website copyright notice stated that 'Except as provided under the *Copyright Act* 1968, any unauthorised copying of this site is prohibited', it is open to a student to rely on the fair dealing defence. For example, a student who copies a single article from a website 'journal' for research or study purposes should be covered by the fair dealing defence. If the defence applies, there is no infringement by making the copy. Staff copying on behalf of their students, would not be able to rely on the exception. To rely on fair dealing, the person making the copy must do so for *their* own research or study purposes.

The insubstantial copying provisions (see 3.23) and statutory licence provisions (see 3.19) will also allow printing and downloading of a web page without the copyright owners permission inserted in circumstances

5.2 *Public domain*

Material in which copyright has expired is often referred to as in the 'public domain'. Public domain materials available on a web site can always be copied without risk of copyright infringement. Generally, copyright material enters the public domain when the period of copyright protection has expired. For most published copyright works, this occurs 50 years after the year of the author's death. For other materials (for example photographs, films and sound recordings), copyright expires 50 years after the year of first publication (see 3.5). Just because material has been created and published by the government does not mean that it is in the public domain. Similarly, material made freely available over the Internet (for example 'freeware' and 'shareware') should not be treated as part of the public domain (see 5.3 and 6.2).

5.3 *Shareware and freeware*

'Shareware' and 'freeware' are terms used to describe computer software (and possibly other material) that is made freely available to Internet users for down loading and use. The owner of 'shareware' usually provides it on condition that users pay a (small) fee if they are satisfied with the software and wish to keep using it after a trial period. No fee is charged for 'freeware', but conditions of use usually apply.

Shareware and freeware should *not* be treated as public domain material. Although there is likely to be a clear licence to use these materials on certain conditions, any use outside the scope of those conditions will expose the user to a risk of liability for copyright infringement. In a recent Australian case, the owner of copyright in a shareware program brought a successful action for copyright infringement against a company that had copied and distributed the program in a manner not covered by the shareware terms of use.

5.4 *Classroom browsing*

When browsing a web site in a public context, there is a risk of copyright infringement by unauthorised public performance of any copyright material available at the site. This risk is most likely to arise when the content of a site is displayed to a public group using a large screen or video projector or when sound clips are played to a similar audience.

Any performance of a work that occurs outside a personal or domestic context can be considered a 'public' performance. However, under the *Copyright Act*, there is an exception which provides that any performance given by staff or students in a classroom context does not infringe the public performance right. Accordingly, classroom displays of web site content will generally not give rise to infringement.

5.5 *Re-using web content*

Any rights of staff and students to browse or copy web site material for personal research, study or educational purposes should not be assumed to cover any re-use of that material for other purposes. For example attaching and transmitting copyright materials via e-mail may infringe copyright unless there is an express or implied licence from the copyright owner, or one of the statutory defences or exceptions applies (see 3.22-3.25).

Attaching and sending computer programs, pictures, downloaded articles or texts, audio files, video files or other material protected by copyright by e-mail without the copyright owner's permission may result in the user being personally liable for copyright infringement, and any other persons who have authorised the conduct may also be indirectly liable.

Example *A student downloads a journal article published on the Internet on a topic for the purpose of that student's own research. This copying is likely to fall within the fair dealing defence, assuming the web site does not display any prohibition on such copying, and assuming the initial publication of the journal article on the web site was not itself a copyright infringement.*

However, the student then copies that article into a newsletter for distribution to teachers, students and parents associated with the school. Although the original copy may have been used for research or study by the student, the copies printed in the newsletter are not, and are likely to infringe copyright unless permission was obtained.

Example *A teacher attaches a journal article downloaded from the Internet to an e.mail message which he then sends to a commercial publisher, for the purpose of showing the publisher the type of journal article the teacher is prepared to write for the publisher for a proposed new*

publication. This subsequent copying would not be covered by the fair dealing defence even if the teacher initially downloaded the journal article for his or her own research or study.

6. CREATING A WEB PAGE

When creating a web page, schools are likely to use a variety of copyright materials, including text, pictures, photographs, music, sound and video clips, animation, software, and HTML code. Some of these materials will be newly created for the web site and other materials will be copied from an existing source. Almost all of the materials will be protected by copyright.

Web site creators risk copyright infringement in a number of ways. First there is a risk of direct infringement when copyright material is copied into digital form and stored on the hard disk of an Internet 'server' computer. Secondly, there is a risk of indirect infringement (that is by 'authorising' someone else to infringe) when a site is made available online such that its content can be freely transmitted to and copied by users who browse the site.

To minimise these risks, it is important that schools, their staff and students follow a consistent rights clearance procedure whenever web pages are created using copyright material. A suggested approach to rights clearance is suggested immediately below, and summarised in the flow chart at page 50.

Copyright material should not be used on a web page unless at least one of the following questions can be answered 'yes':

- (a) do you own the copyright? (see 3.9)
- (b) is the material in the public domain? (see 5.2 and 6.2)
- (c) does a defence or exception apply? (see 3.22 - 3.25)
- (d) is the amount insubstantial? (see 6.4)
- (e) do you have permission or a licence? (see 3.18 - 3.21)

6.1 *Copyright owned by the school's governing body*

Copyright owners are free to use their own material in any way they please, subject only to exclusive rights previously granted to another person. Accordingly, any material owned by the State (through, for example the State Department of Education), such as materials written by a teacher pursuant to employment can be used in a school's web pages without infringing copyright *provided that* permission is obtained from the Department. Note, in this context, the State must own the copyright in the material, not simply a physical copy of the material (for example, a book or picture).

Schools should not assume that copyright material owned by the State/Department is free to be used as if the school owned the copyright itself. Departmental copyright material and material owned by other schools or governing bodies should only be used in accordance with applicable departmental policies or the other clearance procedures set out at page 50.

Any material created by students as part of their school work, unless created specifically at the direction or control of the Crown, is likely to be owned by those students, not the school (see 3.9). Accordingly, schools should not use student materials on their web sites without obtaining permission. Individual students can, however, choose to use their own material on any web sites they create.

6.2 *Materials in the public domain*

Copyright law does not restrict the use of public domain material. Schools and students are therefore free to use any such materials on their web sites without risk of copyright infringement.

Generally, copyright material enters the public domain when the period of copyright protection has expired. For most published copyright works, this occurs 50 years after the year of the author's death. For other materials (for example photographs, films and sound recordings), copyright expires 50 years after the year of first publication (see 3.5).

Simply because material has been created and published by the government does not mean that it is in public domain. Similarly, material made freely available over the Internet (for example 'freeware' and 'shareware') should not be treated as part of the public domain (see 5.3).

Care must be taken when using public domain materials that incorporate other 'underlying' copyright materials (for example, a video clip incorporating underlying script and music). If the underlying works are still protected, copyright restrictions will apply. In addition, the proposed web page use may involve more than one of the copyright owner's exclusive rights. For example, use of sound clips or other musical works on a web page may involve the right of reproduction, the right to adapt the music (say, into an audio-visual format), the right to transmit the music via cable to subscribers, and the right to perform the music in public may be involved. Any permission obtained must cover all the proposed usages.

6.3 *Defences and exceptions*

The *Copyright Act* contains a number of defences or 'exceptions' to infringement that protect users of copyright material from liability for infringement in a number of special situations. If a defence or exception can be shown to apply, copyright material can be used without infringement.

Fair dealing is perhaps the best known of the copyright defences (see 3.24). Most students rely on the defence of fair dealing for the purpose of their own research or study when they photocopy reasonable amounts from books, journals, newspapers and magazines. However, when creating a web site, the material copied is unlikely to be used solely for the research or study purposes of the person creating the site. In these circumstances, the defence will not apply.

Nonetheless, creators of web sites will sometimes be able to rely on a different fair dealing defence. If part of a work is reproduced on a web site as part of a critique or review, that use may be covered by the defence of fair dealing for the purpose of criticism or review. For this defence to succeed:

- (a) the person copying the work must do so in the context of a critique or review of that work, its subject matter or some other work;

- (b) the amount copied must be fair, based on factors such as the size and quality of the part copied, the nature of the work and the effect of the copying on the market for the work; and
- (c) the creator of the work must be given a sufficient acknowledgment (that is, a credit).

The cases decided in this area do not provide detailed guidelines about when the defence will succeed. An English judge once said that 'it is impossible to say' what will be considered fair dealing. Accordingly, schools should only rely on the defence cautiously and when quoting short passages as part of a review included on their web sites.

6.4 *Insubstantial part*

A person who copies only an 'insubstantial part' of copyright material does not infringe copyright. Schools can therefore include 'insubstantial parts' of copyright material on their web sites without risk of infringement.

Measuring an 'insubstantial part' is not easy. It is a question of quality not quantity. Generally schools should not rely on 'insubstantiality' as the basis for using copyright material unless the part used is quite small and relatively unoriginal.

It is important not to confuse the question 'what is insubstantial?' with the question 'what is reasonable?' for fair dealing purposes. Ten per cent of a work will rarely if ever be considered insubstantial, whereas ten per cent may well be reasonable under fair dealing.

An example where questions of substantiality arise is in relation to headings and titles. It is quite likely that the heading of a work will be treated as an insubstantial part of that work. However, a short summary of an article under the heading, even if only 4 or 5 lines may be substantial.

6.5 *Use under licence or with permission*

Any use of copyright material with the permission or licence of the copyright owner will not give rise to infringement (see 3.18).

Accordingly, prior to using any material the copyright in which:

- (a) a school's staff or students do not own;
- (b) is not in the public domain;
- (c) is not covered by a defence or exception; and
- (d) cannot be described as insubstantial,

a school must ensure that it obtains or has obtained the copyright owner's permission.

When using copyright material on a web site, it is best to obtain permission expressly. Although it is not essential to obtain non-exclusive permission in writing, it is generally prudent to do so.

Some examples of material likely to be used under licence include:

Error! Unknown document property name.

- (a) software packages used to operate the web site or certain features of the web site;
- (b) clip art packages used to add pictures and icons to the site;
- (c) articles, photographs, pictures, cartoons, etc obtained from third parties or copied from other published material; and
- (d) any material created and owned by a student.

Be careful to read and comply with the terms of the licence. For example, clip art licences usually require that images not be altered in any way.

For some material, rather than seeking a licence to use the copyright, a school may wish to have ownership of copyright assigned to it. For example, if an independent developer is commissioned to design the site and create or convert text and other content into HTML code, it is advisable under the contract to require that developer to assign to the other contracting party, whether the Department or school (whichever is the correct legal entity), all current and future copyright in what they create.

6.6 *Statutory licence*

The *Copyright Act* provides a statutory licence under which a school can copy limited amounts of material 'for the purposes of a course of education provided by it'. Since the *CADA* this also applies to digital copying and this will apply to materials copied from the Internet (see 3.19 - 3.20).

6.7 *Choosing a domain name*

Domain names ending with the country symbol '.au' (Australia) are divided into separate 'subdomains', such as '.edu.au', '.org.au', '.net.au' and '.com.au'. Each subdomain has an administrator who is responsible for setting policies for the types of names which are to be permitted registration in that subdomain. These policies generally restrict the type of organisations which are able to register a domain name within the particular subdomain.

In most cases, domain names registered for example by a Victorian educational institution, will fall within the '.vic.edu.au' subdomain. The policy of the administrator of this subdomain is that a name will not be registered unless it conforms substantially to the actual name of the institution registering the name, or is a logical abbreviation of the institution's name. Accordingly, an educational institution will often have limited options in choosing a domain name.

If, however, an educational institution intends to adopt a domain name within a different subdomain (such as the subdomain '.com.au'), and the proposed domain name is not simply the name of the educational institution or an abbreviation of that name, it is important to ensure that the proposed domain name is clear for use and does not infringe the trade mark rights of another person.

The best way of doing this is to arrange for a lawyer or patent attorney to conduct clearance searches of the Trade Marks Register. The searches should aim to ensure that the proposed domain name will not infringe another person's registered trade mark. The fact that a domain name administrator is willing to register a particular domain name does not necessarily mean that the domain name is able to be used. There have

been many well-publicised disputes over famous trade marks which have been registered as domain names by someone other than the trade mark owner. For example, an author in the US registered the domain name 'mcdonalds.com'. Many of these disputes have been resolved 'out of court'. However, some disputes have been litigated, and the courts in the USA and UK have shown an increasing willingness to hold that the registration of a domain name, particularly if speculative and for the purpose of sale, may constitute trade mark infringement or passing off at common law. It is likely that Australian courts will adopt a similar view.

6.8 *Use of others' trade marks on web pages*

A person designing a web page will often wish to incorporate trade marks owned by other people. For example:

- (a) a trade mark might be used to identify a hypertext link (for example 'click on the BMW logo below to visit BMW's homepage');
- (b) a web page might contain information about another company's products (for example 'Check out the results of our survey - do students prefer COKE or PEPSI?');
- (c) trade marks, especially well-known logos, might be used to illustrate a web-page (for example, the designer of a web-page about Australian football might wish to include the AFL logo and the logos of AFL football clubs).

As a general rule, it is *not* permissible to include another person's logo in a webpage without the permission of the owner of the logo, as the logo might be protected by copyright and its use might be misleading.

Example *Use of the BMW logo as in example (a) above would not be acceptable without BMW's permission. Similarly, use of the AFL logo or club logos, as in example (c) above, is not permissible without prior approval.*

However, there are generally no problems with using a trade mark comprising a word in plain text to identify the owner of that trade mark or that person's products.

Example *It is permissible to write 'The photographs on this page were taken using KODAK film'. Example (b) above is also fine. However, if a trade mark comprising a word or phrase is lengthy or creative, care should be taken because the word or phrase might be protected by copyright.*

6.9 *Falsely suggesting approval or endorsement*

Care should be taken not to use trade marks or other material (such as photographs of sporting identities or other famous people, or well-known cartoon strips or characters such as Dilbert or Bart Simpson) so as to suggest some sort of approval, endorsement or sponsorship where no such relationship exists, where there is some commercial or trading element to the use.

Example *A student prominently uses a photograph of the AFL footballer Wayne Carey on a school's home page, advertising the school's forthcoming drama production about the exploits of a local footy team entitled*

'Alive, athletic and kicking'. Such use might be taken to mean that Wayne Carey supports the particular drama production, or that Wayne Carey appears in the drama production, or has some sort of connection with the school.

Example A TAFE college uses a photograph of Edward De Bono on its web page advertising its new course entitled 'lateral thinking'. Such usage might suggest that Mr De Bono had either written or endorsed the course.

In both examples, Wayne Carey and Professor De Bono might be entitled to bring legal proceedings to prevent use of their images in this way.

Not every use of a photograph of a famous person will be seen as indicating approval or endorsement. The legal position will depend on the context in which the photograph appears, the prominence of the photograph and the overall impression created by use of the photograph.

6.10 Linking

Most web sites will include *hypertext links* to other sites. These links enable users of one site to call up another page or site by clicking on the link. When creating a site, it is possible to build links to other sites by inserting details of the web addresses of those other sites into the page. Indeed, it is normal for most web sites to include multiple links on each page.

Although most links are created without seeking permission from the 'target' web site, a recent case in the United Kingdom raised the possibility that, in some circumstances, unauthorised linking could give rise to copyright infringement. Arguably, unless the owner of copyright in the site has expressly or impliedly licensed the linking, the creation of a link could amount to authorising the user to infringe copyright. In most cases, an implied licence is likely to cover such linking.

In the UK case, however, the strongest claim for copyright infringement arose not from the creation of links, but from the copying of headlines from one site to another. If the issue is ever fully tested in court, it is unlikely that simply creating a link (without copying any of the content of another site) will be sufficient grounds for a claim of copyright infringement. It would be surprising if the combination of words making up most links would pass the substantiality test (see 6.4). However, where a site owner expressly prohibits its site being linked to other sites, the linking of that site might amount to authorising others to infringe copyright in the site. Permitting or authorising someone else to do something that infringes copyright, is itself a copyright infringement (see 3.16).

The risk of authorising copyright infringement is much greater in the case of another type of linking, called *IMG linking* or '*in-lining*'. These links give the impression that the linked contents originate from the linked site; the link occurs automatically without the user having to click on any word or icon, and without the user being made aware that the content is derived from another site. As IMG links tend to make the linked copyright material appear out of its original context, the licence of the copyright owner to this type of linking is less likely to be implied. Furthermore, the linking site will often create the appearance that the content has been written by the author(s) of the contents of the linking site. This is likely to amount to a false attribution of authorship,

another unlawful act prohibited by the *Copyright Act*. For this reason, you should not use in-lining links unless you have obtained the express permission of the copyright owner.

Another significant legal risk arising from the use of links to other sites is the possibility of liability for misleading or deceptive conduct under the *Trade Practices Act* where this takes place in a commercial context. In some circumstances, the creation of links could imply that there is an affiliation or sponsorship relationship between two sites when in fact no such relationship exists. This is particularly likely, where the type of linking used bypasses the home page, or other important content of the linked site, such as advertising, which enables the user to identify the linked site. This type of linking, called '*deep linking*' may mislead and deceive the user into believing that the 2 sites are part of the same site, or that the linking site (or its products and services) is approved of or sponsored by the owner of the linked site, when this is not the case. Ideally, provided there is no express prohibition on linking to another site, links should be to that site's 'home page' and not to a page 'deeper' within the linked site.

If a trade mark is to be used as a hypertext link, it should appear in plain text and not in a stylised or logo format. Trade marks which contain words or phrases that are lengthy such as '*Supercalifragilisticexpialidocious*' should *not* be used as links. Otherwise, the use of another person's logo or lengthy phrase without permission may infringe copyright in the logo or phrase.

Schools should also take care not to create links to sites that contain unlawful or infringing content. There is a risk that such links may expose a school to liability for authorising copyright infringement by directing users to the relevant site. This risk can be managed partly through the use of an appropriate disclaimer, and partly through regular checking of linked sites. Schools need to develop disclaimers and procedures to manage these risks.

6.11 Framing

Some web sites are created using a 'framing' feature. This makes it possible to split the viewing area of a web browser into a number of different 'frames' or windows so that the content of different sites can be viewed on the screen at the same time. For example, a central frame can be created to permit the viewing of other sites, while an external border of the original site is retained at the edges of the screen.

There are a number of legal risks associated with framing. First, there is a risk that the framing of one site alongside another amounts to an authorising of copyright infringement, because this practice may go beyond any implied licence of the copyright owner. Secondly, if the appearance of the frame suggests that the framed material is the work of the author of the framing site, this will amount to a false attribution of authorship contrary to the author's moral rights (see 3.27). Thirdly, there is a risk that the framing will mislead users into thinking that the content of the framed site is that of the framing site, or creates a false impression of sponsorship or approval between the sites. If so, the owner of the framed site may be able to bring an action based on the *Trade Practices Act* or the common law tort of passing off.

There has already been litigation in the United States based on unauthorised web site framing. Those cases make it clear that web site owners will take action to prevent the unauthorised use of frames, particularly when they are used to obscure advertising and other important content that may be 'cropped' out of the framed site.

Accordingly, schools should avoid using frames:

- (a) where framing is expressly prohibited by the web site owner, or is unlikely to be covered by an implied licence;
- (b) in ways that are likely to mislead users; and
- (c) where important content (including advertising and web page policies) on a framed site is likely to be obscured.

Framing should be avoided wherever it might misrepresent that the framed material actually originates from the site being viewed.

6.12 Caching selected sites to a school intranet

To reduce the opportunities for students to browse inappropriate content on the Internet, some schools may wish to copy, store or 'cache' selected Internet sites to an internal Intranet.

Although this type of caching may seem 'harmless', it is unlikely to be covered by an implied licence. Accordingly, if done without the permission of the relevant copyright owners, there is a risk that the school will be liable for copyright infringement.

The statutory licence for educational institutions allows some caching within the permissible limits (see 3.19), for example 10% of a magazine article contained on a web site. However, the statutory licence does not permit copying of software. Thus, if the downloading would involve copying software, it would not be limited under the statutory licence.

7. DEFAMATION ON THE INTERNET

7.1 What is defamation?

A person will be liable in a civil action for defamation where it is established that he or she published material which defames another person, in circumstances where no defence applies. 'Publication' means communication of the defamatory material to a third person. An on-line communication is treated as a publication for the purposes of defamation law.

A publication occurs no matter whether the material is communicated to one person or to thousands. However, where defamatory material is published to a large number of people, it is more likely that a higher award of damages will be made.

As publication takes place in any jurisdiction where the material is read, seen or heard, an on-line publication will occur wherever computer access is gained to the particular service.

7.2 What types of communications are defamatory?

Material will be considered defamatory where it contains imputations which:

- (a) are calculated to injure the reputation of a person by exposing them to *hatred, contempt or ridicule*; or

- (b) would tend to lower the person in the estimation of right thinking members of society; or
- (c) would tend to make people *shun and avoid* the person.

The defamatory communication need not consist of a statement; it can comprise cartoons, caricatures, images and effigies which harm a person's reputation.

The person suing need not prove that the imputation is untrue. The burden of proof is on the defendant to prove that the material is not defamatory, or that defences apply.

7.3 ***Must a communication identify someone to be defamatory?***

It is not necessary to identify a person by name. References to an address or occupation, physical characteristics, mannerisms or social habits may be sufficient to identify someone, notwithstanding that the author may not have intended to identify *that* person. If people who know the person could reasonably conclude that the defamatory material referred to them, this will be sufficient for the purposes of defamation law.

Example *A teacher named John Hall was awarded \$150,000 damages after the newsletter 'Victorian Teachers' published a fictitious account of a disastrous school excursion, led by 'Jack Hall'*

Example *The owner of a bulk billing medical clinic (who had recently bought a \$3 million property) was awarded damages over a medical journal article which discussed corruption by an unnamed bulk billing doctor with a \$3 million holiday home*

Example *A website invites users to 'click here to read the rantings and ravings of a certified lunatic'. Although not naming the allegedly defamed person, this communication sufficiently identifies that person by referring to that person's web site.*

It is possible to defame a company's business reputation, however generally an allegation about a person is actionable only if it defames a living person.

7.4 ***Who is liable for a defamatory communication?***

The author is liable for any defamatory communication. A publisher of an on-line newsletter or magazine is also likely to be liable.

It is possible that an Internet service provider or the operator of a bulletin board could be liable as a publisher of the material, especially if they have a level of 'editorial' control over the material with which they are associated.

A person's employer is likely to be vicariously liable for defamatory material which is published by staff who are acting in the course of their employment. However, the employer will not be liable for material which is published in breach of the employer's Internet policy.

A school principal or supervising teacher could be held liable if he or she was aware of and could be said to have in any way joined in a publication made by a student.

7.5 *What are the defences to defamation?*

There are a number of defences available to a person who has published defamatory material. In Victoria, truth is an absolute defence. In other states, such as NSW, the defamatory material must not only be true, its publication must also have been in the public interest. Other defences operate in particular circumstances to protect communications such as the following:

- ◆ a defamatory statement made pursuant to a legal, moral or social duty, such as a report to the appropriate authorities of suspected child abuse
- ◆ a fair and accurate report of judicial proceedings, parliamentary proceedings and local council meetings
- ◆ a fair comment relating to a matter of public interest
- ◆ material concerning government and political matters affecting Australians (so long as the publisher has attempted to verify the material and to include a response from the person defamed)
- ◆ material distributed by a person who did not know the material was defamatory and had no grounds for believing the publication was likely to contain defamatory material.

8. **OFFENSIVE MATERIAL ON THE INTERNET**

There are several issues for schools and staff in relation to offensive material over the Internet. Schools and staff have a dual responsibility to protect students from such material, and to ensure that neither principals, staff nor students may be liable for transmitting offensive material.

8.1 *Schools' liability*

It might be contended that a school's duty of care towards its students requires it to protect students from access to obscene, pornographic or otherwise offensive material. It would be prudent for schools to ensure that obscene or otherwise offensive material is not distributed between students. As educational institutions provide computers for the use of students, the educational institution must ensure that the computers are safe for students to use.

If a child were to suffer a psychological illness after accidentally accessing obscene or pornographic material on the Internet, then it might be argued that the principal and possibly the responsible teacher could be liable in negligence.

There are three ways in which educational institutions may protect against students accessing obscene material:

- (a) using a service provider which offers a blocking device to filter out obscene and unsuitable material;
- (b) ensuring that students are adequately supervised while using the Internet; and

- (c) instructing students that the Internet is only to be used for authorised purposes and that it must not be used to access offensive material. If possible, students should be required to sign an agreement that they will only use the Internet for authorised purposes.

8.2 *Liability of Internet users*

Victoria and Western Australia have laws which make it an offence specifically to use the Internet to publish or transmit certain sorts of unsuitable material, such as pornography and depictions of drug misuse, to minors. Such conduct may also be an offence under more general laws of other States and Territories.

It is also a criminal offence under some State and Territory laws to 'possess' or 'knowingly possess' child pornography. For example, an ACT man who downloaded a computer graphics file which depicted a young girl engaging in a sexual act with an adult man and who six months later reported it to the police was found guilty of 'knowingly' possessing child pornography.

Example *Opening an e.mail to which is attached pornographic material if the content of the material is indicated in the e.mail may amount to 'knowingly possessing' pornographic material.*

9. UNLAWFUL DISCRIMINATION AND HARASSMENT

9.1 *Unlawful discrimination*

The Federal and State anti-discrimination laws and relevant industrial relations laws variously make unlawful discrimination on a variety of grounds:

- ◆ age;
- ◆ sex, marital status, pregnancy or family responsibilities;
- ◆ sexual preference or homosexuality;
- ◆ race, colour, descent, nationality, national origin, ethnicity or religion;
- ◆ disability or impairment;
- ◆ transgender status;
- ◆ political belief or activity;
- ◆ trade union membership or union or industrial activity;
- ◆ profession or occupation;
- ◆ physical features;
- ◆ religious belief or activity;
- ◆ parental status or status as a carer; or

- ◆ personal association with a person identified by reference to any of the above attributes.

Whether it is unlawful to discriminate for one of these reasons in a particular State will depend on the legislation which applies.

The areas in which it is unlawful to discriminate on an unlawful ground include employment, education, sport and the provision and receipt of goods and services.

Unlawful discrimination occurs when a person is treated less favourably on an unlawful ground.

It is likely that a comment, joke or other material which would be unlawfully discriminatory if it were made verbally or in writing or published or broadcast will similarly be unlawful if it occurs on the Internet or by e-mail. For example, discriminatory material sent by e-mail to workmates, students, clients or suppliers will be unlawful in the same way as if it were said to the person directly. Discriminatory material published on a website may also be unlawful.

There are various exceptions in anti-discrimination legislation which may apply. A relevant exception to the *Racial Discrimination Act 1975* is that a person will not be liable for anything said or done:

- ◆ reasonably and in good faith in performing artistic works;
- ◆ in a publication, debate or discussion for a genuine academic, artistic or scientific purpose;
- ◆ in publishing a fair and accurate report of any event or matter of public interest, or comment on such matters, based on a genuine belief.

Example *In one case in the United States, racist jokes circulated on the internal e.mail of a company were used to support a claim that the company discriminated against blacks in closing a printing plant.*

9.2 *Unlawful harassment*

Unlawful harassment is a form of unlawful discrimination. Unlawful harassment includes sexual harassment and other types of harassment which the law does not allow.

In general, **unlawful harassment** is any form of behaviour that is not wanted and not asked for, and that a reasonable person would have anticipated would:

- ◆ humiliate someone;
- ◆ offend someone; or
- ◆ intimidate someone.

where such conduct is because of one of the unlawful reasons.

Unlawful harassment may occur whether or not the person who is the target of the conduct feels that his or her job depends on putting up with the conduct. In some cases, one action will be enough to create unlawful harassment. In other cases there may need to be a persistent pattern of behaviour before unlawful harassment has occurred.

It is no defence to a complaint of unlawful harassment that a person did not mean to cause offence.

9.3 *What is sexual harassment?*

Unlawful sexual harassment is one form of harassment which the law does not allow.

Unlawful sexual harassment includes, but is not limited to:

- ◆ pressure or demands for dates or sexual favours;
- ◆ unnecessary familiarity - for example, deliberately brushing against a person or constantly staring at a person;
- ◆ unwanted physical contact - for example, touching or fondling;
- ◆ sexual jokes or innuendo;
- ◆ offensive telephone calls;
- ◆ offensive sexual gestures;
- ◆ unwelcome comments or questions about a person's sex life;
- ◆ display or circulation of sexual material, including magazines, posters or pictures and messages; or
- ◆ sexual assault.

Sending and forwarding to others jokes via e-mails on an intranet or on the Internet can amount to unlawful sexual harassment. Forwarding, discussing or displaying pornographic material via the Internet could also amount to unlawful sexual harassment.

Sexual harassment may be subtle and implied rather than overt. For example, a hostile work environment amounting to sexual harassment or sex discrimination may be created by sending dirty jokes by e-mail or by the display of sexually explicit or offensive screen savers.

9.4 *Other types of unlawful harassment*

Other types of unlawful harassment include, but are not limited to:

- ◆ verbal abuse or comments that put down or stereotype people because of their race, sexuality, pregnancy, disability, etc;
- ◆ jokes based on race, sexuality, pregnancy, disability, etc;

- ◆ mimicking someone's accent, or the habits of someone with a disability;
- ◆ offensive gestures based on race, sexuality, pregnancy, disability, etc;
- ◆ ignoring or isolating a person or group because of their race, sexuality, pregnancy, disability, etc; or
- ◆ display or circulation of racist or other offensive material.

9.5 *In what areas of life is harassment on a prohibited ground unlawful?*

Harassment on a prohibited ground is unlawful in many areas including employment, education and the receipt and provision of goods and services. Unlawful harassment can occur between managers and employees, between employees in a workplace, between employees and other persons in a workplace eg contractors, between students, between students and persons employed at a school and between clients and suppliers and employees.

9.6 *Consequences of unlawful discrimination and harassment*

Complaints of unlawful discrimination and harassment may be made to the relevant state or federal body. Complaints lodged with these bodies will be referred to compulsory conciliation but if a complaint is not settled at conciliation it will be referred to the appropriate tribunal for a court-like hearing.

The Federal Court (the body with whom complaints to the Human Rights and Equal Opportunity Commission can be lodged for determination) and the State anti-discrimination bodies have the power to make a very wide range of orders including, in some cases, for re-employment of a person who has been dismissed and for damages. Orders for damages of more than \$150,000 have been made.

Unlawful harassment or discrimination may also contravene relevant Teaching Service Orders. These orders often require staff to be civil and courteous when dealing with the public and to observe fairness and equity in all dealings with students, the public and other staff. Contravention of such orders may result in disciplinary action against a teacher. Similarly, employers may also take disciplinary action against employees for unlawful discrimination and harassment, which may include the termination of the employee's employment.

9.7 *Minimising the risk of unlawful conduct*

The school should take '*reasonable*' precautions or steps to prevent unlawful discrimination or harassment occurring. How this should be done will depend upon each School. Different approaches may be required for staff and for students. It may be prudent to seek expert advice.

10. PRIVACY ISSUES AND THE INTERNET

Amendments to the Privacy Act which come into effect in December 2001 extend the operation of the Act to the private sector, including private educational institutions. This will make various acts unlawful, including divulging personal information without the consent of the person to whom it refers except in limited circumstances. This Act does not apply to State Instrumentalities.

However, different departments and schools often will have policies which relate to privacy. Such policies, for example, may relate to the posting of photographs of classes or individual children on the school web site. Protection is provided by the law where a breach of personal privacy amounts to another form of unlawful conduct. An interference with privacy may constitute a breach of confidence, trespass to property, copyright infringement, misleading or deceptive conduct or passing off. Where specific legislation of the type discussed at 11.2 applies, the publication of certain protected information, including a person's identity may be an offence.

Example *A student obtains unauthorised access to the personal diary of Mrs X, a teacher at the student's school. The student copies from the teacher's diary an extract of the teacher's personal and very private reflections on a particularly harrowing and stressful incident. The diary entry describes an incident in which Mrs X was allegedly sexually assaulted by another student at the school, including Mrs X's report of the incident to police, the laying of charges against the student, and the personal trauma she suffered from the incident, which leads to her suffering a nervous breakdown.*

The student who has taken the diary from Mrs X's car, then reproduces these diary notes as part of an article entitled 'A Day in the Life of Mrs X' which is written in the first person, that is through the eyes of and under the pseudonym of Mrs X. The student submits the article for publication in an on-line commercial publication, and the article is eventually published as part of a series of articles on the state of mental health of the State's teachers.

The circumstances surrounding the creation and publication of the article may involve a misuse of confidential information, a trespass to property, copyright infringement, misleading and deceptive conduct (because the article is published as if written by Mrs X), defamation, and an offence under legislation prohibiting the publication of information concerning minors who are the subject of Children's Court proceedings, discussed at 10.2.

10.1 Breach of confidence

A person may sue for breach of confidence if:

- (a) a piece of information has a 'quality of confidence' about it;
- (b) the information is disclosed to a person in circumstances or in a relationship giving rise to an obligation of confidence; and
- (c) that person disclosed or used that information without authorisation and to the detriment of the person entitled to prevent it.

Sometimes, where these circumstances are made out, in certain cases disclosure will be allowed where it is made in the public interest, by reasons of a just cause or excuse, or where disclosure is required by law.

Schools need to protect against disclosure on the Internet and elsewhere of any sensitive information, including information about students on their web sites. The general law protecting confidential information is reflected in some states by specific legislation which creates an offence of failing to preserve the secrecy of student information, and

of communicating any 'confidential matter' concerning students to unauthorised persons. 'Confidential matter' is a very broad expression which could cover the fact that a student attends a particular school, and details of a students' behavioural and academic performance. No such information should be published on the Internet without the student's permission, and if appropriate, the permission of the parent.

10.2 *Legislation protecting private information*

In many areas it is an offence punishable by fine (and sometimes imprisonment) to publish names or information about children. The object of the prohibition is to protect the privacy of children, particularly in circumstances where it may affect their future as an adult. The prohibitions apply to publication on the Internet or by e-mail on school intranets. Below are examples of such prohibitions.

In some states and territories, legislation relating to adoptions makes it an offence for a person to publish in a newspaper or periodical, or to broadcast a matter which identifies a party to an adoption, or is reasonably likely to enable identification of that person, without his or her consent. In certain circumstances, the permission of the court is also required for such publication.

The law relating to the protection of juveniles in some states and territories establishes a number of offences in relation to the publication of information about children, particularly in connection with Children's Court proceedings. Children's Court proceedings can relate to concerns about the welfare of the child, for example if there is a belief that a child is being neglected or abused, or to allegedly criminal acts of a child. A teacher may be involved in proceedings before the Children's Court as a result of mandatory reporting requirements.

- ◆ Examples of offences under this type of legislation are:
- ◆ the disclosure of information contained in a report made to the Children's Court to a person who is not entitled to receive or have access to the report without the consent of the child who is the subject of the report;
- ◆ the disclosure of information contained in a report to the Children's Court to the child or parent of the child if that information had not been given to the child or parent;
- ◆ the disclosure of any statement made or information provided at a pre-hearing conference without the leave of the Children's Court and the consent of the person who made the statement or provided the information;
- ◆ the reporting of proceedings of the Children's Court (or any other court proceeding arising out of a proceedings in the Children's Court) in a way that identifies the venue of the Children's Court where that proceeding is being heard, a child or party to the proceeding, or a witness to the proceeding without the permission of the Senior Magistrate of the Children's Court;
- ◆ the disclosure of any information contained in a protection report to any person other than the protective intervener who is investigating the matter;
- ◆ the disclosure by a protective intervener to any person (other than another protective intervener or a person in connection with the Children's Court

proceeding) of the name of the person who gave information in confidence or any information that is likely to lead to identification of that person without the written consent of that person.

In some jurisdictions, legislation relating to court applications for an intervention order in cases of family violence make it an offence to report certain information arising out of the court case. Examples are the publication or causing to be published, including over the Internet, of a report of proceedings containing details which identify the venue of the court, the name, address, picture or school details which could identify a child, party or a witness in the proceedings.

Staff and schools need to be mindful of any relevant guardianship legislation which makes it an offence to publish or broadcast any report of proceedings before the relevant guardianship board. Any person present at those proceedings must not make a record of, divulge, or communicate to any person information that was acquired by the person in connection with that proceeding except in the performance of their official duties.

Other legislation prohibits publication of certain matters in legal proceedings. For example, it can be an offence to print or publish in relation to sexual offences, any material which contains particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed, whether or not that offence is pending in court. This type of legislation may also restrict what information can be published about legal proceedings generally.

Some states and territories have enacted legislation regulating fertilisation procedures for human beings. In some cases, it is an offence for a person to contravene an order of a court prohibiting the publication of the whole or part of the proceedings where information will be given about a donor, a person about to undergo a treatment procedure, the husband of such a person, or a person born as a result of a treatment procedure or the names or addresses of these persons.

The *Family Law Act 1975 (Cth)* governs matters of divorce, property settlement and the care of children. The Act makes it an offence for a person to publish or otherwise disseminate to the public an account of any proceedings under the Act which identifies a party to the proceeding or a person related to or associated with that party or a witness in the proceeding.

When a student is involved in legal proceedings such as those covered by the legislation discussed above, the school and its staff may become involved in those proceedings or at least aware of details of the proceedings. Both in general conversation and in the use of e-mail the temptation to discuss these matters should be resisted as it may constitute an offence. Detection of computer based breaches of this legislation is facilitated by technology. An e-mail which has been deleted is still able to be retrieved from the computer and can form evidence of any offence committed in contravention of legislation.

11. ISSUES FOR E-MAIL USE

Many of the legal issues discussed in the context of the world wide web, are also important in relation to e-mail. For example, it is just as important to prevent:

- ◆ the use of a third party's copyright material;

- ◆ defamatory material;
- ◆ offensive material;
- ◆ racial discrimination and sexual harassment; and
- ◆ unwanted disclosure of private or confidential material,

in respect of Internet e-mail as it is with respect to web sites. There are some important related issues which apply to e-mail which need to be borne in mind before sending that next e-mail message.

11.1 E-mails can come back to haunt you!

The immediacy and seeming transience of e-mails mean that messages often take on the informal manner of a personal conversation, in which gossip and rumour may be traded. However, in most cases, e-mails can easily be forwarded, and are archived on the sender's hard drive. They may also be stored on back up tapes of internal or external file servers.

This means that the contents of e-mails can be read by people for whom they were not intended, and can later be retrieved and used as evidence. This problem is illustrated by two recent Internet cases:

- ◆ a British health insurer, was forced to pay over \$1,000,000 to a competitor after employees spread rumours on its internal e-mail system relating to the competitor's financial position
- ◆ an American company paid out \$250,000 in a case where a dismissed employee sued for sexual discrimination. The plaintiff discovered a message from the company president to the head of personnel saying 'Get rid of that #?% A\$#!'.

11.2 Once sent, you can't control your e-mail

The sender of an e-mail has no control over the future distribution of the message. An item of salacious gossip or a racist joke sent to one friend may then be forwarded on to others, and again to others. The wider the distribution list becomes, the more likely it is that someone will take offence.

Each time a message is forwarded, it is considered to be republished for the purposes of defamation. Not only does this mean that each person forwarding an e-mail could be separately liable, the person injured by the message is also likely to be awarded greater compensation if the message has been widely distributed.

Great care must be taken to ensure that material which may offend some people is *not* distributed. In the United States, discrimination actions have been brought following e-mail distribution of jokes such as the following:

- ◆ a list 'Why beer is better than women'
- ◆ a 'vocabulary test' supposedly completed by an 'eighteen year old ninth grader', which mimicked black speech patterns

11.3 *Don't send confidential or vital e-mails!*

E-mail is *not* a secure means of communication. First, delivery of e-mails on time or at all or to the correct recipient cannot be guaranteed. Secondly, while e-mail is passing through the Internet, it may travel through many different networks before it reaches its final destination. A copy of the information contained in the e-mail is stored on each intermediary computer over which the e-mail passes. It may be accessed or viewed at any one of these computers. The situation is like sending a letter through the post, but not sealing the envelope. The letter can be read by someone at each post office it visits on its way to the final destination. Furthermore, computer 'hackers' may be able to capture the information by other means.

For this reason, you should not send anything by Internet e-mail that you would not like to become public knowledge. You should not, for example, send the answers to a test or exam to markers via Internet e-mail. There are also various technical options for further protecting the content of e-mail sent on school intranets (see 13.4 - 13.6).

11.4 *Bulletin boards - beware!*

Bulletin boards on the Internet enable a person to post a message on to the board, where it may then be read by any person who accesses the site. Bulletin boards are often a hotbed of gossip, and are frequently used by special interest groups who may engage in heated debate. Not only is there scope for defamatory or racist or other discriminatory remarks to be made, it is likely that the message will potentially be published to a large number of people.

Example *An Australian anthropologist was awarded \$40,000 damages after he was defamed on an anthropology bulletin board. An estimated 23,000 academics and students had access to the board worldwide.*

11.5 *Preservation of e-mails*

Although e-mail communications appear to be fleeting, usually they can be recovered from the computer's hard drive or back up files. Where the contents of e-mails are relevant to any issues in legal proceedings, they are 'discoverable' documents. This means that apart from e-mails which are protected by legal privilege (such as e-mails containing legal advice) e-mail messages that are relevant to any disputed legal issues must be made available in any legal proceedings. Once legal proceedings are instituted or likely, you have a legal duty not to delete or hide e-mails that are likely to be relevant.

11.6 *The need for an e-mail policy*

The implication for schools of these e-mail risks is that *all* schools need to develop e-mail policies to educate staff, students and all members of staff on the legal issues in using e-mail, and to make it very clear that only lawful use of e-mail is acceptable. Ideally, the policy should be supported by training programs and procedures to ensure the policy is understood, and to undertake random checks of e-mail use to monitor whether or not e-mail usage is acceptable.

11.7 Viruses

Internet e-mail is a potential vehicle for computer viruses. Schools must protect against any potential liability for sending Internet e-mail containing an embedded virus which may damage the recipient's system. Schools should require all users to scan any files attached to the Internet e-mail received for viruses using appropriate virus scanning software.

The following disclaimer should be placed in the text message of any Internet e-mail containing attached files:

'IMPORTANT

The [School Council of Name of School or other relevant entity] does not represent or warrant that the attached files are free from computer viruses or other defects. The attached files are provided, and may only be used, on the basis that the user assumes all responsibility for any loss, damage or consequence resulting directly or indirectly from the use of the attached files. The liability of the [School Council of Name of School or other relevant entity] is limited in any event to either the resupply of the attached files or the cost of having the attached files resupplied.'

For the use of disclaimers generally, see 14.

12. JURISDICTIONAL ISSUES

Generally, for a person to be able to sue in a particular state or country (a 'jurisdiction') there must be some nexus between the jurisdiction and the claim. For example, Queensland will have jurisdiction over a claim where all parties to the action live in Queensland, or where the events of the claim took place in Queensland.

The Internet poses a jurisdictional dilemma. Material posted onto the Internet may be accessed by anyone in the world who has network access to the particular service on which the material appeared. Potentially, parties to a prospective action will be scattered all over the world, and several countries might be able to claim jurisdiction.

This leads to several problems:

A person wishing to sue might be able to choose a forum which is likely to be most favourable to them.

A person defamed on a worldwide bulletin board may choose to sue in a country which has pro-plaintiff defamation laws, or one which is likely to award much greater damages than a Victorian court.

Where material is republished in separate jurisdictions, a person might also choose to sue in both jurisdictions.

A defamatory or racist joke is e.mailed from A to B in Victoria. B then sends it on to C in New Zealand. The person offended by the joke is able to sue A in Victoria, and as a separate action might be able to sue both A and B in New Zealand.

Material posted onto the Internet from a server in Victoria may comply with all Victorian laws in relation to its content, but may breach laws of other jurisdictions. As

the material is accessible elsewhere, the Victorian person might be in breach of interstate and foreign laws.

A school in the (fictitious) Victorian town of Oreo uses its web site to promote its 'Lamington' software containing a thesaurus for students. People are able to buy the thesaurus over the Internet using their credit card numbers. The school might be in breach of American trade mark laws, as 'Lamington' is a popular American brand of educational software. This risk would be minimised if the school's web site made it clear the software was only being offered to Australian schools and students.

13. PROTECTION OF INTELLECTUAL PROPERTY

As is obvious from the above, it is important that schools' Internet usage does not infringe other people's intellectual property rights. Schools also need to be mindful of protecting intellectual property rights belonging to their governing body, their staff and students or of rights belonging to staff and students of other schools when creating documents on the world wide web or sending Internet e-mail. This is especially important when you consider:

- ◆ the ease and low cost at which digital information can be copied; and
- ◆ the potentially vast number of recipients of those copies.

For example, public dissemination of education department copyright material on the Internet could have serious consequences, including destroying the potential commercial market for that material.

The material needs to be protected in two main ways. You should protect against:

- ◆ inappropriate use by the recipient of the material; and
- ◆ unauthorised access to information.

13.1 *Inappropriate use by web site browsers or e.mail recipients*

The only real means of protecting against inappropriate use by such persons is the inclusion of preventative notices on the web site or in e-mail.

13.2 *Copyright notices*

If you have obtained permission to use copyright material owned, for example, by the education department on a website you should place a 'copyright notice' in an obvious place on that material (such as on the home page, and any subpages of a website) in the following form:

For website home pages and all sub-pages:

©The Department of Education, [insert State/Territory and year of publication].

Copyright in the materials on this web site is owned by or licensed to the [State/Territory], Australia. Except as permitted under the Copyright Act 1968 (Cth) no part of any such materials may be reproduced, or stored, whether electronically or by any other process, without the written permission of the

Department of Education. Temporary electronic copies may be made for the sole purpose of browsing this site. The [State/Territory] expressly excludes any warranty as to the accuracy of the material on this site, and disclaims any sponsorship or approval by or affiliation with any sites which might be linked or framed to this site, and disclaims all liability for material contained on other sites which might be linked or framed to this site.

Copyright protection in Australia does not require such a copyright notice or any form of registration (see 3.4). However, use of the notice will help dispel the commonly held belief that there are no copying restrictions for material on the Internet. Furthermore, because proving copyright infringement can require aspects of knowledge of the infringement, the presence of the notice will make it difficult for someone to argue that they did not know that copyright subsists in the material.

13.3 Trade mark symbols

If you are using any registered trade marks which are the property of the school's governing body, you should signify that these are registered trade marks by the use of the ® symbol. However, you must not use this symbol if the trade mark is unregistered. You should signify unregistered marks which are being used as trade marks by placing the letters 'TM' next to the mark.

The law relating to trade marks, including the protection given to registered and unregistered trade marks is discussed at section 4.

13.4 Protection against unauthorised access to information

The law does protect against unauthorised copying of materials protected by copyright and the unauthorised use of confidential information. However, because detecting copyright infringement on the Internet and enforcing copyright protection can be difficult and expensive, for highly valuable, confidential or commercially sensitive content, the best option may be not to publish the information at all, or to safeguard against unauthorised access to the information.

13.5 Firewalls and passwords

Schools can attempt to prevent unauthorised access to any web sites or other databases by use of passwords. It is possible to regulate authorised passwords through a 'firewall' set-up. A firewall is a barrier between networks of computers. For example, a school's internal network could be set up so that it is accessible only through a single machine (the firewall) that serves as the internal network's interface to the Internet. Any Internet traffic that goes in or out of the school's network must pass through this firewall computer.

This firewall technology allows the school to place either hardware or software security on a particular computer. That security will then apply to all traffic entering or leaving the site. Depending on the security mechanisms involved, the firewall can impose a great many protection systems. The most simplistic firewall involves blocking unauthorised logins to a school web-site.

13.6 Encryption

The main system of protecting unauthorised access to e-mail content has been the use of 'encryption technology'. Encryption involves converting e-mail messages into

unintelligible text by changing each character of the message into another character. The recipient of the e-mail can unscramble the message back into readable form by the use of a 'key'. The effectiveness of encryption relies on the ability to keep the key secret.

Encryption technology is particularly significant in safeguarding the security of commercial transactions over the Internet. Unless schools are dealing with highly confidential material or particularly valuable copyright material or if there is reason to suspect that transmissions are being intercepted, schools may not necessarily require this technology.

14. DISCLAIMERS AND LEGAL WARNINGS

14.1 *What is a disclaimer?*

A disclaimer is a statement that attempts to exclude or limit liability for a certain act. The potential liability for:

- ◆ copyright and trade mark infringement;
- ◆ misleading or deceptive statements;
- ◆ defamation;
- ◆ sexual or racial discrimination; and
- ◆ other offensive material,

has been discussed above. Staff and students of schools should *not* engage in any of this conduct through the Internet or otherwise. However, schools should use disclaimers to minimise the risk of liability if employees or students inadvertently engage in such conduct over the Internet.

14.2 *Are disclaimers effective?*

Disclaimers will rarely be absolutely effective. Whether or not a disclaimer is legally effective is always a matter of fact and degree. Disclaimers can mitigate liability in certain circumstances, but in others they may have no effect. For example, if a school knows that its web site is linked to a site containing content that infringes copyright, a disclaimer will not be effective to exclude liability for copyright infringement.

14.3 *How should disclaimers be used on the Internet?*

A disclaimer can only be effective if it is brought to the attention of the person from whom liability is sought to be disclaimed. If a web site consists of a number of pages, it is possible that someone browsing the site will enter the site other than through the 'home page'. As a result, it is important that each page on the Web site contains a link to the disclaimer that can be seen by users as soon as a page is browsed (ie. without having to scroll down). If you are creating a web page the link should read:

***'You must read our
IMPORTANT DISCLAIMER
It contains important information concerning this web site'***

The more prominent you make the disclaimer link the better. For example, a colourful flashing link is preferable to a black and white link in small print.

14.4 *What should the disclaimer say?*

The link should lead the user to a web page that contains the text of the disclaimer. A sample disclaimer that may be appropriate for use has been included in these guidelines at 14.5. Schools should obtain advice on how to adapt the sample disclaimer to suit the particular content contained in the site or the audience at which it is aimed. It is very important to seek advice on an appropriate disclaimer to use if a school or other educational institution is offering products or services over the Internet. In some cases it is unlawful to attempt to exclude certain warranties when providing certain products and services.

14.5 *Sample disclaimer*

While care has been taken in constructing this site, [Name of institution] is not responsible for the accuracy, legality, and the copyright compliance status of the content of this web site and that of any other web sites which are linked or framed to this site. This web site is not sponsored by or otherwise associated with any web sites that are linked or framed to this site. [Name of institution] disclaims any liability for any damage resulting from using this site.

15. FREQUENTLY ASKED QUESTIONS

15.1 *If I obtain permission from the owner of the website, is it ok to copy materials on that website?*

The answer is that it 'depends'. If the owner of the website owns the copyright in all of the content which you wish to use, then using that material will be alright. If, however, the owner of the website does not own the copyright but has used it without permission, or has only permission for using the material on the owner's website, then you will need to obtain permission from the actual copyright owner.

15.2 *If there is no © notice, can I copy information from a website?*

The absence of a copyright notice does *not* mean that you are free to copy material contained on the website. Unless the material is in the public domain, or a fair dealing defence or an implied licence applies, then you need the permission of the copyright owner to copy the content. As a general guide, the more commercial your use, the less likely it is that an implied licence will apply.

15.3 *Who owns copyright in my e-mail messages?*

If you are an employee, for example a teacher or librarian, then copyright in any messages which you compose as an employee will be owned by your employer. By sending your e-mail to someone or to a group of readers (for example an e-mail discussion group, or a bulletin board) you are implicitly giving them permission to view your e-mail message on their web browser, and possibly to resend your e-mail and any attachments. So be careful not to send e-mail messages which contain or attach copyright materials which you do not own, unless you have obtained permission to do so.

15.4 *If I paid for something, do I own the copyright?*

Not necessarily. Simply paying a person to create copyright material does not always mean that you will own copyright in what they create. As an employer, you will usually own things created by your employees at work. The 'Crown' (i.e. the Government) also owns things created under its direction or control. Otherwise, you should arrange a specific transfer or assignment of copyright (if required) when independent contractors (e.g. photographers, web page designers) are engaged to create material. Legal advice should also be sought.

15.5 *Can students copy material from the net?*

Students are entitled to copy a reasonable portion of material for the purpose of criticism or review or for research or study. If the portion is 10% or less it is deemed to be a reasonable portion. This is referred to as a fair dealing. This is the case regardless of whether the student is working at the school or elsewhere (see 3.24).

15.6 *Who owns copyright in work authored by students?*

The student who create the work is the owner of the copyright in the absence of an agreement to the contrary.

15.7 *What happens if a work reproduced as a fair dealing is then used for another purpose, such as inclusion on a website?*

If the reproduced work is incorporated in an essay for example, and the essay is placed on the web site there is no difficulty. However, if the work is extracted and used on its own so that the original purpose of copying is no longer relevant, then the copy will become an infringing copy.

15.8 *Is there anything needed to be done before a student's work is entered in a competition?*

Whenever entry in a competition would involve the exercise of one or more of the copyright owner's exclusive rights, the student's permission must first be obtained. If, for example, this involves a reproduction or first publication of the work the student's permission must be obtained. Similarly, if it involves, for example, causing a sound recording to be heard, or a film to be seen or heard in public, the student's permission must be obtained. In any event as a matter of courtesy, the student should be asked before their work is entered in the competition.

15.9 *Do we need to obtain a student's permission before reproducing their work on a school, departmental or TAFE website?*

Yes. This involves a reproduction and communication of the student's work and his or her authority must be obtained.

15.10 *Is a school liable if a student infringes copyright or posts offensive material on a website?*

With respect to copyright, provided the school can show it did not directly or indirectly authorise the behaviour, it should not be held responsible. The school should have

appropriate copyright notices placed on terminals and should also have an internet policy which is enforced so that it can establish that it did not authorise the conduct.

It is more difficult to be precise with respect to offensive material but generally if the student was not at school, or supposed to be under the school's control when the offensive material was posted, it is unlikely that the school would be liable. To reduce the risk of liability, the school's internet policy should explicitly prohibit offensive material, and prescribe measures to prevent or reduce the likelihood of such material being posted.

ATTACHMENT 'A'

**PRESCRIBED FORM OF NOTICE FOR SECTIONS 39A
AND 104B OF THE COPYRIGHT ACT 1968,
IN RELATION TO THE REPRODUCTION OF WORKS
AND THE COPYING OF PUBLISHED EDITIONS**

COMMONWEALTH OF AUSTRALIA

Copyright Regulations 1969

WARNING

Copyright owners are entitled to take legal action against persons who infringe their copyright. A reproduction of material that is protected by copyright may be a copyright infringement. Certain dealings with copyright will not constitute an infringement, including:

- A reproduction that is a fair dealing under the *Copyright Act 1968 (the Act)*, including a fair dealing for the purposes of research or study; or
- A reproduction that is authorised by the copyright owner.

It is a fair dealing to make a reproduction for the purposes of research or study, of one or more articles on the same subject in a periodical publication, or, in the case of any other work, of a reasonable portion of a work.

In the case of a published work in hardcopy form that is not less than 10 pages and is not an artistic work, 10% of the number of pages, or one chapter, is a reasonable portion.

In the case of a published work in electronic form only, a reasonable portion is not more than, in the aggregate, 10% of the number of words in the work.

More extensive reproduction may constitute fair dealing. To determine whether it does, it is necessary to have regard to the criteria set out in subsection 40 (2) of the Act.

A court may impose penalties and award damages in relation to offences and infringements relating to copyright material.

Higher penalties may apply, and higher damages may be awarded, for offences and infringements involving the conversion of material into digital or electronic form.

ATTACHMENT 'B'**PRESCRIBED FORM OF NOTICE FOR SECTION 104B
OF THE COPYRIGHT ACT 1968 IN RELATION TO THE
COPYING OF AUDIO-VISUAL ITEMS**

COMMONWEALTH OF AUSTRALIA

*Copyright Regulations 1969***WARNING**

Copyright owners are entitled to take legal action against persons who infringe their copyright. Unless otherwise permitted by the *Copyright Act 1968 (the Act)*, unauthorised use of audio-visual items in which copyright subsists may infringe copyright in that item.

It is not an infringement of copyright in an audio-visual item to use that item in a manner that is a fair dealing under section 103C of the Act.

Section 103C of the Act relates to fair dealing for the purpose of research or study and sets out the matters that must be considered in determining whether a reproduction of an audio-visual item is a fair dealing.

A court may impose penalties and award damages in relation to offences and infringements relating to copyright material.

Higher penalties may apply, and higher damages may be awarded, for offences and infringements involving the conversion of material into digital or electronic form.

ATTACHMENT 'C'

**FORM OF NOTICE FOR PARAGRAPH 135ZXA (a) OF
THE COPYRIGHT ACT 1968**

COMMONWEALTH OF AUSTRALIA

Copyright Regulations 1969

WARNING

This material has been reproduced and communicated to you by or on behalf of [*insert name of institution*] pursuant to Part VB of the *Copyright Act 1968* (***the Act***).

The material in this communication may be subject to copyright under the Act. Any further reproduction or communication of this material by you may be the subject of copyright protection under the Act.

Do not remove this notice.

ATTACHMENT 'D'

**FORM OF NOTICE FOR PARAGRAPH 135KA (a) OF
THE COPYRIGHT ACT 1968**

COMMONWEALTH OF AUSTRALIA

Copyright Regulations 1969

WARNING

This material has been copied and communicated to you by or on behalf of [*insert name of institution*] pursuant to Part VA of the *Copyright Act 1968* (***the Act***).

The material in this communication may be subject to copyright under the Act. Any further copying or communication of this material by you may be the subject of copyright protection under the Act.

Do not remove this notice.

ATTACHMENT 'E'

**FORM OF NOTICE FOR PARAGRAPH 49 (7A) (c) OF
THE COPYRIGHT ACT 1968**

COMMONWEALTH OF AUSTRALIA

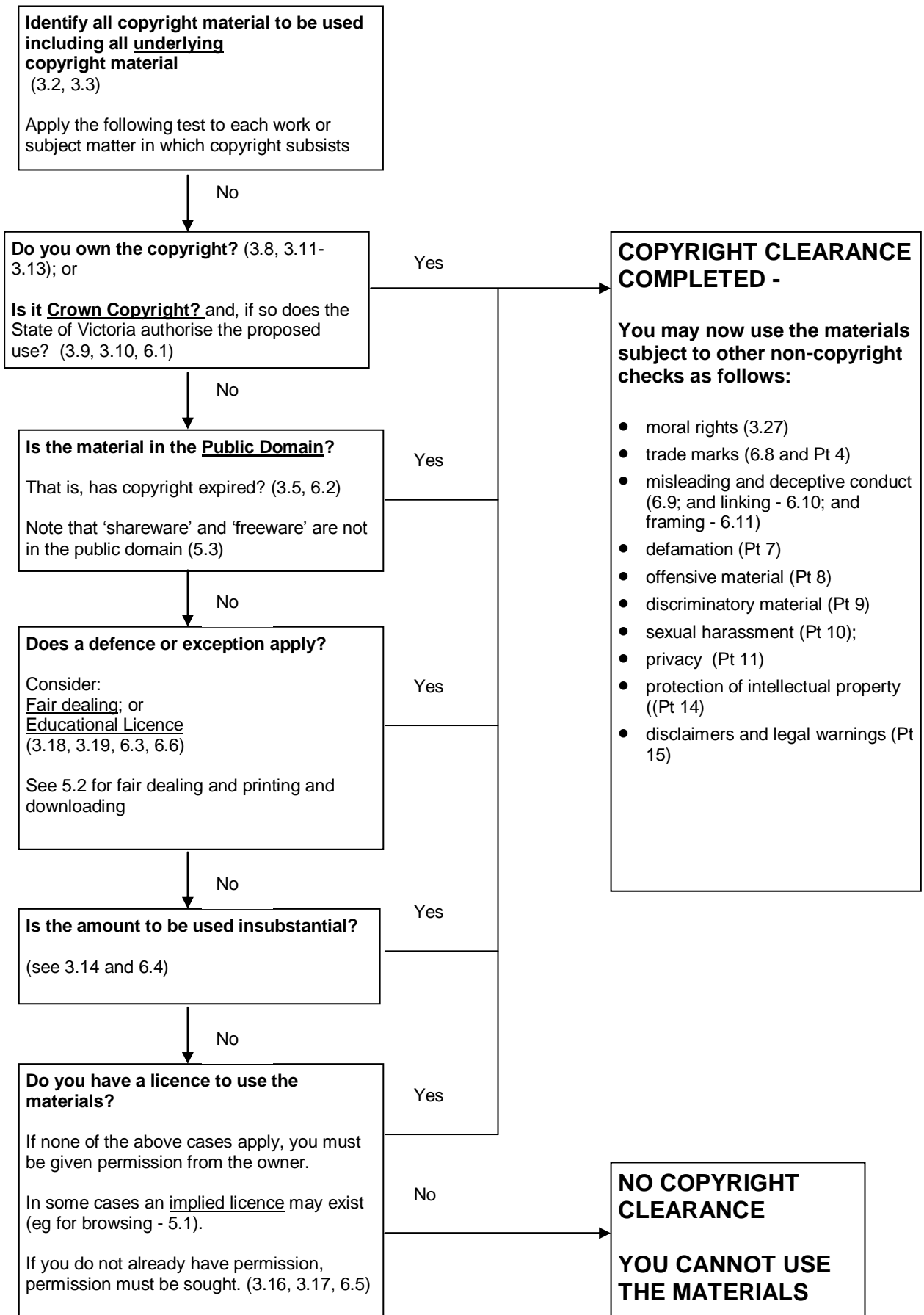
Copyright Regulations 1969

WARNING

This material has been provided to you pursuant to section 49 of the *Copyright Act 1968* (***the Act***) for the purposes of research or study. The contents of the material may be subject to copyright protection under the Act.

Further dealings by you with this material may be a copyright infringement. To determine whether such a communication would be an infringement, it is necessary to have regard to the criteria set out in Part 3, Division 3 of the Act.

COPYRIGHT CLEARANCE FLOWCHART FOR USE OF MATERIALS FROM OR ON THE INTERNET



USEFUL LINKS

Copyright Act 1968 - http://www.austlii.edu.au/au/legs/cth/consol_act/ca1968133/

Copyright Regulations 1969 - http://www.austlii.edu.au/au/legs/cth/consol_reg/cr1969242/

AG's Department copyright law publications - <http://www/law/gov/au/publications/pubs.htm>

Australian Copyright Council - <http://www.copyright.org.au/>

Copyright Agency Limited - <http://www.copyright.com.au/>

Screenrights - <http://www.screen.org/>

APRA/AMCOS - <http://www.apra.com.au>

IP Australia - <http://www.ipaustralia.gov.au/>

Intellectual Property Society of Australia and New Zealand - <http://www.ipsanz.com.au/>

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