

MORAL RIGHTS IN THE AUSTRALIAN ACADEMY: WHERE TO NOW?

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I INTRODUCTION

One of the recurring themes of 20th century Australian copyright law was the question of whether Australia complied with its requirements under the *Berne Convention for the Protection of Literary and Artistic Works* ('*Berne Convention*') to protect the moral rights of authors.¹ While the Government and many others argued that the existing laws of defamation and passing off provided adequate protection, creators and commentators continually expressed their dissatisfaction with the level of protection afforded by Australian law.² After nearly 70 years of debate, the Commonwealth Government capitulated in 2000 and admitted that the existing laws were 'fragmentary and incomplete'.³ To remedy this deficiency, in December 2000 the Government introduced a moral rights legislative scheme into Australian copyright law.

One of the notable features of the discussions that preceded the introduction of moral rights in Australia was that there was very little interest in the potential

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1 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 14 July 1971, 943 UNTS 178, art 6bis (entered into force in Australia 1 March 1978) requires Member States to provide authors with the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of the work which would be prejudicial to the author's honour or reputation.

2 See Staniforth Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (1987); James Crawford, 'Opinion of Australia's Obligation under the Berne Convention to Introduce Moral Rights' (1989) 7 *Copyright Reporter* 8; Sam Ricketson, 'Is Australia in Breach of Its International Obligations with Respect to the Protection of Moral Rights?' (1990) 17 *Melbourne University Law Review* 462; and Peter Anderson and David Saunders (eds), *Moral Rights Protection in a Copyright System* (1992).

3 Second Reading Speech, Copyright (Moral Rights) Amendment Bill 1999 (Cth), House of Representatives, 8 December 1999 (Daryl Williams, Commonwealth Attorney-General).

impact that moral rights might have had in the university sector.⁴ For example, when the Copyright Amendment (Moral Rights) Bill (Cth) was released for public consultation in 1997, there were no submissions made either by the Australian Vice-Chancellors' Committee ('AVCC' – the peak body representing the university sector) or from individual universities.⁵ Neither was there much interest in the role that moral rights might have played in the university sector by policy makers, advocates, or critics of the moral rights scheme.

There are a number of possible reasons for this lack of interest. One explanation might be that there was a lack of appreciation for what the proposed rights may have meant to universities and their staff and students. Also, universities may have felt that the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) reforms, which occurred at much the same time as the debates about moral rights, were more important and thus warranted more attention. Alternatively, the ongoing rounds of consultations and submissions that were made in response to the review of the *Copyright Act 1968* (Cth) might have generated a policy fatigue which undermined any interest that there might otherwise have been in moral rights.

Another possible reason for the lack of interest in moral rights was that there were few infractions of 'moral rights' within the university sector.⁶ Unlike the situation in the radio, film and newspaper industries, there was little evidence that the reputation of academic authors or the integrity of academic works had been interfered with.⁷ At the time, two factors contributed to this. The first can be traced to the fact that academia already had its own set of rules and procedures to regulate attribution, authorship and integrity.⁸ Mechanisms existed that performed similar roles to those that were to be provided by moral rights. Given the central role that reputation and integrity play within the academy, it is not surprising that special rules, procedures and practices have been developed to

4 The debate in the 1980s was largely limited to visual artists (see Australian Copyright Council ('ACC'), *Moral Rights*, Bulletin No 50 (1984) 1) and later widened to include the film and television industry. As Morrison noted, 'much of the debate centred on the film and television industry, which ultimately played a significant role in shaping the legislation': Virginia Morrison, 'The New Moral Rights Legislation' in (2001) 10(1) *Off the Air: Screenrights' Newsletter*, 4. A notable exception is the article by Julie Wells of the National Tertiary Education Union ('NTEU'): Julie Wells, 'University Staff and Moral Rights' (1994) 12 *Copyright Reporter* 22, 23.

5 The AVCC made a submission to the Copyright Law Review Committee ('CLRC'), Parliament of Australia, *Report on Moral Rights* (1988). However, this was largely concerned with the university's position as a holder or commissioner of artistic works. See AVCC Submission to the CLRC *Report on Moral Rights*, 23 December 1985 (copy on file with author).

6 There were thought to be relatively few violations generally: see CLRC, above n 5, 10, 22; Peter Banki, 'The Moral Rights Debate in Australia' in Anderson and Saunders, above n 2, 5.

7 CLRC, above n 5, 26.

8 This can perhaps be contrasted with the position in secondary schools, as Ian Sheppard pointed out: 'very often this [attribution] is done as a matter of courtesy or common practice; but there are many occasions when it is not. Surprisingly, the [CLRC] found that this was especially so in the educational field, particularly at the secondary level.' See Ian Sheppard, 'Moral Rights in Australia' (1993) 11 *Copyright Reporter* 6, 8.

regulate the way in which academics' works are used.⁹ For example, non-attribution carries a number of consequences for academic staff, including loss of credibility, academic misconduct and dismissal.¹⁰

The importance that universities placed on the need to properly attribute authorship is illustrated by the advice issued by the AVCC following the 1985 test case brought before the Copyright Tribunal in relation to photocopying, *Copyright Agency Ltd v Department of Education of NSW*.¹¹ As part of his judgment, the President of the Tribunal, Sheppard J, referred to his concerns expressed during the proceedings where he said he was worried that when university lecturers photocopied materials for their students, they may not acknowledge the source of the materials:

It is the sort of thing that departments and universities and others should have a policy about and it ought to be instilled into lecturers and teachers that this is what they have to do, otherwise there may be a temptation to pretend that work which is being copied is the original work of a lecturer which I think is unforgivable if that is being done.¹²

While the AVCC believed that the Tribunal's fears were unfounded, nonetheless, they issued the following advice to remind universities of their obligations:

It is in the nature of teaching at tertiary level to lay great emphasis on reference back to original source material. ... This flows through to the work of students themselves; assignments are expected to give precise attributions, by footnotes or otherwise, of all material quoted from books or papers. Plagiarism in assignments would be dealt with severely. Teaching staff may be expected to exercise similar care. ... It is the strict policy of the AVCC that due acknowledgement of authorship should be given in all cases and all staff should be made aware of this.¹³

A further reason why there were relatively few 'infringements' of the 'moral rights' of academic authors can be traced to the fact that publishers, who were one of the groups most likely to misuse academic works, shared a number of interests in common with authors. For example, it was in the publishers' best interests to protect and promote the name of authors. Similarly, there were few reasons why publishers would have wished or needed to alter works in a way that

9 See, eg, National Health and Medical Research Council ('NHMRC') and AVCC, *Joint NHMRC/AVCC Statement and Guidelines on Research Practice* (1997), National Health and Medical Research Council <<http://www7.health.gov.au/nhmrc/research/general/nhmrcavc.htm>> at 2 February 2005. See especially cl 3.

10 Failure to observe these rules carries with it far more serious penalties than the moral rights legislation impose. The demise of the Vice-Chancellor of the Royal Melbourne Institute of Technology in 2002 on charges of academic plagiarism is only one example. As Ricketson states in Sam Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (1999) [10.225]:

At one end of the spectrum might lie scholastic endeavor, where failures to attribute and unauthorised interferences with the work of another may constitute offences against academic canons of behaviour, or even amount to disciplinary offence within academic institutions and professional associations.

11 (1985) 59 ALR 172.

12 See Affidavit of Edwin Webb, Vice-Chancellor of Macquarie University attached to AVCC, 'Advice to Universities from AVCC on Attribution of Photocopied Material' (14 May 1984) in AVCC submission to the CLRC, above n 5. See also Sheppard, above n 8.

13 *Ibid.*

gave rise to a complaint that a moral right of integrity had been breached. It should be noted that an exception to this is in relation to excessive or inappropriate editing of an academic's work.

The general lack of interest shown towards moral rights within the Australian university sector has not abated since the moral rights legislation was introduced in December 2000.¹⁴ For example, in its 2002 paper, *Ownership of Intellectual Property in Universities: Policy and Good Practice Guide*, the AVCC observed:

It is likely to be the case that the introduction of moral rights will not require a major change in the way universities manage copyright material. Most policies would already recognise the right of fair attribution or authorship (or invention), and the need to protect the reputation of an author or creator, and to give the opportunity for the originator to be involved in the final outcome resulting from their creative efforts.¹⁵

II A POSSIBLE FUTURE FOR MORAL RIGHTS IN THE AUSTRALIAN ACADEMY

While moral rights have not had much of an impact in the university sector to date, there is a possibility that they may take on a more important role in regulating the way that copyright works are used in universities in the future. One reason for this is that university management and staff have become more cognisant of moral rights and the potential impact that they might have upon the way in which academic works are used. For example, moral rights were recently highlighted as an area of potential concern for university managers in an AVCC Leadership program.¹⁶ Similarly, universities have begun to educate staff and students about the key features of the new moral rights legislation.¹⁷

A further explanation as to why moral rights may take on a more important role in the future is that academics may increasingly find themselves in a situation where they need moral rights. While established practices within the university sector and a shared interest with publishers previously protected both the reputation of academics and the integrity of their works, in recent years this situation has changed. Ironically, one of the reasons for this relates to changes in the way that the copyright is dealt with in academic works. Specifically, a key reason that moral rights may take on a more important role in the future is because of the continuing trend whereby academic authors are relinquishing copyright in the works that they create.¹⁸ One of the consequences of this is that academics are losing an important means of controlling the way in which their

14 There is a brief discussion of Australian moral rights in Ann Monotti and Sam Ricketson, *Universities and Intellectual Property: Ownership and Exploitation* (2003) 71, 283, 285–6, 398–9, 489.

15 AVCC, *Ownership of Intellectual Property in Universities: Policy and Good Practice Guide* (2002) 9, <http://www.avcc.edu.au/content.asp?page=/policies_programs/copyright/> at 12 May 2005.

16 Shaunnagh Dorsett, 'Legal Obligations of Managers' (Seminar presented at the AVCC Academic Leadership Program, Brisbane, September 2003) (copy on file with author).

17 See, eg. Queensland University of Technology ('QUT'), *Guide to Moral Rights* (2002), <<http://www.tils.qut.edu.au/copyright/crguidemoralrights.html>> at 17 March 2005.

18 This presumes that academics own copyright in the works that they create.

works are used. As a result, academic authors are being forced into a position where they have to rely on other mechanisms, such as moral rights, to protect their reputation and their works.¹⁹ This has come about for a number of reasons.

One reason why academics are losing copyright in their creations can be traced to changes in the way that academic works are viewed. Historically, little attention was given to the copyright in the scholarly works and teaching materials created by academics.²⁰ For example, staff frequently assigned copyright in their manuscripts and journal articles without question.²¹ In most cases, copyright was simply not a matter that entered into the minds of academics. The attitude of university management was similar. Generally, universities did not exert ownership over academic works, even though they might have been able to claim that these works were created in the course of employment. Instead, universities let staff manage their publications without interference.²² In turn, publishers did not seek authorisation from the university-as-employer when they were seeking to publish materials generated by academics.²³ University management took even less of an interest in teaching materials. This was largely because teaching materials, like scholarly publications, were rarely thought to have any commercial value.²⁴

Since the 1980s, an important change has taken place in the way that academic works are viewed and consequently, how they are dealt with. In part, this arose as a result of the fact that copyright works created within universities are increasingly being seen as a potential source of income: as assets to be

19 Interestingly, similar arguments were made in the 1980s to justify the introduction of moral rights for visual artists in Australia. See ACC, above n 4, 11:

[A]s the industries and entrepreneurs with whom the creator interacts become more powerful and sophisticated, the creator is becoming obliged to assign his copyright. Another development is the employment of creators who join an entrepreneur's 'stable'... Our thesis is that copyright law is quickly losing its place as the means by which the creator can control his work and the introduction of compulsory statutory licensing is exacerbating the situation.

20 The notable exception being publishers and, in some cases, university librarians. There was also a series of academic articles published by Monotti in the mid-late 1990s that addressed the issue of ownership of copyright works in universities: see, eg, Ann Monotti, 'Who Owns My Research and Teaching Materials – My University or Me?' (1997) 19 *Sydney Law Review* 425 (and the references therein).

21 See, eg, statements like the following: 'Staff have traditionally been free to deal with copyright in a scholarly publication and this policy does not seek to alter this': University of Queensland ('UQ'), *Policy Number: 4.15.1 Intellectual Property Policy for Staff, Students and Visitors* (1996) cl 4.1.1, <<http://www.uq.edu.au/hupp/index.html?policy=4.15.1>> at 12 March 2004 (copy on file with author). Interestingly, this statement does not appear in the new Policy: UQ, *Policy Number: 4.15.1 Intellectual Property Policy for Staff, Students and Visitors* (2004), <<http://www.uq.edu.au/hupp/index.html?policy=4.15.1>> at 10 February 2005.

22 As the University of Queensland admits in its old Policy, 'it has been a long standing practice for scholarly publications to remain free of institutional claims': UQ, *Intellectual Property Policy* (1996), cl 4.1.3. This statement does not appear in the new Policy: UQ, *Intellectual Property Policy* (2004), above n 21.

23 See Phillip Mendes, 'On-line Delivery of Education: Copyright Issues in Universities' (2000–01) 11 *Journal of Law and Information Sciences* 196, 197.

24 There was very little control exercised over the content or form of teaching materials. Similarly there was little control over the way academics presented these materials to their students. Teaching materials largely consisted of lectures notes delivered to students by way of oral lectures. In some cases, reading lists or basic study guides accompanied the lecture.

exploited.²⁵ Prompted by a reduction in government funding, universities have turned their attention to ways in which they can raise additional revenue.²⁶ One area that has attracted the attention of universities is the potential revenue that might flow from works created by academic staff.²⁷ This is particularly the case with teaching materials, which are no longer seen simply as aids for students, but are also now seen as a potential source of revenue. In line with the transformation of students into ‘clients’, teaching materials are now viewed as products to be sold. This process has been reinforced by the growth of online teaching.²⁸ One of the immediate consequences of this transformation is that universities have become more conscious of the need to own copyright in the works created by their academic staff. While the university sector has moved away from the extreme position of the early 1990s (where some institutions asserted ownership over *all* intellectual property),²⁹ many still assert ownership over copyright works created by academics.³⁰ This is particularly the case in relation to teaching and course materials.

Yet another factor that contributed to academics’ loss of control of the works that they create, can be traced to the growing links with industry that have been

25 Monash University’s Framework exemplifies this when it says, ‘the university’s assets, from which it can generate returns, are the research and courseware produced by staff’: Monash University (‘Monash’), *Intellectual Property Framework* (2000), <www.adm.monash.edu.au/unisec/pol/acad21.html> at 12 January 2005.

26 See Wells, above n 4, 23:

Roughly a third of all higher education funding now comes from private sources, which includes student fees and the sale of research and educational materials and services. The expansion of distance education programs in particular has made a potentially profitable area of institutional activity.

27 Mendes, above n 23, 196. This view of intellectual property and its potential value is often reflected in the commercialisation policies (that can masquerade as intellectual property policies) of universities.

28 Online delivery ‘[is] not just an opportunity for commercialisation for the sake of revenue raising but equally is driven by the motivation to deliver and structure higher education taking advantage of technology that is now available and to be responsive and pro-active in seeking out new markets which are possible to serve with on-line delivery’: Mendes, above n 23.

29 Somewhat infamously illustrated by the old University of Melbourne, *Statute 14.1 - Intellectual Property Policy* (1993). However some universities, such as the University of Adelaide and Macquarie University, still claim ownership over all intellectual property created by their staff: see University of Adelaide, *Intellectual Property Policy* (1989) cl 4.1, <<http://www.adelaide.edu.au/ari/researchers/ipmanage.html>> at 28 January 2005 (currently under review); Macquarie University, *Intellectual Property Policy Statement* (2000) cl 4, <<http://www.ro.mq.edu.au/policy/IP/IPPolicy.htm>> at 28 January 2005; and UQ, *Policy Number: 4.15.1 Intellectual Property Policy for Staff, Students and Visitors* (2004), above n 21, cl 6.2.

30 See, eg, Monash, above n 25, which provides that Monash is the owner of copyright in course materials created by its staff. See also Monash, *Statute 11.2 - Intellectual Property* (2001), <<http://www.monash.edu.au/pubs/calendar/statutes/statutes11.html>> at 12 May 2005 and reg 2.1 of ‘Regulations Made under the Statute’: Monash, *Intellectual Property Regulations* (2004), <<http://www.monash.edu.au/pubs/calendar/regulations/regulations22.html>> at 12 May 2005. Some universities claim ownership of copyright in works (excluding scholarly works). See, eg, University of Tasmania, *Intellectual Property Policy* (2001) cl 3.1.1, <http://www.utas.edu.au/universitycouncil/legislation/pol_intellprop.pdf> at 12 January 2005; University of New South Wales (‘UNSW’) *Intellectual Property Policy* (1997) cl 3.3, <<http://www.infonet.unsw.edu.au/poldoc/ippol.htm#3>> at 12 February 2005; and Griffith University, *Draft New Intellectual Property Policy* (2005), cl 5.2, <<http://www.griffith.edu.au/commercialisation>> at 10 March 2005, which waives university ownership in scholarly works.

fostered since the 1990s.³¹ One of the issues that has arisen in the resulting collaboration between universities and industry partners is the ownership of research publications.³² While universities would generally prefer to retain copyright in research results, this has not been acceptable to some external funding bodies. This has led to increased pressure on academics to assign copyright in their research results to the third party providing the funding.³³

The transformation in the way that academic works are viewed and the consequential change in the way that ownership of copyright works is perceived within universities has been reinforced by changes outside of the academy. In particular, it has been reinforced by changes in the way that publishers deal with academic works. While many publishers have continued with their longstanding practice of viewing books and journal articles as commercial objects, in the last decade or so they have expanded their interests to include teaching materials, student textbooks and the like.³⁴ This has led to a proliferation of books and educational services for the expanding student market.³⁵ With an increased interest in teaching materials, academics are being encouraged to publish their teaching resources and to produce tutorial materials in a form for students to purchase. More recently, publishers have begun to repackage existing texts into tailor-made products for academics and students.³⁶ By doing this, publishers are effectively creating their own course packs from the publications in which they hold copyright.³⁷ Another factor that reinvigorated publishers' interest in academic works is the growth of new markets for academic works.³⁸ In addition

31 See, eg, National Board of Employment, Education and Training ('NBEET'), *Crossing Innovation Boundaries: the Formation and Maintenance of Research Links Between Industry and Universities in Australia*, Commissioned Report No 26 (1993).

32 Wells, above n 4, 23.

33 NBEET, above n 31, 10. This is also being experienced by researchers in the Commonwealth Scientific and Industrial Research Organisation ('CSIRO'): 'Protecting Authorship Now an Urgent Priority' *CSIRO Staff Association Analysis* (2003–04), 9.

34 See, eg, the vast array of educational materials and services provided by publishing giant, LexisNexis. These services even extend to infrastructure and materials to support on line courses: LexisNexis <<http://www.lexisnexis.com/lawschool/webcourses/>> at 10 January 2005.

35 These include LexisNexis Butterworths' *Question and Answer Books* and Thompson Law Book Company's *Nutshell Series*.

36 See also Monash University's approach to such publications in Monash, *Intellectual Property Issues for the Internet and Multimedia* (2000), 1 <<http://www.its.monash.edu.au/web/policy/copyright.html>> at 12 February 2005, which states that '[i]t should be noted that the University's ownership of course materials is not released when the materials are published in book form. Any publication printed on campus for supply to students undertaking a course offered by the university will be categorised as course materials not a textbook.'

37 For example, the prescribed text in the first year law unit at QUT, LWB 141 Legal Institutions and Method, is *Course Materials, Legal Institutions and Method, QUT* (2001). This contains extracts from the following books: Robert Vermeesch and Kevin Lindgren, *Business Law of Australia* (10th ed, 2001); Alastair MacAdam and Tony Smith, *Statutes, Rules and Examples* (3rd ed, 1993) and Alastair MacAdam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998).

38 This is evidenced by the claims made by the well-known legal database LexisNexis, <<http://www.lexisnexis.com/>> at 12 October 2004:

to the growth in web-based journals, e-books and other online scholarly publications, there is also talk of the growing market for smaller literary products: the so-called granularisation of works.³⁹ As Michael Fraser of Copyright Agency Limited said, 'portions of digital works (such as chapters and articles) are becoming a significant e-commercial product in the educational market'.⁴⁰ While, to date, there have been few digital publishing success stories, the possibility of expanding their revenue base has nonetheless reinforced publishers' interest in academics works. One of the consequences of these changes is that publishers are more conscious of the need to obtain an assignment of copyright. In some cases, a licence to publish is all that is needed, but a full assignment of copyright is sought. Publishers now routinely require assignment of copyright for books (whether scholarly books or teaching resources) and journal articles. As a result, academic staff are finding that they are being asked, now more than ever, to assign copyright to publishers in the works that they create.⁴¹

In summary, with more and more universities asserting ownership over teaching materials and research results and publishers increasingly asking for assignment of copyright in monographs and journal articles, academics are increasingly finding themselves in the situation where they are losing control over the way in which the works that they create are used.

LexisNexis® provides authoritative legal, news, public records and business information; including tax and regulatory publications in online, print or CD-ROM formats. View our products and services by occupation, industry, task or featured products to see how LexisNexis unites innovative technologies and authoritative content to create solutions to support critical decisions. Discover exciting new tools that go beyond just research to help increase the productivity of your enterprise.

39 According to Charles Duncan, *The Pedagogical and Technological Basis of 2nd Generation E-Learning in Satellite Meteorology* (2002) European Organisation for the Exploitation of Meteorological Satellites [2], <<http://oiswww.eumetsat.org/WEBOPS/meteocal/latest/basis.htm>> at 12 October 2004:

Granularisation is key to reuse and sharing. If e-learning material is broken into smaller and smaller granules then the probability of finding different small useful elements from different sources is greatly enhanced. The opposite effect is obvious when e-learning is produced in large integrated courses (as was often found on CD-ROMs) because if a teacher dislikes any small part of a complete course they may reject all the rest if they cannot disaggregate the course into smaller granules.

40 Copyright Agency Limited Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Copyright Amendment (Digital Agenda) Bill 1999* (1999) 4 <<http://www.aph.gov.au/house/committee/laca/digitalagenda/Sub44.pdf>> at 12 May 2005. For a more general discussion, see the Joint Submission from the Attorney-General's Department and the Department of Communication, Information Technology and the Arts to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Copyright Amendment (Digital Agenda) Bill 1999* (1999) <<http://www.aph.gov.au/house/committee/laca/digitalagenda/Sub75.pdf>> at 12 May 2005, paras 2.8, 3.10, 3.30, 3.32.

41 However, some universities are trying to educate their academic staff about the consequences of assigning copyright to publishers. See, eg, QUT, *E Print Archive Initiative* (2003), <<http://eprints.qut.edu.au/copyright.html>> at 12 May 2005, which states, 'it is now QUT policy that copies of all works which constitute the publicly available research and scholarly output of the University, are to be located in the QUT's *E Print Archive*. This does not apply to works which have the capacity to produce an income stream for QUT or the author (eg books, textbooks or other marketable material)'. See also QUT, *E-print Repository for Research Output at QUT* (2003), <http://www.qut.edu.au/admin/mopp/F/F_01_03.html> at 10 February 2005.

The vulnerable position academic authors may be in has been exacerbated by the rapid uptake of digital technologies that has occurred in universities over the last decade or so. One of the notable traits of works in digital form is that they are 'malleable, mutable and mobile'.⁴² Indeed, as Aplin suggests, 'it is almost expected that, in this interactive environment, works will be altered or manipulated and indeed the malleability of digital data is held out as a positive quality.'⁴³ The fact that it is so easy to manipulate and reuse digital works increases the risk of an academic's work being used in a way that the author may find inappropriate.⁴⁴ For example, it is possible to imagine situations in which an academic's name is omitted from a work, particularly where part of a work is taken from one document and pasted into another. There is also an increased chance that a work may be edited in such a way that it radically changes the character of the work, thus prejudicing the author's reputation.

Another factor that has heightened the vulnerability of academic authors is that their works are now being used in ways that could not have been envisaged a decade or so ago. For example, academics' works are being repackaged into student-driven products, as publishers create tailor-made texts from existing works in which they hold copyright.⁴⁵ Universities are also reusing academics' works in new ways. For example, universities are repackaging teaching materials and licensing them to other universities. The repackaging of copyright works creates a number of potential problems for academic authors. Where the publisher owns copyright in the works that are cut and pasted into a collection of tailor-made readings, they do not need to consult with the authors. This is because if authors assign copyright to publishers, they lose the rights that copyright offers to control the way in which their works are used.⁴⁶ In relation to the reuse of teaching materials, the name of the author may be left off works. This is particularly the case where works are in a digital format or they are delivered to audiences other than those for whom they were first written. This may occur, for example, where teaching materials are used for in-house corporate training delivered by other members of the university. Alternatively, an author's

42 Christine Borgman, *From Gutenberg to the Global Information Infrastructure: Access to Information in the Networked World* (2003) ix.

43 Tanya Aplin, 'Internet Service Provider Liability for Moral Rights Infringement in Australia' (1999) 1(1) *Digital Technology Law Journal* [87].

44 'Digitisation has the effect of blurring the lines between different kinds of works and material but digitisation also has two other dramatic effects: it allows an infinite range of means and degrees of control over (a) copying and (b) adaptation or 'transformation' of material': Gary Lea, 'Moral Rights and the Internet: Some Thoughts from a Common Law Perspective' in Frederic Pollaud-Dulain (ed), *Perspectives on Intellectual Property: The Internet and Author's Rights* (1999) 94.

45 Publishers are now combining parts of existing works into collections of readings. Normally, this involves combining chapters and articles from different sources. In some cases, parts of chapters and articles and even specific paragraphs are combined together. The collection of readings may then be licensed to an institution at an agreed rate. In these circumstances, publishers effectively provide a course pack service to universities.

46 Alternatively, academics may be asked to consent to such activities in their publishing agreements. In this situation, academics become powerless as they have effectively given away the control of their works. There is also the related question of how authors are to be remunerated (if at all) for such uses, as many publishing contracts leave the issue of royalties on electronic publications to be agreed between the parties at a subsequent time.

name may not be placed in as prominent a position as the author might expect. Similarly, there may be circumstances where a researcher's name is accidentally left off or deliberately removed from their research results. This may occur where third parties fund research and they wish to present the research as if it were their own, or where the research results are published in an edited form in an annual report or a publicity brochure.

A further problem which may arise where works are repackaged is that they may be placed in a format that compromises the integrity of the work. This may occur where part of a work is taken out of context in such a way that it changes its meaning, or where a work is placed alongside another work in a manner which is deemed to be derogatory, for example, where an article written by a Jewish author is placed in a collection of neo-Nazi writings.

Other problems may occur where academic works are licensed to other universities. In these circumstances, academics may find that they are removed from the point of delivery of their materials and thus that they have little control over the audience that receives the material or the way in which the materials are presented. This may have important consequences, as Wells explains:

The context in which material is used also poses problems for an academic's professional reputation. The preparation of teaching materials is usually informed by the sensitivity to context: what the originator considers appropriate for one group of students may be quite inappropriate for students of different prior learning environments and different cultural, religious or ethnic backgrounds. Therefore the delivery of material to groups other than those for whom it was prepared may prejudice the creator's reputation as a teacher or researcher among their students and peers.⁴⁷

The upshot of these changes is that academic authors are increasingly being placed in a position whereby they are losing control over the way in which the works that they create are used. The vulnerable position that academics are finding themselves in has been heightened by the growing use of digital technologies within the university sector. As a result, academics are increasingly being forced to rely on other mechanisms to protect both their reputation and the integrity of the works that they create. While moral rights should not be seen as a panacea for all of the problems facing academic authors, there is a possibility that they may provide academics with some protection in the future.

III THE NATURE OF MORAL RIGHTS IN AUSTRALIA

Typically, moral rights are defined in relation to copyright. Copyright provides an alienable economic right to control certain uses (notably reproduction) of protected works. In contrast, moral rights provide specific protection for authors, their reputation and, in some cases, the work itself. Moral rights are personal to

47 Wells, above n 4, 24.

the creator. They are non-economic rights that are distinct from copyright and are often justified on similar non-economic grounds.⁴⁸

As with many legal regimes, moral rights perform, or at least are said to perform, a number of different roles. At the most general level, they provide protection for authors and their works. This is particularly important where creators no longer own copyright in their works, or where they 'no longer own the physical items in which their copyright is embodied, and who therefore do not have an opportunity to contract with users for the protection of those rights.'⁴⁹ Moral rights are also said to embody 'standards of good conduct to be applied between creators and users'.⁵⁰ More specifically, moral rights are intended to play an important role in ensuring the 'truth and authenticity in intellectual and artistic expression.'⁵¹ Moral rights are also said to 'raise awareness in an educative way of the need to respect the creativity of authors and artists'⁵² and to promote the author's reputation by ensuring that they receive appropriate recognition in the form that the author desires.⁵³ It has also been suggested that moral rights 'encourage harmony and good nature in our social relations and improve the overall performance of human intercourse'.⁵⁴

Australian law recognises three moral rights: the right of attribution of authorship, the right of integrity of authorship and the right to prevent false attribution.⁵⁵ Generally speaking, moral rights in literary works continue in force until copyright ceases to exist in the work.⁵⁶ All three moral rights are potentially important for academic authors.

The right of attribution provides authors with the right to be identified as author of their works⁵⁷ in relation to certain specified uses of the work (so-called 'attributable acts').⁵⁸ For literary works, the right applies where the work is reproduced, published, performed, communicated to the public, or adapted.⁵⁹ The

48 Moral rights derive from Continental Romantic notions of authorship, including ideas from natural law that liken the author's creation of a work to the creation of a child. The 'good manners' argument also stems from these ideas: Ricketson, above n 10, [10.15]. See generally Maree Sainsbury, *Moral Rights and their Application in Australia* (2003).

49 Virginia Morrison, 'The New Moral Rights Legislation' (2000) 18 *Copyright Reporter* 170, 178.

50 Ricketson, above n 10, [10.15].

51 *Ibid.*

52 Commonwealth Attorney-General's Department, *Copyright: New Law Protecting Authors' Moral Rights* (2001), <<http://www.ag.gov.au/agd/Department/Publications/publications/moralrights.htm>> at 12 January 2005.

53 Ricketson, above n 10, [10.70].

54 *Ibid* [10.15].

55 The moral rights recognised under the Act are not transmissible by assignment, by will, or by devolution by operation of law: *Copyright Act 1968* (Cth) s 195AN(3). However, if the author of a work dies, the author's moral rights (other than the right of integrity of authorship in respect of a cinematograph film) may be exercised and enforced by the author's legal personal representative: *Copyright Act 1968* (Cth) s 195AN(1).

56 *Copyright Act 1968* (Cth) s 195AM(2).

57 In relation to literary works, the right of attribution applies to works that were made before the commencement of the moral rights regime (*viz* 21 December 2000). However, the right only applies to acts carried out after the 21 December 2000: *Copyright Act 1968* (Cth) s 195AZM(2).

58 *Copyright Act 1968* (Cth) s 193.

59 *Copyright Act 1968* (Cth) s 194(1).

author of a work may be identified by any reasonable form of identification,⁶⁰ so long as it is clear and reasonably prominent.⁶¹ An identification will be reasonably prominent if it is included on each reproduction, adaptation or copy in such a way that a person acquiring the item would have notice of the author's identity.⁶² It has been suggested that a reasonably distinct identification of the author at the beginning or end of the work would satisfy this requirement.⁶³ Industry practice may also have an impact on what is considered to be a reasonable attribution.⁶⁴ Attribution is not required where it was 'reasonable in all the circumstances not to identify the author' or where the author has consented in writing to not being identified.⁶⁵ These defences will be discussed in more detail below.

The right of attribution has the potential to reinforce existing academic practices and to encourage greater respect for academic authors.⁶⁶ The right of attribution may provide protection for academic authors where their works are repackaged and manipulated, whether by universities or by publishers.⁶⁷ Where academic authors are able to assert their right to attribution, they are able to ensure that their name remains on the works which they have created. The right to have authorship attributed means that academics' names should remain on the works that they create, even when these works are used by parties outside of the university sector. This is particularly important where scholarly works are rebundled into larger collections of works. The moral right of attribution also has the potential to improve the position of academics where their research is assigned or licensed to third parties. Academic authors who assert their right to be named as author will be in a better position to ensure that they get appropriate recognition for the work that they have done. Similarly, it is in the interests of universities to allow academic staff to assert their moral rights to ensure that staff get proper recognition for the works that have been created.

The second moral right granted to authors is the right of integrity of authorship.⁶⁸ In relation to literary works, the right of integrity arises where the work is reproduced, published, performed, communicated to the public, or

60 *Copyright Act 1968* (Cth) s 194(1).

61 *Copyright Act 1968* (Cth) s 195AA.

62 *Copyright Act 1968* (Cth) s 195AB. A person infringes an author's right of attribution if the person deals with the work, or authorises another to deal with the work, without identifying the author: *Copyright Act 1968* (Cth) s 195AO. The factors to be taken into account when determining whether there has been an 'authorisation' are outlined in *Copyright Act 1968* (Cth) s 195AVA.

63 Ricketson, above n 10, [10.70].

64 Virginia Morrison, *Moral Rights: A Practical Guide* (2000) 11.

65 *Copyright Act 1968* (Cth) ss 195AR, 195AW, 195AWA.

66 See, eg, the importance of attribution of authorship in University Research Codes of Conduct that are largely based on NHMRC and AVCC, above n 9. Often universities choose to promote their high profile researchers (who may have a large number of external grants) in their marketing strategies. This assists them in attracting more research higher degree students.

67 To date, however, a lack of attribution has not been an issue in relation to academic works that are published. Publishers realise the importance of the author's name in creating a reputation for the work in the market place.

68 *Copyright Act 1968* (Cth) ss 195AI(1), (2).

adapted.⁶⁹ In essence, the right of integrity provides that authors have the right not to have their work subject to derogatory treatment in relation to certain specified uses of the work.⁷⁰ For literary works, derogatory treatment means the doing of anything that results in the material distortion, mutilation, or material alteration of the work that is prejudicial to the author's honour or reputation.⁷¹ Thus the right covers both derogatory treatment to the work itself, as well as the derogatory treatment in the use of the work. In both cases, to be derogatory, the treatment must be prejudicial to the authors' honour or reputation.⁷²

The right of integrity, which gives authors the right to protect their work from distortion, modification or mutilation that is prejudicial to their honour or reputation, has the potential to play an important role in protecting academic authors. For example, where academic works are made available online there is the risk that those works may be manipulated in ways that offend the author. The manipulation may take many forms: works may be repackaged into larger collections of works, or inappropriately placed alongside another author's works. As the right of integrity is meant to enable authors to object to certain derogatory treatments of their works, academic authors who assert their moral right of integrity are in a position to prevent inappropriate dealings with their work.

The third moral right recognised in Australian copyright law is the right of authors not to have authorship of their work falsely attributed.⁷³ This right allows authors to prevent someone else affixing or inserting another's name to a work (or a reproduction of a work) in a way that falsely implies that that person is the author of the work. It also prevents commercial dealings with the work carrying a false attribution.⁷⁴ As Ricketson suggests:

if moral rights in a common law system are concerned with good manners and authenticity, then any conduct which omits or clouds any reference to the person who has made the alteration or adaptation, and simply presents the work as that of the author, should clearly breach the author's moral rights against false attribution.⁷⁵

The right against false attribution, which gives authors the right to prevent someone else from affixing or inserting their name to a work in a way that falsely implies that the person is the author of the work, may provide assistance to academic authors in the future. In particular, it may help to ensure that, where

69 *Copyright Act 1968* (Cth) s 195AQ(3).

70 In relation to literary works (other than those included in films), the right of integrity subsists in respect of works made before or after the commencement of the *Copyright Amendment (Moral Rights) Act 2000* (Cth) (which is 21 December 2000).

71 *Copyright Act 1968* (Cth) ss 195AJ(a), 195AL(a); or the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation: *Copyright Act 1968* (Cth) ss 195AJ(b), 195AL(b).

72 See Roque Reynolds and Natalie Stoianoff, *Intellectual Property Text and Essential Cases*, (2nd ed, 2005) 243.

73 *Copyright Act 1968* (Cth) s 195AC(1). This right subsists in works made before or after the 21 December 2000. However, the right only applies in relation to acts of false attribution done after that date: *Copyright Act 1968* (Cth) s 195AZN(1).

74 *Copyright Act 1968* (Cth) s 195AG. This is subject to the requirement that the offender knows that the work has been altered.

75 Ricketson, above n 10, [10.100].

works have been altered by someone else, they are not falsely represented as the original author's work.⁷⁶

The three moral rights recognised under Australian law provide academic authors with a number of ways of protecting both their academic reputation and the integrity of their creations. In so doing, they offer academics a way of retaining (some) control over the use that is made of their written works in the face of declining control. Given this, there is a chance that moral rights may come to play a more important role in regulating the way in which copyright works are used and reused in the future. This is particularly the case where works are in a digital form or where academics no longer own copyright in the works that they create.

While moral rights have the potential to remedy some of the problems facing academic authors, the impact that they actually have on the way academic works are used ultimately depends on a number of factors. This is because, in response to fears that moral rights would have imposed unreasonable burdens on industry,⁷⁷ the government imposed two important limitations on the operation of an author's moral rights. The first is the so-called 'reasonableness defence' which provides that if a person performs an attributable act or subjects a work to a derogatory treatment, that there will be no infringement if the act or treatment of the work was 'reasonable in all of the circumstances'.⁷⁸ The second limit is that authors are able to consent to acts that may otherwise infringe their moral rights. Given that the reasonableness defence and the ability of authors to consent to moral rights infringements have the potential to erode the impact that moral rights have in regulating the way in which academic works are used, it may be helpful to look at each in turn.

The *Copyright Act 1968* (Cth) outlines some of the matters to be taken into account when determining whether a treatment of a work was 'reasonable in all of the circumstances'.⁷⁹ The question of whether the conduct of a party is reasonable will vary depending on the circumstances of the case.⁸⁰ A number of

76 When determining whether an author's moral rights have been infringed, the courts take a number of things into account. These include the knowledge of the defendant, the effect on the author's honour or reputation resulting from any damage to the work, the number or type of people who have seen or heard the work, any mitigation by the defendant, and the cost or difficulty in removing or reversing false attribution or derogatory treatment of the work: *Copyright Act 1968* (Cth) s 195AZ. *Copyright Act 1968* (Cth) s 195AZA provides that the court may award an injunction and/or damages, make a declaration that a moral right of an author has been infringed, make an order that the defendant make a public apology or that any false attribution of authorship or derogatory treatment be removed or reversed, or any combination of these remedies. See also *Copyright Act 1968* (Cth) s 195AZA(2).

77 Particularly from the film and advertising industries.

78 *Copyright Act 1968* (Cth) ss 195AR(1) and 195AS(1) (which deals with literary, dramatic, musical or artistic works).

79 *Copyright Act 1968* (Cth) s 195AR(2) and s 195AS(2) (literary, dramatic, musical or artistic works). It has been suggested that such a defence is curious because the moral rights of authors are 'subject to the practices which existed prior to this right being introduced. Practices which in the past may have been seen as "morally wrong" from the author's point of view may now be protected simply because of this prior bad practice': Reynolds and Stoianoff, above n 72, 244–245.

80 It is interesting to note though that QUT has adopted its own definition of reasonableness. See QUT, *Intellectual Property Policy* (2003) cl 2.5, <www.qut.edu.au/admin/mopp/D/D_08_01.html> at 30 May 2005 which provides:

different factors are taken into account when determining whether it was reasonable not to identify the author of a work, or to subject a work to a derogatory treatment. These include the nature of the work; the purpose, manner and context in which the work is used; any industry practices or voluntary codes in place; any difficulty or expense that has been incurred as a result of identifying the author; whether the work was made in the course of the author's employment; or whether the treatment was required by law or otherwise to avoid a breach of law.⁸¹

In determining whether a treatment of a work was 'reasonable in the circumstances', the nature or type of work will be relevant.⁸² In particular, works of 'high art' will be treated differently from more mundane or 'lowbrow' works.⁸³ In the university sector, this means that the question of whether the potentially infringing treatment was reasonable in the circumstances will differ depending on whether the act takes place in relation to research and scholarly works, teaching materials, or administrative materials (such as policy documents, reports and memorandums). In most circumstances it would be reasonable to assume that authorship of research results would be attributed. However, this may not be the case with large scale collaborative research projects, particularly in the sciences, which may have numerous, or possibly hundreds of, contributing authors. In these cases, existing authorship protocols that determine who may be named as an author and the manner in which they are named, may mean that attribution is both unwieldy and unreasonable.⁸⁴ Attribution in relation to teaching materials is similar in that if teaching is carried out by a collaborative team of teachers, it is often the anonymous team as a whole, rather than the individual creators, who is named as author. Obviously where a course is taught by one individual, it would be more reasonable to assume that authorship would

Matters to be considered when determining whether an omission or modification, adaptation or alteration was reasonable are:

- common sense;
- the common practice existing in academic culture;
- any difficulty or expense that would have been incurred as a result of locating, consulting with or seeking the consent of the creator;
- whether the works produced at QUT have been modified, adapted or altered in a substantial manner.

It is suggested that modification in a substantial manner means that:

- more than 75 per cent of the content of the works have been modified; or
- in relation to works that may reasonably be expected to date quickly, at least five years has elapsed since the date of creation of the materials or input by the creator and 50 percent of the content of the materials has been modified.

81 *Copyright Act 1968* (Cth) ss 195AR(2), 195AS(2) (literary, dramatic, musical or artistic works). The *Copyright Act* provides no guidance as to how the reasonableness factors are to be balanced as against one another. In the absence of such guidance, it can be assumed that each factor weighs equally with the others. However, it is arguable that in an educational context, a number of factors could be seen to be more relevant than others.

82 *Copyright Act 1968* (Cth) s 195AR(2)(a).

83 Ricketson, above n 10, [10.175]; Morrison, above n 64, 13.

84 Peter Galison, 'The Collective Author' in Mario Biagioli and Peter Galison (eds) *Scientific Authorship: Credit and Intellectual Property in Science* (2003) 353.

be attributed. What is obvious is that the more parties that collaborate in the creation of a work, the more difficult the practice of attribution will be.

The nature or type of work is also relevant when determining whether a treatment of a work is derogatory.⁸⁵ Again a distinction will be drawn between works that have been created as a result of intellectual creativity and those works that are more utilitarian in nature.⁸⁶ This may mean that academics who create scholarly works will have more control over the way in which their works are used than would academics who create policy documents or course outlines.

Other factors to be taken into account when deciding whether an act or treatment of a work was reasonable are the purpose,⁸⁷ manner⁸⁸ and context⁸⁹ in which the work is used. In relation to the purpose of the use, a relevant consideration is whether the work was used for a private or public purpose,⁹⁰ and whether the purpose of the intended use was commercial or non-commercial.⁹¹ Where the use was for the greater public good, the conduct in question may be considered to be reasonable in the circumstances. In contrast, where the use is private and likely to result in commercial gain for the user, the use may not be considered to be reasonable.⁹² Where a work is used within a university for a private, non-commercial end (for example, where it is disseminated as part of a public seminar series) there may be circumstances in which a failure to attribute authorship or to deal with the work in an otherwise derogatory way would be reasonable. This may especially be the case where the work is circulated on a one-off basis and the recipients were not expected to keep the publication. However, where a work is used for a commercial purpose outside of the university, for example, for a full-fee paying course that is continuously on offer, it would be reasonable to expect proper attribution and treatment of the work that does not prejudice the academic's honour or reputation.

The manner in which a work is used is also relevant when deciding whether an act or treatment was reasonable.⁹³ In relation to attribution, a failure to attribute may be reasonable where part of a work was used, or where there were constraints of time or space.⁹⁴ It could also be suggested that if a work which is subject to an allegedly derogatory treatment is used in a manner that is respectful or sensitive to the author, this ought to be taken into account in determining the reasonableness of the conduct.⁹⁵

85 *Copyright Act 1968* (Cth) s 195AS(2)(a).

86 For example, the re-circulation of teaching materials or research publications, in a different form to a different audience from that which was originally intended, may, in certain circumstances, prejudice the author's honour or reputation. It is arguable that the recirculation of utilitarian works would not cause prejudice to the author's reputation.

87 *Copyright Act 1968* (Cth) ss 195AR(2)(b), 195AS(2)(b).

88 *Copyright Act 1968* (Cth) ss 195AR(2)(c), 195AS(2)(c).

89 *Copyright Act 1968* (Cth) ss 195AR(2)(d), 195AS(2)(d).

90 Ricketson, above n 10, [10.175].

91 *Ibid.*

92 This may also refer to the permanency of the use of the work, that is, whether the work is used, eg, in a more permanent publication or a transitory handout.

93 *Copyright Act 1968* (Cth) ss 195AR(2)(c), 195AS(2)(c).

94 Ricketson, above n 10, [10.175].

95 *Ibid.*

The context in which the work is used is also relevant when deciding whether an act or treatment was reasonable.⁹⁶ If this refers to ‘contextual abuse’, the question must be asked: ‘to what degree can the context of the use cause prejudice to the author’s honour or reputation?’⁹⁷ Another factor that may be relevant when deciding whether an act or treatment was reasonable is ‘whether there is any practice in the industry in which the work is used that is relevant to the work or the use of the work’.⁹⁸ This consideration was introduced in recognition of the fact that certain industries already had in place existing practices that regulated how creators and their works would be treated. It was also designed to encourage other industries to adopt best practice. In the university context, it is arguable that the relevant industry is the higher education sector. However, as a large proportion of scholarly publishing in Australia is undertaken by commercial publishers, the relevant industry may extend to include publishers. Hence, the relevant industry may be an amalgam of the two.

While other peak industry bodies have developed industry codes of conduct,⁹⁹ to date the AVCC has not issued any formal protocols or guidelines in relation to moral rights. As a result, any industry practice would have to be distilled from existing conduct within the sector.¹⁰⁰ To be considered industry practice, the practice must take place across the industry as a whole. It is not sufficient for it to occur in only a limited number of organisations. While universities in Australia share a number of common goals, there are marked differences in the way that they attempt to achieve these goals. These differences make it difficult to suggest that there is a common sector-wide practice in relation to moral rights. For example, while some university intellectual property policies merely acknowledge the existence of moral rights, others undertake to use their best endeavours to protect moral rights.¹⁰¹ A few others go even further to provide

96 *Copyright Act 1968* (Cth) ss 195AR(2)(d), 195AS(2)(d).

97 As Ricketson suggests, there may be a sharp conflict between author’s personal opinions and those of a more ‘objective character’: above n 94.

98 *Copyright Act 1968* (Cth) ss 195AR(2)(e), 195AS(2)(e).

99 Of relevance to universities are the codes regarding the attribution and use of author’s works reached by the Australian Publishing Association in conjunction with the Australian Society of Authors. According to Morrison, above n 64, 45:

The aim of the code is to give authors and publishers some clarity about the extent of their respective rights and obligations in the context of the publishing relationship, and to establish an industry standard that would be recognized by the courts when applying the reasonableness defence in infringement cases.

100 According to Jill McKeough, Kathy Bowrey and Philip Griffith, *Intellectual Property Commentary and Materials* (3rd ed, 2004) 34:

It is possible to consent to subsequent uses of copyright material which may offend against moral rights, but the owner of a work may not have the right to alter a work against the wishes of the creator. This could have implications for the use of material written by academics in ‘electronic courseware’ and other products where material is used and altered. Generally, industry practice will provide a guide to what is acceptable use that will not infringe the moral rights in copyright material.

101 See, eg, UNSW, *Intellectual Property Policy* (1997) cl 6.1, <<http://www.infonet.unsw.edu.au/poldoc/ippol.htm>> at 12 May 2005 which states that UNSW will ‘use its best endeavours to assist authors in asserting their moral rights in cases where clear breaches of accepted academic conventions occur’.

guidance as to how moral rights ought to be managed. As we will see, however, there is often a large gap between practice and policy.

Perhaps the closest one gets to industry-wide practice in the university sector is in relation to attribution of authorship. In part, this is because of the fact that it is normal academic practice to attribute authorship of academic publications. In this sense, academia shares the view of the publishing industry that attribution of authorship of books and journal articles is, in effect, mandatory.¹⁰² This is reflected in university codes of conduct for research that have always paid close attention to the need for proper attribution of authorship.¹⁰³ It might also be said that it is normal practice to attribute authorship of teaching materials.¹⁰⁴ However, the way in which authorship of teaching materials is attributed differs from discipline to discipline and from university to university. Practices also seem to differ depending on the number of staff involved. For example, where one academic develops and delivers a course, it is more likely that their materials would include an attribution of authorship. However, where a number of academic staff are responsible for the creation and delivery of a single course, there is more of a chance that individual authors may not be named on the teaching materials.¹⁰⁵ This is especially the case where course materials are developed incrementally over a period of time. As the way that authorship of teaching materials is attributed differs between disciplines and from university to university, there is not a practice that is common to the university sector as a whole. The absence of a sector-wide industry practice means that it is unlikely that this facet of the reasonableness defence would act as a defence to either a failure to attribute authorship or a treatment of a work that is considered to be derogatory.

Another factor that may influence the decision as to whether the way that a work was used was reasonable is the fact that the work was made in the course of the author's employment.¹⁰⁶ While this does not mean that employed authors have no moral rights, it does suggest that it may be more reasonable for employers to breach the moral rights of their employees than is the case with non-employed authors.¹⁰⁷ Compelling arguments of practicality and convenience

102 Morrison, above n 64, 14.

103 'For example, the moral rights to fair attribution of authorship and recognition that no alteration of a copyright work should harm the reputation of the author are part of the established academic culture in the context of research output': Monotti and Ricketson, above n 14, 399 (explaining the fact that codes of research practice commonly contain these rights).

104 See, eg, the proliferation of University Teaching Excellence Awards in recent years.

105 This is often the case in large first year courses. While teaching teams may be identified, individual academics are rarely named in the parts of the teaching materials that they have authored.

106 *Copyright Act 1968* (Cth) ss 195AR(2)(h)(i), 195AS(2)(g)(i). Together with the issue of consent (formerly the waiver provision) this was one of the more controversial aspects of the moral rights legislation. This is largely because of the concern that employed authors are in a much less favourable position than other authors. That is, because of the nature of the employment relationship, it may be considered 'reasonable in the circumstances' for employers to breach their employees' moral rights. However, when thinking about academic authors and their works, this is a less powerful argument as universities have traditionally taken very little interest in their employees' works and have not, until recently, asserted any ownership claims over them.

107 Ricketson, above n 10, [10.175].

can be advanced in favour of such a view, particularly where the employer already owns the economic rights in the work.¹⁰⁸

A number of difficult issues arise when determining the types of teaching materials that are produced 'in the course of employment'.¹⁰⁹ One potential problem is that an academic's contractual obligation to teach may be construed both broadly and narrowly.¹¹⁰ On a broad view, academics are employed to teach and thus, any materials created in pursuance of this obligation will be owned by the employing institution.¹¹¹ On a narrower view, however, it is arguable that while academics are employed to teach, there is no formal obligation upon academics to produce teaching materials.¹¹² While there is an obligation on academics to give lectures, there is no obligation on an academic to write lecture notes as such.¹¹³ Accordingly, it is arguable that it is beyond the scope of an academic's duty as an employee to produce lecture notes and teaching materials. As such, any materials created by academics would not be caught by the employer's copyright.¹¹⁴ For many years, there were valid arguments that favoured both interpretations. However, in recent years a number of changes have occurred which suggest that the broader view may now be correct.

With the ascendancy of teaching as a priority goal within the university sector and the related growth in online delivery that has occurred over the last decade or so, there is a growing expectation that academics ought to produce teaching materials for their students. In addition, teaching materials that were previously not available to students, such as lecture notes, handouts, PowerPoint slides and the like are now placed on university websites for students to access and copy. Given these changes, it is more likely that the teaching outputs of academics would fall within the scope of their duties as an employee.¹¹⁵ In these circumstances, it may be 'reasonable' for the university as owner of the economic

108 Ibid.

109 As was noted in a study of copyright issues in higher education in the UK, Ralph Weedon, *Policy Approaches to Copyright in Higher Education Institutions*, Centre for Educational Systems, University of Strathclyde (2000), <<http://www.strath.ac.uk/ces/projects/jiscipr/report.html>> at 12 May 2005:

institutions rarely consider the relationship between academics and publishers. With the codification and formalisation of teaching material, and audits such as the Teaching Quality Assessment (TQA), there are significant issues over ownership and control of teaching materials, which many departments have not yet recognised.

110 ACC, *Teachers and Academics as Creators: Current Issues* (1997) 28.

111 *Copyright Act 1968* (Cth) s 35(3).

112 There seems to be clear authority for the narrow view that, in the absence of express terms in the contract of employment, the person employed to give lectures will own the copyright in those lectures: *Stephenson Jordan v McDonald & Evans* (1953) 69 RPC 18 and *Noah v Shuba* [1991] FSR 15, 26.

113 William R Cornish, 'Rights in Universities Innovations: The Herschel Smith Lecture for 1991' (1992) 1 *European Intellectual Property Review* 13, 15.

114 According to the ACC, above n 110, 22:

The obligation to teach may not necessarily mean that the institution has copyright in the academic's teaching materials. On this narrow view an institution may need to rely upon a contractual obligation other than the obligation to teach or to expressly provide for this in its contracts of employment. Similarly with the creation of CD-ROMs and disks for online distribution, an institution may need to exert ownership through an implied term or through express contractual arrangements.

115 Kathy Bowrey, 'The Ideal Copyright Framework for Academic Authors? A Bounty to Genius and Learning' (2002) 33 *Australian Academic and Research Libraries* 223.

right to infringe the moral rights of the creator. This is particularly the case in universities that have embraced online delivery of their academic programs.¹¹⁶

The decision as to what is produced in the course of employment is even more difficult to determine in relation to research. While academics are required to undertake research, it would be wrong to suggest that the university can direct academics to produce particular types of publications.¹¹⁷ Some academics concede that ownership of all research publications should be able to be claimed by the university. Others, perhaps with their royalties in mind, argue that their writings fall outside the scope of their employment. This is because the research is often done at home, during their own time, using their own resources.¹¹⁸

The second factor that has the potential to limit the impact that moral rights have in the university sector is that authors are able to consent (in writing) to acts that would otherwise infringe their moral rights.¹¹⁹ In relation to literary works,¹²⁰ it is not an infringement of moral rights to do, or omit to do, something if the act or omission is within the written consent given by the author or by a person representing the author.¹²¹ Consent can be granted in relation to specified

116 One problem with the attempt by universities to claim ownership of teaching materials is that works such as lecture notes, reading guides, overheads, power point slides and class materials represent a fundamental part of the academics' knowledge and 'stock in trade' which they have developed throughout their careers. If teaching materials are part of the 'stock in trade' of academics, attempts to claim ownership of teaching materials by universities may be seen as an attempt at a restraint of trade against academics. See Monotti, above n 20, 457–8. See also Mendes, above n 23, 197.

117 However, in May 2004, the Prime Minister announced that the Australian Government will establish *Quality and Accessibility Frameworks for Publicly Funded Research*: <http://backingaus.innovation.gov.au/2004/research/qual_pub_res.htm> at 12 May 2005. This is part of the initiative *Backing Australia's Ability – Building our Future through Science and Innovation*: <<http://backingaus.innovation.gov.au/>> at 12 May 2005. The initiative will introduce a system similar to the Research Assessment Exercise that operates in the United Kingdom. This may mean that academics could be pressured to produce certain types of publications, which is what has occurred in the UK. For background, see Commonwealth Government, *Research Quality Framework: Assessing the Quality and Impact of Research in Australia*, Issues Paper (2005), <http://www.dest.gov.au/sectors/research_sector/policies/research_quality_framework/issues_paper.htm> at 2 May 2005.

118 Another factor that may be taken into account when assessing whether a failure to attribute the author is reasonable is whether there was any difficulty or expense incurred as a result of identifying the author. In an academic context, it is unlikely that this will be an issue.

119 See generally Warwick Rothnie, 'Moral Rights: Consents and Waivers' (2002) 20 *Copyright Reporter* 145.

120 *Copyright Act 1968* (Cth) ss 195AWA and 195AWB.

121 See Second Reading Speech, Copyright (Moral Rights) Amendment Bill 1999 (Cth) House of Representatives, 8 December 1999 (Daryl Williams, Commonwealth Attorney-General):

As recognised by the Government when withdrawing the original legislation, the most controversial and divisive issue was whether it should be possible for authors, artists and film-makers to waive their moral rights. Understandably, creators saw the provision for waiver in the original legislation as a means by which economically powerful users of their copyright works could force them to agree to give up these new rights completely. In response to these concerns the concept of waiver has been dropped from this Bill.

existing works when the consent is given, or to works of a particular description that do not yet exist. Generally, the consent must be in relation to specified acts of omissions, or classes or types of acts or omissions.¹²² Where the author is an employee, consent can be given in relation to all works made in the course of employment.¹²³ Where such a broad consent is given, a waiver of moral right is effectively granted. Consents must be granted by the author, who may or may not be the copyright owner. Where consent is obtained as a result of duress or false or misleading statements, the consent will be invalid.¹²⁴

It is difficult to determine the extent to which academics in Australia are being asked to consent to their moral rights being infringed. In part, this is because consent clauses are often included in contracts that are commercial-in-confidence and are thus not available to scrutiny. While it is difficult to predict with precision the extent to which consents are being used, anecdotal evidence suggests that consents have been sought from academics in three situations. These are where an academic is seeking to publish materials, where research is externally funded and where universities acquire an assignment of copyright from academics.

When academics submit articles or books for publication, there is often little opportunity for them to negotiate the terms of the publishing contract, as such terms are often presented to authors on a 'take it or leave it' basis. Recently, many publishing contracts have not only required academics to assign copyright to publishers, they have also allowed publishers to do certain acts that would otherwise infringe the moral rights of the academic. While the granting of consents in publishing contracts is not yet widespread, there is evidence that the practice is growing. As commentators recently noted, 'the reality is that many publishers ... will be able to insist on limiting (if not entirely eliminating) the

At a public forum held by the Attorney-General into the Moral Rights Bill in August 1999, lobby groups were split between the pro and anti-waiver factions. The National Tertiary Education Union ('NTEU') and the Australian Society of Authors ('ASA') were in the anti-waiver camp: James MacPail, 'Moral Rights' (2000) 17 *Copyright Reporter* 91. See further Department of Communications, Information Technology and the Arts, *Guide to the Copyright Amendment (Moral Rights) Act 2000*, Fact Sheet, <[http://www.dcita.gov.au/ip/parallel_importation/fact_sheets_and_background_information_on_ip/guide_to_the_copyright_amendment_\(moral_rights\)_act_2000_-_fact_sheet](http://www.dcita.gov.au/ip/parallel_importation/fact_sheets_and_background_information_on_ip/guide_to_the_copyright_amendment_(moral_rights)_act_2000_-_fact_sheet)> at 12 May 2005.

122 For works that are not films.

123 See *Copyright Act 1968* (Cth) s 195AWA(4) which provides that consent may be given by an employee for the benefit of his or her employer in relation to all or any acts or omissions (whether occurring before or after the consent is given) and in relation to all works made or to be made by the employee in the course of his or her employment.

124 See *Copyright Act 1968* (Cth) s 195AWB. This section was introduced in the Senate: Second Reading Speech, Copyright Amendment (Moral Rights) Bill 1999 (Cth) Senate, 7 December 2000 (Daryl Williams, Commonwealth Attorney-General). It was welcomed by many. See, eg, Julie Rigg, who stated on ABC Radio National 'Moral Rights Legislation Question and Answer', *Arts Today with Michael Cathcart*, 12 December 2000, 2, <www.abc.net.au/rn/arts/atoday/stories/s222198.htm> at 6 October 2004:

the legislation was further strengthened by opposition amendments in the Senate, invalidating 'consent' obtained under duress. What this exactly means no one knows. One view of film and television industry negotiations is that contract negotiations all involve duress: as in 'sign this or you don't eat'. It is a field rife with lawyers ... A test case on this might be very interesting.

exercise of moral rights, through carefully drafted consent provisions'.¹²⁵ One publishing contract recently presented to an academic for an edited collection with a large publishing company contained the following consent provision:

The editor acknowledges and agrees that the Publishers may in developing electronic or other editions of the works, whether for sale or for publicity purposes, need to carry out some or all of the activities listed below provided that the Publishers shall wherever practicable consult the Editor:

- Adaptation of the form or structure of the works to enhance its use;
- Publication of the work in whole or part in combination with other works;
- Maintenance of the works' accuracy by producing supplements and new editions;
- Preparing of abridgements and other adaptations of the work.

[T]he editor on written request from the publisher undertakes to waive his/her right to object to derogatory treatment of his/her work ... where such a waiver is an essential condition of the exercise of any of the rights granted to the publisher hereunder...¹²⁶

The second situation in which academics are being asked to consent to the waiver of their moral rights is through research-funding contracts, particularly where the contract is with a commercial partner or where the academic is a member of a research centre that actively pursues commercial ends.¹²⁷ Driven by a belief that moral rights may restrict the ability of parties to use research results in a way that they see fit, research contracts are increasingly stipulating that researchers consent to the possible infringement of their moral rights. For example, one Co-operative Research Centre requires potential members to sign an agreement that allows the Research Centre to use their copyright materials:

- (i) without attribution of authorship to me as the author;
- (ii) bearing the name of the Centre, the Participants, the Company, or any other person associated with the Centre or a Project;
- (iii) even if it results in 'derogatory treatment' of the material which may be prejudicial to my honour or reputation; and
- (iv) by changing, relocating, demolishing or destroying any three dimensional reproduction of that material without notice to or consultation with me.

The consent I have given in this document is genuinely given and is not provided by me under duress.¹²⁸

Yet another situation in which academics are being asked to consent to the infringement of their moral rights is where they assign their copyright to

125 'But in practice, it will generally be superior bargaining power and control over the fine print of contracts that can deliver the necessary consents, not threats or deception': McKeough, Bowrey and Griffith, above n 100, 146.

126 Cavendish Publishing, United Kingdom (2004) (copy on file with author).

127 Similar problems are occurring at CSIRO where 'more and more staff ... are having to consent to potential infringement of their moral rights because such contract demands are tending to go unquestioned': above n 33, 9. However it is interesting to note that none of the large Australian research granting bodies (such as the NHMRC, the ARC, or the bulk of the Rural Industries Research Corporations) require consent from their researchers.

128 Co-operative Research Centre for Construction and Innovation, QUT (copy on file with author).

universities. This practice, which is becoming increasingly common across the sector, is usually justified on the basis that if universities do not obtain blanket consents in advance, it would impose unworkable burdens on university management in the future.¹²⁹

IV CONCLUSION

To date, moral rights have had very little, if any, apparent impact on universities in Australia.¹³⁰ It is unclear at this stage whether the situation will change in the future.¹³¹ While the potential clearly exists for moral rights to protect academic authors, recent trends, which have seen academics consenting to the infringement of their moral rights, suggest that this may not be the case. If this eventuates, it will undermine the potential that moral rights have to protect academic reputation and academic works from misuse. It may also undermine industry practices which existed in Australia prior to the introduction of moral rights legislation that regulated attribution, authorship and integrity. This is particularly ironic given that one of the federal government's aims in passing the moral rights legislation in 2000 was 'to build on good existing industry practice and, where necessary, to raise awareness in an educative way of the need to respect the creativity of authors and artists'.¹³²

The Australian university sector is currently at a crossroads. There is a chance that the trend that has developed in recent years which has seen academic moral rights being undermined, degraded and downplayed may increase across the sector. There is also a possibility that these trends may be marginalised. To date, one of the problems has been that those drafting agreements with academics have seen moral rights as a potential threat to university operations. While this might be standard advice from some lawyers, it need not be the case. Indeed, a number of research funding agencies, such as the Grains Research and Development Corporation, which have to deal with some of the same issues facing universities, do not require researchers to waive their moral rights. The logic behind these decisions is that there is little sense in undermining the very thing that the research organisation is investing in: namely, the reputation of the academic and the integrity of the academic's research results. The danger here is that

129 If universities attempt to obtain blanket consents from staff, they may encounter a number of difficulties. As the legislation requires that consents must be granted *in writing*, no change to policy would achieve the universities' objective. Universities would have to undertake contractual negotiations on a massive scale to obtain consents from existing staff. Consent may be given to the academic author stipulating the exact works that are being reused and the particular treatment of the work that is anticipated. Where teaching materials are reused for in-house training programs for fee paying clients, the University may not only be asked to assign copyright in the resultant copyright materials to the third party, but also to provide written consents to infringement of moral rights from their staff.

130 Some commentators have suggested that the impact of the moral rights scheme as a whole has been difficult to assess: see Reynolds and Stoianoff, above n 72, 244.

131 Wells believed that the introduction of moral rights in Australia would have a major impact on the university sector: Wells, above n 4, 24.

132 Commonwealth Attorney-General's Department, above n 52.

universities will undermine the very activities that define them as institutions. If this is to be avoided, universities should listen less to the advice given to them by their lawyers and think more about the nature of the 'business' in which they are engaged. In this context, it is important that administrative expediency and commercial ends not be allowed to trump academic integrity and the protection of reputation. It is also important that the AVCC adopts a leading role and introduces an industry code of conduct in relation to moral rights.¹³³ While this may be a difficult task, it is one that must, nevertheless, be undertaken. If this does not occur, there is a danger that the vacuum created by the absence of a sector-wide code of conduct may be filled by conduct that is prejudicial to academic interests. There is also a danger that this will not only have a negative impact on academics, but also have long-term ramifications for the sector as a whole.

133 There is always the danger of an 'ad hoc' approach being taken to the issue of consents: CSIRO, above n 33, 9.