Exploring Flexibilities within the International Copyright System for Teaching, Research and Study

Ratnaria Wahid

Thesis submitted in fulfilment of the requirements of the degree of
Doctor of Philosophy in Law

University of East Anglia
Norwich Law School

24 August 2011

ABSTRACT

In the digital era, many people are still denied opportunities for equitable acquisition and sharing of knowledge and information, for instance when accessing materials necessary for teaching, research and study in universities. One factor that contributes to this problem arises from the extent to which copyright restrictions and limitations differ from one country to another.

This study analyzes whether the international copyright exceptions facilitate or hinder teaching, research and study, particularly in respect of legal education in universities. It was found that the exceptions available in the international treaties is purposely couched in an abstract terms leaving the matter mostly for countries to consider according to their economic, social and political background. At the national level, this study identifies the main similarities and differences between the UK and Australia, which predominantly produces educational legal materials, and Malaysia which predominantly consumes them, and analyzes the extent to which the law has the tendency to facilitate or hinder teaching, research and study. Comparisons are based on five factors namely the rights granted, purposes allowed, beneficiaries affected, works covered and other conditions.

This study then explains why these differences matter for Malaysia, as a predominantly user of copyright works, and what we can learn from the comparison. It was found that Malaysia has a more rigid approach to the exceptions to copyright law compared to either the UK or Australia. This paper identifies the importance of these exceptions and limitations in copyright law and the need to utilize the copyright exceptions effectively, especially when legal education is at stake.

ACKNOWLEDGEMENTS

I have worked with a great number of people who contributes in many ways to the thesis and deserved special mention. It is a pleasure to convey my gratitude to them all in my humble acknowledgment. First and foremost, my utmost gratitude to my primary supervisor, Prof. Christopher Wadlow, Professor of Law at the School of Law, University of East Anglia who was abundantly helpful, patient and offered invaluable assistance, support and guidance for me to complete this thesis. To you sir, I give lots of thanks and respect. Deepest gratitude are also due to the member of the supervisory committee Prof. Morten Hviid, Professor in Competition Law at the School of Law, University of East Anglia for his understanding, kindness, steadfast encouragement and unfailing support as my dissertation adviser.

I would also like to record my gratitude to Robert A. Heverly who is now the Assistant Professor of Law at Albany Law School of Union University, in Albany, New York for his supervision, advice, and guidance from the very early stage of this research as well as for giving me valuable experiences throughout the work. I am much indebted to Professor Mathias M. Siems, the previous Research Director, School of Law, University of East Anglia who is now in Durham University for his valuable advice in research methods, and whose sincerity and encouragement I will never forget. Many thanks to Professor Dr. Ida Madieha Abd. Ghani Azmi, Private Law Department, International Islamic University (Malaysia) for the insights and a lot of positive perspective in life she has shared. Special thanks to all the staffs of the law school, University of East Anglia, participants in the Queen Mary Law PhD Conference 2011 and participants in the 5th International Conference on Legal, Security and Privacy Issues in IT (LSPI 2010), the 1st International Private Law Conference and the 4th International Law and Trade Conference (ILTC) for your invaluable comments and sharing your thoughts and views on my research presentations. I would also like to convey thanks to the Malaysian Ministry of Higher Education, Universiti Utara Malaysia and University of East Anglia for providing the financial means and support throughout the duration of my studies.

Not forgetting to my friends especially Dr. Sharifah, Dr. Harisun and colleagues for the help, assistance and encouragements in many ways.

I would have not finished this project without the support of my family; especially my dad, Wahid, and other siblings without the help of them it might not be possible for me to come up to this level. Special gratitude goes to my husband, Muhammad Eshraq and my three little wonderful daughters Sarah, Imtiyaz and Amani, who has always been there for me, who have made a lot of sacrifices, their understanding and support is always with me through the entire process. The strength, patience and encouragement they give to keep me going and their love, smiles and laughter to empower me never fails all the time. Last but not the least thanks be to the One above all of us, the omnipresent God, for answering my prayers, for giving me the strength to go through it all. You have made my life more bountiful. May your name be exalted, honoured, and glorified.

This thesis is dedicated to my late mother, Rohaniah Husin who has always been my source of strength and inspiration.

TABLE OF CONTENTS

LIST OF TABLES

LIST OF FIGURES

Chapter 1: Introductory Chapter

1.1 Problem of inequitable knowledge acquisition and sharing

Mr. Koichiro Matsuura (2009), the Director General of UNESCO in his addressing speech at the UNESCO Future Forum on Knowledge Acquisition and Sharing stated:

> "Never before in human history has so much information been so readily available to so many. In an increasingly connected global community, the ability to access information and transform it into meaningful and useful knowledge is a key driver of sustainable social and economic development. *Yet, knowledge acquisition and sharing is still far from equitable. Huge numbers of people, particularly in developing countries but also marginalized groups elsewhere, are denied the opportunities to acquire, use and share knowledge in this way.*" [emphasis added]

The inequitable knowledge acquisition or denial of opportunities to acquire, use and share knowledge has resulted from many factors. Amongst others, one recent UNESCO report (Altbach, Reisberg, & Rumbley, 2009) reveals certain trends that have affected higher education over the past 10 years. These trends include new patterns for funding higher education, increasingly diversified higher education systems in many countries, and generally an overall lowering of academic standards. The economic crisis has resulted in countries and universities facing severe financial difficulties that have had serious consequences. These include limited budgets from governments for the research departments within universities, and severe constraints on the availability of public or private loan programmes to students, along with increased interest rates, increased tuition fees for students, cost-cutting practices leading to deterioration of quality, and increased class sizes; freezes on hiring staff on the construction of new facilities, on updating information technology, and on purchasing books and journals are also likely developments

(Altbach, Reisberg, & Rumbley, 2009). It is clear that higher education is entering a period of significant cutbacks. In struggling to cope with these pressures in the early 21st Century, higher education has to fight for its existence and is increasingly becoming a competitive enterprise.

At the same time, there has been an uneven pattern of adoption and benefit from Information and Communication Technologies (ICT) in higher education around the world (Altbach, Reisberg, & Rumbley, 2009: 137). Although ICT has created a universal means of instantaneous contact and simplified scientific communication, it has been reported that these changes have somehow helped to concentrate the ownership of publishers, databases, and other key resources in the hands of the strongest universities and some multinational companies, located almost exclusively in the developed world; numerous regulatory, administrative, technical, and logistical challenges further hamper the use and deployment of ICT in accessing resources for education (Altbach, Reisberg, & Rumbley, 2009: 134), thereby putting developing countries at a significant disadvantage. This uneven distribution of human capital and funds inadvertently allows some nations to take full advantage of the new opportunities while other nations risk lagging even further behind.

With millions of students and countless scholars worldwide, and with degrees and universities moving freely around the globe, there is a pressing need for international cooperation and agreements. While the scope and term of copyright protection has been extended in favour of the copyright owners thereby curtailing access to copyright works (Dutfield & Suthersanen, 2008: 282), agreements on, for example, international benchmarks and standards for accessing resources cannot be reached easily; this is clearly the case in copyright exceptions and limitations for the purpose of teaching, research and study. To ensure that the higher education community benefits from copyright law, the rights given to the copyright owner have to be balanced with certain exceptions and limitations. The purpose of integrating exceptions and limitations in copyright law is specifically to stress the

importance of utilizing information as a foundation for economic growth and for the development of creativity and science, ultimately for the benefit of all (Okediji, 2003). Despite this, there is no universal all-encompassing exception for education. The specific teaching exception available in international copyright law seems to be very narrow. The general provision regulating exceptions and limitations made by countries is viewed as abstract, imprecise and uncertain, and this causes it to be interpreted differently in different jurisdictions and in different contexts. Hence despite the intended flexibilities allowed by the international copyright system, it has been claimed to be underutilized and approached rigidly and restrictively by the domestic courts of many countries.

1.2 Research Objectives and Significance

The aim of this research is to analyse whether the exceptions available under international law are sufficiently flexible, and whether they encourage or hinder teaching, research and study. I shall also examine the national laws relating to the exceptions for teaching, research and study, through comparing the UK and Australia, which are exporters of educational materials, with Malaysia, which is predominantly an importer of educational materials. In comparing these countries, I shall assess the main similarities and differences between all three countries, and further analyse whether the flexibilities under the international copyright law have been utilized by them to accommodate teaching, research and study.

The above aim is significant because the education sector is both a major contributor and consumer of copyright works (Monotti & Ricketson, 2003). As the developing economies become increasingly knowledge-based, intellectual property protection has become a key concern for the developed nations. Since copyright law plays an important role in the issue of access to knowledge and information, it is therefore vital for decision makers, negotiators, private actors as well as civil society to clearly understand the available exceptions and limitations in

international copyright law in order to make well-informed policy decisions, as cautioned by Okediji (2003: 95):

> "Developing countries are typically caught unawares or unprepared when issues for new treaty negotiations are submitted. As a strategic matter, it is important for developing countries to think ahead about issues that may be introduced in multilateral negotiations. […] Developing countries must consider the implications of these initiatives for their priorities by advance study of the debates that have taken place in the developed countries, and by ascertaining development interests related to each subject matter".

A better understanding of "the three step test" (described later) is crucial for policy makers, especially in legislating copyright protection.

1.3 Literature Review

The current discourse relating to copyright law can be mainly divided into the proponents and the opponents of copyright expansion (Azmi, 2002). The proponents of copyright expansion stress the needs to provide certainty to copyright owners, who feel threatened by the copying ability of modern technology. It has been argued that copyright law has been underused (Puay Tang, 1997), and that stronger protection as well as better mechanisms for enforcement of copyright law (Barbosa, 2007) for the benefit of the copyright owners is recommended. While it is important to have a robust copyright system that supports the free exchange of ideas and secures the necessary freedoms of reflection and expression, strong author rights are also vital to democratic values, and are also central to securing the necessary freedoms of reflection and expression (Goldstein, 2008: 221). Supporters of strong intellectual property rights have claimed that copyright is necessary for developing countries, since the benefits to be derived from copyright outweigh the difficulties that copyright poses. Copyright protection creates the circumstances under which the generation and movement of ideas are possible;

when there is commercial gain, incentives to innovate are much greater, eclipsing any loss due to increased commodification of knowledge as property.

On the other hand, the opponents of copyright expansion emphasize the need to maintain an environment in which protection does not stifle the dissemination of ideas and works of expression (Delzell, 1995). Many commentators have voiced their concerns on the danger of copyright towards free access to information (Geiger, 2006a: 366). Copyright is increasingly said to hinder access to knowledge (Barbosa, 2005; Hilty, 2006), although high levels of protection are said to have the potential to unleash the creativity of individuals (Sookman, 2010: 18). Technological and global challenges have complicated copyright law, rendering the public interest under-protected, thereby threatening the public welfare that it had initially set out to promote through the advancement of knowledge (Alexander & Baird, 2003). Stronger intellectual property protection may impede competition and technology transfer to developing countries, and the uniform global system of intellectual property protection (coercively instituted through the TRIPs agreement) was not only established to combat counterfeiting and piracy, but also to consolidate an international division of commerce where the Northern countries are the sellers, while the Southern countries are the market; TRIPs also serves to limit the increasing competition posed by the Southern countries against the North (Correa, 2000). The propositions that intellectual property can serve as an "investment" for a particular Bilateral Investment Treaty have merely been asserted rather than proven and raise many questionable issues (Wadlow, 2011: 93). There have also been attempts to control the dissemination of digitized knowledge goods, primarily through technology, reinforced by the international copyright system under the auspices of the World Intellectual Property Organization (WIPO).

1.3.1 Importance of exceptions and limitations in copyright law

To satisfy the various interests regarding copyright law, proper balancing between the parties may be achieved through the integration of exceptions and limitations which is an integral part of copyright law (Guibault, 2002: 109). Previously, the

exceptions and limitations to copyright law have not been emphasized because countries enjoy total freedom to make exceptions and limitations based on their national interests, and any binding regulation on the matter would presumably weaken the copyright system rather than promote public welfare (Okediji, 2006: xii). Nevertheless, in the era of digitization and globalization, access to knowledge goods is indispensable, especially for developing countries. Hence, expressed recognition, emphasis, promotion, as well as the active implementation of those limitations and exceptions that suit domestic needs, are all required if access to knowledge goods is to be ensured (Okediji, 2006: xii). This would specifically underline the importance of utilizing information as a foundation for economic growth, for expansion of creativity and for the development of science for the benefit of all. The important role of exceptions and limitations to improve the welfare of society, which matters not only for uses but for creators as well, by encouraging creativity and promoting dissemination, are recognized by the international copyright system; important proposals have been made with respect to facilitating a more explicit balance between rights and access within the international context (Okediji, 2006: xi).

Several studies have been conducted on the issue of exceptions and limitations to copyright law within the international copyright system. A study outlining the international framework of exceptions and limitations to copyright protection was undertaken, setting broad parameters in which policy makers and legislators at the national level have to work on (Ricketson, 1999a). Studies circumscribing the main exceptions and limitations existing under several international conventions as well as national approaches to their application particularly relating to the digital environment has also been conducted by WIPO (Ricketson, 2003) and UNESCO emphasizing its impact to transmission of knowledge (Guibault, 2003). A specific study on the role of copyright exceptions in empowering digitally integrated scientific research has emphasized the responsibility of governments to facilitate and promote the production and dissemination of scientific research (Reichman & Okediji, 2009: 5). Other studies on exceptions and limitations to copyright law

have also discussed its theoretical and historical context and developments (Davies, 2002; Mendis, 2003), importance (Burrell & Coleman, 2005), changing scope (Jehoram, 2005), possible realms for improvement and reform for the benefit of the public interest (Ricketson & Monotti, 2003). A global approach to limitations and exceptions (that better balances the exclusive rights conferred through copyright) with the public interest considerations of developing countries is also planned within the confines of the present international copyright system (Okediji, 2006). It is suggested that the global system incorporate positive access rules and monitor the process of standard-setting, which would allow national policy room to implement meaningful limitations and exceptions (Okediji, 2005b: 187). In 2008, a study sponsored by the Open Society Institute examined policy options and the manner in which international instruments on limitations and exceptions to copyright within the current treaty obligations may be framed (Hugenholtz & Okediji, 2008: 3).

Studies by the Commonwealth of Learning Copyright further emphasized that there is a great deal of flexibility provided by the international treaties as to how copyright may be legislated, given national goals such as literacy and education, but this is not adequately known by member countries (Prabhala & Schonwetter, 2006). It was urged that the flexibilities in the TRIPs Agreement should be explored by countries when designing an IP regime that best suits the country's economic, social and cultural needs (Loon, 2009: 162). It was viewed, however, that there is also the possibility that the domain of exceptions and limitations is shrinking as countries invariably strike bargains when in the process of negotiation (Hugenholtz & Okediji, 2008: 36-37). Thought is also being given to harmonizing exceptions and limitations at the international and regional levels (Ginsburg, 2000; Perlmutter, 2001) but there had been concern on the drawbacks of harmonization (Peukert, 2005; Dutfield & Suthersanen, 2004) and some suggested that it is more appropriate to leave the matter to be determined at the national level (Ginsburg, 2000). Through re-establishing the balance between the different interests, it is hoped that solutions can be found, especially for developing countries, to deal with

the issue of access to copyright works (Geiger, 2006a). Okediji (2006: 35) emphasis on the importance of exceptions and limitations especially for developing countries:

> "For developing countries, limitations and exceptions are indispensable strategic and doctrinal tools to facilitate economic development by proving citizens with the basic means to engage in intellectual endeavors and to participate in the global knowledge economy. The international system must confront and successfully address the challenges of development in the digital age by ensuring that creators and users have the necessary regulatory framework to realize the welfare goals for which the system was designed".

1.3.2 General exceptions to copyright (the three step test)

The three conditions of Article 9(2), later incorporated in other important international treaties, multilateral agreements and national laws, have become generally known as the "three step test" (Ricketson & Ginsburg, 2006: 763). There has been considerable debate on the interpretation of the three step test. In some jurisdictions, there is tendency for the test to be restrictively interpreted and the three steps of the test to be considered cumulative (Browne, 2009: 463). The three step test was viewed as restricting the ability of states to legislate the matter of exceptions and limitations which would be beneficial for their countries (Griffiths, 2009: 1; Kojima, 2010). The leading case on interpretation of three step test under Article 13 of the TRIPs Agreement, on the dispute between the European Communities and the United States European Communities, concerning section 110(5) of the US Copyright Act 1976, as amended by the Fairness in Music Licensing Act 1998 (WTO, 2000) was analyzed (Brennan, 2002; Gaubiac, 2001; Ginsburg, 2001) and was said to have adopted a restrictive approach and incompliance with principles of interpretation of public international law (Brennan, 2002; Geiger, 2009: 627). However, the decision is of limited precedent value and does not bind other member states, nor domestic courts (Schonwetter, 2006). A new interpretation of the three step test was thought necessary (Geiger, 2007b: 18)

and various commentators offered their own interpretations, and some even propose changes in the wordings of Article 13 (Geiger, 2006c; Gervais, 2005; Ginsburg, 2001; He, 2009; Kur & Levin, 2011; Koelman, 2006; Okediji, 2000; Senftleben, 2006; Sun, 2007; Wright, 2009). In 2008, thirty copyright experts signed a declaration advocating that the test should be applied in a liberal, holistic and dynamic manner and that it ought not to be mechanically applied as an instrument to reign in existing or future limitations (Geiger, Griffiths, & Hilty, 2008; Lucas, 2010). The Declaration clears the way forward for national legislatures to exert their political will to introduce new limitations, which is however lacking on the part of the stakeholders (Hilty, 2010).

A study considering whether the fair dealing exception for research and study and as part of the library exceptions and statutory licence for educational copying under the Australian Copyright Act 1968 complies with the three step test as set out in the Berne Convention, TRIPs Agreement and WIPO Copyright Treaty has reported that in many respects, these provisions do not fulfil the requirements of the three step test, and recommendations have been made as to how these deficiencies might be met (Ricketson, 2002).

The study on the exceptions and limitations to copyright protection provided under the Berne Convention found that there is a reasonable degree of flexibility available for national legislators but cautioned that the digital context may change things considerably, as certain uses that were hitherto minor and economically insignificant may now entail far greater prejudice to authors' economic and personal interests (Knights, 2000; Ricketson,1999b: 94). Senftleben (2010: 78), on the other hand, has proposed for a renaissance of the initial understanding of the three-step test, "a renaissance of the test as a refined proportionality test that offers breathing space for unauthorized use within reasonable limits. The reinforcement of this balanced understanding of the test is central to the international debate on copyright limitations. It challenges the false rhetoric of the three step test that is primarily designed to restrict all kinds of copyright limitations." By reading the

three step test in a constructive and dynamic fashion, it empowers contracting states to fully take into account the interest of the general public (Hugenholtz & Okediji, 2008: 25). For some, as the TRIPs three step test criteria seem too vague (Geiger, 2006b: 81; Griffiths, 2010) to help resolve conflicts of laws, it was also suggested that courts learn to make copyright reforms globally coherent (Geller, 2009: 395).

Studies have also been conducted on the controversial issue of whether the flexibility of the open-ended exceptions used by the US (fair use), as compared to the purpose-specific exceptions commonly used in the common law countries (fair dealing), actually contravene the three step test (Burrell, 2001; Goldstein, 2008; Loon, 2009; Tawfik, 2005a). The interpretations of fair dealing or fair use that is essentially used by courts when considering the defence for copyright infringement has also been widely explored (Depoorter & Parisi, 2002; Mathur, 2003; Newby, 1999; Zwart, 2007). Generous interpretive approach by courts on the scope of fair dealing as shown in the *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 SCC 13 case was appreciated although oddly seen as deviating from the commonly proposed governments policy paper on copyright reform (Scassa, 2005: 98). Further studies have suggested that the fair dealing provision should be enhanced by the introduction of clear, detailed, progressive provisions, and that other exceptions and limitations should also be actively and efficiently used by countries in order to address the serious problem of access to knowledge goods (Rens, Prabhala, & Kawooya, 2006).

1.3.3 Exceptions for the purpose of education

Reviews on national legislation around the world have shed light on the fact that, while all copyright legislations recognize exceptions for the benefit of educational activities, there is no single standard approach adopted in formulating the exceptions. The extent and conditions of copyright exceptions between different countries varies sometimes widely and a statutory licensing scheme is proposed as a remunerated copyright exception, to cover all teaching uses over the Internet

(Xalabarder, 2004). A comparative study was conducted on European countries looking at the implementation of exclusive rights, limitations and the legal protection of technological protection measures, portraying areas where states have significantly deviated from the European Directive and problem areas that may have a detrimental effect within the internal market (Westkamp, 2007). WIPO has conducted several studies describing the state of the law, particularly on the issue of copyright exceptions for educational activities in the Asia-Pacific region (Seng, 2009b), North America, Europe, Caucasus, Central Asia and Israel (Xalabarder, 2009) but these studies do not attempt to offer any recommendations or prescriptions for action by policy makers at international, regional or national level. The exceptions pertaining to educational activities (for the benefit primarily of educational institutions) exists in various forms ranging from the generic fair use or fair dealing exceptions or even residual exceptions based on the three-step test set out in Article 9(2) of the Berne Convention and Article 13 of TRIPs, specific exceptions pertaining to quotations, criticism and review to allows taking extracts of works or by way of implementing statutory, voluntary or compulsory licensing arrangements to enable the use of multiple reproductions of works in educational institutions (Seng, 2009b: 1). Studies on the specific exceptions relating to "illustration for teaching" under Article 10(2) of the Berne Convention have also been conducted, viewing that such provisions provide a potential policy space for member countries to mandate access to educational materials for development needs (Chon, 2007: 806). Unfortunately, the domestic legislations of some countries have significantly narrowed the scope of this Berne exception (Okediji, 2006: 21).

Despite the flexibilities provided within copyright law, there seems to have been certain negative impacts of copyright law on education, especially in developing countries (Nicholson, 2006). There has been an incorrect balance between the copyright owner's interests and the interests of education and scholarship, especially where the educator and the copyright author reside in a single individual (Suthersanen, 2003). Copyright has also denied access to digital information,

contributed to the price of books, course packs, academic journals and literary materials, and caused difficulties for librarians as well as slowly stifling public interest (Goburdhun, 2006). Groups of prominent legal scholars, artists, scientists and experts from around the world similarly challenge and asserted that copyright laws are simply inhibiting innovation (Gil, Sulston & Boyle, 2005).

These happen when the available limitations and exceptions for educational use, that should have opened up access to knowledge, are not fully utilized (Guibault, 2003: 40; Hong Xue, 2008) despite the need for access to education. Some countries have even expanded the scope of copyright protection beyond what is required by the international copyright treaties (Consumer International Asia Pacific Office, 2006; Wilkinson, 2005). Some courts seem to apply the exceptions in a restrictive manner (Cahir, 2004). The coming of the Internet age has further complicated copyright law, rendering copyright policies to be theoretically and practically deficient, putting much reliance on economic justifications rather than stressing the original values of copyright (Ganley, 2004). This has been said to be due to ambiguities and uncertainties (Crews, 1993) surrounding the three step test, which have misled some countries deterring them from setting out appropriate exceptions and limitations for educational purposes as well as the linkage between national IP regulation and trade law under the TRIPs Agreement (Hong Xue, 2008), which has resulted in the creation of relatively low levels of exceptions and limitations, particularly in developing countries' national copyright laws (Hinze, 2008). It has also been claimed that the flexibilities provided by the international treaties are not working efficiently in developing countries due to problems such as lack of resources to integrate them into their domestic laws (Nicholson, 2006). Moreover, the optional character of the teaching exception provided by the international and European provisions led to major differences, uncertainties in national laws and very few national legislators took advantage of this possibility (Papadopoulou, 2010).

An analysis on the copyright exceptions applying to education in the UK (Burrell & Coleman, 2005) found that the exceptions only apply to a narrow range of copyright subject matter and not applicable to computer programs [1] and non-authorial works. They also found that the research and private study exception suffers from a number of serious defects such as failing to distinguish between different stages of research and gives no clear guidance as to the quantity of material that can be copied in reliance on this exception thereby causing difficulties for students, researchers and institutional users (Burrell & Coleman, 2005: 135). Investigations were made on concerns regarding copyright protection posing as a barrier to the widespread development of e-learning practices within further education colleges (Wallace, 2006). It is also questionable whether amendments to UK legislation in compliance with the EU Copyright Directive have actually provided adequate protection for higher education establishments and have allowed equal opportunity for prosperity in the digital environment (Wallace, 2004, 2006).

Studies explained the reform proposed by the Australian Education Sector which questioned the appropriateness of the Australian statutory license scheme for the educational use of free and publicly available internet material (Browne, 2009). Issues on the application of the Australian provision for the use of copyright material for "fair dealing purpose of research or study" as it applies to a university library was examined (Khan & Hancock, 2001). The application of educational provisions or the fair dealing provisions within the Australian Copyright Act to commercial activities undertaken by a university was analyzed (Shelly, 2008) finding that the issue is still in grey area. Studies are also made considering on how the extra-legal aspects of fair use practices as practiced in the US can be replicated in Australia (Hudson, 2010).

Meanwhile, in the US, the TEACH Act was viewed as requiring rigorous undertakings on the part of educational institutions (Crews, 2002: 1), and unnecessarily restrictive domestic legislation regarding access to copyrighted

[1] Copyright Designs & Patent Act 1988 (CDPA), Ss 29(1), (1C), (2).

content for teaching purposes, as it fails to devise new exceptions and limitations that are appropriate in the digital network environment (Gasaway, 2001).

Studies have been generally concerned with the growing digital divide between the industrialised and the developing countries (Harms, 2000; Sun, 2005) due to the impact of intellectual property protection which was thought unlikely to benefit the developing and least-developed countries, especially in regard to knowledge and education (Gonzalez, 2005). Despite the flexibilities provided under international law, in the context of digital works and content, they are not adequate for safeguarding the interests of developing countries, especially in education (Mathur, 2003). Countries were asked not to follow blindly the extensions in intellectual property rights without an understanding of trade deficit, foreign debt and broader economic welfare issues, merely in anticipation of international harmonisation developments which later may prove to be inconsistent with the national interest (Power, 1997).

Specific case studies on copyright law in relation to developing countries have also been conducted. It has been found that, despite the trend of governments to strengthen intellectual property protection at the expense of public access to new knowledge, apparently, the cultural acceptance of intellectual property differs between countries (Marlin-Bennett, 2004). Some argued for reformation and a global approach to limitations and exceptions that better balance the exclusive rights conferred through copyright with public interest considerations for developing countries (Okediji, 2006). Despite all this debate on the ineffectiveness of the flexibilities provided in international copyright law, Drahos (2002a), interestingly, viewed that the developing countries' interests will only ever be given minimal consideration vis-à-vis the developed countries' economic interests, and therefore they will have to look to self-help in dealing with intellectual property issues. More focus on information or cultural resources and how we nurture and allocate them for the social and economic good are also called for (Fitzgerald, 2008).

Similarly, the laws and policies are primarily concerned with responding to the fear or threats of prosecution from private interests, rather than to internal needs for optimal information use for public benefit; this is particularly persistent at the micro level. Research has concluded that the copyright policies at institutions of higher education are more restrictive than what the law actually requires (Crews, 1990). This limits the use of the information resources needed for teaching, research and study. Most universities are overly conservative in their interpretation of copyright law, and often neglect their own interests, adding unnecessary costs and obstacles to the lawful dissemination of information (Crews, 1993). Here, there is some dilemma, since higher educational and research institutions are not only users of copyrighted material, but also producers of new works (Wagner, 1998). Although both educational and research institutions as well as copyright owners have a similar objective, that is to disseminate knowledge, it is difficult to protect the interests of the private owner and to address the public's need to access information at the same time (Fine & Castagnera, 2003; Ricketson & Monotti, 2003).

Taking into account users who lack access to educational materials studies and taking into consideration distributive justice, Chon (2007: 846) holds that enhancing the capability for education within a human development framework should take priority over safeguarding excessive payments to copyright owners.

Studies have variously focused on issues ranging from the justification of the current copyright system in the digital age (Wiese, 2002), through the digitization of books by Internet search engines and its impact on legal and commercial matters (Laing, 2006), to the capacity as well as the danger of rights owners of being able to control access or even monopolize digital works by using technological and contractual means (Colston, 2002); this latter could lead to the death of copyright (Glynn, 2001), and could also cause inappropriate governmental intervention in a non-governmental entity (Lucchi, 2007). Other researchers have considered topics

such as process issues, institutional policies, software and licensing, and copyright alternatives in the course of examining copyright issues related to on-line course development and delivery (Colyer, 1997). Mohrbacher (2003) concluded that the rise of new legislations made by policy makers, merely to update current copyright law to match technological advances, has weakened the educational exemption and impedes educational access to copyright protected work. On the other hand, Braunstein (1977), who discussed the economics of property rights applicable to computer software and databases, critically viewed that the exemptions from copyright for broad classes of users decrease economic efficiency, and that this could then be increased through user charges. Chon's (1996) examination of one Internet art project and one doctrinal copyright category found that the print-based copyright principles unduly distort the creative process in networked computer environments. It was viewed that in order to accommodate and indeed capitalize on the flexibility and flux inherent in the medium of networked computer environments, copyright principles should more accurately reflect the actual practice of creation in these environments (Chon, 1996).

The limitations adopted for the benefit of classroom or research activities concerning the digitisation of works have posed even greater problems in the digital environment (Guibault, 2003). This is because the copyright owners can now easily block any access to their work through technological means, thereby creating the danger of monopoly and circumventing the applicability of exceptions and limitations in certain circumstances. What is more, the exceptions to copyright rules that university tutors and lecturers enjoy when they are teaching face-to-face in a lecture theatre or seminar room currently do not apply when they are teaching on-line (McCracken, 2001). Additionally, access to educational material could also be barred by using contracts that are more slanted to the copyright holders' interests especially when there is no clear provision that could ensure that the exceptions for permitted acts are made available to the public where it has lawful access to the protected work. As a result of all these setbacks and problems, the copyright system has been continually questioned and challenged in recent years, as it has

been seen to be a barrier to easy access to education and information. Technological and global challenges seem to complicate the copyright law we have today, and many have called for the law to be reviewed and reconsidered, to be made compatible with the technological developments used in education today.

Works used in education involve not only copyright works but also public domain works or works which are not protected by copyright or work in public domain which was easily made accessible (Greenleaf, 2009). In some countries, legal materials may not be copyright protected while in other countries, Acts and Statutes may be owned by the government or Crown, in which many had debated (Robbie, 1996) (however, less certainty can be made for written judgment (Nessen, 1985; Taggart, 1984)), but several initiatives had been taken to free these law materials for the public (Greenleaf, 2009; Leith & Fellows, 2010).

Law is a 'highly knowledge-intensive domain' and it is important to obtain accurate and up-to-date legal information (Makri, 2008). Despite this, in some countries, legal resources are insufficiently available (Cooper, 1990) and accessing legal information poses a major problem, particularly in developing countries (Otike, 1997). Inadequate materials, limited law libraries and out dated information creates problems for the accessing and utilization of legal information (Tuhumwire & Okello-Obura, 2010). Studies have been made into whether the strict legal principle that the Crown owns the copyright in statutes and judicial decisions, is less important than the principle of encouraging public access to the law (Cox, 2006, 2008). However, little research has been reported in the area of the application of exceptions and limitations to materials used in legal education within universities.

1.4 Research Questions and Methods

In order to supplement the existing literature, the questions that I shall address are:

1. To what extent do the exceptions provided under Article 9(2) of the Berne Convention as well as Article 13 of the TRIPs Agreement facilitate or hinder research and study of law in universities?

2. To what extent do the exceptions provided under Article 10(2) of the Berne Convention facilitate or hinder the teaching of law in universities?

3. What are the similarities and differences in the exceptions relating to research and study between the UK and Australia, which predominantly produce educational legal materials, and Malaysia, which predominantly consumes educational legal materials, and what is their significance?

4. What are the similarities and differences in the exceptions relating to teaching between the UK and Australia, which predominantly produce educational legal materials, and Malaysia, which predominantly consumes educational legal materials, and what is their significance?

5. Whether the implementation of these copyright exceptions and limitations in Malaysia is appropriate for the purposes of teaching, research and study of law in Malaysian universities?

More generally, this thesis will consider what lessons may be learnt in relation to the teaching, research and study of law at university level in developing countries from the Malaysian experience.

To approach these research questions, a doctrinal research method will be used. Major treaties and conventions concerned with the international copyright regime, namely, The Berne Convention for the Protection of Literary and Artistic Works of 1886 and The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) of 1994, will be analysed, identifying the provisions that relate to exceptions and limitations for the purpose of teaching, research and study. These provisions will be interpreted according to the rules of treaty interpretation governed under the Vienna Convention on the Law of Treaties. These perspectives will then be syllogized so as to deliver a conclusion regarding the extent to which the exceptions relating to teaching, research and study under the international law are available for member states to use as yardstick for designing and instituting exceptions and limitations in national law.

The national laws of three common law countries will be analysed, namely, the laws in the United Kingdom, Australia and Malaysia. The United Kingdom is selected for the purpose of this study as it is the country from whence copyright law originates. The United Kingdom also represents the perspective of a developed country that produces and largely exports materials used in education and is presumably strict in protecting the copyright owners' interests. For the purpose of comparison, another developed country that also excels in research and education, namely Australia, is chosen particularly as its laws seem to be more flexible for the benefit of users. Finally, Malaysia is taken as a comparison from the perspective of a developing country that consumes a considerably quantity of copyright materials from the developed countries for its teaching, research and education, particularly in its higher education institutions. This thesis will consult the latest edition of the Copyright, Designs and Patents Acts 1988, as amended by the Copyright and Related Rights Regulations of 27 September 2003, No.2498 for United Kingdom copyright laws; Copyright Act 1968, taking into account amendments up to Act No. 113 of 2008 for Australian copyright laws, and Copyright Act 1987, No.332, Incorporating latest amendment – Act A1139/2002 for Malaysian copyright laws.

The exceptions to copyright law available for the purpose of teaching, research and study will be analysed, synthesized and explained by breaking down the rules and identifying their constituent elements, taking five aspects into consideration, namely 1) rights, 2) purposes, 3) beneficiaries, 4) works and 5) other conditions contained in the available exceptions. The study will also assess each country's approach, analyse the similarities and differences that it has with the other two, and assess the extent to which the flexibilities under the international copyright law are fully utilized by each for the purpose of providing appropriate and necessary rules to accommodate teaching, research and study. For the purpose of this thesis, the terms "exceptions" and "limitations" will be used interchangeably or indistinctively to refer to provisions that allow the use or exploitation of copyright works, and where necessary, it will indicate whether the act or use is for free or in need of certain remuneration.

In consideration of the limited time, finance and word restrictions, this research will not analyse exceptions of copyright works used in libraries and archives for teaching, studying and research purposes (for an analysis of such exceptions, please refer to the WIPO Study on Libraries and Archives). This study also does not discuss translation issues, laws on databases nor the licensing systems adopted by the relevant countries, which is also pertinent in respect of teaching, research and study.

1.5 Thesis Structure

This thesis is comprised of eight chapters. The current chapter (Chapter 1) is an introduction to the main thesis. The problem of inequitable knowledge acquisition has been reviewed in this chapter, with a focus on the role of exceptions and limitations to copyright law as one way of reducing the problem. It also provided an introduction to the study area and the methodology.

Chapter 2 describes briefly the concept of copyright, particularly the nature, purpose, general principles and the role of exceptions and limitations to copyright in maintaining the balance of interest of copyright owners and users. This chapter will further touch on several international conventions governing copyright law as well as the relevant provisions available under the international copyright treaties that relate to exceptions in the context of teaching, research and study. It will then discuss the differences in implementation of the copyright laws between the countries. This chapter is important for the purpose of providing a necessary legal and factual framework in order for readers to generally understand the successive chapters.

Chapter 3 explores the issue of copyright dilemma, focusing on legal education in Malaysia. This chapter first provides an overview of legal education in Malaysia and discusses the various factors that contribute to rampant copyright infringement in Malaysian educational institutions. This chapter further explains the historical background on how copyright law was initially established and its evolution up to its present form. The chapter moves a step further by discussing the relevant provisions that generously bar copyright protection to legal materials but that somehow seem to be futile.

Chapter 4 and 5 examine the provisions available under the international treaties that relate to exceptions to copyright protection for the purpose of teaching, research and study. Chapter 4 firstly prepares the background of the provisions that act as a yardstick for delineating exceptions and limitations to copyright law on both the international and national level, commonly known as the "three step test". This chapter shows the significance of three step test by discussing its origin and its incorporation into various international treaties, which consequently has influence over national legislatures in drafting their copyright law. Further, this chapter discusses the rules on treaty interpretation according to the Vienna Convention of the Law of Treaties. It then presents how the three step test was incorporated into the TRIPs Agreement and, further, discusses the relationship between the Berne

Convention and TRIPs Agreement, which could affect the interpretation of three step test as it exists in both treaties. This chapter then analyse the three step test, as embodied in Article 9(2) of the Berne Convention and Article 13 of the TRIPs Agreement. Here, different interpretations are explored, examining further whether using copyright works for research and study purposes falls within the ambit of the three step test, as well as the extent of the flexibilities. Chapter 5 explains the extent of the specific teaching exception provided under Article 10(2) of the Berne Convention. In analysing these provisions, consideration is based on five factors, namely, rights, purposes, beneficiary, works and other conditions. By examining the exceptions provided under the international system, this chapter demonstrates the extent of the flexibilities provided under the international conventions in encouraging the use of copyright works for teaching, research and study. This will advance existing knowledge by contributing to the understanding of the general and special provisions governing exceptions to copyright law that relate to teaching, research and study purposes.

Chapters 6 and 7 contain an analytical comparison between the laws governing exceptions to copyright law in the UK, Australia and Malaysia. Chapter 6 focuses on the exceptions for the purpose of research and study, while Chapter 7 focuses on exceptions permitted for teaching or instructional purposes. The process of comparing the national laws takes into consideration five factors, namely 1) rights, 2) purposes, 3) beneficiary, 4) works and 5) other conditions. Significant similarities as well as differences are identified. These comparisons could also show which approach is more favourable for the interests of education and fully utilizing the flexibilities provided under the international copyright system. The comparative analysis of these three countries contributes to the understanding of the current conditions of national law on exceptions relevant to teaching, research and study, especially between predominant exporters and importers of copyright works, their significance and the problems found, which will be useful for future research.

Chapter 8 concludes the present work by summarizing the findings to the research questions, considering the possible reasons for such findings as well as their implications. This chapter also contemplates future challenges and concludes by asking whether the implementation of copyright exceptions in Malaysia is appropriate for the purposes of teaching, research and study of law in Malaysian universities. Certain recommendations are made on how to better utilize the flexibilities available under the international copyright law to their maximum potential. This chapter argues that each government or state is a powerful force in creating the structure of the copyright laws in their own jurisdictions, and that each government or state should creatively use the flexibilities, exceptions and limitations provided under the international treaties to suit their individual economic and developmental needs. To ignore this important power is to downplay the flexibilities provided in the international treaties related to copyright law.

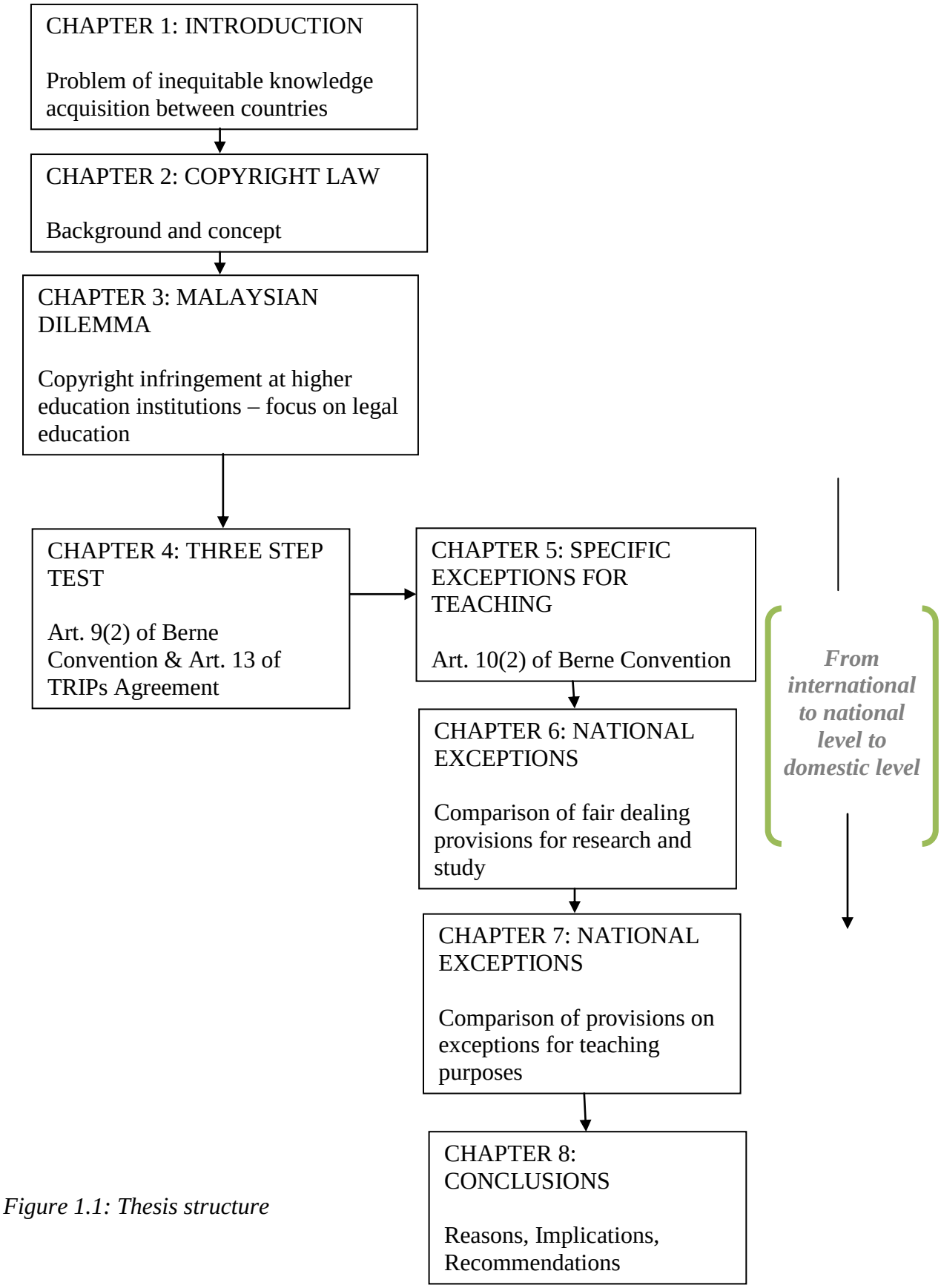

Figure 1.1: Thesis structure

Chapter 2: The Concept of Copyright Law

2.1 Introduction

This chapter first, briefly describes the nature of copyright law, and the application or otherwise of copyright protection with respect to the relevant legislative materials. It then explains the original purposes of copyright protection which require the balancing exercise between the public against the private interest. Next, the justification for exceptions and limitations in copyright law will be explained. This chapter further discusses the position of copyright on the international level, and accordingly, this chapter briefly explains how countries may have both similarities as well as significant differences when implementing exceptions and limitations in their domestic legislation. This chapter is important for the purpose of providing a legal and factual framework in order for readers to fully understand the successive chapters.

2.2 The Concept of Copyright Law

2.2.1 Nature of copyright law

Copyright is a branch of intellectual property rights, amongst other rights, namely, design, patent, trademark and database rights. Copyright is not merely the right to prevent copying (Philips, Durie, & Karet, 1997) but it grants many other rights to the owner. Once a work has met the criteria for protection, authors (creators) are automatically given a bundle of rights to reproduce the work, or to authorize others to do so (in whole or in part) within the constraints of the relevant copyright law .

Owners of copyright works acquire economic and moral rights. Through the economic rights, the owner has an exclusive right to copy or reproduce the work, to rent out or lend, to publish or issue copies of the work to the public, to perform, show or play the work in public, broadcast the work or include it in a cable

programme service, to make an adaptation of the work or do any of the above in relation to an adaptation.[2] These economic rights may also be bought or sold (like property) or be assigned or licensed for a specified period (Garnett, James, & Davies, 1999). This gives the copyright owner the opportunity to control the ways in which his/her copyrighted material may be used or exploited for profit. By giving all these exclusive rights to the copyright owner, all other people are restricted from copying, renting, lending, or issuing copies of the work to the public. It is also an offence to perform, broadcast, show or adapt the work without the consent of the copyright owner. Here, the copyright owner or his/her exclusive licensee therefore has the right to bring proceedings before the courts. Any infringement or secondary infringement of copyright law could subject the alleged perpetrator to criminal liability.[3]

Additionally, independent of the economic rights, an author also possesses moral rights, which include (a) the right of paternity, i.e. the right of the author to be identified, (b) the right of integrity, i.e. to prevent or object to derogatory treatment of their work, (c) false attribution, i.e. the right not to have a work falsely attributed to them, and (d) the right to disclosure, i.e. the author's right to withhold their work from being published.[4] These rights, unlike economic rights, are inalienable or cannot be given away. The principal remedies for breach of copyright (known as piracy) are an action for damages and account of profits, or an injunction. An author of copyright work may also be liable for libellous statements made in the material, defamation, plagiarism and, of course, copyright infringement (Alexandra & Miller, 1999: 87).

The basic rule for the attribution of copyright is that the author is the holder of copyright from the moment of creation. An author is referred to as the person who creates a work[5] or is responsible for first reducing an intellectual idea into the

[2] CDPA 1988 (UK) S.16(1)
[3] CDPA 1988 (UK) S.107
[4] CDPA 1988 (UK) Chapter IV
[5] CDPA 1988 (UK) S. 9(1)

relevant material form[6]. So, legally speaking, an author is not necessarily the person who originally had the idea. The author of a work is the first owner of any copyright of it.[7] When a copyright work is jointly created, all those who contribute to the final product may have a claim to some legal rights in the work. However, if a work is produced as part of employment, then it normally belongs to the person or company who hired the individual creator.

Copyright only protects the expression of an idea, not the idea itself. This principle is expressly recognised in Article 9(2) of the TRIPs Agreement and in Article 2 of the WIPO Copyright Treaty which limits copyright protection only to "expressions and not to ideas, procedures, methods of operation or mathematical concepts as such". Copyright is not infringed if two works are very similar to each other but produced wholly independently of one another. The mere taking of a sufficiently general idea is also not infringing copyright. Only when an idea is worked out in some detail in the plaintiff's work and the same expression of that idea is reproduced by the defendant, may there be an infringement. Here, it is not the idea that has been copied, rather its detailed expression. Copyright protection is also automatic as there is no legal requirement to register in order to obtain protection, however, only recognizably original forms of work qualify for protection.

Works protected by copyright are generally the expression of creative authorship (Garnett, James, & Davies, 1999), which includes original artistic, dramatic, literary and musical works, sound recordings, films (and videos), broadcasts (including cable and satellite broadcasts), and the typographical arrangements of published editions of a literary, dramatic or musical work. These works may either be published or unpublished or in an electronic format. Thus, letters, e-mail messages, works included in an electronic database (CD-ROMs) and material on websites are also protected (Sandy, 2004). Copyright however does not protect individual bibliographic citations, facts and headlines, although a collection of

[6] Copyright Act 1968 (Australia), S. 22(1)
[7] CDPA 1988 (UK), S. 11(1) ; Copyright Act 1987 (Malaysia) S. 26(1)

them would be protected by copyright and/or database right. Ideas that are in general circulation, having been expressed in written and other forms frequently and over a long period of time, are also not subject to copyright claims, as decided in *Kenrick & Co. v. Lawrence & Co*., (1890) 25 Q.B.D. 99 (Davies & Harbottle, 2007).

In order for a work to be protected under copyright law, it is required that the literary, dramatic, musical or artistic works be "original". To be original, the work cannot be simply copied, but must be the result of "independent creative effort". However, a work that is similar to another work that already exists, but where there has been no copying either directly or indirectly, can still be considered original. The term "original" also involves a test of substantiality. Literary, dramatic, musical and artistic works are not considered original if there has been insufficient skill and labour expended in their creation, although significant investment of resources without significant intellectual input can still, sometimes, count as sufficient skill and labour.

Ultimately, only the courts can decide whether something is original. The lowest standard of originality was decided in *University of London Press Ltd. v. University Tutorial Press Ltd.* [1916] 2 Ch 601, where it was decided that a work originating from an author, which is more than a mere copy of another work, is sufficient to ground copyright. On the other hand, some courts set a very high standard on the meaning of "original", such as in *Feist Publications Inc. v. Rural Telephone Service Co.*, (1991) 499 U.S 390, where it was decided that a work must be creative to be original, and thus protected by copyright. A middle position, representing a new standard of originality in copyright law (Scassa, 2005: 97), taken in between these two extreme definitions, was taken in the case of *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, where the Supreme Court of Canada held:

> "For a work to be 'original' within the meaning of the Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be

creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce 'another' work would be too trivial to merit copyright protection as an 'original' work."

2.2.2 Copyright protection on law materials

Law materials can be divided into primary and secondary law materials. Primary law materials consist of statements of law from government entities, which includes statutes, regulations and law reports that are authoritative records of law. Secondary sources offer an analysis, commentary or a restatement of primary law, and are valuable in helping to locate and explain primary sources of law. These sources may influence a law decision but they do not have the controlling or binding authority of the primary sources of law. The secondary sources include a wide variety of works, such as law dictionaries, law encyclopaedias, law textbooks and other books, and journal articles as well as key Internet resources and guides.

The Berne Convention for the Protection of Literary and Artistic Works 1886, under Article 2(4), leaves it to individual countries to determine whether their governmental works should be copyright protected, stating as follows:

> "It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts."

As there is no uniform rule on whether nations can copyright their governmental works, individual states have different approaches on this matter. Australia, for example, under Part VII of its Copyright Act, specifies that the Australian government owns copyright in any work, film or sound recording made by or under the direction or control of the government, and any work first published by or under the direction or control of the government. Similarly, the UK government claims copyright on the text of its laws and legislative materials, specifically under Chapter X of its Copyright Designs and Patent Act 1988. Section 163 provides that a work made by Her Majesty or by an officer or servant of the Crown in the course of his/her duties, qualifies for copyright protection, and that Her Majesty is the first owner of any copyright in the work, referred to as Crown Copyright, notwithstanding that it may be, or have been, assigned to another person. Her Majesty is also entitled to copyright in every Act of Parliament or Measure, referred to as Parliamentary Copyright.[8] Protected works under Crown Copyright include Bills and Acts of Parliament, Statutory Rules and Orders, Statutory Instruments and other Parliamentary papers, and the Official Reports of the House of Lords and House of Commons debates (Hansard).

Although it is clear that copyright belongs to the Crown with respect to statutes, it is unclear whether a judgement is owned by the presiding judge or by the Crown (Garnett, Davies & Harbottle, 2010). In many cases, it has been argued that the Crown acquires copyright over the decisions and judgments of the courts, mainly because the work is made by an officer or servant of the Crown in the course of his/her duties as expressly provided under the statute, such as under S. 163(1) of the UK CDPA 1988. This was noted in the case of *The Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd*., (1938) 38 SR(NSW) 195 at p. 236, in that, although the UK Treasury minutes dealing with copyright in government publications did not include rights in judicial opinions, this does not mean that the right of the Crown on judgments does not exist because the listing was not necessarily intended to be exhaustive; indeed, various legislative

[8] CDPA (UK) 1988 S. 164

enactments have assumed the continuation of such a right, despite the absence of administrative efforts to enforce it (Nessen, 1985: 418). Notwithstanding the observations expressed in the *Butterworth* case, it has been viewed that any assertion of prerogative rights in judgments would at present be unlikely to be sustained (Nessen, 1985: 418). It has been viewed that individual judges, despite their function as a judge, should own the copyright in their written judgements for the reason that only their decision was official and covered by Crown Copyright, not their reasoning (Taggart, 1984). Copyright may also be acquired by a reporter or editor of those parts of a report of which s/he is the author or compiler, such as headnotes, annotations, additional citations, statements of fact, and abstracts of the arguments of counsel (Fox, 1947: 115).[9]

Nevertheless, in the UK, Crown Copyright in both primary and secondary legislation as well as Parliamentary Copyright in Bills were waived pursuant to the Government White Paper, The Future Management of Crown Copyright (*Reproduction of Bills and Explanatory Notes to Bills of the United Kingdom Parliament*, 2000). The waiver also extends to copyright in the typographical arrangements of the texts of all the categories of material to which it applies (Garnett, Davies, & Harbottle, 2010). By waiver, it means that the Crown is no longer seeking to exercise its legal right to license formally, restrict usage or charge for the reproduction of the still-copyrighted material. However, Crown Copyright is asserted to protect the materials against use in a misleading or derogatory manner. Hence, legislation from official sources can be reproduced freely provided that the conditions intended to protect the materials against misleading and derogatory use are met. As explained in the Government White Paper (1999), this light approach was taken in order to provide access to official materials as widely as possible, whilst protecting the integrity and authority of official materials, as well as acknowledging the role played in the information chain by the government's tradable information and by departmental commercial activities.

[9] Butterworth v. Robinson (1801) 5 Ves. 709; Sweet v. Shaw, (1839) 3 Jur. 217; Saunders v. Smith, (1838) 3 My. & Cr. 711; Sweet v. Maugham, (1840) 11 Sim. 51; Hodges v. Welsh, (1840) 2 Ir. Eq. 266; Sweet v. Benning, (1855) 16 C.B 459.

Nevertheless, users need to enter into a different and separate licensing agreement if the same legislative materials are reproduced from the government's Statute Law Database or from any other value-added legislation product or service provided by the government.[10]

Copyright protection is granted for a certain limited period but different terms of protection apply to different materials. The generally accepted duration for copyright protection lasts for the author's lifetime plus fifty years from the end of the year in which he died (or from the end of the year in which it was made, in the case of films and broadcasts), as prescribed under Article 7(1) of the Berne Convention and Article 12 of the TRIPs Agreement. This right can also be assigned or transmitted on death thereby giving authors and their heirs the opportunity to exploit a work, so that a work may not fall into the public domain for many years (Sandy, 2004). After the copyright in a work has expired, it is considered to be in the public domain and is available for anyone to copy and use. Through regional and bilateral free trade agreements made between countries, the period of copyright protection has been extended; it is now for the lifetime of the author plus seventy years. For Crown Copyright, the copyright protection lasts for much longer than for any ordinary copyright work, that is 125 years from the end of the calendar year in which the work was made, or if the work is published commercially, before the end of the period of 75 years from the end of the calendar year in which it was made, until the end of the period of 50 years from the end of the calendar year in which it was first so published (S. 163 of the UK CDPA 1988). In Australia, the Crown prerogative right enjoys indefinite duration of copyright protection (S. 8A(3) Copyright Act 1968).

Some countries nevertheless do not grant copyright protection to legislative materials such as statutes and judicial decisions, as they are not considered as original literary work but regarded as documents in the public domain. For instance, in the US, the US Constitution (S. 105) excludes copyright protection on

[10] HMSO Guidance Note 6, para.15; Queen's Printer for Scotland Guidance Note 1, para.13.

its federal government works, although no similar prohibition exists for works of state and local governments. In *Matthew Bender & Company, Inc. v. West Publishing Co.* 1997 U. S. Dist., a Federal Court in New York ruled that the changes made by the publisher to the Court opinions are insufficient to qualify as an original work of authorship, causing great concern to publishers of compilations and other collections of facts (Atlas, 1998: 84). Similarly, Malaysia, under Section 3 of Copyright Act 1987, excludes the official texts of the government or statutory bodies of a legislative or regulatory nature, or judicial decisions from its definition of literary works protected under copyright, meaning that these works are considered as information that is common property, containing no original authorship, such as in the case of standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources.

2.2.3 Purpose of copyright protection

Historically, copyright law was created for the "encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned … and for the encouragement of learned men to compose and write useful books". This was expressly stipulated in the Statute of Anne 1710, the first formal copyright law document when the concept began in England since the revolution of printing machines in 1557 (Deazley, 2004). This shows that the goal of copyright was originally aimed at encouraging wider access to works by the public. The framers of the United States Constitution also had a similar purpose in mind when enacting the US Copyright Law, which is to ensure the advancement of learning by "promote[ing] the progress of science and useful Arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries", as provided under Article 1, Section 8, Clause 8 of the United States of America Constitution. In other words, the original concept of providing copyright protection for a limited time was primarily to

encourage or promote learning and progress, thereby acting for the public good (Davies, 2002).

Giving the rationale for copyright protection, WIPO (2011) expressly states:

> "Copyright and its related rights are essential to human creativity, by giving creators incentives in the form of recognition and fair economic rewards. Under this system of rights, creators are assured that their works can be disseminated without fear of unauthorized copying or piracy. This in turn helps increase access to and enhances the enjoyment of culture, knowledge, and entertainment all over the world."

Nevertheless, developing countries have been increasingly demanding for intellectual property regimes to reflect a more appropriate balancing of interests, to better serve health, education and culture, as demanded in the 2005 Draft Access to Knowledge Treaty (Fitzgerald, 2008). In relation to the TRIPs Agreement, the Sub-Commission on the Promotion and Protection of Human Rights (of the UN Commission on Human Rights) (2000) approved a Resolution asserting that the benefits of scientific progress and its applications are not adequately reflected through the implementation of the TRIPs Agreement.

The philosophy behind the copyright system is that whoever expends skill and labour to create, as well as taking the financial investment risks, in order to produce and market a material, should be allowed to reap the benefits. Accordingly, s/he should have the right to be protected so that there is an incentive to create materials for the betterment of the public. Copyright presupposes that the guarantee of protection and the possibility of controlling and being paid for the exploitation of copyright works would encourage authors and more learning materials would be created for the benefit of the wider community (Burkitt, 2001). However, there is also a social requirement that the works should be published and disseminated as wide as possible for public at large (Davies, 2002; Garnett, James, & Davies, 1999). It has rarely been advanced that the author's right to control the dissemination of a work is detached from appeals to the public interest (Cahir,

2005: 3). However, although private rights were grounded for the purpose of public interest, the public interest background has been forgotten, and those enforcing them, have ended up believing that the rights were granted exclusively for the purpose of protecting their individual private interests and in the midst of several judicial litigations, this public dimension of copyright, was later diverted into solely protecting the interest of the authors and publishers (private interests) (Cahir, 2005). Thus, the concept of copyright protection for the private interest aimed for the benefit of the public is confusing, and has led to some believing that the purpose of copyright law is to advance the non-individuated public interest, whilst others think that the purpose of copyright law is to secure the private interests of authors and publishers (Cahir, 2005: 6).

Copyright relates very much to education since the notion of "education" involves at least the development of knowledge and understanding, and some kind of learning. "Education" is increasingly associated with schooling, training and instruction conducted in special institutions, although it is originally derived from the Latin word *educere*, which was used to denote the rearing of plants and animals as well as children (Katz, 2010:101). Specifically within higher education, copyright law plays an important role in the implementation of the mission of a university, which is to promote service, research and scholarship. This is because a higher education institution can both be a producer as well as a consumer of copyright works. By having both roles to play, it is pertinent for higher education institutions to have a balanced perspective in terms of copyright as each impacts the others (Wagner & Karen, 1998). Failure to do so will lead to unnecessary barriers in accessing information and knowledge for the benefit of the public. For instance, a 'white paper' report on the study conducted by the Berkman Center for Internet and Society, examining the relationship between copyright law and education, found that the copyright law provisions concerning the educational use of copyrighted material, as well as the business and institutional structures, are among the most important obstacles to realizing the potential of digital technology in education (Fisher *et al*., 2006). 2.3 Balancing public and private interests

In each copyright system, there is a need to balance the copyright owner's interest in receiving adequate reward and the public interest in accessing works but all such systems should stress the importance of utilizing information as a foundation for growth and expansion of creativity and science for the benefit of all.

The balancing of rights is necessarily inherent to copyright, indeed those rights may even be regarded as a human right (Torremans, 2004). Article 27 of the Universal Declaration of Human Rights[11], straightforwardly deals with copyright law by granting the right to the individual author in Paragraph 1 and at the same time manifesting the rights of organized society in Paragraph 2, stating as follows:

> (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
>
> (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

However, the Universal Declaration of Human Rights is merely aspirational or advisory in nature, as it is not a binding treaty. Nevertheless, the Declaration has gradually gained importance, acquiring the status of customary international law, and has greatly enhanced the standing of copyright as a Human Right, although the provision is still deemed weak compared to provisions on basic civil and political rights.

A specific treaty article that imposes legally binding obligations on member states that become contracting parties to it, which followed and reflected Article 27 of the Universal Declaration of Human Rights, is Article 15 of the International Covenant on Economic, Social and Cultural Rights; it clearly provides that:

> […]

[11] adopted 10 December 1948 UNGA Res 217 A(III)

(2) the steps to be taken by the states parties to the present covenant to achieve the full realization of this right shall include those necessary for the conservation, development and the diffusion of science and culture.

(3) the states parties to the present covenant undertake to respect the freedom indispensable for scientific research and creative activity.

(4) the states parties to the present covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.

The inclusion of copyright in the international Human Rights instruments is highly controversial; there have been many criticisms and rejections. The copyright and intellectual property components of the various articles were only included because they were seen as tools to protect other stronger human rights, as the rights of authors and creators are understood to be an essential precondition for cultural freedom and for the participation in and access to the benefits of scientific progress (Torremans, 2004). Moreover the preamble of the WIPO Copyright Treaty 1996[12], in desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible, recognizes "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention".

The right to access information, science and art is linked to discovery, enlightenment and creation, which are vital for development; this process further leads to the creation of scientific, literary and artistic works, protected under copyright law, in order to encourage cultural productivity (Akester, 2010: 372)

Nonetheless, while copyright can be in harmony with access to information, which benefits the public as a whole, it can also pose challenges. Copyright benefits the public when it acts as an incentive for private entities to expend time and labour in

[12] Adopted in Geneva on December 20, 1996.

engaging in costly and risky research in order to produce more innovative and creative works for the benefit of the public. Thus, it is in the interest of the private copyright owners as well as the public to have strong copyright protection. However, when the public interest refers to a private user or consumer of copyright works, excessively strong protection of copyright will hamper free access to copyright works; this is an important consideration in research and scholarship. This can happen when private individuals are constrained from gaining access to copyright works due to high prices and availability problems. Here, conflict arises between the interest of the users, who want easy access to copyright works, against the interest of the copyright owners, who want robust protection of copyright law, enabling them to fully control and exploit their work. The expansion of copyright protection has further raised concerns that excessive enforcement of copyright law can actually limit public access to copyright works (Litman, 1994).

Nevertheless, defining "public interest" under the present copyright regime alone is problematic, as there are disagreements amongst the different stakeholders on how copyright law can actually be made beneficial to the public (UNCTAD, 2007). Supposing that "public interest" is a collection of the interests of each member of society, one must understand private interest (i.e. what is it that an individual wants) before one can understand public interest (Deskins, 1965: 76). In the area of copyright policy within higher education for example, Suthersanen (2003: 598) categorized primary and secondary stakeholders, who may have differing as well as common interests.

Primary stakeholders may range from groups of persons who are directly affected either positively or negatively by the copyright policy, which includes a) students who want cheap and easy access to reading materials but who may also want to publish their own research and build up their own portfolio; b) academics who take the role of authors wanting their works to be published and protected, as well as being major users of copyright works wanting easy access to copyright materials that can be used for teaching and for correlating their learning and research process;

c) universities wanting an upper hand in negotiating blanket licences, thereby ensuring access to copyright goods for the research community at a reasonable cost for the purposes of exploitation and dissemination, but also wanting protection for their IP goods in order to boost reputation and income; d) commercial publishers who expect copyright protection for the purposes of the production and sale of copyright database goods and licences, and royalty payments to authors, and e) other primary shareholder interests (Suthersanen, 2003: 598).

Secondary stakeholders who have indirect interests in the policy include intermediaries who are involved in the production of copyright goods within the educational sector, which in turn includes a) libraries that manage copyright materials for users lobbying for greater access to copyright goods in order to ensure maximum usage of library resources; b) collecting bodies that lobby for greater copyright protection, as they deal with the collection of licensing income for distribution to authors (this also includes negotiators acting on behalf of authors); c) media conglomerates who act as the ISPs and content providers involved in transmitting digital works, monitoring traffic of copyright goods, and ensuring clearance of rights (they lobby for clearer copyright rules, as they monitor and collect licensing income in respect of their own works; and d) governments that seek to widen access to higher education, increase research productivity, and make universities more cost effective, ensuring a sustainable higher education (they may also have an interest in supporting important ancillary industries e.g. publishing) (Suthersanen, 2003: 599). Nevertheless, despite a number of differences, the different stakeholders share the common interest of having their respective assets protected, while gaining access to others' assets (Suthersanen, 2003).

The problem in defining public interest in the area of copyright and education is also due to differing cultural and religious influences. Some have viewed that access to knowledge is considered a basic human right, which one should not have to pay for. Different cultures also have different concepts vis-à-vis public interest; the Muslim and Chinese cultures (Guanhong, 2004) for example, believe that

society's interest is the first priority, and in a certain sense is beyond any other private rights, including property rights.

2.2.5 Exceptions and Limitations

Like any type of private property right, copyrights are not absolute rights. Coexisting with the rights of authors and publishers to control and protect their works so that there is an economic incentive to create and disseminate, there is also the requirement that such rights be balanced to the extent that society can also benefit from the works (Marsnik, 2004: 111). Even those countries most committed to the advancement of authors' rights recognise the need for restrictions or limitations upon these rights in particular circumstances (Hugenholtz, 1997: 5). Numa Droz (1986: 105), the President of Switzerland, stated during his closing address at the first of the International Berne Drafting Conferences of 1884:

> "Whereas, for one thing, certain delegations might have wished for more extensive and more uniform protection of authors' rights, due account did also have to be taken of the fact that the ideal principles whose triumph we are working towards can only progress gradually on the so-varied countries that we wish to see joining the Union. Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion, by the public interest. The ever-growing need for mass instruction could never be met if there were no reproduction facilities which are at the same time, should not generate into abuses."

There is no definition in the international and regional instruments of the difference between a "limitation" and an "exception". Sometimes what is called a limitation in one law is called an exception in another (Sterling, 2003: 434). Copyright limitations can be in the form of permitted use subject to certain conditions (exemptions), compulsory licences, statutory licences or mandatory collective administration of author's rights (Guibault, 2002: 20-21). Under these exceptions and limitations, the users do not have the *right* to copy, as rights belong to authors,

but merely given the *permission* to copy (Okediji, 2006). Thus, there is still a risk of such acts being challenged and being defended in court.

The international copyright instruments, particularly the Berne Convention and the TRIPs Agreement, provide certain flexibilities, designed to enable countries coming from various social and economic backgrounds to adopt the laws that may best suit their interests and capacities. This includes parallel importation, compulsory licensing for translation, reproduction and publication, the requirement for fixation in material form, the idea-expression dichotomy, anticompetitive practices, the three step test, anti-circumvention provisions, exceptions in teaching, the quotation exception, exclusion of official texts and their translation from being copyrighted, political speeches and speeches delivered in the course of legal proceedings, data in compilations of data, the use of works in broadcasting, as well as minor reservations for educational purposes (Consumer International Asia Pacific Office, 2006). Under these exceptions, the use of copyright works can be free, provided the situation falls within the scope of the exceptions provided in the relevant statute. This usually refers to the requirement of "fair dealing", which generally means that there is general permission to copy as long as it does not harm or prejudice the interests of copyright holders. Fair dealing can be defined (Tawfik, 2005a: 1) as:

> "a formulation known to jurisdictions that evolved our of the British common law copyright system and is designed to permit reasonable access to copyright works for purposes deemed to be in the public interest, such as research or study. It is structured as a free use exception, namely one not requiring prior permission or a royalty payment for the use".

Fair dealing applies to specific purposes only. Dealing is a form of general behavior and what is fair is left to the courts to decide. Instances of fair dealing include copying for private study, which should be purely personal and should only benefit the person himself, copying for research that has non-commercial purposes (copies must however be acknowledged as long as it is practicable), copying for the purposes of criticism and review, for news reporting, and for the purpose of

education and libraries; all these acts (subject to further conditions) are not considered as infringing copyright.

2.2.5 Justifications of exceptions and limitations

Limitations imposed on the exercise of exclusive rights under copyright law can be based on many considerations such as for defence of fundamental rights, limitations based on competition law considerations, limitations based on public interest consideration and limitations based on market failure (Guibault, 2000). Limitations to copyright in respect of education for instance, are based on the major public interest considerations, such as the promotion of education and culture (Guibalt, 2000: 137).

Making works available for public interest has a lot of advantageous since its availability could enhance both pleasure and profit, as it can decrease the costs for further innovation, open the opportunity for exchange of ideas, networking, public funding and support (Picciotto, 2002: 1). Moreover, it is the interest of authors to disseminate and make known his or her creations. There is also a need for ready availability of some works in which a public interest justifies overriding the private rights of authors in their works in these particular circumstances regardless of the author's consent, but subject to the payment of appropriate remuneration (Ricketson, 2003: 4).

Exceptions and limitations are also meant to prevent monopoly control (Sterling, 2003). While sufficient protection of copyright works is important to encourage commercialisation, it is vital that the extent of monopoly is curtailed and optimum social benefit is ensured due to the fact that "intellectual property right are exploited not by authors or inventors, whose creativity they are supposed to reward, but by large information-based corporations" (Picciotto, 2002: 1-2). Appropriately designed limitations and exceptions may act as a mechanism of access and "contribute to the dissemination of knowledge, which in turn is essential for a variety of human activities and values, including liberty, the exercise of political

power, and economic, social and personal advancement … open up rapid advances in information and communication technologies that are fundamentally transforming the processes of production, dissemination and storage of information" (Hugenholtz & Okediji, 2008: 10-11).

2.4 Copyright in international and national laws

In today's globalized world, the scope of copyright protection available in other jurisdictions is highly relevant to a work's creator and owner as works of authorship, whether entertainment or informational, can be disseminated around the world easily through the Internet and no more confined to a single jurisdiction (Perlmutter, 2002: 326). Companies that produce and distribute content are often multinational, or at least operate their businesses across national borders. In respect of research and education, collaborative projects and research cooperation between higher education institutions in various countries have constantly been designed, funded and developed. Occasionally, these educational activities are restraint as a result of difficulties in accessing works due to copyright restrictions which is different from one country to another. Although international copyright law allows certain exceptions and limitations to copyright protection for the purpose of education, its implementation is largely depending on the discretion and interpretation of individual countries according to their needs and circumstances. Hence, different countries' laws would affect each other, as they deal with intersectional issues (Perlmutter, 2002: 326). The copyright balance, and its effect on incentives and the public interest, can no longer be confined to a purely domestic sphere.

Layers of substantive international law to protect copyright works or creative expression is created by the TRIPs Agreement (substantially based on the Berne Convention for the Protection of Literary and Artistic Works 1886), the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) 1996, the World

Intellectual Property Organization Performances and Phonograms Treaty 1996 (WPPT) and several bilateral and regional free trade agreements (FTAs) entered between countries (Okediji, 2005a: 3). These international instruments generally specify the minimum standard to follow although the scope of copyright protection has gradually been expanded over the years. However, the matters of legislating exceptions and limitations for the most part are not mandatory (Hugenholtz & Okediji, 2008: 36) and depends on discretion of member states whether and how to implement the limited number of exceptions and limitations included in the Berne Convention, but its application are usually restricted by international treaties. Hence, limitations and exceptions introduced by national laws and international and regional instruments cover a variety of activities, and differs from country to country (Sterling, 2003: 435). Similar to the position before Berne Convention came into place, there are significant variation to the state practice, where states implement very few of the exceptions and limitations in their domestic legislation and other states implementing them only selectively (Hugenholtz & Okediji, 2008: 36). Thus, although copyright works are protected at both international and national level, there is no single international copyright law and it is only applied based on the law of particular jurisdictions (Wadlow, 1998).

The application of copyright law at the international level contains both important similarities as well as differences from one country to another (Crews & Ramos, 2004). Similarities and consistencies in the laws of individual countries exist due to establishment of international copyright conventions, bilateral treaties and international trade agreements. The rule on copyright law has significantly evolved from being a domestic matter based on national laws into one of the important international law governing countries around the world. The international copyright system has played a central role in shaping the course of domestic legislation that is capable of fulfilling the public good (Okediji, 2006). The Berne Convention, being an international treaty that only binds countries that signed and recognize it led to differences in the protection and enforcement of copyright protection among countries. This leads to tension in the international economic

relations. Difficulties arose from different application of copyright law from one country to another, especially with respect to the criteria for protection, scope of protection, what constitute infringement and etc (Mazeh, 2002). The effects of the TRIPs Agreement on countries also vary based on the degree to which these countries had established a domestic system of copyright protection prior to becoming WTO members. For example, many developing countries such as Hong Kong, Indonesia, Singapore, and Guatemala were not parties to the Berne Convention prior to becoming WTO members. Thus, by becoming parties to the WTO, many of these developing countries committed themselves to a higher level of domestic reform with regard to the copyright legislation in their country.

Although all countries acknowledge the importance of exceptions and limitations to copyright law for the benefit of educational activities, no standard approach or uniform formula was adopted. The international treaties are supplemented by national laws which differ widely between individual countries (Crews & Ramos, 2004; Sterling, 2003). The assessment by the national legislator on the extent of limitations adopted for the benefit of educational and research institutions varies significantly from one country to the next (Crews & Ramos, 2004; Guibault, 2003; Xalabarder, 2004). In other words, national legislatures retain a great measure of discretion in the way in which they interpret and implement their international copyright obligations (Tawfik, 2005b). These variations are understandable and recognized or even encouraged by the provisions of the international and regional instruments allowing countries to make their own decisions, within certain parameters, as to the restrictions to be imposed. This is purposely meant to be left to the national legislators' discretion so as to suit the individual countries diverse political, economic, social and cultural interests and needs. For instance, some countries supplement their exceptions pertaining to educational activities to allow educational institutions, teachers and students alike to take extracts and use quotes from diverse sources, some countries implemented statutory, voluntary or compulsory licensing arrangements to enable the use of multiple reproductions of works in educational institutions and some countries supplemented these

exceptions with generic fair use or fair dealing exceptions or even residual exceptions based on the three-step test set out Article 9(2) of the Berne Convention and Article 13 of TRIPs (Seng, 2009: 1).

The role of limitations and exceptions was emphasized to be extremely important for developing countries as they are considered indispensable strategic and doctrinal tools to facilitate economic development by providing citizens with the basic means to engage in intellectual endeavours and to participate in the global knowledge economy (Okediji, 2006). These flexibilities allowed by the international copyright systems were approached differently by countries in their formulation of domestic copyright policy.

2.5 Conclusion

Copyright laws aims to encourage and promote learning and progress by protecting copyright owners work for a limited time. It was hope that through giving incentive to the authors, more learning materials could be created for the benefit of the community. In order to address the needs of the public to access of copyright work in the area of education, copyright law provide for exceptions and limitations to copyright protection. The issue of balancing the rights of authors, publishers and copyright owners with the users' right and need for the free flow of information is however left to the respected individual countries and governments to apply the law that best suits their developmental needs.

The next chapter will continue the discussion by focusing on a particular country, namely Malaysia with regards to its approach to copyright law, its circumstances as a newly industrialized country in providing legal education in the universities as well as the causes and dilemma it has to encounter which led to copyright infringement in the country.

Chapter 3: Malaysian Copyright Dilemma in Legal Education

3.1 Introduction

This chapter provides some background to the law courses in the Malaysian higher education system. It describes the various public and private institutions that offer law courses, the stakeholders directly or indirectly involved in teaching and learning such courses, as well as the methods employed for the delivery of law courses in Malaysia. This chapter further explains the most important copyright problem affecting higher educational institutions, and the causes of that problem. This chapter then outlines the historical background of the Malaysian copyright law, which was inherited from British colonization, and details how the colonial copyright law was then forced into the national laws of the country; this law was then developed and gradually strengthened to comply with international obligations. This chapter also explains in detail the copyright status of the materials commonly used in law courses by differentiating between publicly generated law materials, which do not have any copyright protection, and privately generated law materials (existing in various forms), which are protected under the Malaysian copyright law. All this information sets the stage for an initial understanding of the formal legal education system in Malaysia. This is important for analysing the purposes, beneficiaries, works, rights and other matters relating to copyright law, teaching, research and private study, all of which will be discussed in the subsequent chapters.

3.2 Education in Malaysia

Education is a top priority in order for Malaysia to achieve 'developed nation' status, as laid out in Vision 2020. This was evident when the then Prime Minister of Malaysia, YAB Dato' Seri Abdullah Bin Haji Ahmad Badawi, in his statement contained within the National Higher Education Action Plan (2007: 3), stated that in order to realise the national aspirations and to achieve the development objectives:

> "[a] concerted effort is needed to increase our nation's competitiveness, productivity and innovativeness. Attributes such as desire for knowledge, innovative thinking, creativity and competitiveness must be imbued within our people… This will determine our success as a knowledge-based economy. Given this, the National Mission and Ninth Malaysia Plan have stipulated the development of first-class human capital as one of the five national development thrusts. The success of our human capital development agenda rests in large part on the quality of the national education system."

Under this objective, increased funding has been assured by the Malaysian government for improving the quality of education and training in order to increase innovation and human capital development. Such efforts are incumbent on the Malaysian government to demonstrate the seriousness of its support for the educational system in Malaysia, despite the fact that the Malaysian Constitution (1957) does not guarantee the right to education (as in the case of the right to property under Article 13 of the Malaysian Constitution) but merely provides safeguards against discriminatory exclusion from education (Article 12 of the Constitution). Malaysia also reserved the right not to make education free and compulsory when it ratified the Convention on the Rights of the Child, although Malaysia declared that primary education would be available to everybody; all-encompassing primary education has since been attained and in 2003 it was made compulsory across Malaysia (Tomasevski, 2006: 137).

Legal education is particularly important in protecting the rule of law and democracy as a whole. Through legal education, society can function more peacefully and without much conflict. The role of law schools in imparting legal education and in developing the law society of the future is central to the development of a country. Investment in providing sufficient and reasonable access to important sources of law and legal materials without undue restrictions from copyright law benefits a nation and helps to accelerate the pace of development. Failure to provide access to legal materials will affect not only the law students but consequently the country's justice system in terms of providing the right to due process i.e. the right to be treated fairly, efficiently and effectively; this lies at the heart of the common law system of justice as well as being embodied in the European Convention on Human Rights[13], in the International Covenant on Civil and Political Rights[14] and in the law of every democratic country throughout the world.

According to the UNESCO Institute for Statistics (2009), Malaysia is among the few governments of developing countries whose public expenditure per student is as much as those of developed countries i.e. exceeding PPP$ 5,000 per student per year (UNESCO, 2009: 50). According to the same statistical analysis, Malaysian spends around 60% of GDP per capita on tertiary education per student. This is a great deal compared to the UK which spends only 30 to 33% and Australia at around 25% (UNESCO, 2009).

Malaysia is also one of those countries that send significant numbers of students abroad (46,500) (UNESCO, 2009: 37). Malaysia, despite its population of approximately 28.7 million, is among the group of countries that together account for 37% of the world's mobile students[15], sending abroad fewer students than only

[13] Article 5 (the right to liberty) and 6 (the right to a free trial)
[14] Article 9 and 14
[15] Internationally mobile students leave their country or territory or origin and move to another country or territory with the objective of studying.

China, India, Republic of Korea, Germany, Japan, France and the USA. Comparatively, the UK and Australia were among the top countries for hosting the world's mobile students (UNESCO, 2009: 37). Seemingly, Malaysia still relies very much on other countries' expertise in tertiary education, particularly compared to the UK and Australia. Based on the Organisation for Economic Co-operation and Development (OECD) Statistics for 2005 (OECD, 2007), most Malaysian students who studied abroad chose Australia (36.4%) and the UK (26.8%) as their preferred destination. An illustration of the major countries that send students to study abroad as well as countries that host international students is presented in Figure 3.1 and Figure 3.2 below.

The above reasons as well as the statistical comparisons present the justification for why Malaysia was chosen as a sample country to represent developing countries that are earnestly dedicated to seeking education across jurisdictional borders, especially to Australia and the UK. It would therefore be interesting to study the similarities as well as the differences in terms of the application of copyright law in all three countries, namely Malaysia, Australia and the UK, which cooperate very closely in the context of education.

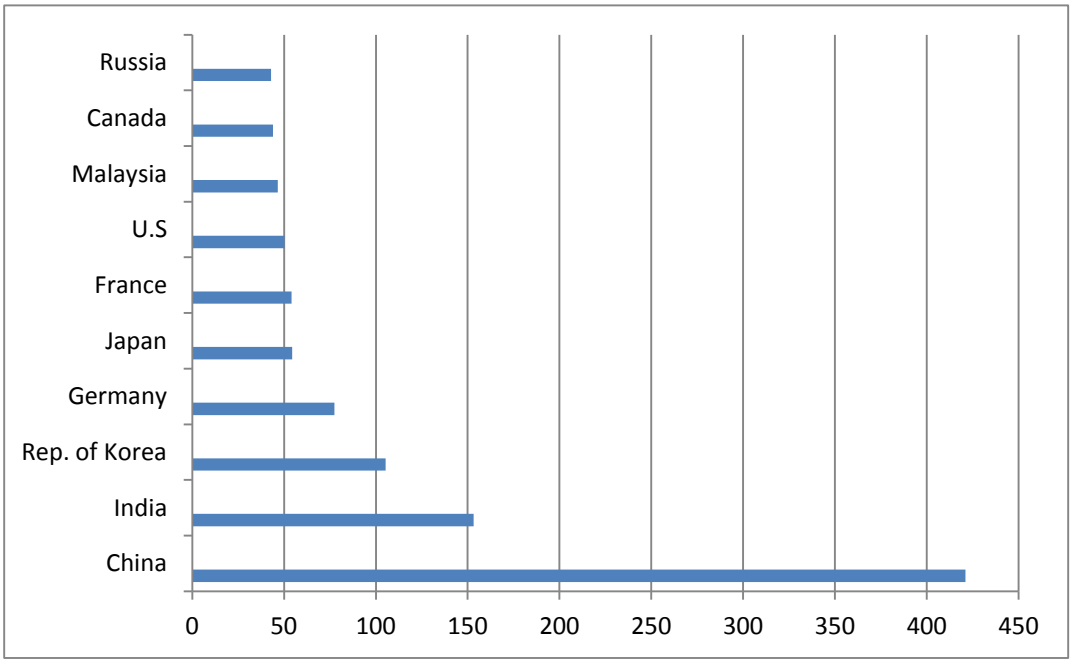

Figure 3.1: Countries accounting for 37% of the world's mobile students.
Source: UNESCO, Global Education Digest 2009

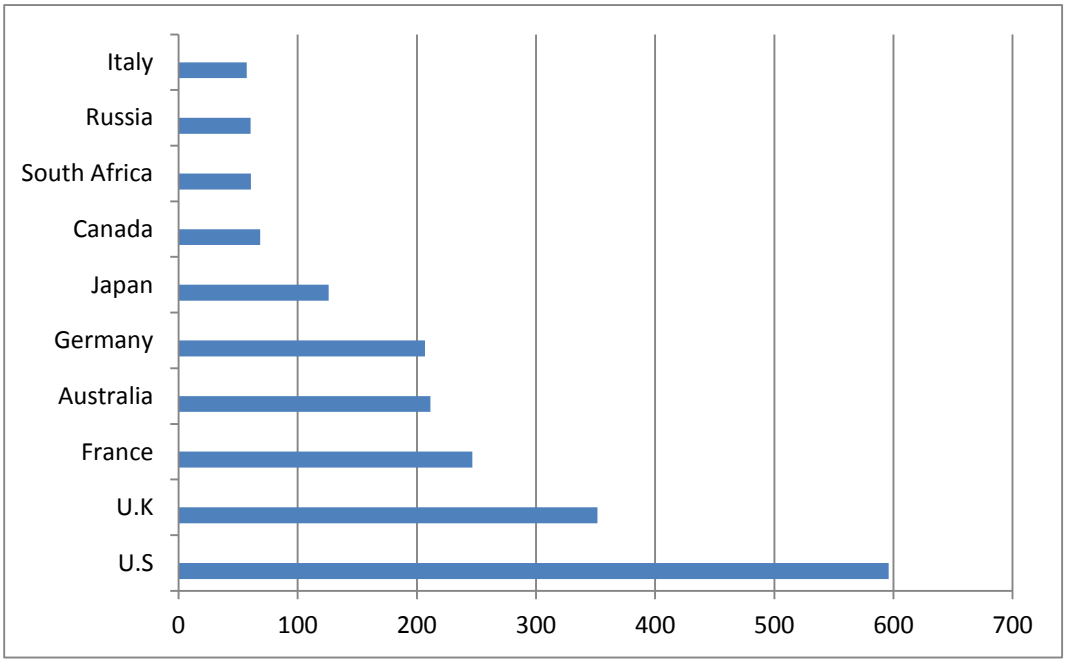

Figure 3.2: Countries hosting 71% of the world's mobile students.
Source: UNESCO, Global Education Digest, 2009

3.2.1 Legal Education in Malaysian Public and Private Institutions

According to the Ministry of Higher Education (2009: 284), higher education in Malaysia involves more than 900,000 students pursuing higher education in 20 public universities, 33 private universities and university colleges, 4 foreign university branch campuses, 22 polytechnics, 37 community colleges and about 500 private colleges. There are also various higher educational institutions (HEI) from the UK, US, Australia, Canada, France, Germany and New Zealand, which offer twinning and "3+0" degree programmes through partnerships with Malaysian colleges and universities. Both public and private educational institutions play an equally important role in the provision of tertiary education to Malaysia.

Law courses are offered widely by both public and private institutions. Five public universities, mainly funded by the Malaysian government, offer legal education, including the University of Malaya, Universiti Kebangsaan Malaysia, the International Islamic University of Malaysia, Universiti Teknologi Mara and Universiti Utara Malaysia. Other than the public universities, law courses are also taught in various private universities and colleges. The private universities and university colleges are governed in accordance with the Private Higher Educational Institutions Act 1996. Some private universities and colleges offer UK or Australian law degrees, such as the University of London External, Help University, Taylor's University, and Stamford College.

From early 1960s to mid-1990s, the government has been the absolute provider towards funding of public universities, thereby keeping low tuition fees for students (Foong, 2008). Nevertheless, the policy of financing higher education in Malaysia shifted in 1996 where private sector was encouraged to participate in the higher education subsector due to financial crisis, the Vision 2020 policy as well as external influences from the advanced economies, thereby moving the higher education industry towards more market-oriented policies (Foong, 2008).

The Malaysian higher education sector is rapidly becoming a centre of educational excellence in Asia. The government is also initiating many programmes to keep pace with the ever-changing world of education, to satisfy the needs of today's students, and to develop a well-structured higher education system. The government has also clearly outlined the strategic imperatives that underpin the National Higher Education Strategic Plan, designed to make Malaysia an international centre of educational excellence by 2020.

3.2.2 Participants in Legal Education

Legal education in Malaysia involves various bodies and professionals, ranging from the institutions that offer law courses, which are chiefly the public universities, private universities and colleges, to the lecturers, who are generally fulltime lecturers, engaged to teach on a contractual basis, or law practitioners who also give law lessons on a part-time basis. The lecturers are sometimes assisted by tutors, particularly when conducting seminars or tutorials. The students doing undergraduate degrees or postgraduate law research may be government sponsored, sponsored by private organizations, or self-sponsored, and can enrol in part-time or fulltime studies. Government departments and private firms sometimes undertake to give practical experience to law students in the course of their studies.

3.2.3 Trends in delivering legal education in Malaysia

The most common way of teaching in the Malaysian institutes of higher learning is through giving lectures to large numbers of students (Fong, 2007: 14). There are also seminars and tutorials, where students are grouped to discuss and analyse certain topics of interest. Lecturers normally prepare notes and copy them onto transparencies or into PowerPoint in order to teach certain legal principles or cases to the class.

The method of delivery is becoming highly complex due to recent developments in ICT, which was strongly emphasized under the Ninth Malaysian Plan. The use of

ICT in Malaysia is further being encouraged by certain government initiatives, such as the Malaysian Superhighway Corridor (MSC) and Vision 2020, which emphasizes the use of ICT as the main impetus in bringing Malaysia into the digital and global 21st Century. According to the Internet World Stats website (2010), in 2010, out of a population of 26 million, 16,902,600 or 64.6% are Internet users and the number of subscribers is expected to increase further due to the growing trend of Internet use as Malaysia moves towards advanced information, communications and multimedia services.

The use of ICT in educational institutions has various advantages. It is claimed to be convenient, self-paced, individualized and interactive, as well as fast, cheap, and providing learning everywhere, anytime, reaching geographically isolated or place-bound populations (UNESCO, 2009a). Such benefits allow flexible delivery, which in turn avoids redundancies or the costs associated with employing new lecturers according to how times change. Limited budgets and mounting demands for higher education further entice one to believe the private sector providers arguments, that they can supply cheap on-line education without the necessity of employing highly paid professors or using expensive buildings (Knapper, 2001: 93-94). The fact that this completely distorts what is involved in a meaningful educational experience may be irrelevant if the public can be persuaded that university education is largely a matter of providing information (Knapper, 2001: 93-94). Moreover, ICT provides a rich space for learners to collect quality information from various areas of knowledge and opens up the opportunity to create, manipulate and share information, expertise and experience (Kuksa, 2008: 75). Even though ICT does not replace classroom-based modes of teaching or learning, it is increasingly utilized by higher education institutions worldwide (UNESCO, 2009).

In addressing the current developments in ICT and its various benefits, the Report by the Ministry of Higher Education Malaysia (2006) for Committee to Study, Review and Make Recommendations Concerning the Development and Direction

of Higher Education in Malaysia acknowledged, emphasized and developed strategies to take advantage of the growing importance of ICT in teaching and learning as well as research towards achieving excellence. As a result, most universities and colleges in Malaysia are also now allied to the Internet (Yaakub, 2000). Based on the Education Guide Malaysia (2011), teaching is no more limited to traditional classroom teaching, but includes e-learning, distance learning, flexible learning, open learning, cross-border learning and mixed learning. Distance learning has been around for more than half a century in Malaysia, since Universiti Sains Malaysia introduced its off-campus programme in 1970 (Alhabshi, 2005: 1-2). Nevertheless, the first e-learning initiative was only conducted two decades after Internet had been operative in Malaysia, which was by Universiti Tun Abdul Razak in 1997/8 (Alhabshi, 2005: 2). Despite the infancy of virtual education in Malaysia, some educational institutions in Malaysia are already offering full degrees to students through virtual classrooms, while others are formulating new courses. The use of information and communication technologies has now emerged as a part of on-campus delivery as well as open and distance modalities of higher education delivery. New types of instructional materials, including compacts disc, tutorials over the Internet, films, and narratives are used in legal education (Fong, 2007: 15).

The university system normally requires that lecturers provide their students with a synopsis of the subject, assessment tasks, a broad outline of the necessary materials and important datelines. However, it is up to the lecturers to decide the sort of materials that are to be used, whether based on a certain selection of textbooks or utilizing his/her own case materials; it is up to the lecturers to choose their own way and materials in developing their subjects. In such circumstances, it is normal for educators to rely heavily on copyrighted books, newspapers, magazines, and sometimes photographs, videos, slides, musical works, or sound recordings, in the course of teaching their students. These resources are sometimes integrated with the educators' own original works in a meaningful way, providing compact educational tools that allow great flexibility in teaching and learning. In the course

of teaching, modern technological equipment and appliances are utilized, such as overhead projectors, PowerPoint, videos, sound recordings, CD-ROMs and also the Internet.

In certain circumstances, a lecturer might take advantage of ICT and upload articles, photos, videos, or other kinds of copyright works into a portal for students to access at their convenience for the purposes of preparing before or studying after class. This may be done through the university portal or through their own blog. Normal trends in using ICT for teaching include lecturers developing course materials, making presentations, giving lectures, conducting academic research, sharing and delivering detailed module materials or lecture notes and organizing seminar activities. PowerPoint slides are uploaded prior to giving a lecture, and Hypertext links into key materials, both within the lecture notes and the reading lists are also used. Questions or quizzes are sometimes made available online. A reflective podcast on key issues from the classroom is also accessible following delivery of the session. Additionally, ICT is also used for communication and administrative support.

Malaysian universities also provide websites with basic tools to enable communication between lecturers with their students and to send materials. Staffs are expected to send out notices, upload PowerPoint or other files, and key in marks for assessments on the website. Internet-based materials used for teaching are constantly improving and the development of online units is also well supported. Consistent with the development of the virtual learning environment available in the great majority of institutions, especially in the developed world (Brenton, 2009), the majority of institutions in Malaysia also have a virtual learning environment (VLE). VLE typically includes "a chat room; a discussion board; a calendar; an announcement feature; a tool for building online assessments; a function for setting work …; a way to upload, order, index and time-release learning materials; a glossary; a tool for providing web links; a way to track

students' activity in the VLE; and a facility for displaying syllabus information" (Brenton, 2009).

In terms of learning law in Malaysia, previously, law students were expected to write up their notes taken from the lecture or tutorial as well as to find the relevant cases on their own from the library or from casebooks. Students were then expected to work independently in groups to understand, analyse and make use of the materials learnt, and to discuss any problems relating to the subject during tutorials. Sometimes, students were also asked to make presentations on certain topics to the class. Students were then assessed through assignments or formal examinations. With the coming of the digital age, students are now provided with facilities that enable them to plug in their laptops or utilize networking to bring up the relevant law page, browse law database for cases or other related materials, and then refer to them in the classroom, allowing any subsequent discussions to thread off in different directions based upon those materials. These facilities are commonly available in the Malaysian higher education institutions. Similar to the astounding uptake and acceptance of electronic resources by students in developed countries (Johnstone & Vignaendra, 2003: 406), most Malaysians also seem to want to use on-line sites, apart from a small minority who complain that the speed of the Internet is slow. Students often request that lecture notes and materials be uploaded for easy access, although printed modules are preferred to on-line texts and the Internet for communication (Poon, Low, & Yong, 2004: 375).

3.3 Copyright Problems in Malaysian Education

The task of analysing the copyright provisions on exceptions and limitations in Malaysia should also take into account the problems as well as causes that have led to copyright infringement in Malaysia. This information is important because any future recommendations that may follow will have to consider best practice in terms of addressing issues according to the circumstances of the country in question.

According to the International Intellectual Property Alliance 2010 Special 301 Report on Copyright Protection and Enforcement (2010), Malaysia remains on the Watch List, with an Out-Of-Cycle Review to monitor the Malaysian government's progress in order to ensure a decrease in the level of copyright piracy, by concentrating on certain areas of concern. Malaysia is placed at the lower level of the Watch List, which indicates that copyright is an issue of concern but not such a big issue that it poses a threat to US businesses, unlike China, Russia, Canada, Algeria, Indonesia, Argentina, Chile, India, Israel, Pakistan, Thailand and Venezuela (Anonymous, 2009). Similar to situations in other countries, most copyright infringement cases in Malaysia involve software, films and music. Books and literary works remain the least pirated copyright works i.e. only 10% in Malaysia (Azmi & Abdul Rahman, 2008: 91).

The most common copyright infringement involving literary works is book piracy, where local publishing and printing houses publish or print books without any authority or paying royalties, and sell them cheaply in the market. People also are sometimes able to download books from the Internet and reprint them in their homes or offices. Another wide copyright infringement involves the massive illegal photocopying of academic books. The International Intellectual Property Alliance (2009: 239) Special 301 Report on Copyright Protection and Enforcement reporting on Malaysia, reported that in 2008, the level of illegal photocopying had increased, mostly in the many shops that exist in or around universities as well as in students' residential areas. These photocopying services are available on request, and sometimes popular academic books are photocopied in bulk beforehand to ease business in order to satisfy the demands of so many students (Azmi & Abdul Rahman, 2008: 94). The problem is further exacerbated by lecturers, who often provide sample copies they receive from publishing representatives to be used as masters for illegal photocopying. The practice of photocopying books is even more preferred by tertiary students as it is more economical, especially as they only need parts of works for their studies (Azmi & Abdul Rahman, 2008: 76).

Apart from literature piracy of the hardcopy of copyright materials, there is also the illegal downloading of copyright materials from the Internet. Although literature piracy on the Internet is less common than music or film piracy, the unauthorised re-use and distribution of works, plagiarism and associated infringements are just as harmful to the respective authors and their associates (Wallace, 2004: 2). Research conducted on academic literature piracy in 2009 reported that illegal downloading is considered a behavioural and attitudinal issue, rather than a legal one, among young people, especially students (Hunt *et al*., 2009). While there are conveniences and advantages for flexible learning and distance education, this situation increases the opportunities to misuse the fair dealing doctrine in planning and designing curricula and courses. Students are also more prone to committing copyright infringement as they feel that no one is watching them, this is especially so when they are off campus.

Lecturers may also find themselves plagiarizing fellow faculty members' work from a different campus (Nemire, 2007); in September 2009, two academics from Universiti Putra Malaysia, a professor and a junior author who had recently completed her PhD, were exposed for plagiarizing a substantial amount of material from several foreign university websites in a guidebook on writing effective resumés for their management students six years ago (Phang, 2009: 1). The junior author did not cite the articles in question as she thought that information taken from the Internet was in the public domain. They were both given stern warnings by the university management, required to return any royalties received and the guidebooks were removed from the university shelves immediately. To this end, responses in various blogs[16] on the Internet showed that many people condemned the lecturers and the lackadaisical attitude of the university in dealing with the issue

[16] http://ctchoolaw.blogspot.com/2009/09/upm-lecturers-hauled-up-over-plagiarism.html ; http://www.azizikhan.net/?p=126 ; http://malaysianunplug.blogspot.com/2009/09/professor-turiman-suandi-and-dr-zoharah_23.html ; http://abangraja.blogspot.com/2009/09/2-pensyarah-upm-kantoi-plagiat-research.html

(Fook, 2009), while others were more sympathetic; importantly, some were even unaware or uncertain that copying from the Internet is actually plagiarism.[17]

3.3.1 Causes of copyright infringement in higher education institutions

The high level of copyright infringement occurring in higher education institutions is due to various reasons, such as the high pricing of educational resources, reliance on foreign publications, limited resource centre, inadequate governmental websites, exploitation of local and foreign commercial publishers, low levels of copyright awareness, uncertainties and differing values pertaining to intellectual property.

a) High prices of educational materials

Legislations, prepared by the Federal or State Government Gazettes are sold to the public at a nominal cost and the general Indexes of all Acts, Enactments and Ordinances are also easily available in the Malaysian market except for comprehensive and up-to-date index of federal or state subsidiary legislation that is neither available in the market nor in most law libraries which pose serious problem to access this source of law (Faruqi, 1992). Nevertheless, the costs of obtaining secondary sources of law which is important in leading to the relevant legislation and case law such as textbooks, monographs, handbooks, journals, encyclopaedias is costly or too high compared to the students limited financial resources which ultimately resort them to copyright infringement or extensive photocopying.

The table below presenting a comparison of the prices for law books in the UK, Australian and Malaysian bookstores shows the relatively high costs that have to be

[17] http://komuniti.iluvislam.com/index.php?/topic/21726-dua-pensyarah-upm-hadapi-kes-plagiarisme/

borne by the Malaysian students (see Table 3.1). From the table it can be seen that the books are priced at local prices together with their US Dollar equivalents.

Book Title and Author	**UK (GBP)**	**Australia (AUD)**	**Malaysia (MYR)**
Nutshells Criminal Law (2011) 9th ed. by Clough, J., Jackson, A. & Wortley, N.	10.95 **[$17.29]**	38.99 **[$39.47]**	59.13 **[$18.77]**
Studying Law (Palgrave Study Skills) (2011) 3rd ed. by Askey, S. & McLeod, I.	13.09 **[$20.67]**	50.99 **[$51.62]**	87.95 **[$27.93]**
International Economic Law (2011) 3rd ed. by Qureshi, A.H. & Ziegler, A.	38.95 **[$61.51]**	101.99 **[$103.26]**	210.33 **[$66.79]**
The English Legal System (Routledge Revision Questions & Answers) 9th ed by Slapper, G. & Kelly, D.	28.99 (2009-2010) **[$45.78]**	33.95 (2009-2010) ebook **[$34.37]**	83.98 (2011-2012) **[$26.67]**
Clerk and Lindsell on Torts by Dugdale, A. M. & Jones, M. A. (Hardback) (2010) 20th Rev. Ed.	335.00 **[$529.03]**	1,243.99 **[$1,259.70]**	1809.00 **[$574.47]**

Table 3.1: Prices for law books in the UK, Australian and Malaysian bookstores. National Currencies converted to $US purchasing power parity estimate 1 USD = 3.16 MYR, 1 USD = 0.63 GBP, 1 USD = 0.99 AUD as on 17/11/2011

Despite the high prices for books, allocation of monies by the major sponsors of most students to purchase books is only around Ringgit Malaysia (RM) 250-320 per year (equivalent to £51 - £65), while the cost of buying an essential legal textbook is around RM 70-200 (Azmi & Abdul Rahman, 2008: 94). A similar situation was reported in another study (Higher Education Expenses and Cost-Sharing in Malaysia) conducted in 2007, which found that the expenses on books and other educational materials normally borne by parents or students in one

academic year is only around RM400 to RM600, which is considerably less than the other necessary expenses that they have to bear[18] (see Table 3.2 below).

		Public university	Private university
	Special 'up–front' fees	600 RM [$346]	540 RM [$311]
Instructional expenses	Tuition	1,102 RM [$635]	15,200 RM [$8,765]
	Other fees	196 RM [$113]	940 RM [$542]
	Books & other educational expenses	400 RM [$230]	600 RM [$346]
Student living expenses	Lodging	4,500 RM [$2.595]	5,000 RM [$2,883]
	Food	9,500 RM [$5.478]	4,500 RM [$2,595]
	Transportation		3,000 RM [$1,730]
	Other personal expenses		6,000 RM [$3,640]

Table 3.2: Higher Education Expenses Borne by Parents and Students, First Degree, Academic Year 2007 (10 months).
National currency (Ringgit Malaysia (RM)) converted to $US by World Bank ICP 2005 purchasing power parity estimate $1 = 1.734RM

Looking at the cost of books and the allocation of monies for books above, a student can only purchase four or five original books per year. For a comparative example, the total cost of buying several books of RM400 each is more or less the cost of a month's rent for a three bedroom semi-detached house outside the city centre. A similar amount could also be used to buy lunch and dinner every day for a month. In short, the costs of books are relatively high in the local economy. Table 3.3 summarizes a rough estimate of a student's monthly living expenses in Malaysia, as provided by the Malaysian Universities Guide (2011).

[18] The expenses under "Public university" are based on publicly-supported tuition and students living in university accommodation. The expenses under "Private university" are based on private tuition and students living in apartments.

Type of Expenses	**Expenses (RM)**
Accommodation	350
Food	400
Transportation	150
Stationary and study materials	200
Misc. expenses	300
Total	1,100

Table 3.3: Estimate of a student's monthly living expenses in Malaysia

These detailed breakdowns of expenses reveal the much higher costs that need to be borne by the Malaysian students. For example, their telephone bills are around RM50-100 a month, a typical electricity bill ranges from RM50-100, and Internet charges are around RM100 a month. By way of comparison, a washing machine costs RM1000-1500 and a refrigerator RM1000-2000 (Malaysian Universities Guide, 2011). Thus, the cost of books for Malaysian students are disproportionately high, especially when compared with their other living expenses as well as with their income. Unsurprisingly, this problem has created much demand for photocopying facilities in and around university campuses. Thus, compared to developed countries such as the UK and Australia, photocopying academic books is appealing because books are expensive relative to the cost of living.

It could be argued that there are cheaper books elsewhere in the world, and that one way of dealing with the problem of expensive books could be through parallel importation. Parallel importation is an important tool for addressing the public interest; it involves the importation of books from a country where they are sold at a lower price, so that domestic consumers can have access to cheaper books. Parallel importation is pertinent "for international trade and management especially due to the advancements in technology, communication and transportation that blur the geographical boundaries among countries" (Yasin *et al*., 2009: 103). Parallel

imports are direct imports of legitimate copies of goods from overseas for commercial resale, bypassing the authorised supply channels in the importing country (Vautier, 2004: 1), and whether or not the parallel import of copyright work is allowed in a particular country depends on the right of the copyright owner being 'exhausted' in terms of control of sale, transfer or other distribution (Consumer International, 2006). Article 6 of the TRIPs Agreement leaves it to member countries to determine their own policy on parallel importation; its provides on the issue of exhaustion as follows:

> For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4, nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

Thus, countries are free to frame the law so as to allow the parallel import of copyright materials from places where such materials are available at lower prices. Using this discretion given by Article 6 of the TRIPs Agreement, Malaysia has chosen to allow parallel importation seemingly for internal economic reasons (Hawin, 2004). Malaysia has many publishing companies and relaxation of parallel importation in Malaysia could potentially affect these companies, but Malaysia is a net importer (consumer) of intellectual property products and it is viewed that it is more important at present to give protection to consumers than to indigenous creative activity. The view that a policy allowing parallel importation always harms the local industry has yet to be substantiated. For example, in the minutes by the LegCo Panel on Trade and Industry (1997), it was pointed out that Australia's relaxation of the parallel importation of books under certain conditions did not jeopardise the growth of the local publishing industry, rather it increased competition and, as a result, enhanced the development of the industry.

Malaysia has weakened its restrictions on parallel importation pursuant to the Copyright (Amendment) Act 1990, where Section 36(2) of the Copyright Act 1987 implicitly allows the parallel importation of goods that are subject to copyright; it provides as follows:

> (2) Copyright is infringed by any person who, without the consent or licence of the owner of the copyright, *imports* an article into Malaysia for the purpose of -
> (a) selling, letting for hire, or by way of trade, offering or exposing for sale or hire, the article;
> (b) distributing the article -
> (i) for the purpose of trade; or
> (ii) for any other purpose to an extent that it will affect prejudicially the owner of the copyright; or
> (c) by way of trade, exhibiting the article in public,
> where he knows or ought reasonably to know that the making of the article was carried out without the consent or licence of the owner of the copyright. (Emphasis added)

Parallel importation is thus allowed in Malaysia provided that the parallel imports are produced with the consent or license of the copyright owner. Even if they are not so produced, any lack of knowledge on the part of the parallel importer that they are not so produced can legitimize the parallel imports. In addition, the onus is on the plaintiff (not the importer) to prove that the parallel importer "knows or ought reasonably to know" that the parallel imports are unlawfully manufactured (Hawin, 2004).

Malaysia's Copyright Act 1987 expressly grants a copyright owner the exclusive right to control distribution. However, the right is subject to the exhaustion principle. Section 13(1)(e) provides:

> 13(1) Copyright in a literary, musical or artistic work, a film, a sound recording or a derivative work shall be the exclusive right to control in Malaysia – (e) the distribution of copies to the public by sale or other transfer of ownership … of the whole work or a substantial part thereof, either in its original or derivative form provided that, without prejudice to paragraph (e), the exclusive right to control the distribution of copies refer

> only to the act of putting into circulation copies not previously put into circulation in Malaysia and not to any subsequent distribution of those copies or any subsequent importation of those copies into Malaysia.

Based on section 13(1)(e), although a copyright owner has the right to control the distribution of copies, the right is restricted to the first sale of those copies so that his or her right in respect of any subsequent dealings with those copies is exhausted. A parallel importer can therefore rely on section 13(1)(e) as a defence against a copyright infringement action.

Malaysia seems to adopt the 'limited' international exhaustion principle in the sense that the principle applies only when the making of the parallel imports is consented to by the copyright owner in Malaysia. In Malaysia, parallel imports are legitimate only if they have been manufactured by or with the consent of the Malaysian copyright owner. If the parallel imports have been manufactured without the consent of the owner, the owner's right is not exhausted and the owner can therefore prevent the parallel imports. This means that a copyright assignee in Malaysia can prevent the parallel importation of goods manufactured by the copyright assignor in a foreign country if the goods have been manufactured without the consent of the assignee (Hawin, 2004).

The Malaysian approach to parallel import is based on the "free movement of goods" principle adopted in the patent case *Smith, Kline & French Laboratories Ltd v. Salim (Malaysia) Sdn Bhd* [1989] FSR 407; this principle can also be applied to copyright. In this case it was stated that the unrestricted sale of patented goods implied the patentee's consent to the purchaser re-selling the goods. This was necessary to give the contract "business efficacy". The Minister of Domestic Trade and Consumer Affairs of Malaysia expressly stated that the policy allowing parallel importation aimed "to encourage competition and a fair price for the product" (Hawin, 2004). Local interests greatly influences the Malaysian policy on parallel importation. By allowing parallel importation, such practice support the

justification for their intellectual property laws which is to protect not only the right owners but also the interest of the society.

Seemingly, Malaysia provide opportunities for consumers to purchase materials from cheaper alternatives. The internet has posed a great impact on the book market by giving consumers wider choices to purchase books directly from overseas, sometimes at a cheaper rate. Individuals are thus able to "parallel import" books through internet which provides a wider range of books and with competitive price. However, not all consumers in Malaysia have access to internet and many are still cautious about sending payment by electronic means and the guarantee of delivery (Khairul, 2010). A quick look at the titles of books available on the Amazon.UK website reveals costs that are similar to those in UK bookstores, although with additional charges of £3.29 per book (with a £5.49 handling fee) for delivery to Malaysia. When combining the cost of a book together with the delivery costs, it may seem that the cost is still high but this is merely a benchmark and cheaper prices may be available with thorough research on the Internet (provided that the seller is willing to deliver to Malaysia).

Parallel imports, to a certain extent, may be useful in assisting students to gain access to cheaper books from overseas authors and publishers, but the same would not be true for books written and published in Malaysia, especially as most sources for legal education (which is the focus of this thesis) are taken from primary and secondary sources of law, namely statutes and legislations originating from within Malaysia rather than from outside. In addition, Malaysia is at present actively negotiating the Trans-Pacific Partnership (TTP) Agreement,[19] in which one US demand is for copyright right holders to be allowed to prevent parallel imports (Ministry of International Trade and Industry, 2011). Thus, it can be said that the status of parallel imports for ensuring affordable access to information is not secure. Hence, parallel imports may not provide a comprehensive or satisfactory

[19] TPP is an FTA initiative involving other eight countries namely Australia, Brunei, Chile, New Zealand, Peru, Singapore, United States and Vietnam

solution to the problem. Reliance on parallel importation may offer one option for access to materials, but the more important issue, which is the focus of this thesis, is that of the exceptions and limitations to copyright law; this is even more far-reaching and pertinent, and is discussed at length later in this thesis.

b) Reliance on foreign materials

Another factor contributing to the high rates of copyright infringement is the substantial reliance on foreign textbooks for reference (Azmi & Abdul Rahman, 2008: 77). Much of the teaching materials used in law courses in Malaysia, such as legal principles, cases and references, is based on English law (Mohd Awal, 2004). For many years after independence, all Malaysian judges and lawyers were trained in English law schools and universities; Malaysia continues to adopt the common law system and many British legacies, including its legal system and legal education, have been also inherited and are followed (Mohd Awal, 2004). Malaysian case materials is also relatively scarce (Antons, 2009: 179), it follows that many legal references, such as cases and principles, are taken both by the courts and the academics in legal education, from other common law countries, particularly the UK and Australia. Reliance on foreign materials is also prevalent in challenging or newly developed areas of law, as only developed countries have the technology and capacity to discuss such issues and to consider the consequences for law in depth and in an appropriate manner. High reliance on foreign materials for study means that the original materials are generally more expensive or sometimes difficult to access. Consequently, users resort to easier and cheaper ways, i.e. photocopying.

c) Limited resource centre for legal research

Malaysia does not have an expansive collection of resources for conducting law research. The most useful resource centres for law research are the well-stocked libraries of Universiti Malaya, Universiti Kebangsaan Malaysia, and the International Islamic University of Malaysia, which are all located around Kuala

Lumpur, the capital. All these universities conduct legal education courses up to postgraduate level, and have a wide variety of law materials to support most research needs. Also, the National Archives of Malaysia is an excellent repository of historical law documents.

d) Inadequate legal references in government websites

In Malaysia, matters pertaining to law are freely accessible in the three law-making institution websites, namely, (i) the Attorney General's Chambers' website, (ii) the Parliament's website and (iii) the Courts' websites. There are also some ministries, statutory agencies, Bar Councils and local governments which may also include their relevant laws and regulations on their respective websites (Noordin & Keng, 2009). Nevertheless, accessing the country's laws on the government websites has its drawbacks; the legal resources are not properly organized; there are no added features for helping researchers, principal statutes are displayed separately from amendments, etc. There were also no specific directions from the Malaysian Administrative Modernization and Management Planning Unit (MAMPU) that requires for all legal information relevant to agencies to be uploaded in the governmental websites (Noordin, 2009). Proper organization, systematization, storage and retrieval of legal information in Malaysia information is much to be desired (Noordin, 2009) especially when "knowledge not stored or organized properly is like knowledge that does not exist at all" (Faruqi, 1992: 1).

The Federal Court of Malaysia website[20] is the only website that provides free access to judgments, containing the latest judgments of the higher courts since 2000, but it is also limited in many ways (Noordin & Keng, 2009). The websites of the various government bodies and courts are updated and further developed from time to time in order to offer the public quicker ways of accessing Malaysian laws through web searching. However, the remaining difficulties in accessing important materials freely, easily and speedily continue to contribute to copyright

[20] http://portal.kehakiman.gov.my/

infringement. Under the Commonwealth Legal International Institute (CommonLII), the multijurisdictional database, Malaysia participated with this non-profit organization, which enables small jurisdictions to take advantage of the technical infrastructure to publish their legal materials on the Internet for free (Winterton, 2010: 6), in order to provide Malaysian citizens with free access to primary legal materials, as readily available in the BAILII project in the UK or the AustLII project in Australia. This Open Law project is purposely created to provide an open-access resource to users of law information who might otherwise be excluded from such access by commercial publishers (Leith & Fellows, 2010: 93). Nevertheless, this effort is still far from giving adequate assistance to citizens wishing to obtain free access to law information because it is too simple, making it difficult for users to search for the laws they require.

e) Exploitation by local and foreign commercial publishers

Private entrepreneurs have vigorously taken the opportunity to supply legislative materials to the public especially when the government and Parliament do not own copyright for their legislative materials (Faruqi, 1992). In supporting access to law materials in Malaysia, two major commercial law information providers in Malaysia, CLJ Legal Network (CLJ Online) and PNMB-LawNet, offer different levels of access to numerous databases containing legislation, subsidiary legislation and court decisions as well as other materials for a fee (Noordin, 2005). Both are commonly subscribed to by most law libraries in Malaysia. Other than local publishers, law information is also available from the foreign commercial databases, such as Lexis Nexis or Westlaw, which impose high licensing fees constituting a major portion of the libraries" acquisition budget (Azmi & Abdul Rahman, 2008: 10-11). The unavailability of affordable informational resources caused users to have no choice but to stick to the commercial suppliers and causing difficulties for institutions that could not afford it (Dutfield & Suthersanen, 2008: 284). Differential pricing between universities is also practiced, putting the smaller ones in a weak negotiating position (Azmi & Abdul Rahman, 2008: 10-11). As a

result, many academic libraries have discontinued their subscriptions to the print version of journals, thereby restricting the availability of reading materials to students, especially as remote access to online databases is restricted (Azmi & Abdul Rahman, 2008: 70). This behaviour correspond to the study that when the price of private information is not adjusted, there will be less incentives for institutions or firms to acquire information resulting to private information not being used, thereby leading to insufficient information acquisition (Andersen & Hviid, 1999: 254).

f) Lack of awareness, uncertainties and different views on copyright

Copyright awareness is relatively low among Malaysians (Azmi & Abdul Rahman, 2008). The country's focuses have always been to eradicate poverty and to increase its GDP. Matters such as the empowerment of Malaysians with knowledge have only recently been highlighted. As the cultural need for the free and unhindered flow of ideas is deeply ingrained (Smith, 1999), attitudes to intellectual property rights are less than uniform, with some opposing the so called "Western idea being imposed on the global South" (Story, Darch, & Halbert, 2006: 330). This can be seen in the literary works of Malay traditional communities, where often no reference is made to authors (Tee, 2004). Malay *adat* or rules also make no reference to copyright, nor do they provide any rules governing property in literary works (Tee, 2004). Therefore, acts of infringing copyrights, such as photocopying and the trading of pirated copyrighted works, are generally very common in Malaysia. Such acts are not considered wrong, misplaced or unacceptable, and people widely believe that if information is transferred onto the World Wide Web and made available on the Internet, then its use thereafter must be free and unrestricted. This is a wrongly held belief and despite this popular ignorance of the law, users that infringe copyright laws are open to legal redress (Wallace, 2004: 2).

Local complaints of copyright infringement are few compared to complaints made by foreign copyright owners. Thus, most copyright infringement involving literary works goes unreported with no further action taken (Azmi & Abdul Rahman, 2008: 96). To improve copyright awareness in Malaysia, the publishing industry established a Copyright Clearance Centre (CCC) that issues licences to businesses wishing to photocopy copyrighted works. Unfortunately, poor public response and several limiting factors left the CCC largely ignored (Azmi & Abdul Rahman, 2008: 80). Also, dialogues and seminars have been organised by the industry as well as campaigns on reading awareness and the fight against piracy at national and regional levels (Azmi & Abdul Rahman, 2008: 80). Nevertheless, there is still a lack of clear guidelines, and even within the copyright law itself, there is no effective copyright clearance policy (Azmi & Abdul Rahman, 2008: 10). Furthermore, despite the present copyright law, there is still the problem of misinterpretation (Mohd Labib, 2000).

3.4 Copyright Law in Malaysia

Before analysing further the exceptions and limitations to copyright law in Malaysia, it would be beneficial to provide some background to the copyright law in Malaysia so as to better comprehend how copyright law originated and developed in Malaysia. It would also be useful to know the extent to which Malaysia is committed to international agreements, and its aspirations in the realm of copyright and intellectual property. This information is pertinent in understanding the Malaysian approach to crafting exceptions and limitations in copyright law, as they suit the country's needs and circumstances; the latter points will be discussed in later chapters.

3.4.1 Copyright Law in Malaysia before independence

The copyright law in Malaysia is not home-grown; it mainly originated from the law of the British colonization, was influenced by developed countries and international developments, and has been pressured by copyright owners. Copyright law found its way into the Malay States only after British established an important trading centre on the island of Penang. The law of copyright in the Straits Settlements was actually the copyright law applied and enforced in England, as described in various statutes[21] and common law. This was explained in *R v. Willians* (1858) 3 KY 16, stating that the Second Charter of Justice issued on 27 November 1826 to the Straits Settlements[22] empowered the courts to apply both written and unwritten English law in force at that time. Nevertheless, as regards copyright law, no evidence seems to suggests that copyright laws were actually applied or that any copyright cases arose for adjudication in the Settlements (Tee, 2008).

Later, the Copyright Act 1911 passed in the UK was extended to the Straits Settlements. None of the legislatures of the Federated Malay States[23] and the Unfederated Malay States[24], North Borneo and Sarawak felt any need for a copyright law, nor was there any public demand for it (Tee, 2008). However, petitions by UK copyright owners to the Board of Trade against frequent infringements of their works led to the enactment of copyright laws in the

[21] These include the Statute of Anne 1709, the Engraving Copyright Acts of 1735 and 1766, the Prints Copyright Act 1777 and the Sculpture Copyright Act 1814.

[22] The Straits Settlements consisted of the individual settlements of Malacca, Penang (also known as Prince of Wales Island) and Singapore which now form part of Malaysia with the exception of Singapore. It was established in 1826 as part of the territories controlled by the British East India Company and later came under direct British control as a crown colony on 1 April 1867.

[23] The Federated Malay States (FMS) was a federation of four protected states in the Malay Peninsula namely Selangor, Perak, Negeri Sembilan and Pahang, established by the British government in 1895

[24] The term Unfederated Malay States (UFMS) was the collective name given to five British protected states in the Malay Peninsula in the first half of the twentieth century. These states were Johor, Kedah, Kelantan, Perlis, and Terengganu. In contrast with the four neighbouring Federated Malay States of Selangor, Perak, Pahang, and Negeri Sembilan, the five Unfederated Malay States lacked common institutions.

Federated Malay States in 1930.[25] North Borneo[26] and Sarawak[27] followed suit in enacting copyright laws based on the Imperial Copyright Act of 1911, with the necessary modifications and certain omissions (Tee, 2008). Meanwhile in the UK, the Copyright Act 1956 replaced the Copyright Act 1911. With regard to Malaysia, only Sarawak (1960) and North Borneo (1962) extended the application of the 1956 Act, while the other states continued the application of the 1911 Act.

Figure 3.3: Map of Malaysia extracted from Cadastral Template–Country Data (2003)

3.4.2 Copyright Law in Malaysia after independence

After Malaysia gained independence in 1957, there was a need for a single national copyright law rather than the multiplicity of statutes. The Copyright Bill 1969 was drafted with the conscious aim of reflecting "the present prevailing trends in developing countries with regard to the concept of national and international copyright protection, while at the same time containing specific provisions to meet

[25] Copyright Enactment (Cap 73)
[26] Copyright Ordinance 1935
[27] Copyright Ordinance (Cap 94)

Malaysia's needs" (Tee, 2008: 7). Abandoning the model of copyright laws from developed countries, reliance was made upon the Nigerian Copyright Bill. Nevertheless, it seems to resemble more the copyright statutes of Zambia and Malawi, both enacted in 1965, than the Nigerian Copyright Decree of 1970 (Tee, 2008). The deliberations of the East Asian Copyright Seminar held at New Delhi in January, 1967, and the Protocol to the Berne Convention (Stockholm Revision) 1967 were both taken into consideration (Tee, 2008).

The 1969 Act was then replaced by the Copyright Act 1987 due to demands from local and foreign copyright owners as well as pressures from the UK and the US. Amendment to Copyright Act 1987 was made in 1990 to ensure compliance, and in anticipation of Malaysia's accession to the Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971), which allows developing countries to make reservations, in respect of terms of protection, compulsory licensing and translation rights. In 1996, the 1987 Act was amended for the second time through the Copyright (Amendment) Act 1996 (Act A952). Later, the Copyright (Amendment) 1997 (Act A994) was enacted against the background of two international agreements, namely the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), which formed useful starting points for the amendments to the Malaysian copyright law for the digital era, even though Malaysia had not ratified the treaties at that time.[28] Further amendments were made to the Copyright Act 1987 in 2000, as part of Malaysia's obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPs). This made provisions for, amongst other things, performers' rights in live performances, the protection of databases, border measures and proof of ownership of copyright. More amendments were made in 2002[29] and 2003[30] (Tee, 2008: 12).

[28] The Amendment Act incorporated various provisions of the WCT and, where relevant, the WPPT. These included the provisions relating to the transmission via the Internet, the act of circumventing technological devices and the removal of right management information. The provision relating to the distribution right, which already existed under the 1987 Act was also redefined in line with the WCT.

[29] Copyright (Amendment) Act 2002 (Act A1139) with effect 3 March 2003 (see PU(B) 104/2003)

Hence, this chronology of events shows that the establishment of copyright in Malaysia is mainly due to the influence or pressures emanating its Western counterparts. Being a former British colony, Malaysia shares very similar legal principles with the UK and derives much of its existing local intellectual property legislation from other Commonwealth countries, particularly Australia. Subscribing to common law, cases decided in other Commonwealth jurisdictions, particularly the UK and Australia, are of significant persuasive value in Malaysia (Chong, 1998).

3.4.3 Malaysia and international copyright treaties

Malaysian participation in international copyright relations has always been based on its international copyright obligations and trading position. Malaysia is a signatory to the Paris Convention for the Protection of Industrial Property and became a party to the Berne Convention on 1 October 1990 (WIPO, 1990). Malaysia is also a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) signed under the auspices of the World Trade Organization (WTO). During the negotiations for the TRIPs Agreement, Malaysia was one of the "hardliner" developing country members that opposed intellectual property in GATT, and was active in the "10 + 10" TRIPs Negotiating Group (Drahos, 2002a: 775). Malaysian resistance to strong enforcement of copyright law resulted to Malaysia being listed for bilateral investigation by the US. The US subjected Malaysia to a Special 301 investigation, and had it listed under the Watch List and Out of Cycle Review as a threat, so that Malaysia would enact strong intellectual property protection (Drahos & Braithwaite, 2003). This is an irony as the US itself have a lot of intellectual property problems but would unlikely be in the USTR's Special 301 Watch List (Wadlow, 2008: 741). Being a developing country which is very much dependant to the Western innovations and services

[30] Copyright (Amendment) Act 2003 (Act A1195) with effect 1 October 2003 (see PU(B) 296/2003)

(Gutowski, 1999), Malaysia and other developing countries reluctantly negotiated and finally acquiesced to reform their national legislation according to TRIPs Agreement with the belief that a more effective competition would be achieved through a more unified copyright law among countries, especially after pressure and persistence from big countries (Trebilcock & Howse, 1999).

Powerful international players have been pressuring and forcing other weaker countries to adopt their legal standards (Antons, 2004: 110), notwithstanding the fact that the colonial Copyright Act in force in Malaysia was rarely enforced in the first few decades after independence (Tee, 2004). Intellectual property laws were originally not high on the political agenda, and more focus was given to laws that were regarded as useful for nation-building and modernizing the economy (Antons, 2004: 112). "Selective adaptation" was practiced, whereby certain laws that served certain interests would be enforced, whereas others simply remained on the books (Antons, 2004: 112). However, selective adaptation seems to have decreased when Part III of the TRIPs Agreement was introduced to deal with Enforcement of Intellectual Property Rights, allowing for dispute settlement and ultimately trade sanctions if a country was found guilty of violating its provisions. Selective adaptation nevertheless continued throughout the 1980s and 1990s in various forms, mainly aiming at slowing down the reform process in parts of the intellectual property system that developing countries regarded as problematic (Antons, 2004: 113). As international monitoring of intellectual property law enforcement improved, selective adaptation at the national level became an increasingly difficult option but international cooperation in regional groupings with similar interests became an important alternative (Antons, 2004: 121).

Consequent to being the members of WIPO, WTO and other international intellectual property organizations, Malaysia has consistently made laws in accordance with international policies. According to the Special 301 Report (2010: 239), Malaysia was the first country in the world to have partially implemented the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and WIPO

Performances and Phonograms Treaty (WPPT), as early as in 1998, despite not being signatories of either agreement. Under its National Intellectual Property Policy (2007), Malaysia has aimed to expand its capacity to increase the generation of intellectual property, to effectively protect and enforce, to properly manage and to maximize the commercial exploitation of intellectual property in order to enhance the socio-economic prosperity of the community. However, nothing was mentioned in it on the importance of balancing the rights of copyright owners with the needs and interest of the public. To ensure adherence to international copyright law, the Malaysian Copyright Act 1987, has been repeatedly amended, in 1996, 1997, 2000, 2002 and 2003, resulting to broader and stricter protection of copyright laws. Malaysia has also participated in bilateral, regional and multilateral cooperation in order to promote the country's interests and position on intellectual property. Malaysia, through the offices of its Intellectual Property Corporation of Malaysia, has also entered into several Free Trade Agreements negotiations, in particular with the US (*Annual Report* 2008), Australia, New Zealand, India, Chile and Pakistan (*Annual Report* 2009).

3.5 Malaysian copyright law regarding materials used in legal education

3.5.1 Literary work

Materials used in legal education can be in the form of literary works, which raise different treatment or implication under the Malaysian copyright law. The main subject matter used in teaching and learning law includes primary sources such as acts of parliament, subordinate legislation and reputed decisions of courts and tribunals. Other works, such as textbooks, journal articles, dictionaries encyclopaedias, and case reviews, may also be used in the course of researching and teaching law. These materials may cover a wide range of legal topic areas and jurisdictions (Makri, 2008). For the purpose of analysis, the works used in teaching and learning law can be categorised into publicly and privately generated materials.

3.5.2 Publicly generated materials

a) Government legislative text or judicial decisions

Publicly generated materials commonly used when teaching and learning law in higher education institutions include mainly the statutes and cases. These materials are generally considered as governmental works, and Article 2(4) of the Berne Convention leaves it to individual countries to determine whether their governmental works should be copyright protected.

In Malaysia, official texts of the government or statutory bodies (of a legislative or regulatory nature), or judicial decisions are not protected under copyright law. Although Section 11(1) of the Copyright Act 1987 provides that "every work which is eligible for copyright and which is made by or under the direction or control of the Government and such Government organizations or international bodies as the Minister may by order prescribe" is protected under copyright law, and Section 7 of the same Act lists "works eligible for copyright" as literary works, musical works, artistic works, films sound recordings and broadcasts.[31] However, Section 3, through the Copyright (Amendment) Act 1990 expressly excludes "official texts of the Government or statutory bodies of a legislative or regulatory nature, or judicial decisions" from the definition of "literary work". According to Section 3, "literary work" includes:

> "(a) novels, stories, books, pamphlets, manuscripts, poetical works and other writings;
>
> (b) plays, dramas, stage directions, film scenarios, broadcasting scripts, choreographic works and pantomimes;
>
> (c) treatises, histories, biographies, essays and articles;
>
> (d) encyclopaedias, dictionaries and other works of reference;
>
> (e) letters, reports and memoranda;

[31] Unlike other jurisdictions, Malaysia does not make any distinction between literary, musical, artistic 'works' with sound recording and broadcast, which are normally referred to as 'related rights' in other jurisdictions.

(f) lectures, addresses, sermons and other works of the same nature;

(g) tables or compilations, whether or not expressed in words, figures or symbols and whether or nor in a visible form; and

(h) computer programs;

but does not include official texts of the Government or statutory bodies of a legislative or regulatory nature, or judicial decisions." [emphasis added]

Hence, all laws enacted by the Federal Parliament as well as State Legislative Councils, official publications of such bodies, and also of statutory bodies such as the Securities Commission and the Malaysian Commission for Communications and Multimedia, and decisions handed down by the courts, are all excluded from the realm of copyright law. Effectively, this means that such subject matter may be reproduced freely without infringing any copyright. Copyright would also not subsist in the published editions of statutes or judicial decisions made in Malaysia. Nevertheless, works of Government, Government organizations and international bodies other than expressly excluded under the definition of "literary work" under section 3 is still valid for copyright protection by virtue of Section 11.

Section 9 of the Copyright Act 1987, which grants copyright protection to published editions of literary, artistic or musical works, reads as follows:

"(1) Copyright shall subsist, subject to the provisions of this Act, in every published edition of any one or more literary, artistic or musical work in the case of which either -

(a) the first publication of the edition took place in Malaysia; or

(b) the publisher of the edition was a qualified person at the date of the first publication thereof: Provided that this subsection does not apply to an edition which reproduces the typographical arrangement of a previous edition of the same work or works."

Since statutes and judicial decisions do not fall under the definition of literary works by virtue of Section 3, there can be no copyright in the typographical arrangement of such published editions.

b) Works derived from legislative text or judicial decisions

Translations, adaptations, arrangements and other transformations of works that are derived from official legislative texts are also not protected under the Malaysian copyright law. This is by virtue of Section 8 of the Copyright Act 1987, addressing derivative works as follows:

> "(1) The following derivative works are protected as original works:
>
> (a) translations, adaptations, arrangements and other transformations of works eligible for copyright; and
>
> (b) collections of works or collections of mere data, whether in machine readable or other form, works eligible for copyright which, by reason of the selection and arrangement of their contents, constitute intellectual creation."

Section 8 requires that such derivative works must only be derived from a work that is "eligible for copyright". Since official texts of the Government or statutory bodies of a legislative or regulatory nature, or judicial decisions, are excluded from copyright protection, the exclusion extends to not only the original texts of the subject matter but also to any works derived from such texts. Hence, it can be implied that the translation of official legislative texts into another language or the compilation of laws are not derivative works within the meaning of Section 8, and are thus not protected under Malaysian copyright law (Tee, 2008: 92). This position is different from that of the UK and Australia, who grant copyright protection to government works under the so-called "Crown Copyright".

3.5.3 Privately generated materials

Apart from using original government legislative materials and judicial decisions in teaching law, academics and students also rely on headnotes, case summaries, annotations, encyclopaedic works, law dictionaries, journals and textbooks, whether prepared by law reporters or commercial publishers. These materials are normally the first point of reference before one seeks out the relevant primary legal materials or sources of academic comments and analysis of developments in law.

a) Headnotes

Headnotes contain facts and holdings extracted from the longer judgment, which is useful for researchers in deciding whether further reading of the original judgment is needed (Leith, 2010). Based on Section 8(1)(a) Copyright Act 1987, it can be argued that headnotes may not be protected under the Malaysian copyright law, as headnotes are derived from judicial decisions, which are not considered literary works eligible for copyright protection. Nevertheless, there is also the view that headnotes are not judicial decisions, but rather summaries of judgments which requires certain degree of skill and judgment for its preparation (Tee, 2008: 93), and thus should be protected like any other literary work under copyright law.

In a Canadian case, *CCH Canadian Ltd v. Law Society of Upper Canada* [2004] 1 S.C.R. 339, it was held that the judicial reasons, in and of themselves, are not original works for which the publishers can claim copyright, but that the headnotes, defined as including the summary of the case, catchlines, statement of the case, case title and case information are more than mere copies, and hence are "original" works for which copyright subsists in the commercial publisher. The Federal Court of Appeal in para. 30 explained:

> "Although headnotes are inspired in large part by the judgment which they summarize and refer to, they are clearly not an identical copy of the reasons. The authors must select specific elements of the decision and can arrange them in numerous different ways. Making these decisions requires the exercise of skill and judgment. The authors must use their knowledge about the law and developed ability to determine legal *ratios* to produce the headnotes. They must also use their capacity for discernment to decide which parts of the judgment warrant inclusion in the headnotes. This process is more than just a mechanical exercise. Thus the headnotes constitute 'original' works in which copyright subsists."

Some commentators have also viewed that even if the summary often contains the same language as the judicial reasons, the act of choosing which portions to extract

and how to arrange them in the summary requires an exercise of skill and judgment (Garnett, Davies & Harbottle, 2010).

Nevertheless, applying this case to the Malaysian context, although the headnotes require skill and judgment in their preparation, and therefore could constitute original works that should be protected under copyright law, such argument may be difficult to succeed (Tee, 2008: 93) since Section 8(1)(a) expressly requires that any works that can be protected under copyright law must be derived from works eligible for copyright only. As judicial decisions are not eligible for copyright protection by virtue of Section 3, any works derived from it, such as headnotes, cannot be protected under copyright law.

b) Compilations

Compilations of legislative texts, official texts or judicial decisions may qualify as literary work in the form of a table or compilation pursuant to Section 8(1)(b), which does not prescribe that the compilation or "collections of works or collections of mere data, whether in machine readable or other form", must be of copyright works (Tee, 2008: 94). Thus, it can be assumed that legislations or judicial decisions contained in the form of compilations, which is common in electronic legal databases, can be classified as compilation of works protected under the Malaysian copyright law. Malaysia does not have a special or separate category of copyright protection for database but databases could potentially be classified as tables or compilation under the literary work category or compilation of works as a derivative work (Azmi, 2008: 3). Section 8(1)(b) was amended by the Copyright (Amendment) Act 2000 (Act A1082) to include collections of mere data pursuant to Article 10(2) of the TRIPs Agreement which requires member countries to protect "compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations …" although such protection shall not extend to the data or material itself. So, in Malaysian context, there is no

copyright protection for legislations or judicial decisions, or any work derived from them. However, compilations made based on such works or legal database in particular can be classified under Section 8 (Azmi, 2008: 5) and may be protected under the Malaysian copyright law.

It is common for law textbooks, such as those on cases and materials, to obtain much of their contents from legislations and judicial decisions, which are developed into a more easily understandable piece of writing. A casebook for instance would normally comprise of a wide selection of primary materials, key historical cases as well as recent cases to bring the subject in question to life. The extracts from primary materials are carefully selected and sometimes are quite lengthy in order to give sufficient detail to illustrate the point of law being discussed. It often further includes clear explanatory text that clarifies the key concepts as well as commentaries that highlight difficulties and complexities in the law, providing students with a deeper understanding of the matter. Sometimes, additional features, such as summaries, key points, hint boxes, cross-references, comparisons, questions and weblinks, which provide plenty of learning support for students, are also included. All these works, although based on government legislative works and judicial decisions, are developed with skill and judgment and sometimes creativity to help academics and students to understand the particular topic better. Hence, law textbooks are also protected under copyright law.

While local legislations and judicial decisions are free from copyright protection, academics and students do not refer to these materials straight away in the course of studying and teaching law. In solving a problem in law for example, the legislations or decided cases relevant to the matter can only be found easily and speedily through referring to textbooks or journal articles, which will point out to the applicable statutes or similar cases. As law textbooks are protected by copyright law, the exceptions and limitations to copyright law applicable for the purpose of teaching, research and private study are handy and of assistance to students, academics and researchers alike.

3.5.4 Other works

Apart from literary works, other materials may also be used in teaching and learning law in Malaysian universities and colleges. These can be in the form of artistic works, sound recordings, films and broadcasts that are protected under the copyright law. Under Section 3 of the Malaysian Copyright Act, "artistic work" means (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality; (b) a work of architecture being a building or a model for a building; or (c) a work of artistic craftsmanship, but does not include a layout-design within the meaning of the Layout-Designs of Integrated Circuits Act 2000. In legal education, "artistic work" such as photographs or maps may be used to illustrate a topic. For example, a lecturer may show to the class a photo of human rights violations or a map in order to illustrate a topic in a Law of the Sea class. These works or materials are protected under copyright law.

To make the class interesting and to vary the method of teaching, a sound recording may also be used, such as a lecture from a renowned professor on a current legal topic. "Sound recording" is defined in Section 3 of the Copyright Act to mean any fixation of a sequence of sounds or of a representation of sounds capable of being perceived aurally and of being reproduced by any means, but does not include a sound-track associated with a film. Films or broadcasts may also be shown. Under Section 3 of the Copyright Act, "film" means "any fixation of a sequence of visual images on material of any description, whether translucent or not, so as to be capable by use of that material with or without any assistance of any contrivance (a) of being shown as a moving picture; or (b) of being recorded on other material, whether translucent or not by the use of which it can be so shown, and includes the sounds embodied in any sound-track associated with a film" (S. 3). "Broadcast" is defined as follows:

> "the transmitting, by wire or wireless means, of visual images, sounds or other information which is capable of being lawfully received by members of the public; or (b) is transmitted for presentation to members of the public, and

includes the transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting service or with its consent."

All these works are useful in teaching and learning as they make the lesson more interesting, engaging and current. It is up to the lecturer's own devices to decide the sort of materials that will be used, whether based on a certain selection of textbooks or using his own case materials. When there is no policy requirement whatsoever on teaching materials, lecturers normally use their own methods and carefully selected materials to develop their subjects.

3.6 Conclusion

Law courses in Malaysia are offered in both public and private institutions, which may in turn serve both public and commercial interests. They also involve many actors, who may be both owners and users of copyright works, and they affect a wide variety of stakeholders. The methods of delivering legal education have been modernized and developed to include new teaching strategies and technological tools. However, the Malaysian higher education institutions are also implicated in rampant copyright infringement. High prices for books, a heavy reliance on foreign materials, limited resource centres for legal research, the inadequacy of most government websites, the role of local and foreign commercial publishers, the general lack of awareness, uncertainties and differing views on copyright all contribute to the problem of copyright infringement in Malaysia. The problems and causes that have led to copyright infringement in Malaysia must be understood and taken into consideration when analysing the copyright law of the country, especially when it is to be compared with developed nations, which may not have the same problems as Malaysia.

Historically, copyright is foreign to Malaysian custom and practices, and was introduced through the British colonization of the country. Although copyright

laws were enacted in the Malaysian legislation after independence, they were not actually applied or enforced. Knowledge of the copyright law is only now being disseminated to the populace and to the new generations of students. Malaysia has also been constantly increasing its copyright protection in order to satisfy international pressure. In respect of materials used in delivering law courses, publicly generated materials, particularly the official texts of the government and statutory bodies (of a legislative or regulatory nature), or judicial decisions are expressly excluded from copyright protection in Malaysia. The exclusion of copyright protection also extends to works derived from such sources. Nevertheless, the status of privately generated materials is more complex. Copyright protection however subsists in compilations of works and other privately generated materials.

Taking into account Malaysian circumstances, it is important to analyse the appropriate copyright laws and policies that would best facilitate access to knowledge, particularly in respect of law courses in Malaysia (especially when the basic original sources are supposed to be freely available for public use). However, to do so, it is also necessary to refer to the relevant international treaties, namely the Berne Convention and the TRIPs Agreement, in looking for the guiding principles governing copyright law, i.e. those laws that are adhered to by the international community. This will be further explained in the next chapter.

Chapter 4: Three Step Test

4.1 Introduction

This chapter seeks to answer the first research question, which pertains to the extent to which the exceptions provided under Article 9(2) of the Berne Convention as well as Article 13 of the TRIPs Agreement facilitate or hinder legal research and study in universities. Any exception that is not specifically covered by the Berne Convention (namely Articles 10, 10*bis*, 11*bis*(3) and 13(1)) will fall under the general provisions governing exceptions and limitations in national legislations, particularly Article 9(2) of the Berne Convention. Countries are allowed to make exceptions and limitations that suit their national interest, subject to the criteria provided in Article 9(2), which is commonly referred as the "three step test". The three step test was later adopted in Article 13 of the TRIPs Agreement and other international agreements, and thus it is now a control mechanism at the international level.

This chapter will initially discuss the origin, development, expansion and the significant impacts of the three step test in acting as a yardstick for delineating exceptions and limitations to copyright law at both the international and national levels. Prior to analysing the three step test provision, this chapter will also explain the rule of interpretation of treaties according to the Vienna Convention on the Law of Treaties. Having set out the necessary background, this chapter will then explain the relationship between Article 9(2) of the Berne Convention and Article 13 of the TRIPs Agreement, and some of the more important aspects to consider when interpreting the provisions in each agreement. A closer inspection of the interpretation and application of the three step test will be made to demonstrate the extent to which it permits or limits the right of national legislatures to make exceptions to copyright for research and study purposes, focusing in the context of legal education in higher education institutions. This will be done by addressing certain considerations, namely, rights, purposes, beneficiaries, works as well as

other conditions attached. A clear understanding of what is prescribed under the international agreements is crucial before any analysis or suggestions on how to redress the shortcomings of the available educational exceptions can be proposed.

4.2 Three step test and its significance

4.2.1 Origin of the three step test

When a general right of reproduction was proposed during the revision of the substantive copyright provisions of the Berne Convention (Articles 1 to 20) in the Stockholm Conference 1967, it was thought that there should also be some provisions that would limit such general right of reproduction. The Study Group working on the revision noted that "if a provision on the subject was to be incorporated in the text of the Convention, a satisfactory formula would have to be found for the inevitable exceptions to this right" (WIPO, 1971: 111). It was also acknowledged that the task of finding a formula that would allow exceptions, bearing in mind the existing exceptions in many domestic laws, would be difficult to achieve (WIPO, 1971: 113). This is because at that time countries already enjoyed the freedom to make their own exceptions and limitations to their copyright law.

Previously, there had been no provisions governing exceptions or limitations to the reproduction rights applicable to national legislation, except for the special exceptions contained in Articles 10, 10*bis*, 11*bis*(3) and 13(1) of the Convention. At that time, there was no overall rule that applied to the way in which countries could introduce limitations (Sterling, 2003: 439). Various exceptions in favour of various public and cultural interests were already widespread and available in domestic laws according to the level that the national legislatures wanted. Therefore, some countries that were concerned with public access to protected materials, such as those found in Articles 11 to 21 of the Finnish Copyright Law 1961 and Section 57 of the Indian Copyright Act 1957, have broad exceptions to

their copyright law. On the other hand, countries with a stronger commitment to the ideal of authors' rights, such as the French Copyright Law of 1957, Article 41, couched their exceptions to copyright law in a much narrow terms. The most frequent exceptions recognized in the domestic laws relate to the following works or methods of use: public speeches; quotations; school books and chrestomathies; newspaper articles; reporting current events; ephemeral recordings; private use; reproduction by photocopying in libraries; reproduction in special characters for the use of the blind; sound recordings of literary works for the use of the blind; texts of songs; sculptures on permanent display in public places, etc.; artistic works used as a background in films and television programmes; and reproduction in the interests of public safety (WIPO, 1971: 112).

The proposal for general exceptions to the right of reproduction revealed several tendencies. Some countries, such as France (document S/70), the Netherlands (document S/81) and the Federal Republic of Germany (document S/67), wanted to further restrict the proposed exception. In contrast, some countries, such as India (document S/86) and Rumania (document S/75), proposed that the exceptions indicated in the proposed document (*Programme)* be extended, as they had some concerns on maintaining the capability and power of states to allow reproduction in certain circumstances and that the right of reproduction should not be solely left to an individual author's discretion. The United Kingdom (document S/42) on the other hand, proposed that all the exceptions be grouped in a single formula, eliminating private use and judicial or administrative purposes, and that a slightly different wording in the *Programme* be used, namely: "in certain special cases where the reproduction does not unreasonably prejudice the legitimate interests of the authors" (WIPO, 1971: 1144).

The Study Group working on formulating general exceptions to reproduction right also acknowledged that "it would be vain to suppose that countries would be ready at this stage to abolish these exceptions to any appreciable extent" (WIPO, 1971: 112). After a lengthy debate, it was decided that the amendment proposed by the

UK be adopted, with some slight alterations in the English version (document S/109) (WIPO, 1971: 1145).

The Drafting Committee, chaired by Mr. William Wallace (of the UK) also proposed for a more logical order for the interpretation of the rule by placing the second condition (does not conflict with a normal exploitation of the work) before the first condition (is not contrary to the legitimate interests of the author). This was explained in the Records of the 1967 Stockholm Conference para. 85 as follows:

> "... if it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment."

The three step test was developed as embodied in Article 9(2) of the Berne Convention providing for a general exception to reproduction right, which reads as follows:

> "It shall be a matter for legislation in the countries of the [Berne] Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

The aim of the three step test is to curb limitations on the exclusive right of reproduction, while at the same time withdrawing from dismantling the extensive set of exceptions that already existed in many domestic laws in 1967 (Senftleben, 2004: 82). The open wording of the three step test was intentionally drafted to show deference to the interests of the member states to maintain their various

limitations concerning the right of reproduction (Senftleben, 2004: 44), to shelter national concepts for limitations from being eroded in the Stockholm Conference (Senftleben, 2004: 52), and to afford members of the Berne Union to maintain their long-standing limitations (Senftleben, 2004: 82). A UK delegate at the Stockholm Conference (WIPO, 1971: 857) described this dualism inherent in the three step test, by saying:

> "The inclusion in the Convention of a general right of reproduction was only acceptable if the exceptions to it were expressed in terms which, whilst remaining broad enough to cover at least the reasonable exceptions already provided for in domestic laws, were nevertheless sufficiently restrictive to ensure that the author was not worse off than he would have been if the general right of reproduction had never been introduced."

Hence, a satisfactory formula for permissible limitations was aimed for, with courteous regard to existing copyright exceptions in domestic laws. As a result, the three step test was deliberately created in abstract to "indicate the limits within which national legislation could provide for exceptions" (WIPO, 1971: 81). Hence, it is important that, when interpreting the three step test, the long-standing national limitations, such as those for use in schoolbooks, for personal and private study, and for parliamentary, administrative and judicial purposes (widespread in domestic legislations) be considered. The Berne Convention was revised again on 1971, but the provision pertaining to the three step test was maintained.

4.2.2 The spreading of the three step test

The openness and abstract criteria of the three step test renders it capable of encompassing a wide range of limitations, and makes it convenient for the words to be incorporated and to form a basis for reconciling any contrary opinions expressed during the deliberations of other international treaties (Geiger, 2007a: 487). Thus, when the TRIPs Agreement was established to ensure the harmonisation of the worldwide standard of intellectual property protection, the three step test was

incorporated into TRIPs in many of its provisions namely, Article 13 (copyright)[32], Article 30 (patent)[33], Article 17 (trademarks)[34] and Article 26(2) (industrial designs)[35]. The effect of three step test seems to differ from one provision to another. For example, it has been viewed that the three step test applied in patent is more lenient than the one in copyright, as it uses the term "unreasonably" (Vuyst, Fairchild, & Meyer 2003). It has also been observed that the use of the three step test in either the trademarks or in the industrial designs provisions does not entail a real three step test, and that accordingly, neither provision is as strict as the provisions pertaining to copyright or patent (Vuyst, Fairchild, & Meyer, 2003).

Other than TRIPs, the wordings in the three step test were also followed by Article 10 of the WIPO Copyright Treaty and Article 16 of the WIPO Performances and Phonograms Treaty (Ficsor, 2002b). Fearing that the incorporation of the three step test would reduce the potential of making new exceptions and limitations in digital environment (Geiger, 2007a: 487), an Agreed Statement Concerning the WIPO Copyright Treaty expressly specified that:

> "the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment"

[32] Article 13 of TRIPs Agreement: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder".
[33] Article 30 of TRIPs Agreement: "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties"
[34] Article 17 of TRIPs Agreement: "Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties".
[35] Article 26(2) of TRIPs Agreement: "Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties"

Other than being adopted in international treaties, the three step test has also been applied in multilateral agreements; the three step test can be found in Article 6(3) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Article 6(3) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, and Article 5(5) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. Article 5(5) reads as follows:

> "The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

By using the term "shall only be applied", the test can now be applied and used in the national courts. Hence, the test is not only for the legislature to use as a guiding principle in creating or revising their exceptions or limitations in their copyright law, but the test has become more important in the sense that national judges are obliged to use the test when confronted with the application of exception (Geiger, 2007b: 4).

Certain countries have also incorporated the three step test into their national legislation. These include France, Italy, Greece, Luxembourg, Portugal, Spain, and recently China and Australia (Geiger, 2007a: 1). The insertion of the three step test in many intellectual property provisions, with slight variations, and without much debate, is mainly due to its "consensual character" (Geiger, 2007b: 3). The three step test's modest origin in the Berne Convention has become a model, incorporated and steadily extended through all subsequent trade and international copyright treaties. The test is now applied to the full range of authors' rights and other related subject matters, and not simply to the author's reproduction right, as initially intended.

Several national courts seem to have settled on restrictive interpretations of the three step test and have refrained from implementing fully balanced policies for fear of conflict with the three step test (Geiger, 2008: 491). For example in the *Mulholland Drive* case, (2006) 37 I.I.C. 790, the French Supreme Court, reversing the Paris Court of Appeal, held that an exception permitting the making of private copies of DVDs would impair the normal exploitation of the copyright work and thus violate the three step test. The Supreme Court considered that in the digital environment, there is an increased risk of piracy that needs to be addressed because DVD distribution is a highly significant source of income for the movie industry.

In *Ministry Press Reviews* LJN AS 8778 at 16-18, the District Court of The Hague held that the act of scanning and reproducing press articles for internal electronic communication in ministries did not satisfy the three step test as set out in Article 5(5) of the Information Society Directive, as such activities endanger the normal exploitation of the relevant works and unreasonably prejudice the publisher's legitimate interests in digital commercialisation.

A similar restrictive interpretation of the three step test was taken by the Brussels Court of First Instance in *Google Inc v. Copiepresse SCRL* [2007] E.C.D.R. 5, where Google was sued by a copyright management society acting on behalf of a number of newspaper publishers, for providing services that automatically searched websites carrying current news and reproducing extracted articles from newspaper websites. The Court held that Google's defence in relying upon the Belgian statutory limitations for quotation and news reporting as well as their right of freedom of expression under Article 10 of the European Convention on Human Rights could not be supported, viewing that the wording of the three step test simply reinforces the restrictive nature of the traditional exceptions.

It was argued that the restrictive interpretations were influenced by the dominant interpretation of the three step test at the international level (as decided by the WTO Panel) in the *Fairness in Music Licensing* case, Panel Report, June 15, 2000,

WT/DS/160/R, where the EU argued that Section 110(5) of the US Copyright Act violated the three step test as incorporated into Article 13 of the TRIPs Agreement (Griffiths, 2009: 435).

In contrast to the restrictive views of the three step test evident above, some courts have taken a more flexible approach. For example, in *ProLitteris v Aargauer Zeitung AG* (2008) 39 I.I.C. 990, a Swiss Federal Court held that the private use exception under Article 19(1) of the Federal Act was broad enough to cover the distribution of both paper and electronic works by the press review agencies. The court concluded that the first step of the three step test did not prohibit the extension of the private use exception to a third party. The claimant's argument, that the activities of press agencies had led to a decline in print runs and a loss of readers, was, according to the court, unsubstantiated and thus could not be said to conflict with the normal exploitation of the work, as required by the second step. As to the third step requirement, the court confirmed that payment of remuneration could mitigate any infringement of legitimate interests as well as taking into account the interests of both the authors and newspaper publishers.

Another flexible interpretation was also taken in *Google—Caching*, where the Barcelona Court of Appeals refused to accept the copyright holder's argument that the exemption of Google activities from liability for copyright infringement when caching content in the operation of its search engine service would violate the three step test. The court held that the three step test regulates both the scope of statutory exceptions as well as the copyright holder's exclusive rights (Griffith, 2009: 440).

In short, the three step test has been approached differently by legislators and courts. Restrictive interpretations of the three step test are undesirable as this approach fails to take into account the differences in social, cultural or commercial conditions, technological developments as well as the interest of other divergent interests apart from the right-holders.

4.2.3 Past and present impact of three step test

a) Prior to TRIPs

The impact of the three step test, when it was first introduced in the 1967 Stockholm Conference, was not as powerful as it has been during recent years. In the beginning, the way in which countries made use of this provision of conditional free use[36] was a matter of cultural preference and differed from country to country (Bossche, 2008: 766). This was because the provisions on how contracting states were to fulfil their obligations under the Berne Convention were quite neutral (Ricketson, 1988: 197). Based on Article 36 of the Paris Act, once a country became a member of the Berne Convention, it "undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention", and further, "understood" that, at the time it ratified or acceded to the Convention, it would be "in a position under its domestic law to give effect to the provisions of this Convention" (Ricketson, 1988: 197). Hence, in carrying out treaty obligations, due regard was to be given to the different constitutional requirements[37] of each individual country (Ricketson, 1988: 197).

[36] WIPO Glossary of Terms of the Law of Copyright and Neighbouring Rights – Geneva 1980 (WIPO) described 'free use' in para. 112 as follows: In relation to works, the possibility, resulting from the limitations on copyright, of using the work in particular cases gratuitously and without authorization, subject, however, to certain conditions, as set out by law, mainly with regard to the modalities or extent of the use and the safeguard of the moral rights of the author. Free use is primarily motivated by informatory purposes or the needs of educational, scientific and cultural development. Examples of forms of free use frequently provided for in different copyright laws are quotations, some sorts of illustration, reproduction in certain special cases, particular forms of use of speeches delivered in public, and reproduction of certain kinds of articles published in newspapers and periodicals, as well as incidental or accidental uses of works. Some laws which follow the Anglo-American legal approach provide for free use by determining the main characteristics of fair dealing with or fair use of works.

[37] In relation to the national approaches to the Berne provision, members of the Berne Convention can be divided into two different categories: a) Those in which treaty obligations become part of municipal law once the treaty has been ratified or adopted by that state (such as France, Switzerland, the Federal Republic of Germany and the United States of America that automatically incorporate treaties into their domestic law), and b) those where treaty obligations need to be implemented directly by municipal law quite separately from the ratification or adoption of a treaty by that state (for example the United Kingdom, the common law countries of the Commonwealth and the Scandinavian states)

Moreover, the three step test provision under Article 9(2) of the Berne Convention expressly left the matter of legislation to each contracting country in permitting reproduction, subject to certain conditions. Hence, this provision was not capable of being directly applied by a court in that country; further action on the part of each contracting state, by virtue of some kind of enabling legislation, would be required before effect could be given to domestic courts (Ricketson, 1988: 198). Since the provision of three step test under Berne requires further implementing measures at the domestic level, one could assess whether countries had incorporated the three step test into their domestic law by comparing their domestic law provisions to the Convention itself. In addition to the requirement of enabling legislation, the Berne Convention is also not judicially enforceable upon ratification, as it is not a self-executing treaty. In other words, the Berne Convention merely indicates principles without providing rules that have the force of law. Hence, under the Berne Convention, it is up to the contracting states themselves to decide whether their own laws comply with the three step test (Koelman, 2006: 407). The weight of any implementation of the three step test however changed when it was incorporated into the TRIPs Agreement in 1994.

b) Incorporation of three step test into TRIPs Agreement

By the end of the Uruguay Round in April 15, 1994, it was perceived by the developed-country contracting parties of GATT 1947 that the Berne Convention was inadequate for addressing the needs of their business sectors in the "post-industrial era" or "information age" (Abbot, 2003: 11). The Berne Convention also does not have detailed rules on the enforcement of rights before national judicial administrative authorities, and does not have any binding and effective dispute settlement mechanism (Gervais, 2008: 10). It was thought that there was a serious need to update international intellectual property rules due to the evolution of the world trading system, the importance of intellectual property, and technological changes, particularly those occurring in computerisation, digital technology and the

emergence of the Internet (Gervais, 2008: 10). Hence, a new standard of intellectual property protection was proposed and negotiated, despite years of hesitation by certain member countries, to establish new intellectual property standards within the GATT framework.

During the course of negotiations, it was acknowledged that limitations needed to be included in consideration of the "underlying public policy objectives" of the various national intellectual property regimes, "including developmental and technological objectives", and the need to reduce tensions by reaching "commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures" (Gervais, 2008: 15).[38] Several proposals were made by certain countries in relation to limitations to copyright. Japan submitted that the limitations on copyright should "follow the line of the Berne Convention".[39] Attention was also drawn to the importance of limitation of these rights in respect of computer program works, provided for in paragraph (2)(b)(ii) of the Japanese proposal. Japan's view was important as a developing country participant at that time, stressing that there was need for modification of certain of the special provisions of the Berne and Universal Copyright Conventions for developing countries, particularly in relation to the use of certain types of work.

The US also proposed applying the standards of the Convention, adding that any limitations and exemptions to exclusive economic rights in any event should be confined to clearly and carefully defined special cases which do not impair actual or potential markets for, or the value of, copyrighted works.[40] However, in the meeting of the negotiating group on 12th to 14th July 1989,[41] the Secretariat noted the comment but stated that the US proposal on compulsory licensing was unacceptable because it appeared to impose standards higher than those set out in the Berne Convention. It was viewed that the proposed standards would defeat the

[38] MTN.TNC/11(April 21, 1989), p. 21
[39] MTN.GNG/NG11/W/17/Add.1
[40] MTN.GNG/NG11/W/14/Rev.1
[41] MTN.GNG/NG11/14

aim of ensuring easy access to information for teaching purposes. Some participants considered the United States proposals excessively detailed for the purposes of a TRIPs agreement. Clarification was sought as to what was intended by "potential markets". Responding to these comments and certain other questions, the US representative said that, although he recognised that the US proposal used language a little tighter than that in the text of the Berne Convention, he believed that the proposal constituted a clarification of the Berne Convention, rather than a substantive change. In this regard, he referred to the Guide to the Berne Convention published by the WIPO. He considered the reference to "potential" as well as "actual markets" consistent with the Berne Convention, but clearer.[42] Finally, the three step test under the Berne Convention was incorporated in Article 13 of the TRIPs Agreement with only slight modification which reads as follows, "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder". Article 13 is the search for the "appropriate balance between the rights of creators and the public interest in access to copyrighted works" (UNCTAD-ICTSD, 2005: 186). Too many limitations could reduce the economic rewards to rights holders, however, certain exceptions are desirable in order to advance the public good.

c) Impact of three step test under TRIPs

TRIPs came into effect on January 1st 1995, and was considered a more comprehensive international agreement on copyright and intellectual property. Under the TRIPs Agreement, the effect of the three step test is much more substantial. Being one of the 14 multilateral trade agreements in the World Trade Organization (WTO), the TRIPs Agreement is binding on all WTO members. This system of international copyright conventions therefore results in the convention law becoming an integral part of national law (Sterling, 2003). Under the TRIPs

[42] MTN.GNG/NG11/14

Agreement, contracting states are required to comply with most of the provisions of the Berne Convention, irrespective of whether the country is a signatory to that Convention. By incorporating and referring to specific provisions of the Berne Convention, the obligations under TRIPs must therefore be read together with the relevant WIPO conventions (Bossche, 2008: 751). Other than incorporating the provisions of these earlier conventions, the TRIPs Agreement further supplements and updates the rules of the relevant WIPO conventions, as well as expressly provides new rules in some areas. The most significant effect of this is that it creates an obligation on members to have a system in place for the enforcement of protected IP rights, and links that national system to the effective and enforceable dispute settlement system of the WTO (Matthews, 2002: 46). Overall, TRIPs harmonizes and modernizes the basic principles of substantive law (Torremans, 2008). By enforcing stronger levels of intellectual property at similar levels throughout the global community, TRIPs create significant transfers of wealth from developing countries to developed countries whereas it is contestable whether its harmonization would benefit the domestic economies of developing countries (Okediji, 2003: 90).

Under the TRIPs Agreement, member countries are obliged to ensure a minimum level of protection and enforcement of IP rights in their territories. TRIPs has broadened the scope of copyright protection by including provisions on computer programs and databases, and rental rights. A member country is required to provide national treatment to nationals of other participating countries. The TRIPs agreement also allows members to implement laws that give more protection than is required, so long as the additional protection does not conflict with the TRIPs provisions. Under TRIPs, non-compliance is easy to detect through the application of the transparency rule (Art. 63). Council for TRIPs has the power to invite countries to present their laws, to discuss and to challenge them, through a periodic review mechanism and other consultative procedures. All conflicts or controversies are to be subjected to the WTO multilateral procedures of the Dispute Settlement, which requires that a judge applies the three step test and determines

the real interpretation of it within a given context or case (Koelman, 2006: 407). Trade sanctions may be imposed against other member nations for violation of its provisions. In this respect, the protection of intellectual property can have overwhelming economic implications for offending countries; it is no longer left for the countries to decide for themselves what is meant by the general exceptions and limitations provided in the international treaties.

Thus, the three step test under the Berne Convention allows for the free use of copyrighted works in special cases and subject to certain conditions. The way in which countries make use of these, in part, optional free uses of works is a matter of cultural preference, and it differs from country to country. These exceptions are then included in national law and therefore apply to individuals directly (Bossche, 2008: 766). On the other hand, the three step test under Article 13 of the TRIPs Agreement constitutes a binding guideline for all WTO members. It lays down the requirements that exceptions and limitations to exclusive rights provided for in national IP law have to meet (Bossche, 2008: 766). By using the words "shall confine", it has been viewed that Article 13 of the TRIPs Agreement is more restrictive than the wording in Article 9(2) of the Berne Convention (Correa, 2007: 136).

Some have viewed that the three step test is complementary or something to be considered and directed for legislature to use as guidelines, not for private dealings in court (Jehoram, 2009). This can be seen in that nearly all of the EU member states, in their implementation of the Copyright Directive, have simply not introduced the three-step provision of Article 5 into their national legislation. This renders the copyright owners not able to use or invoke the three step rule when arguing that their works have been abused (Jehoram, 2009). A detail research by Senftleben (2004) has also viewed that the three step test works as an eventual complementary test for the courts. The Dutch Government, based on the advice of the standing Dutch Copyright Committee, for example, viewed that the three step test would only serve as a general framework to be addressed by states, and that the

test would be misplaced in the national Copyright Act (Jehoram, 2009). Despite the Dutch State Council's protest that Section 5 of the Directive should be introduced into the Bill and therefore applies to all restrictions and limitations, the government did not follow the Council's advice, holding that "as long as it has not been really implemented it cannot be applied by way of directive-friendly interpretation of the national law which still protects the interests of users of works, irrespective of any abuse of restrictions on copyright" (Jehoram, 2009). Nevertheless, France has implemented the three step test in its national legislation, particularly in the French Intellectual Property Code, Articles 122-125, despite being fully aware of its significance (Jehoram, 2009).

4.3 Treaty Interpretation according to Vienna Convention

4.3.1 Applicability of the Vienna Rules

In interpreting the meaning of three step test under the Berne Convention as well as its existence in other international treaties, one has to interpret according to certain rules of interpretation under international law. The precise interpretation of the three step test is pertinent as it is the keystone of the copyright system that allows a fair balance of interest (Geiger *et al.*, 2009: 432).

As the Berne Convention (1886) was created before the establishment of the Vienna Convention on the Law of Treaties, 1969, the Berne Convention needs to be interpreted according to the rules of customary international law. Nevertheless, Articles 31 and 32 of the Vienna Convention are generally accepted as codifications of customary international law. This is clearly evident in the *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium/Netherlands)* Award of 24 May 2005 (2005:23), as follows:

> "It is now well established that the provisions on interpretation of treaties contained in Articles 31 and 32 of the Convention reflect pre-existing customary international law, and thus may be (unless there are particular

> indications to the contrary) applied to treaties concluded before the entering into force of the Vienna Convention in 1980. The International Court of Justice has applied customary rules of interpretation, now reflected in Articles 31 and 32 of the Vienna Convention, to a treaty concluded in 1955 ... and to a treaty concluded in 1890, bearing on rights of States that even on the day of Judgment were still not parties to the Vienna Convention ... There is no case after the adoption of the Vienna Convention in 1969 in which the International Court of Justice or any other leading tribunal has failed so to act."

Hence, although the Berne Convention was concluded before the existence of the Vienna Convention, the Vienna Rules are still generally applicable to it. The Vienna rules are also endorsed with unreserved recognition in various judgments and opinions of the ICJ, arbitral awards as well as decisions of national courts (Gardiner, 2008: 13). In addition, with regards to the TRIPs Agreement, Article 3(2) of the Understanding on Dispute Settlement clearly provides that in clarifying the provisions under the TRIPs Agreement, dispute panels can construe it "in accordance with the customary rules of interpretation of public international law".

In short, both Articles 31 and 32 of the Vienna Convention represents the rules of interpretation applicable to both the Berne Convention and the TRIPs Agreement. It is thus necessary to examine and apply these Vienna rules of interpretation when interpreting the three step test existing under the Berne Convention and TRIPs Agreement.

4.3.2 General rule of interpretation

The general rule of interpretation of treaties, as provided under Article 31 of the Vienna Convention, states the following:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

a) Ordinary meaning

The starting point in interpreting a provision in a treaty is by reading the works in the treaty whereby it "almost axiomatically involves giving them the meaning which the reader takes to be usual or as one of a range of meanings" (Gardiner, 2008: 162). The ordinary meaning however does not have a determinative role, as it is subject to confirmation with the context, object and purpose in question. This was confirmed by the ICJ in *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* [1991] ICJ Reports 53, where the Court observed the role of "ordinary meaning" as follows: "An arbitration agreement (compromise d'arbitrage) is an agreement between States which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties". In that respect, according to the *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports* (1950: 8):

> "The first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words."

In *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports* (1962: 336), the rule of interpretation according to the natural and ordinary meaning of the words employed "is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it." These principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which in many respects may be considered as a codification of existing customary international law on these point, as stated in the Judgment on the *Arbitral Award of 31 July 1989*, [1991] ICJ Reports 53 at 69-70, para 48. Therefore, in the course of interpreting the three step test, based on Article 31(1), the starting point is to find its "ordinary meaning" in its "context".

In constructing the ordinary meaning of the three step test, the WTO 2000 Dispute Resolution Panel *Report on Section 110(5) of the United States Copyright Act* has generously referred to the General Oxford Dictionary as their source of definitions. The practice of referring to this dictionary for the meaning of certain terms is normal and acceptable. However, certain caution is needed, as amplified in the *WTO's US-Measures Affecting Gambling* case (WTO, 2000: 21), stating that "... dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue all meanings of words – be those meanings common or rare, universal or specialized". The multiplicity of meanings

offered by dictionaries also makes it highly important to recourse to context and other aids prescribed by the rules for selection of the appropriate ordinary meaning (Gardiner, 2008: 169).

b) Context surrounding the three step test

Reference to the context qualifies the ordinary meaning of terms used in a treaty as well as identifying the material that needs to be taken into account when interpreting a treaty. Context can be understood by drawing attention to the whole text of a treaty, its preamble and any annexes (Article 31(2)). Article 31(2) also clearly identifies the agreements and instruments that may constitute the context of an agreement. In considering the context of the treaty in question, certain matters also need to be taken into account, namely subsequent agreements made by the parties, their subsequent practice in relation to treaty obligations, and such rules of international laws as may be applicable to their interpretation.

With regards to interpreting the three step test, Article 31(2)(a) is of particular relevance in determining the context of three step test, i.e. "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty". Ricketson, noting Yaseen and the WTO Panel in *United States – Section 110(5) of the US Copyright Act*, 15 June 2000, further observed that any such agreement may include "uncontested interpretations given at a diplomatic conference, for example by the chairman of a drafting committee or plenary session" (Ricketson, 2002: 13). In relation to Article 9(2) of Berne, there were several uncontested statements made by the chairman of the Main Committee I of the Stockholm Conference. Such agreements may form part of the context of a treaty for the primary task of interpretation under Article 31(1), and this has particular significance for the primary task of interpretation, and therefore cannot simply be regarded as "preparatory work", which is considered a supplementary means of interpretation.

c) Object and purpose

The secondary process of applying the rules of treaty interpretation is by referring to the "object and purpose", by which the initial and preliminary conclusion must be tested and either confirmed or denied. The least controversial way, in confirming or denying any conclusion made as to the meaning of the provision, is by examining the text of the treaty, including its preamble. This is, after all, the expression of the parties' intentions, and "it is to that expression of intent that one must first look" (Sinclair, 1984: 130).

The "object and purpose" of the Berne Convention can be found in its preamble, which states, "[t]he countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works…". The protection of the rights of authors is also brought to the fore as early as in Article 1 of the Berne Convention, which provides that "[t]he countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works". From the text, it seems clear that the object and purpose of the Berne Convention is solely to protect the rights of authors, as it does not mention any other kinds of purpose, including any protection for public interest, education or whatsoever.

d) Supplementary means of interpretation

In the event a) the interpretation resulting from an application of Article 31 leaves the meaning ambiguous or obscure, or b) when this leads to a result that is manifestly absurd or unreasonable, Article 32[43] of the Vienna Convention permits

[43] Article 32 reads: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to article 31:
(*a*) leaves the meaning ambiguous or obscure; or
(*b*) leads to a result which is manifestly absurd or unreasonable.

the use of supplementary means of interpretation. What is regarded as "supplementary means" is not exhaustively defined, but it includes "preparatory works" and "the circumstances of its conclusion". With regard to "preparatory works", Ricketson (1987: 136) viewed that this would:

> "…comprise the documentation usually published as the 'Actes', 'Documents', or 'Records' of the diplomatic conferences leading to the conclusion of the Convention. This would include the conference programmes and the work of any advisory or expert committee that assisted in its preparation, the proposals and counter-proposals of the different delegations, the minutes of meetings, the reports of committees, and the resolutions or votes taken. Furthermore, although the words 'preparatory work' might, on a strict reading, be taken as referring only to the 'preparatory work' carried out in relation to the latest text that binds the parties, it seems reasonable to interpret them in a broad sense as comprehending all preparatory work done in relation to the Convention at each of its successive conferences."

The phrase "circumstance of the treaty's conclusion" includes considering the historical background against which the treaty was negotiated, and the individual characteristics and attitudes of the contracting parties (Sinclair, 1984: 141). As such, the historical background of the Berne Convention (particularly the preparatory work of the Stockholm Conference 1967, and the revision proposals for Article 9(2) of the Brussels Act 1948) is relevant in interpreting Article 9(2) of the Berne Convention. Similarly, the background of the TRIPs Agreement is also useful when the interpretation gathered by the application of the primary means of interpretation is ambiguous, obscure or leads to an absurd or unreasonable result.

Other matters that may not be referred to in Article 32 of the Vienna Convention can still be considered as other supplementary means and regarded as capable of providing a genuinely authentic interpretation, such as the decisions of WTO panels regarding interpretations of the Berne Conventions (Articles 1-21 and the

Appendix, except for Article 6*bis*) (Ricketson, 1987: 136). Nevertheless, the WTO Panel decisions only bind the states that are party to the dispute, and caution must be made when applying any WTO determination, as the objects and circumstances of the TRIPs Agreement are different from Berne.

There are also other non-authentic sources to aid the interpretation of a treaty, but yet are still regarded as important, such as the views of the International Office of the Union (these functions are carried out by the World Intellectual Property Organization (WIPO)), and the various expert advisory committees and working groups of the Union. Reference to it may reveal different interpretations and applications of the use of terms, and may further furnish any authoritative statements, particularly when the documents addressed have been prepared by officials of long-standing international experience and/or at the request of member governments.

As the interpretation of the three step test has also been considered by various national courts, these decisions might also be relevant; this is considered as providing "authentic interpretations" for a treaty provision. Diplomatic records of the governments that negotiated the original Convention and its successive revisions, the resolutions, reports and proceedings of various private bodies and congresses concerned with copyright, and the writings of learned commentators can also cast some light on the circumstances of the treaty's conclusion, although they may be of little weight (Ricketson, 1987: 137). These materials could also provide evidence of state practice in relation to which way the particular terms of the treaty have been interpreted and applied, although this use of the state practice criterion is limited to practices that are unanimous and unchallenged by other states (Ricketson, 2002: 16).

4.4 Analysis of the three step test

Article 9(2) of the Berne Convention will be analysed together with Article 13 of the TRIPs Agreement, as the identity of language and subject matter is very similar; this concurs with one WTO Panel decision that asserted that the three step tests in Berne and TRIPs required essentially the same analysis (WTO, 2000: 34). However, although Article 13 of the TRIPs Agreement simply replicates or adopts the language and formula of the three step test in Article 9(2) of Berne, with slight modification, Article 13 of the TRIPs Agreement needs to be interpreted as part of the TRIPs Agreement, rather than as part of Berne, as it contains a free-standing TRIPs obligation in relation to exceptions and limitations permitted for national legislation (Ricketson & Ginsburg, 2006: 850). The context of the TRIPs Agreement, being a trade agreement that is more concerned with maximizing the protection of intellectual property rights, is also different from the context of the Berne Convention because the TRIPs Agreement contains specific features that suggest different nuance or emphasis when interpreting its provision (Ricketson & Ginsburg, 2006: 852).

Although the preamble, objectives[44] and principles[45] of the TRIPs Agreement may suggest for a more balanced or generous interpretation of the components of the three step test, which take into consideration the competing public interest, particularly in educational and developmental concerns, some commentators viewed that this is not allowed due to Article 2(2) of TRIPs and Article 20 of Berne (Ricketson & Ginsburg, 2006: 855). Article 2(2) modifies the application of a "balanced" approach under TRIPs by acting as a non-derogation clause, providing

[44] Article 7 of the TRIPs Agreement provides that 'the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge, and in a manner conducive to social and economic welfare, and to a balance of rights and obligations'.

[45] Article 8(1) of the TRIPs Agreement provides that 'Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement'.

that "nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have towards each other under … the Berne Convention". Thus, Article 13 of the TRIPs Agreement should not be interpreted in a way that might permit further limitations or exceptions to the exclusive rights protected under the Berne Convention than those presently allowed under it.

Moreover, the TRIPs Agreement is considered as a "special agreement", which is permitted under Article 20 of the Berne Convention, as follows:

> "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable."

Hence, Article 20 of the Berne Convention, which is incorporated into TRIPs by virtue of Article 9(1) of the TRIPs Agreement, limits the Agreement by disallowing any contradiction with the provisions in the Berne Convention; Article 9(1) requires that members comply with Articles 1 to 21 and the Appendix of the Berne Convention regardless of whether the country in question is a Berne member. This is with the exception of Article 6*bis* of the Berne Convention relating to moral rights,[46] which have been expressly excluded.

Article 13 thus cannot be used "to justify derogation of any minimum right established by Berne" (Goldstein, 2001: 295). Thus, any exceptions relating to copyright works, apart from exception for reproduction, will still need to find a basis under the Berne Convention and not from the general language of Article 13 of the TRIPs Agreement (Ricketson & Ginsburg, 2006: 854). Provisions that extend the scope of the existing Berne Convention limitations and exceptions, "even though otherwise sustainable under Article 13 of TRIPs, would be unacceptable because they will place Berne members in breach of Article 2(2) of

[46] 'Moral rights' of authors refers to the inherent and inalienable rights of authors, aside from economic rights, such as the right to prevent distortion or modification of the author's work in a way that would negatively affect his/her reputation or honour.

TRIPs" (Ricketson, 2003: 51). The inclusion of Article 20 of the Berne Convention, which prescribes on special agreements among countries in TRIPs,[47] by virtue of Article 9(1) of TRIPs, also forces those applying the Agreement to ensure that TRIPs is interpreted in a way that increases the protection of authors, or at least in no way contravenes the Berne Convention (including Article 6*bis*). Article 20 of the Berne Convention combined with Article 1(1) of TRIPs[48] thereby allows member countries to agree to certain benchmarks restricting exceptions, which results in a higher level of protection[49] (Gervais, 2008: 213). Article 2(2)[50] of TRIPs further provides a form of safeguard to ensure that lower conditions than those already provided in other international treaties are not being applied. In other words, the TRIPs Agreement is subject to the obligation laid down in Article 20 of the Berne Convention. The function of Article 13 of TRIPs is to be construed in the light of the obligation to safeguard the Berne standard of protection (Senftleben, 2004: 89).

Based on Article 9 of TRIPs, the Berne Convention is a source of rights and obligations for all WTO members. Some commentators even conclude that the Berne Convention, to the extent incorporated, is a source of law (Matsushita, Schoenbaum, & Mavroidis, 2006: 58). Article 9 of the TRIPs Agreement is extremely important as it brought most of the Berne Convention under the WTO dispute settlement mechanism, which Gervais (2008: 213) described as "giving teeth to a Convention that was until then very difficult to enforce, owing to lack of

[47] Article 20 of the Berne Convention reads as follows: The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.

[48] Article 1(1): Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

[49] This is with exception to Art. 10(1) of the Berne Convention, which contains an exception for quotations, subject to certain conditions.

[50] Article 2(2) reads: Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

an authority with the power to interpret the Convention". Although Article 33(1) of the Berne Convention provides that any dispute on the interpretation of the treaty that cannot be settled through negotiation may be brought to the International Court of Justice jurisdiction; such has never been done. In other words, the incorporation of WIPO conventions into the TRIPs Agreement subjects member countries to the TRIPs Agreement dispute settlement regime, and allows WTO panels to interpret WIPO conventions (Matsushita, Schoenbaum, & Mavroidis, 2006: 724).

In contrast to the view that Article 20 of the Berne Convention limits the application of Articles 7 and 8 of the TRIPs Agreement in interpreting the three step test in a flexible manner, many other commentators, during the academic discussion on how the three step test should be interpreted, considered and referred to Articles 7 and 8 of the TRIPs Agreement as well as to the preamble of the WIPO Copyright Treaty towards achieving a better interpretation of the three step test. Introducing the Munich Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law (2008), it was considered as follows (JIPITEC, 2010: 1):

> "The public interest is not well served if copyright law neglects the more general interests of individuals and groups in society when establishing incentives for rightholders. Where friction arises between the interests of rightholders and the general public, an effort must be made to bring them into equilibrium. This balancing of interests is a general objective of intellectual property regulation as embodied in Art. 7 TRIPs and the WIPO Copyright Treaty, the preamble to which emphasizes 'the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information'".

It was also explained that the omission of the interests of other (third) parties under the three step test in copyright law (unlike in patents, trademarks and industrial designs) must be addressed and considered by reference to the overall aim

contained in Articles 7 and 8 of the TRIPs Agreement and in the preamble to the WIPO Copyright Treaty (UNCTAD-ICTSD, 2009: 2).

To this extent, it seems that the interpretation of three step test through the WTO Panel in Articles 13 (copyright),[51] 17 (trademarks)[52] and 30 (patents)[53] of the TRIPs Agreement is at a crossroads, as to the question of whether the interpretation limits the international standard for intellectual property rights (Senftleben, 2006: 435). Others nevertheless have commented that the WTO Panel interpretation of three step test is not in compliance with the principles of interpretation of public international law as it disregards fundamental freedoms, interests in competition and public interests (Geiger, 2009: 627). A more flexible interpretation, taking into account the public interest as prescribed in the objectives of TRIPs, is very much encouraged and called for in order to achieve a more balance approach to the interpretation of the three step test.

4.4.1 Rights

The general provisions allow certain kind of rights when making exceptions and limitations to copyright protection.

a) Reproduction

The provision providing on the general exception to copyright in Article 9(2) permits the right to reproduction. This was interpreted as referring to the copy of work rather than the work itself (Ricketson, 2006: 407). This reproduction right also extends to complete or partial reproductions of the work, either in its original form or into other forms, and thus encompasses the broad realm of adaptations (Ricketson, 2006: 622). The act of copying may take the form of manual copying

[51] See WTO Document WT/DS160/R
[52] See WTO Document WT/DS174/R (US complaint) and WTO Document WT/DS290/R (Australia complaint)
[53] See WTO Document WT/DS114/R

of a published work by hand or by means of reprographic machine. This is by virtue of Article 9(1) of the Berne Convention, which stipulates that "literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form".

A controlling number of delegations at the Stockholm Conference leading up to the adoption of this provision of the Berne Convention considered that an attempt to specifically define the term "reproduction" would be dangerous and that it was unnecessary to be too specific, stating also that the present language of Article 9(1) was sufficient (Smith, 2001: 3). Masouye (1974), in his authoritative Guide to the Berne Convention, explains the meaning of "in any manner or form" in Article 9(1) as follows:

> "The words 'in any manner or form' are wide enough to cover all forms of reproduction: design, engraving, lithography, offset and all of the printing processes, typewriting, photocopying, mechanical or magnetic recording (discs, cassettes, magnetic tape, films, microfilms, etc.) and all other processes known or yet to be discovered."

The scope of Article 9(1) is sufficiently general to cover any technological advance in the means of fixing works. Based on Masouye's explanation, the right of reproduction is independent of the physical medium (Lopez, 2002: 5), and may also include storage in any medium by electronic means, and making copies that are transient or incidental to some other use of the work (Smith, 2001: 3).

Such reproduction also involves making the works available at a time and place chosen by the individual reproducer, that is to say they may be communicated to the public in the digital environment (Lopez, 2002: 7). Sound or visual recording shall also be considered as a "reproduction" for the purpose of the Convention. This is pursuant to Article 9(3) of the Berne Convention, which provides that any sound or visual recording shall be considered as a reproduction for the purposes of the Convention, thus making it clear that sound recordings and films constituted reproductions of the works incorporated in such media (Sterling, 2003: 618).

b) Exclusive right

While Article 9(2) of the Berne Convention only permits reproduction or copying of works in any manner or form, Article 13 of the TRIPs Agreement expands the formula for making exceptions beyond "reproduction" to cover "exclusive rights". However, the term "exclusive rights" is somewhat ambiguous (Ricketson & Ginsburg, 2006: 852). The WTO Panel (2000: 28) reporting on Section 110(5) of the US Copyright Act, viewed that the term "exclusive right" should apply to reproduction and all other exclusive rights listed in Berne, including the rental right in TRIPs. This view is based on Article 9(1) of the TRIPs Agreement, which requires its members to comply with Articles 1 to 21 of Berne (other than Article 6*bis*). To view that the term "exclusive right" only refers to those rights protected under the TRIPs Agreement itself would only lead to a limited sphere of application, which is the rental right, and which applies only in limited cases such as computer programs and cinematographic works (Ricketson & Ginsburg, 2006: 852). Hence, Article 13 covers a broad range of rights including the right to reproduction, translation, public performance, broadcasting and other communications, public recitation, adaptation as well as to the rental right provided for under Article 11 of the Agreement, which is not stipulated in the Berne Convention (Correa, 2007: 136). In this regard, Article 13 is considered as a "Berne-minus" solution, as it expands the room for exceptions, beyond what the Berne Convention provides for (Correa, 2007: 136).

Therefore, the rights permitted by the general provisions controlling exceptions and limitations, including the rights granted with respect to copying in various forms, applies to the new methods used in teaching, research and study, thereby facilitating the research and study of legal education in universities.

4.4.2 Purposes

Article 9(2) of the Berne Convention and Article 13 of the TRIPs Agreement do not specify any particular purposes that may fall under this exception, as they are deliberately created in abstract or general terms for countries to be able to apply it within their national laws without much difficulty. However, it requires that limitations and exceptions should be limited to "certain special cases" only.

The ordinary definitions of "special case" give rise to separate boundaries vis-à-vis any quantitative or qualitative approach. The quantitative aspect lies on the consideration that an exception has a limited scope, enabling only a limited number of privileged uses (Ricketson & Ginsburg, 2006: 767; Senftleben, 2004: 138). The small number of certain privileged uses will appear special when compared with the other normal cases of copyright use (Senftleben, 2004: 138). This quantitative standard of review, as taken by the WTO Panel (2000: 33), has been viewed as creating an unnecessary obstacle for national limitations in complying with the three step test (Senftleben, 2004: 144). Relying on the quantitative connotation of the term "special" is not advisable, as it does not constitute a firm basis for an examination of exceptions and can be unsuitably injurious against any socially valuable ends (Senftleben, 2004: 144).

On the other hand, the qualitative aspect of speciality is based on the interpretation of the term "special" as referring to being distinctive or exceptional, which is widely accepted to refer to exceptions that have sufficiently strong justification by clear reason of public policy or other exceptional circumstances. In the context of Article 13 of TRIPs, a clear and sound political justification can include freedom of expression, public information, and public education but it is not allowed to curtail author's rights in an arbitrary way (Ficsor, 2002a: 133). Reinbothe and von Lewinski (2002: 124) similarly explain in respect of Article 10 WCT that "limitations and exceptions should be based on a specific and sound policy objective. … such policy areas of concern or relevance to limitations and

exceptions may be public education, public security, freedom of expression, the needs of disabled persons, or the like". The qualitative standard of review is thus for the states to decide, upon which various justifications may be invoked, and such national policy decisions should not be interfered with too much (Senftleben, 2004: 147). The expression "special cases" underlines the responsibility of national legislators to use the existing freedom moderately, and to permit copyright limitations with sense and reason (Senftleben, 2004: 157).

Although the WTO Panel stated that "an exception or limitation should be narrow in quantitative as well as a qualitative sense", they disagree that the term "special purpose" relates the exception to legitimate public policy purposes (2000: 33). The WTO Panel's "cautious" approach is based on their concern of a broader kind of provision, one that is applicable to all exclusive rights of copyright owners, not just reproduction rights (Ricketson 2006: 766), and on the relevancy of any interpretations applied by the Appellate Body to other WTO rules. The Panel Report referred to the Appellate Body Report on Japan – *Alcoholic Beverages* that rejected interpreting WTO rules based on the subjective aim pursued by national legislation (2000: 33-34). Moreover, although the term "special purpose" is similar in both Berne and TRIPs, the context is different, as Berne is purely concerned with intellectual property rights, while TRIPs affects a much broader context, i.e. a trade agreement (Ricketson & Ginsburg, 2006: 766). The WTO Panel does not attempt to interfere with national discretion in determining the purpose of exceptions to copyright exclusive right, as Article 13 also never authorized the WTO bodies to scrutinize the public policies of Member countries in adopting such exceptions, but observed that it could be of subsidiary relevance for drawing inferences about the scope of an exemption (WTO Report, 2000: 42). Departing from his earlier view in his 1987 commentary, Ricketson agreed with Ginsburg (2001: 11) that the phrase "certain special cases" should not receive a normative interpretation, as the drafting history of Article 9(2) never required any need for policy justification in the first step of the test. This is evident in that not all of the exceptions recognized under national laws during the adoption of Article 9(2) have clear public policy

justification, such as the exceptions for "private use", "ephemeral use", and "texts of songs" that do not suggest any rationale for their recognition, other than convenience for the user or the fact that they are possibly *de minimis* uses that will not affect the copyright owner (Ricketson & Ginsburg, 2006: 767). The justification of an exception however may fall to being tested by the second and third steps of the test (Ginsburg, 2001; Ricketson, 2002: 31).

The question now is whether the teaching, research and study of legal education at universities can come within the limit of "certain special case" required by Article 9(2) of Berne and Article 13 of TRIPs.

a) Teaching purposes

All specific limitations provided under the Berne Convention, such as teaching exceptions, (Article 10(2)) and quotations (Article 10(1)), can automatically be regarded as "special case" (Senftleben, 2004: 157). The Study Group, in discussing Article 9(2) of the Berne Convention, point out that other provisions in the Convention must be taken into account, stating that "the provisions already existing for certain special purposes (Articles 10, 10*bis* and 11*bis*, paragraph (3)) must be regarded as rules exercising limits on the questions with which they deal" (WIPO, 1971: 112). There are two views pertaining to the question whether the specific exceptions provided under the Berne Convention should or should not be applied cumulatively with the three step test provision. Applying the principle of *lex specialis legi generali derogat*, (Gardiner, 2008: 297-298) which means that specialized law prevails over general law, it has been viewed that the teaching purposes exception continues to exist in an unqualified form because it provides, in effect, a special rule, where the three step test would not be applicable. Another view suggests that the specific exceptions are supported by the open-formulated three step test, which acts as an additional safeguard (Senftleben, 2004: 155). For example, Article 10(2) permits the utilization of works for teaching purposes provided that it is justified by the purpose and compatible with fair practice. In

order to determine whether a national limitation based on these provisions is compatible with fair practice and justified by the underlying purpose, it is advisable to employ the proportionality test inherent in the three step test (Senftleben, 2004: 242). Thus, a national legislature that wants to exempt the utilisation of a work by way of illustration for teaching must fulfil not only the conditions under Article 10 of the Berne Convention, but also the abstract criteria of the three step test. The exception must also be limited to certain special cases, not conflict with the normal exploitation of a work, and not unreasonably prejudice the legitimate interests of the right holder.

b) Fair Dealing

The fair dealing exception for the purposes of research or private study may also constitute a "special case" because its scope has traditionally been considered fairly limited (Senftleben, 2004: 166), although this has been criticized as undermining the critical role that it should play (Craig, 2005: 438). For example, the fair dealing provision under Section 29 of the UK 1988 Act does not apply to multiple reproductions or copying by third parties who know that the materials will be provided to more than one person at substantially the same time or for the same purpose. Compared to fair dealing, the fair use doctrine, as used in the US, has a greater degree of difficulty in satisfying the "special case" requirement, as it is more open-ended, allowing great latitude for courts to decide on a case-by-case basis (Senftleben, 2004: 162-163).

c) Research or study

Personal or individual use

It is debatable whether research or study conducted for personal or private use may qualify as special case in the sense of the three step test. Ricketson (1987:482) viewed that the private or personal use is considered a broadly framed exemption,

and thus cannot be justified. The interpretation on the phrase "certain special cases" is that the exceptions should be finite and limited in scope (Ricketson & Ginsburg, 2006: 767). This view is similarly recognized by the WTO Panel (2000: 33), viewing that this guarantees a sufficient degree of legal certainty but at the same time cautioning that "there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised". Reinbothe and von Lewinski (2002:124) also elaborated thus, "national law has to contain sufficient specifications … unspecified wholesale limitations or exceptions are not permitted ... exceptions have to be well defined and to be of limited application". These interpretations indicate that general exceptions would not be permissible. Sterling (2003: 440) viewed that exceptions which provide that "reproduction of any work may take place for any purpose connected with education" cannot be upheld as it is considered general and not limited to special cases. It was also contended that in the digital environment private use has become too broad a category to be regarded as a "special case" under the three step test. Reinbothe (2000: 257) contends that digital reproduction for the purpose of personal use can no longer be regarded as a "certain special case" unless it is defended on another basis (apart from the market failure rationale).

Senftleben nevertheless argued against these views, upholding that the use of copyright materials for personal research, study or learning as constituting certain special cases (Senftleben, 2004: 159), as private use was clearly perceived as "certain special case" at the 1967 Stockholm Conference (Senftleben, 2004: 166). The drafting history of Article 9(2) proposing for a general exception to the right of reproduction shows that its original draft explicitly permitted the reproduction for "private use" and for "judicial or administrative purposes" (WIPO, 1971: 113) stating that:

> "It would be possible for national legislation to permit the reproduction of the works referred to in paragraph (1) in three cases: (a) for private use; (b) for judicial or administrative purposes; (c) in certain particular cases,

> provided (i) that reproduction is not contrary to the legitimate interests of the author, and (ii) that it does not conflict with a normal exploitation of the work."

Wallace, a delegate from the UK, was concerned that the terms "private use" and "administrative purposes" could be interpreted too widely (WIPO, 1971: 857). It was decided that the explicit enumeration of cases should be refrained from but that the abstract formula constituting the three step test was so expressed in order to comprise such cases anyhow. The UK delegation emphasized that the abstract criteria "can take care of legitimate cases of private use and judicial and administrative purposes" (WIPO, 1971: 630). Further questions as to whether such exceptions should be adopted or maintained on the national level and how their scope should be delineated were confidently left to national legislation (Senftleben, 2004: 148). Moreover, the general report of the conference expressly mentioned the exemption of the scientific use of copyrighted material. The practical example given therein with regard to Article 9(2) BC refers to "individual or scientific use" (WIPO, 1971: 1146).

Wallace also based his view on another dictionary interpretation of "certain", which refers the word to something "of positive yet restricted (or of positive even *if* restricted) quantity, amount, or degree" (Oxford Dictionary). When the drafters inserted the word "certain", they were bearing in mind a number of limitations that had existed at the national level at the time of the Stockholm Conference (Senftleben, 2004: 134). This is evident in the French text of the Berne Convention, which was ultimately to prevail in the context of the Berne Convention, that clearly indicates that the drafters of the three step test intended the term "certain special cases" to merely mean "some special cases" (Senftleben, 2004: 134).

Furthermore, the Study Group had considered, but rejected, the possibility of adopting an exclusive list of exceptions, stating that such "would be very long and would considerably restrict the authors' rights". They also feared that "the

introduction of a list of this kind would encourage the adoption of all the exceptions allowed and abolish the right of remuneration. On the other hand, a list, however long, would be inadequate, because it could never cover all the special cases existing in national legislation" (WIPO, 1971: 112).

When the matter was discussed again in the 1996 WIPO Diplomatic Conference, the suggestion that limitation should be restricted to "precisely defined special cases" was again rejected, thereby rejecting the view that the term "certain" necessitates an exact and precise definition (Senftleben, 2004). It is not desirable for law to be too specific and rigid, but a law needs to be foreseeable, and adaptable to the changing circumstances and needs of society (Senftleben, 2004). This is best explained in the *Sunday Times* case, ECHR Judgement of April 26, 1979, Series A No. 30, where the court viewed the issue as follows:

> "Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

Nevertheless, although a determined or fixed set of special cases is not required, there should be a clear dividing line between different limitations for it to be counted as "some special cases". An incalculable, shapeless provision exempting a wide variety of different uses is impermissible (Senftleben, 2004: 135); the matter is left to the national legislature and courts to decide which special cases can benefit from the exceptions to the copyright law (Senftleben, 2004: 136).

Research or study done for personal use are also justified on the grounds that they contribute to the dissemination of information and the right to privacy (Senftleben, 2004: 158). This is also clearly pointed out when the Study Group stated that exceptions should only be made for clearly specified purposes, giving example of private use, the composer's need for texts, and the interests of the blind (WIPO,

1971: 112). The example of "the composer's need for texts" can be used as an analogy with the needs of users for materials to create new works, students to study, and researchers to analyse and discuss the law.

Personal use by non profit organisations

Other different facets of personal use can also arise when copyright materials are used by non-profit organisations, especially those involved in the dissemination of knowledge, such as libraries, archives, and higher education institutions. It has been viewed that these organisations may be qualified as a special case; facilitating such organisations to fulfil their tasks properly (Senftleben, 2004: 160). However, if the organisation has an underlying motive for profit, the exemption cannot be supported and it would be difficult to qualify it as a special case (Senftleben, 2004: 160). This was also apparent when the Chairman cautioned the Main Committee to be flexible in its listing of exceptions to the exclusive right of reproduction; he gave the example in regard to the right to make photocopies, "it might be considered that the consent of the author was essential in the case of industrial firms but not in the case of scientific institutes" (WIPO, 1971: 857). Applying this to private universities, and even to the situation of public universities that have increasingly been cooperating with corporate organisations or industrial organisations in order to secure funding, the exception may not be applicable where there is training or teaching conducted with a view to making a profit. The profit motive silences arguments supporting the exemption.

Research and study conducted for private use purposes covered under "certain special case" in Article 9(2) also extends to uses by corporate bodies. This is evident from the statement by Krever from France who justified that "the purpose of the French proposal (S/70) was to determine the exact scope of the exception since it was clear that the phrase "private use" would cover corporate bodies, which would perhaps be going too far" (WIPO, 1971: 858). The acceptance of private use

by corporate bodies or industrial undertakings is also reflected in the final report on the work of Main Committee I (WIPO, 1971: 1146) as follows:

> "It [photocopying for various purposes] implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that according to national legislation, an equitable remuneration is paid."

From the above, "use in industrial undertakings" was obviously regarded as a special case (Senftleben, 2004: 159). However, distinctions are made between the internal use of copyrighted material in industrial undertakings as being a special case in the analogue environment only, but not a special case insofar as digital technology enables the exertion of control (Senftleben, 2004: 162).

4.4.3 Beneficiary

Article 9(2) and Article 13 do not specify any particular beneficiary that may use this provision. It is open in the sense that any parties or stakeholders may benefit from the exceptions and limitations provided that other requirements and conditions prescribed under Article 13 are fulfilled.

It is questionable whether the three step test should merely be treated as a general statement of principle intended to guide the actions of national governments, or whether it was being also addressed to national courts. Different governments have differing approaches to this question. The UK for example views that the test should be treated as a general statement of the principle intended to guide the actions of national governments, as it is too vague and open for it to be a useful guide for national courts (Burrell & Coleman, 2005: 298). Other states following this approach include Germany, Austria, Denmark, Sweden and Finland (Griffiths, 2009: 4).

Australia, however, incorporated the three step test into its domestic law through Copyright Amendment 2006, resulting in the direct effect of the three step test needing to be complied with by its national courts. Some commentators, however, have viewed that the imprecise nature of the three step test means that it should not be used as a guideline by courts when deciding cases on an individual basis, such as to determine the scope for research and private study (Griffiths, 2009). In this regard, I would be more inclined toward the view that the three step test is directed towards governments and legislatures to use as guidelines, rather than for courts to decide individual cases based on it. The three step test should be used as complementary test or something to be taken into account and considered by the courts when dealing with the issue of exceptions and limitations. Different approaches to the application of the three step test were discussed under subsection 4.2.2 relating to the spread of the three step test as well as in subsection 4.2.3 (c) relating to the impact of three step test under TRIPs.

4.4.4 Works

Article 9(2) permits reproduction of "such works" in its general term. Although the Convention refers "such works" to "literary and artistic works" under Article 9, it does not limit the provision to literary works and artistic works in its restrictive term. This is because under Article 2(1) of the Berne Convention, the expression "literary and artistic works" covers a broad range of works, which includes "… every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression". Article 2(1) further provides some examples of "literary and artistic works", and illustrates the kind of subject matter that may fall within the general definition, as follows:

> "… such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are

> assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."

By using the word "such as", the list in Article 2(1) cannot be taken to be an exhaustive list; it only sets some examples as guidance for member countries.

With regard to publicly generated materials, which are commonly used in legal education, particularly in statutes and cases, countries are left to decide whether their government works should be copyright protected (Article 2(4) of the Berne Convention), stating as follows:

> "It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts."

As there is no uniform rule on whether nations can copyright their governmental works, individual states have differing approaches on this matter (Sterling, 1995). For example, UK and Australia[54] claim copyright on the text of its laws and legislative materials; Section 164 of the UK Copyright Designs and Patent Act 1988 particularly provides for Parliamentary copyright in works "made by or under the direction or control of the House of Commons and the House of Lords". Under its Section 165, Parliamentary copyright extends to bills, official reports, journals of both Houses, and committee reports. Conversely, Section 105 of the United States Constitution excludes copyright protection on its federal government works, although no similar prohibition exists for the works of its state and local governments. Similarly, Malaysia excludes official texts of the Government or statutory bodies of a legislative or regulatory nature, or judicial decisions from the

[54] Section 182A Copyright Act 1968

definitions of "literary work" (Section 3 of the Malaysian Copyright Act 1987) which are eligible for copyright. For countries that grant copyright protection to their government works, it is arguable whether this general provision controlling exceptions and limitations in national law still applies.

When discussing the protection of official texts of a legislative, administrative and legal nature as well as official translations (Article 2(3) of Berne Convention), Wallace, from UK viewed that although he understood and supported the proposed amendment to allow countries latitude in denying protection to original texts as well as translations, he raised his concern as follows (WIPO, 1971: 882):

> "It would be dangerous if the word 'administrative' was interpreted as allowing countries to deny copyright to Government publications such as expensive textbooks, which should always be entitled to protection. Freedom to deny protection was only justifiable in the case of material such as statutes and subordinate legislation."

Works covered under this general exception may also cover sound or visual recording. This is expressly provided under Article 9(3) of the Berne Convention, which states that "any sound or visual recording shall be considered as a reproduction for the purposes of this Convention".

It is not entirely clear whether computer programs and compilations fall under the category of works under Article 9(2) of the Berne Convention (Ricketson & Ginsburg, 2006: 850). This is because Article 2(5) appears to only require protection of "collections of literary or artistic works which, by reason of the selection and arrangement of their contents, constitute intellectual creations", and does not refer to compilations of data or other materials that are not literary or artistic works (Ricketson & Ginsburg, 2006: 850), such as in the case of compilations of journal articles normally distributed to students in the course of learning. Thus, these subject matters are subject to Article 10(1) and (2) of the TRIPs Agreement. Article 10(1) requires that these are to be protected as "literary works under the Berne Convention", while the obligation under Article 10(2)

requires only that compilations of data and material that constitute intellectual creations be protected "as such", which is unclear. Nevertheless, it has been argued that computer programs fall within the general description in Article 2(1), relating to a "production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression" (Ricketson & Ginsburg, 2006: 851). With respect to compilations of works, it has been viewed that Article 13 does not apply (Ricketson & Ginsburg, 2006: 851).

The subject matter referred to in Article 13 indicates any works to which Articles 1 to 21 of the Berne Convention apply, by virtue of Article 9(1) of the TRIPs Agreement. This includes "literary and artistic works", which is broadly interpreted under Article 2(1) of the Berne Convention as well as other kinds of works protected under the Berne Convention.

While the Berne Convention contains a non-exhaustive list of "copyrightable" works, which covers "every production in the literary, scientific and artistic domain" only (Art. 2(1) of Berne), the Berne Convention is supplemented by the recognition in the TRIPs Agreement of new rights regarding the protection of computer programs and compilations of data, and the related rights of performers and broadcasters. While Article 13 undisputedly applies to the newly created rights set out in the TRIPs Agreement, the question arises whether it also creates a new exception to the existing rights in the Berne Convention. Discussing the scope of the application of Article 13 of the TRIPs Agreement, the WTO Panel (2000: 28) viewed that "neither the express wording nor the context of Article 13 or any other provision of the TRIPs Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPs Agreement". This means that the scope of Article 13 applies to both new rights introduced in the TRIPs Agreement as well as the existing rights provided under the Berne Convention.

4.4.5 Other conditions

Other than the above, there are two important conditions required by the general provisions regarding exceptions and limitations to copyright protection. They require that national limitations a) must not conflict with a normal exploitation of the work, and b) should not conflict with the legitimate interest of the author or right holder.

a) "does not conflict with normal exploitation of work"

The interpretation of the phrase "does not conflict with normal exploitation of work" which form the second criteria of the three step test leads to controversial interpretations.

The test has been interpreted as referring to whether a copy and an original enter into or will enter into economic competition with the author. This is by virtue of the Study Group that prepared the proposals for the revision of the Berne Convention, Stockholm 1967 (WIPO, 1971: 112), which suggested that exceptions should be made for specified purpose and that these purposes "should not enter into economic competition with these works" in the sense that "all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors."

This historic approach has also been adopted in the WTO Panel (2000: 48). Ricketson (1987: 483) similarly viewed that "normal exploitation of a work" refers simply to "the ways in which an author might reasonably be expected to exploit his work in the normal course of events". In illustrating "conflict with a normal exploitation of the work," appearing under Article 9(2) of the Berne Convention, Masouye (1978: 55) illustrates novels and schoolbooks as being items that are normally exploited by printing and selling to the public, and thus member countries

cannot allow exception for this, even if payment is made to the copyright owner under compulsory licence. Comparing this with the analogy of a law textbook, this item is normally printed by commercial publishers for the purpose of research or study by law students as well as law practitioners. Any exceptions that allow the use of law textbooks for free without the need for permission or payment would conflict with the normal exploitation of the work. The same analogy may apply to law materials generated by private bodies, such as case summaries, annotations, encyclopaedic works, law dictionaries, journal articles, and headnotes prepared by law reporters or commercial publishers. Any exceptions that allow reusing these copyright materials to the extent that they will cause economic competition with the author or owner would indeed conflict with the normal exploitation of the work.

A different argument however applies with regard to publicly generated materials such as statutes or other government materials. States differ over the question whether their government works should be protected under copyright law. In some countries, such as Malaysia, statutes and reports of judgments are free, while in other countries, such as the UK and Australia, they are copyright protected (Sterling, 1995). Notwithstanding this fact, copyright law is intended to grant rights to creators with the purpose of protecting the income and assets of the creator, giving them an incentive to produce copyright materials, but these objectives are inapplicable to governments (Colebatch, 2008: 2). Laws, regulations and reports are constantly produced by governments, notwithstanding whether they will or will not be protected by copyright law; neither incentives nor motivations are necessary for governments to produce these materials for their people. Government is both representative of and funded by the greater community, and thus its works should belong to the people (Catherine, 2007). It is in the interests of the government that everyone has the fullest possible access to its laws. Seemingly, these law materials are purposely generated for the public and their exploitation is only to serve the public, not to seek profit from them or to enable one group of people, such as the publishers, to profit from them. Hence, using

copyright works invested in publicly generated materials, such as statutes and regulations, cannot be said to conflict with the normal exploitation of the work.

Interpreting this phrase to all the forms of exploitation that can be taken by authors is also not a good interpretation, as it gives the author or market more power than the states (Senftleben, 2004: 174). This particular concern is especially apparent in the digital environment, as the new ways of exploitation could be beyond the reach of the national legislator, towards the control of the author, resulting in "national copyright systems being subject to market powers without an initial decision of the legislator and beyond the legislator's control" (Senftleben, 2004: 176). This is commonly seen when commercial publishers seem to shrink the law information initially freely available as government works into becoming the private commercial publishers' property, protected under copyright law. This happens when private companies take the public information and release a "value-added" product or services such as headnotes, case summaries and other privately produced content added to case law and legislation that is licensed in its basic form by the government (Catherine, 2007). Additionally, the owners of online copyrighted information have also used contractual licensing terms and technological protection measures to control access to their information (Tjaden, 2005: 165). Hence, it has been suggested that preference should be given to a standard of control based on normative considerations instead (Senftleben, 2004: 176). States must have the power to limit or control the market or copyright owner, especially when it involves access to law resources. Law resources should not be allowed to be controlled by commercial publishers aiming for financial ends, who have the potential to make law resources extravagantly pricy.

In determining what "normal exploitation" is, one needs to consider not only existing but also potential uses of work. Conflict with the "normal exploitation" arises when exception robs the right holder of a real or potential source of income that is substantive (Okediji, 2008: 24). This interpretation raise a concern, that the various methods of exercising economic rights would increase the field of "normal

exploitation" and diminish the scope of making exceptions and limitations. The WTO Panel (2000: 44) viewed that "normal" exploitation clearly means something less than full use of an exclusive right, and not the full exploitation of the owners' rights, as this would render the three step test useless; this is important for avoiding exploitation. Moreover, if the authors were granted full exclusive rights, considerable economic or practical importance could be exploited in nearly all forms and ways of using and enjoying works of the intellect, which can be made possible in the digital environment (Senftleben, 2004: 181).

The prohibition of a conflict with a normal exploitation only protects the economic core of copyright from erosion, and concerns with ways in which an intellectual work is used from which major royalties accrue, i.e. the market that authors would generally develop or license others to develop (Senftleben, 2004: 188). The common policy about the use of materials protected under the Crown copyright is that the costs of publishing are met by the end-users through their paying commercial rates for the titles that they require, rather than out of general taxation (Robbie, 1996). It is also a general practice for government to readily license the reproduction of Crown material on a non-exclusive basis to avoid the danger of creating a private monopoly in public information (Robbie, 1996). The Government White Paper on the future management of Crown copyright in UK (1999) waived Crown Copyright in primary and secondary legislation in printed form (the Statute Law Database however does not fall within this category). This gives law publishers free and unrestricted access to Acts and regulations for use in their wide range of textbooks and reference material, thus enabling them to keep the prices of their excellent publications at a readily affordable level, for the benefit of students, the law profession and the general public; this waiver has been extended in the same terms to the reproduction of Acts and regulations in all other formats (Robbie, 1996). The free right to reproduce these important official texts in print and electronic form is hoped to have some effect on the prices charged for those products by commercial publishers, where this Crown material forms a

significant proportion of the content, so that the benefit is properly passed on as intended to the public at large (Robbie, 1996).

A "normal exploitation" also cannot be equated with full use of all exclusive rights; it only refers to something of a lesser degree (Senftleben, 2004: 182), as illustrated in the Stockholm Conference general report (1967: 1145-1146):

> "If [the photocopying] consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use."

The above example demonstrates that the prohibition of a conflict with a normal exploitation has the function to distinguish exceptions that exempt "a very large number of copies", thereby limiting it to exceptions that deprive authors of a major source of revenue, causing a substantial market impairment (Senftleben, 2004: 187).

The term "normal exploitation" is also taken as being a dynamic concept. The WTO Panel (2000: 50) opined that "what is a normal exploitation in the market-place may evolve as a result of technological developments or changing consumer preferences". The question then arises as to how this normative aspect of normal exploitation could be given meaning in relation to the exploitation of works in law research and study. One way to measure this is to consider whether the exploitation generates significant or tangible revenue or is likely to acquire considerable economic or practical importance (WTO, 2000: 48). In terms of publicly generated materials, it cannot be said that the materials are produced in order to, or generate, significant or tangible revenues for the government. At the most, the government may expect that making the law materials available for public access and use would at least recover their costs of production (Vaver,

1995). In contrast, the privately generated law materials, particularly those generated by commercial publishers, may rely significantly on the profit derived from these materials. However, less can be said for authors of law textbooks, who normally have various other sources of revenue, such as teaching and practicing, and who normally do not rely on royalties alone. Commentators, however, have felt that this line of interpretation essentially relies on economy (Correa, 2007: 153) and restrictive (Okediji, 2008: 23). It also raises some concerns on the remaining room available for exceptions based on social grounds, which includes educational exceptions.

Although the WTO Panel (2000: 50) acknowledged that "the extent of exercise or non-exercise of exclusive rights by right-holders at a given point in time" is highly relevant in determining what the normal exploitation of a particular exclusive right in a particular market actually is, it was nonetheless viewed that in certain circumstances, "current licensing practices may not provide a sufficient guideline for assessing the potential impact of an exception or limitation on normal exploitation". Uses not covered by exclusive rights or unlicensed work are not an indication that the work is not normally exploited, as it may be due to impracticalities or lack of effective or affordable means of enforcement. At present, it is common for universities providing legal education (or even government entities) to subscribe to law journals or commercial databases such as Lexis and Westlaw in order to access law quickly (Tjaden, 2005: 165). Allowing copyright exceptions in this normal practice would obviously conflict with the normal exploitation of the right holder.

On the other hand, facilitating government information online in order to make government information more accessible to the public is now a well-established practice. In providing a reliable source of online information about legislation and case law to the public, governments have responded positively to the Internet development by offering a great deal of official information via departmental servers. Additionally, new copyright arrangements allowing free electronic

reproduction of Acts and regulations in a value-added context are increasingly applied. Governments generally are therefore placing much emphasis on using the Internet, and putting a lot of steam into Internet development.

For example, the UK Statute Law Database (SLD),[55] an official revised edition of the primary legislation of the UK, was made available online. Its contents are subject to Crown copyright protection and they are available for viewing and private use, free of charge in any format, for non-commercial research, private study or internal circulation within an organization, provided that Crown copyright be acknowledged and the Statute Law Database is identified as being the source of the material. However, any other proposed re-use of the material, for example in commercial information products and services, payments must be made. Users are also encouraged to establish hypertext links to this website. In short, despite the Government claim on copyright, there is a general right or freedom to reproduce the text of statutes, and this has become the common position in many Commonwealth jurisdictions (Cox, 2008: 16). Although these statutes and legislation are subjected to Crown copyright, they may be freely reproduced and utilized. Special websites are also available for the public to access the law. This is the normal approach practiced by various governments, and thus using primary law materials created by governments should therefore not represent a conflict with the normal exploitation of work, as required by the three step test criteria.

b) "does not unreasonably prejudice the legitimate interest of the author/right holder"

The phrase "does not unreasonably prejudice the legitimate interest of the author/ right holder", being the third criterion under the three step test is considered as providing some flexibility or "wiggle room", through the use of the terms "prejudice," "unreasonable" and "legitimate" (Hugenholtz & Okediji, 2008). The terms "legitimate" and "reasonable" inject a measure of normative meaning into the

[55] http://www.statutelaw.gov.uk/Copyright.aspx

three step test (Gervais, 2005: 17). Both terms allow an infinite variety of public interests, such as the freedom to make private copies, to be factored into the three step equation (Hugenholtz & Okediji, 2008). The term "legitimate interests of the author" in Article 9(2) of the Berne Convention protects both the economic and moral (article 6*bis*) interests of the author and successor in title (Nordemann, Vinck, Hertin, & Meyer, 1990). The TRIPs Agreement, however, sheds a different light, as it devotes attention to "the legitimate interests of the right holder". Article 13 also does not cover moral rights, as it is expressly excluded from the scope of TRIPs by virtue of Article 9(1) of the TRIPs Agreement. The phrase "legitimate interests" is not an absolute conception; other consideration or some normative justification must be taken into account, thereby providing some kind of balancing process (Ricketson, 2006).

Prejudice to these interests by the proposed usage may be substantial or material, but it must not be "unreasonable", in the sense of being disproportionate. This is explained by Ulmer in Main Committee I in the Stockholm Records 1967, who commented that any exceptions to the right of reproduction will inevitably prejudice the author's interest, and so only exceptions that would "unreasonably" prejudice the author are not allowed. The report of the Main Committee I further asserted that "unreasonable prejudice to the legitimate interests of the author" may be avoided by the payment of remuneration under a compulsory license. The Main Committee I (WIPO, 1967: 1145-6) provides an illustration, as follows:

> "... a rather large number of copies for use in industrial undertakings ... may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use."

The illustration given by the Committee shows that exception under Article 9(2) can take the form of absolute exceptions or compulsory licences, depending essentially on the number of copies made. As there was no opposition to Prof. Ulmer's interpretation in Main Committee I, it was thus adopted as part of the

Committee's report, and has become an authentic supplementary aid to interpretation (Ricketson, 2006: 775).

In the preparatory work for the Stockholm Conference, the Study Group (WIPO, 1971) commented that the proposed formula expressed the "thought that it is advisable to take special precautions before countenancing exceptions that may be applied without giving authors the right to claim remuneration. If this right is granted, the right to make exceptions widens to some extent." This is because at that time, some countries permitted exceptions for using an author's work but granted a certain payment to the author; this was practiced in the Nordic countries. Hence, it was feared that the creation of exclusive list of exceptions would abolish the right to remuneration. Thus, adequate monetary reward may reduce the harm flowing from a limitation to a reasonable level. In *Kirchen und Schulgenbrauch*, the German Federal Constitutional Court held that an author may be hindered from exerting his right to prohibit the utilisation of a work in order to enable the inclusion of his work, for instance, in a schoolbook; however, it is not justifiable to deprive the author of the economic interests that he may have in the exploitation of the right of reproduction (Senftleben, 2004: 215). Commentators, however, have viewed that such a requirement somewhat restricts the availability of uncompensated exceptions (Hugenholtz & Okediji, 2008).

The WTO Panel (2000: 59) viewed that "prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitations causes or has the potential to cause an unreasonable loss of income to the copyright owners". Nevertheless, the Panel agreed that exception may be conferred, even if it causes "unreasonable prejudice to the legitimate interests" of the copyright owner, in cases where a system of compulsory licensing or equitable remuneration is available (2000: 59).

Applying this principle to the law textbooks used in the teaching, research and study of law courses, similar deductions might apply. Here, important social

interests are at stake. Any works used may contribute substantially to the dissemination of knowledge, thereby supporting the consideration of intergenerational equity (Senftleben, 2004: 234). Yet, authors or right holders also have their own vital interests. Adequate pecuniary reward will testify to the specific appreciation of their works and serves as an incentive to create. Feelings of rightness and justice, thus, militate against leaving the author empty-handed.

In sum, the circle of interests that must be taken into account in the context of the third criterion of the three step test can be circumscribed as follows: the economic interest of the authors in the exploitation of the exclusive rights recognised in international copyright law always plays a decisive role. On balance, it can be said that the involved users' interests are of particular importance. Nevertheless, the author's interests must also be considered. However, it cannot be concluded that the users' interests in including a work in teaching outweighs the author's competing economic interest. On the contrary, the author's interest in receiving a pecuniary reward for a work's reproduction in a schoolbook appears legitimate. It must consequently not be unreasonably prejudiced. To find an appropriate solution, it is therefore advisable to have recourse to the payment of equitable remuneration. The three step test offers this possibility as a means to reduce the prejudice caused by a limitation to a reasonable level (Senftleben, 2004: 234).

Applying the third criterion to the production of law materials generated by the public sector, in the majority of situations, the creation of such materials is for the interest of disseminating the law to the public. The interest here is not commercial gain; the government does not seek to make money when it creates law materials. This is evident in the general practice of the UK Government, which readily licenses the reproduction of Crown materials in a wide variety of formats and circumstances (Robbie, 1996):

> "Bills, Acts and Statutory Instruments are published and distributed efficiently, and are widely available to the ordinary citizen through retail bookshops nation-wide, by mail order and through public libraries. They are

> priced as cheaply as possible given the requirements placed on HMSO, the publisher, by Parliament and Government - and those prices are subject to Parliamentary oversight while HMSO remains a Government Agency. Additionally, there are the other licensed sources in conventional textbooks, in legal journals, and computer databases, either in distributable form like the many CD-ROMs on the market, or through existing on-line services."

None of the theories that are usually used to justify copyright really explains why protection should be extended to works of this kind, such as internal memorandums and safety reports (Burrell, 2001: 378); the inclusion of such work was accidental to the expansion of copyright. More specifically, there is no need to provide incentives for the creation of these works, nor can they truly be said to embody the personality of their creator (Burrell, 2001: 378). The early development of English copyright law shows that the author's interest was exclusively used to legitimate the publisher's position, i.e. the author was made a proprietor by statute to legitimate the publisher's monopoly (Peifer, 2008: 683).

In the field of non-economic interests, however, a distinction must be made between Article 9(2) and Article 13 of TRIPs. Non-economic interests are prevented from influencing the framework of the latter provision. Article 9(2) by contrast, afford authors moral rights protection. The author's interest in the acknowledgement of authorship and a work's integrity, as set out in article 6*bis* BC, can be taken into account in the framework of these provisions (Senftleben, 2004: 225-226). In the emerging information society, moral rights are constantly being threatened. The work or parts thereof can easily be restructured, remodelled or combined with other material. This can easily happen in academic systems and educational institutions. This ease of manipulation might furthermore lead to carelessness in respect of the author's right of attribution. Digital reproduction affords users, profiting from limitations, almost unrestricted possibilities of distorting, mutilating and modifying an author's expression (Senftleben, 2004: 223). Here, the three step test, particularly as required by the Berne Convention,

requires proper acknowledgement of authorship to fulfil the non-pecuniary interests of the author.

4.5 Conclusions

This chapter has sought to answer the first research question, pertaining to the extent to which the exceptions provided under Article 9(2) of the Berne Convention as well as Article 13 of the TRIPs Agreement facilitate or hinder legal research and study in universities. The nature of the provisions contained in these two international agreements is ambiguous, vague and open-ended, therefore giving rise to differing interpretations. Hence, it leads to a situation where the provisions can be interpreted narrowly, therefore protecting the interests of the copyright owner. On the other hand, the same words could also be interpreted broadly, allowing much flexibility, thereby affording greater freedom to the user of the copyright work.

The freedom that national legislation enjoys, pursuant to the abstract nature of the three step test, can be used by a country to react adequately to its particular circumstances. Heide (1999: 105) stated that "the adopted formulation was intended to be flexible enough [...] to provide a sufficient margin of freedom to craft inevitable exception in order to address important social or cultural needs". National laws differ widely between individual countries (Crews & Ramos, 2004; Sterling, 2003), and the three step test was drafted in harmonisation with the exceptions that were already widespread. The three step test is an essential, flexible element in the international limitation infrastructure that allows national law makers to satisfy domestic social, cultural and economic needs, and it creates much more breathing space than the more specific exceptions recognized in international copyright law (Senftleben 2010: 67). National legislatures still retain a great measure of discretion in the way in which they interpret and implement their international copyright obligations (Tawfik, 2005b). In short, it is up to the

member countries to creatively utilize the opportunities provided under the international copyright agreements to their maximum potential.

A restrictive interpretation of three step test is problematic because it "may preclude the legislature and judiciary from responding flexibly and appropriately to changes in social, cultural or commercial conditions or to developments in technology. Secondly, law makers may be prevented from taking fully into account important interests – including interests such as access to information … under an approach focusing exclusively on the interests of economic right-holders, the potentially divergent interests of creators or performers may not be properly taken into account" (Geiger, Griffiths, & Hilty, 2008: 490). It is important that the three step test is interpreted in a balanced way, as set out in the Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law, advocating that the test should be applied in a liberal, holistic and dynamic manner, and that it ought not to be mechanically applied as an instrument to rein in existing or future limitations. Although there is no mechanism that prohibits restrictive approach to the three step test, a proper and balanced interpretation of the three step test is essential to ensure that an effective balance of interest can be achieved (Geiger, *et al*., 2010).

In the next part of the thesis, the specific provisions available in the international convention relating to exceptions for teaching purposes will be analysed. This further expands the issue of exceptions to copyright from the area of research and private study toward the issue of teaching or communicating the work to students.

Chapter 5: Specific Exception for Teaching Purposes

5.1 Introduction

This chapter seeks to address research question pertaining to the extent to which the exceptions provided under Article 10(2) of the Berne Convention facilitate or hinder teaching law in universities. While the previous chapter explained the international provisions that govern exceptions relating to research and study, this chapter further extends the explanation towards the available international provision that applies if the research or study made is further taught or communicated to others in an educational context. This is because the act of acquiring, researching or using copyright works for study purposes is dealt with differently under the law when it is used for teaching purposes. This chapter specifically addresses the provision in the Berne Convention that permits utilizing copyright work for the purpose of teaching; this chapter analyses the scope of Article 10(2) of the Berne Convention based on the rights allowed, purposes, beneficiaries, works covered as well as other conditions attached to this provision.

5.2 Origin of Teaching Exception under the Berne Convention

The importance of educational activities was recognized even in the first edition of the Berne Convention, as provided in Article 8 of the Berne Act 1886, which states as follows:

> "With regard to the right to make lawful borrowings from literary or artistic works for publications *intended for education or of scientific character, or for chrestomathies*, the effect of the legislation of the countries of the Union and of special arrangements existing or to be concluded between them is reserved." [emphasis added]

This provision was created as no agreement could be achieved at the 1885 Conference regarding how to regulate the form of "borrowing" which was viewed

as "generous to educators" (Ricketson & Ginsburg, 2006: 789) as proposed in the 1884 Draft Convention which reads as follows:

> "The publication in any of the countries of the Union of excerpts, fragments or whole passages of a literary or artistic work that has appeared for the first time in any other country of the Union shall be lawful, provided that the publication is specially designed and *adapted for education, or has scientific character*.
>
> The reciprocal *publication of chrestomathies* consisting of fragments of works by various authors shall also be lawful, as shall the *insertion in a chrestomathy or in an original work published* in one of the countries of the Union of the whole of a short writing published in another country of the Union.
>
> It is understood that the name of the author from whom, or of the source from which, *the excerpts, passages, fragments or writings* referred to in the above two paragraphs have been borrowed shall always be mentioned.
>
> The insertion of musical compositions in collections intended for schools of music shall be considered unlawful reproduction, however." [emphasis added]

The question of lawful borrowings was thus, left to domestic legislation and specific arrangements between countries of the Union (1885: 132). Nevertheless, it was undisputed in the 1885 Conference that the term "teaching" include elementary as well as advanced teaching, and that the expression "having a scientific character" cover works intended for self-instruction (1885: 132). Article 8 remains unchanged but was later renumbered as Article 10 in the Berlin Act.

At the Rome Conference 1928, France's proposal to include quantitative restrictions on the amount that may be copied for chrestomathies, anthologies and educational publications was opposed and withdrawn, but member states were called upon to define clearly the limits of any "borrowing" in their legislation (Ricketson & Ginsburg, 2006: 790). Again, in the Brussels Revision Conference in 1948, France proposed a modification of the existing provision so as to make it

applicable to the "… inclusion of short extracts of literary, scientific or musical works in works and publications destined for educational purposes or having a scientific or documentary character, as well as in works of criticism or discussion", with the use of "short extracts" in the provision relating to chrestomathies and anthologies. This was again opposed, particularly the term "short extracts".

Article 10 was substantially retained as Article 10(2) but it additionally qualifies that national legislation should only regulate the use of extracts "in so far as this inclusion is justified by its purpose" (Ricketson & Ginsburg, 2006: 790). After modification, Article 10(2) of the Brussels Act of 1948 reads as follows:

> "*The right to include excerpts from literary or artistic works in educational or scientific publications, or in chrestomathies*, in so far as this inclusion is justified by its purposes, shall be a matter for legislation in the countries of the Union, and for special Arrangements existing or to be concluded between them." [emphasis added]

Marcel Plaisant reported on the scope of Article 10(2), contrasting it with the right of quotation in Article 10(1), stating that the teaching purposes exception was larger than the tolerance allowed under the right of quotation, and "it is justified by the purpose of the taking, which is for an educational or scholastic or scientific work or a chrestomathy" (Ricketson & Ginsburg, 2006: 790-791).

At the 1967 Stockholm Revision, Bulgaria, Czechoslovakia, Poland and Rumania (S/83) jointly proposed that the scope of Article 10(2) be broadened to include radio and television broadcasts and phonograms. Contrarily, the UK delegation cautioned the Main Committee that the word "borrowing", which translates the original French word "*emprunts*", might mean not only excerpts but that the whole work might be taken, and this would make wide inroads into authors' rights (WIPO, 1971:862). He also viewed that Article 10(2) should be deleted taking into consideration other articles (Article 9(2) and Article 10(1)) being inserted in the Convention. The French delegate however suggested that "to permit the lawful borrowing of extracts" would be a better wording (WIPO, 1971:862). Similarly,

the Netherlands (S/108) proposed that Article 10(2) be deleted, stating that "production of school text books was now a commercial business and authors should not be deprived of their rightful share in the business" (WIPO, 1971:862). While Czechoslovakia agreed with the Netherlands that Article 10(2) was out of date in view of the technical developments at that time, and that the paragraph restricted the possibilities of using works for educational purposes, the reason of accruing benefits from the production of textbook could not be justified against the essential need for countries to improve their educational systems.

Due to various disagreements, a Working Group was then instructed to make a careful study of Article 10(2) together with Article 9(2) of the Berne Convention. The Working Group chose to draw up a more restrictive text (S/185). This resulted in the current Article 10(2) of the Berne Convention, which reads as follows:

> "It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, *to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching*, provided such utilization is compatible with fair practice." [emphasis added]

5.3 Teaching Exception under the Berne Convention

Article 10(2) of the Berne Convention reserves the right whether to allow or disallow utilization of works for teaching purposes to the discretion of member countries. This provision is not mandatory (Ricketson, 2003: 14) due to the words "It shall be a matter for legislation in the countries …". This is unlike the provisions of the exception for quotation purposes under Article 10(1),[56] which use the term "It shall be permissible…", denoting a mandatory exception that must be

[56] Article 10(1) of the Berne Convention reads: "It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries."

applied by Union members. Hence it is up to the discretion of each individual country whether to make copyright exceptions relating to teaching purposes or not. Thus, the use of works for teaching purposes remains a matter for national legislation or for bilateral agreements between Union members to decide on (Ricketson & Ginsburg, 2006: 791). However, in the event a country wishing to make copyright exceptions for teaching purposes in its national law, that country needs to take into account the conditions laid down in Article 10(2) of the Berne Convention, meaning that Article 10(2) set the limits within which copyright exceptions for teaching purposes may be carried out. For the purpose of this thesis, the limitations will be assorted under five points of analysis, namely a) rights, b) purposes, c) beneficiaries, d) works, and e) other conditions.

5.3.1 Rights

a) Utilization … in publications, broadcasts or sound or visual recordings

Article 10(2) of the Berne Convention does not specify any particular acts of exploitation that may benefit from this exception but simply uses a general term, particularly permitting the right of "utilization" of copyright works. The Working Group (WIPO, 1971: 885) that was given the task of studying Article 10(2) of the Brussels Act 1948 no longer referred to "borrowing" but spoke of the utilization of literary or artistic works "by way of illustration". The word "utilization" replaced the phrase "the right to include excerpts" as used in Article 10(2) of the Brussels Act 1948, which was much narrower.

Article 10(2) specifies that utilization is permitted "by way of illustration in publications, broadcasts or sound or visual recordings for teaching". In this phrase, the term "publications" is drawn from the expression "published works", which is defined in Article 3(3) of the Berne Convention as follows:

> "… works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication."

This encompasses all permanent forms of fixation of a work, "whatever may be the means of manufacture of the copies" (Ricketson & Ginsburg, 2006: 261).

The term "broadcasts" was not defined in the Berne Convention but from the records of the Brussels Conference, it is clear that the delegates accepted that it was one means of wireless communication to the public, as interpreted in the Rome Convention Article 2(f) to be "the wireless transmission for public reception of sounds or images and sounds of the representations" (Ricketson & Ginsburg, 2006: 732; Xalabarder, 2009: 9). With regard to the right to utilize copyright works in broadcast, it is difficult to ensure that the utilization is used only for teaching purposes, as it is not easy to control the destination when a work is broadcasted. Hence, an educational broadcast may be made to a far wider section of the public than those for whom the instruction is intended. However, when some members of the Study Group proposed to limit the scope of the teaching exception to only educational broadcasts carried out within teaching establishments or inside schools, this was not agreed upon (WIPO, 1971: 886). Hence, inclusion of works in a broadcast for school and other educational institutions is permitted under Article 10(2), even where the broadcast can be received by a larger section of the general population which may not fall under the exception (Ricketson & Ginsburg, 2006: 793). Moreover, Article 10(2) encompasses not only the making of broadcasts but also the performances of broadcasts in schoolrooms or lecture theatres (Masouye, 1978: 60).

The term "sound and visual recordings" under Article 10(2) includes tapes, videograms, phonograph records and cinematographic films (Ricketson & Ginsburg, 2006: 793). Hence, compared to the previous provision in the Brussels Act, Article 10(2) allows a wider range of utilizations and affords the opportunity for educationalists to take advantage of the new means of dissemination provided by modern technology (Ricketson & Ginsburg, 2006: 793).

b) Utilization of works in other forms

The wording in Article 10(2) seems to limit utilization to publications, broadcasts and sound and visual recordings only. There are two conflicting views on whether Article 10(2) actually limits the range or type of utilization of works for teaching purposes (as opposed to the type of work that can be utilized) to only publications, broadcasts and sound and visual recordings.

Ricketson and Ginsburg (2006: 794) viewed that the utilization is limited to publications, broadcasts and sound and visual recordings only. Moreover, Article 3(3) of the Berne Convention clearly excludes "the performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture" from the definition of "published work". Article 10(2) deliberately omits referring to utilization by way of distribution of a work either as part of an original programme or as part of a broadcast over a cable system (Ricketson, 2003: 15), or a digital on-demand transmission, as this is included in other provisions dealing with exceptions to authors' rights, namely Article 10*bis*(1) and (2) (Ricketson & Ginsburg, 2006: 794). It was also argued that "on-demand transmissions", such as works streamed via the Internet, fall outside the range of works that can be utilized under Article 10(2), not even as an extended form of "broadcasting" (Ricketson & Ginsburg, 2006: 794). According to this view, online instruction is a form of "making available" works for teaching purposes, pursuant

to Article 8 of the WIPO Copyright Treaty,[57] and thus must satisfy the criteria set out in the three step test, if one needs to use it under the exceptions provision.

Contrary to this approach, other commentators have viewed that the provision extends the scope of the exception, and that a broad range of utilization is allowed under the provision, particularly publications, broadcasts or sound or visual recordings (Okediji, 2006: 13). Xalabarder (2007: 379) viewed that Article 10(2) is an "open, flexible and technology-neutral exception". She viewed that the word "utilization" is considered neutral enough to cover not only reproduction, as provided under Article 9(2) on general exceptions, but also other kinds of economic rights granted under the Berne Convention, namely the right of adaptation, translation, distribution or communication to the public as well as making available to the public; she also contended that Article 10(2) is extendable to the use of digital means in teaching (2009: 15). The term "utilization" includes all the exploitation acts envisaged under the Berne Convention, TRIPs and, later, by the WIPO Copyright Treaty.

The phrase "by way of illustration in publications, broadcasts or sound or visual recordings for teaching" does not constitute an exhaustive list (Xalabarder, 2009: 14). The Stockholm Conference delegates intended to broaden the permissible utilizations with the expression "publications, broadcasts and sound and visual recordings", and that these categories were not intended to exhaust the full range of permissible utilizations, but the language results from a specific wish to accommodate new technology (Xalabarder, 2006: 378). In this approach, "distance learning", correspondence courses, "teaching on demand" or even "pod-casting" where Web-based courses take the place of face-to-face instruction, are all covered under the Article 10(2) provision (Seng, 2009a: 10). Ultimately, it is left for the

[57] Article 8 of WCT reads as follows: "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."

national legislation to determine what is meant by "utilization" (Ricketson, 2003: 14; Xalabarder, 2009),

With regard to the right to translate, the Main Committee I in the Stockholm Conference 1967 (WIPO, 1971: 1165) reported that "it was generally agreed that Articles ... 10(1) and (2) ... virtually imply the possibility of using the work not only in the original form but also in translation, subject to the same conditions...". Ricketson (2003: 37-38) also considered whether translation is a type of reproduction that is automatically covered by any exception to the reproduction right, or whether reproduction right and translation right are two distinct rights. He viewed that the latter approach would "render the exceptions permitted by the Convention in respect of reproduction rights of limited effect, and would lead to an absurd result that cannot have been intended by the framers of the Convention and its revised Acts. Such a result could also be said to be in conflict with the fundamental nature of the Berne Union, as an international union of states with widely differing linguistic backgrounds" (Ricketson, 2003: 38). The problems and solutions applicable to translation right may also be applicable with respect to the public communication right (Xalabarder, 2009: 16).

c) Instructional and teaching uses

Article 10(2) of the Berne Convention "permit[s] the utilization … of literary or artistic works by way of illustration *in publications, broadcasts or sound or visual recordings for teaching* …" [emphasis added]. Based on the wordings of Article 10(2), the provision seems "incomplete" (Xalabarder, 2009: 17), as it does not address the mere act of instruction, nor does it address teaching uses that do not necessarily result in the making of a publication, broadcast or recording for teaching purposes. This wording seems to be silent on other acts of teaching uses, such as copying, displays and recitations, commonly done to convey the instruction (Xalabarder, 2009: 16). Xalabarder viewed that other acts of teaching uses or instruction are also exempted under Article 10(2) of the Berne Convention

(Xalabarder, 2009: 16), based on the reason that putting the language of Article 10(2) in its historical context, teaching uses at that time, were considered as *de minimis non curat lex* or "law takes no account of trifles", compared to the more visible exploitation of acts (Xalabarder, 2009: 17). Using copyright works simply for teaching purposes was never envisioned when drafting Article 10(2) because at that time, it was never thought that such uses would conflict with the authors" interests (Xalabarder, 2003: 158). Moreover, the teaching uses may still have been covered under the quotation exception of Article 10(1), public performance done for teaching purposes may have been covered under the minor reservations doctrine, and acts of reproduction done for teaching purposes might have been covered under Article 9(2) of the Berne Convention (Xalabarder, 2009: 17).

In the normal course of teaching in modern times, different acts of exploitation of copyright works may be used. Texts of works may be reproduced by dictating or by displaying them on PowerPoint slides, performances of copyright works by way of reading, audio or video, or playing in class, and works may be communicated to the public, or made available online; sometimes translations of works may be necessary in certain circumstances. It is thus necessary to examine whether Article 10(2) permits exploitations of copyright works in these different acts, which are normally used in teaching.

In the context of teaching in the era of the digital environment, teaching uses may be covered under the Article 10(2) exception by virtue of the doctrine *maiori ad minus*, which describes that what holds for a stronger claim also holds for a smaller claim (Xalabarder, 2009: 17). As the utilization of copyright works in the publication, broadcast or recording for teaching purposes is permitted, the weaker act of everyday teaching uses should also be permitted to use this exception. Moreover, Article 15 of the Rome Convention, which provides the same kinds of limitations as in the Berne Convention but with regard to the protection of performers and phonogram producers, refers in general to "for the purposes of

teaching"[58], thus it is only sensible to interpret that recordings and performances together with works performed and recorded in them may be used for teaching purposes. Likewise, it can be concluded that Article 15(2) of the Rome Convention,[59] which permits the application of the national limitations and exceptions envisaged for copyright, also includes the use of performances and recordings in broadcasts, and further recordings by way of illustration for teaching (Xalabarder, 2009: 17).

Applying Article 10(2) to the context of teaching law courses in universities, the rights cover a broad use of works for teaching exceptions. Based on a flexible interpretation, the exception may apply when a work is copied, reproduced, translated, adapted or performed for the purpose of teaching. The exception may also apply when the copyright work is communicated to the public or made available to the public (Xalabarder, 2007). Thus, flexibly interpreted, Article 10(2) seems to support and permit various activities conducted on copyright works, which are commonly undertaken by lecturers when teaching their students.

5.3.2 Purpose

The purpose permitted by the Berne Convention is generally worded to be "by way of illustration … for teaching".

[58] Article 15(1) of the Rome Convention reads: "Any contracting state may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards: (a) private use; (b) use of short excerpts in connection with the reporting of current events; (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts; (d) use solely for the purposes of teaching or scientific research."

[59] Article 15(1) of the Rome Convention reads: "Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licenses may be provided for only to the extent to which they are compatible with this Convention."

a) By way of illustration

Examining the meaning of the phrase "by way of illustration … for teaching" is relevant and important as it deals with the question of why the copyright works are used or for what reason copyright works may be reproduced under this exception. Additionally this phrase has also found its way into the national laws of some countries, such as the UK and Malaysia.

The ordinary meaning of the word "illustration" in the Oxford English Dictionary (1989) refers to:

> "The action or fact of illustrating, 1) Lighting up, illumination, enlightenment; 2) The action of making or fact of being made illustrious, brilliant, or distinguished; distinction. Also, an example, means or cause of distinction; 3 a) The action or fact of making clear or evident to the mind; setting forth clearly or pictorially; elucidation; explanation; exemplification b) That which serves to illustrate or make clear, evident, etc.; an elucidation, explanation; an example, instance 4) The pictorial elucidation of any subject; the elucidation or embellishment of a literary or scientific article, book, etc., by pictorial representations b) An illustrative picture; a drawing, plate, engraving, cut, or the like, illustrating or embellishing a literary article, a book, etc."

Based on the Proposal of the Working Group on Excerpts from Protected Works (WIPO, 1971: 885) "by way of illustration," was to be understood "in the sense of subsidiary reproduction". On the basis of the ordinary meaning of "illustration" and what was intended by the Working Group, this may mean that the exception may only be permitted when the copyright works are used as serving to assist or supplement other work. This may also imply that the copyright work used is only secondary or in subordinate position, which is of lesser importance. For instance, a book written on the topic of "Drafting Treaties on Copyright" for use of students may reproduce the Berne Convention by way of example. This particular use would easily come within the definition of an "illustration" permitted by Article

10(2), as the text is simply reproduced and incorporated into the thesis in order to support or demonstrate the arguments. In contrast, if a teacher produces a book solely about the Berne Convention, where each and every detailed provision were analysed, and the whole Berne Convention were reproduced for his students' use, this kind of use may arguably not constitute mere "illustration", and thus would not surpass the requirement of "by way of illustration" under Article 10(2).

Many different acts are necessary during the course of teaching, including giving lectures, exercises, tests and examinations as well as readings for debate, commentary or analysis. In these acts, copyright works are directly related and are of material assistance to the instruction, rather than being additional, supplementary or for mere entertainment. To apply this teaching purposes exception, it would be important to determine whether the act may constitute "by way of illustration", which is required under Article 10(2) of the Berne Convention.

Xalabarder (2009:15) viewed that the meaning of "by way of illustration … for teaching" is neither different from nor narrower than the "educational purposes" previously stated in Article 8 of the Berne Act and Article 10(2) of the Brussels Act. Her opinion is based on the Stockholm Conference documents, which reveal that no changes were proposed by the Study Group except for the accuracy of the English version which raised concern with regard to the amount of a work used, rather than any intention to modify or reduce the concept of "educational purposes" itself. "The new language 'by way of illustration for teaching' was never intended to further restrict the original scope of the 'educational purposes', it was only enacted to make sure that the reproductions used are indeed 'illustrating' the teaching" (Xalabarder, 2009:15). In the commentary to Section 7(i)(c) of the Tunis Model Law on Copyright for Developing Countries proposed by WIPO in 1976, which provides for exceptions for teaching purposes, this was explained as follows:

> "… there is a further restriction on the exception for the purpose of illustration: the illustrations must actually illustrate the teaching, and they are

> permitted only to the extent justified by the purposes. In practice, this means that the publication… is itself made solely for teaching purposes…"

The above explanation demonstrates that the exception is tied into education or teaching. The teaching purposes exception may be used in the publication of tertiary literature consisting of textbooks, encyclopaedia articles, guidebooks or handbooks meant as resources for students. The teaching purposes exception however does not apply to the reproduction of copyright works that are not intended to be used for teaching purposes, such as works published in primary or secondary literature for use by practitioners, researchers or specialists, nor works to be published in popular media, such as magazines, newspapers, radio, television and websites, for use by the general public.

b) Amount of work allowed

The result of the discussions arising from the Stockholm Conference lead to an acceptance that the words "by way of illustration" do impose some limitation on the size of the borrowing, but would not exclude the use of the whole of a work in appropriate circumstances (Guibault, 2003: 15; Ricketson & Ginsburg, 2006: 791). For example, in the case of a short literary work or artistic work such as case summaries or photographs, it might be argued that it is necessary to reproduce the whole work if it is to be properly utilized for teaching purposes.

In short, Article 10(2) permits using copyright works for teaching purposes; it does not limit the quantity of work that may be utilized as long as other conditions are fulfilled. This exception easily covers the teaching of law courses in universities, as it falls under the scope of "teaching" explained by the report of the Stockholm Conference.

In relation to teaching law courses in universities, most works used by the lecturers include literary works, such as statutes, law reports, journal articles and books,

either in analogue or digital format. Sometimes, sound recording of lectures, visual recordings of certain important events or current news broadcasts may also be used to offer more variety in the method of teaching. All these works are covered under Article 10(2), and thus can be used without the need for permission or payment of royalties to the copyright owner. Commentators have also viewed that digital works, such as downloaded materials, are also covered under this teaching exception.

c) Teaching compilations

It is debatable whether Article 10(2) facilitates the use of teaching compilations under the exception. The application of Article 10(2) to teaching compilations was derived from its reference to "publication" as well as the express reference to "chrestomathies" in the earlier version of the Berne Convention, particularly in Article 8 of the Berne Act of 1886, which was later reorganized into Article 10(2) of the Brussels Act 1948 as follows:

> "The right to include excerpts from literary or artistic works in educational or scientific publications or in chrestomathies, in so far as this inclusion is justified by its purpose, shall be a matter for legislation in the countries of the Union, and for special Arrangements existing or to be concluded between them."

The Working Group however recommended deleting the word "chrestomathies" on the ground that it was no longer unnecessary due to the number of exceptions to the right of reproduction that were already included in the Convention (WIPO, 1971: 885). The term "chrestomathy" has a dictionary meaning of "a collection of choice passages from an author or authors, *esp.* one compiled to assist in the acquirement of a language" (Oxford English Dictionary, 1989), and in the present context, this might be rendered as "educational compilations" (Ricketson & Ginsburg, 2006: 784). Ricketson (1987: 499), in his early edition, rationalizes that chrestomathies

and anthologies, in many instances, would naturally fall within the scope of publications made for teaching purposes under Article 10(2). This position was however reserved in his last work, viewing that it is unlikely that chrestomathies and anthologies would fall within the scope of publications made for teaching purposes under Article 10(2), as "it will be a distortion of language to describe an anthology of poetry (with the complete texts of the poems) or a 'course pack' consisting of chapters taken from various books about the subject to be covered in the course, as being used 'by way of illustration … for teaching' " (Ricketson & Ginsburg, 2006: 794). They gave examples where in some countries, such as Australia, exploitation of compilation of copyright materials is subject to voluntary licensing arrangement or even compulsory licensing schemes that fulfil the requirements under Article 9(2) of the Berne Convention (Ricketson & Ginsburg, 2006: 794).

Xalabarder (2009: 14) however disagreed with this view for the reason that the existence of well-developed licensing schemes in some countries cannot justify nor support an interpretation against the express wording of Article 10(2) that refers to "publications" (as well as the original reference to "chrestomathies" in the Berne Act), which favours the acceptance of teaching compilations provided that it fulfils further conditions i.e. "to the extent justified by the purpose" and that "such utilization is compatible with fair practice". Thus, this can only be decided based on a case-by-case basis. For example digital educational compilations, which are fundamental in online teaching, consisting part of the instruction itself compiled on a web page, may pose far greater risks against the legitimate interests of authors compared to non-digital educational compilations (Xalabarder, 2009:14). Moreover, the phrase "by way of illustration" was not intended to restrict the term "educational purposes" previously used in the earlier version of the Berne Convention, but to make sure that the reproductions used are indeed "illustrating" the teaching. (Xalabarder, 2009:15).

Referring back to the ordinary meaning of "illustration", it refers to works that could make things clearer or evident to the mind, not just by giving mere example, but may also include setting forth clearly or pictorially, elucidating or explaining a matter in question, which can commonly be done by posting journal articles or chapters that better define, clarify or explain the subject matter in detail. Moreover, the Working Group (WIPO, 1971: 885) dealing with Article 10(2) describe "by way of illustration" to be understood only "in the sense of subsidiary reproduction", which means that the copyright work is used to assist or supplement the main teaching material, which is normally the lecturer's notes. Thus, I agree with Xalabarder's view that teaching compilation used for the purpose of teaching can also be considered as "by way of illustration" and thus rightly falls under the teaching exception.

d) For teaching

Formal and informal teaching

The word "teaching" in Article 10(2) received considerable attention from the delegates at the Stockholm Conference. It was made clear in the report of the Stockholm Conference (WIPO, 1971: 293) that:

> "…the word 'teaching' was to include teaching at all levels - in educational institutions and universities, municipal and State schools and private schools. Education outside these institutions, for instance general teaching available to the general public but not included in the above categories, should be excluded."

As such, Article 10(2) refers only to formal education at elementary, intermediate and tertiary institutions of learning, or something that is of an "official" degree (Xalabarder, 2007: 378). Thus, this exception only applies to teaching that is classroom-based, provided by trained teachers, where there would be the same students and same teachers, based on a specified curriculum lasting for several days, months, terms or years. This exception cannot be used in informal teaching

activities that may happen outside the classroom, in after-school programmes, community-based organizations, museums, libraries or at home, in which attendance is often drop-in or inconsistent and flexible in various ways. This could be disadvantageous to informal educational settings, as this exception is inapplicable both to parents wishing to use materials at home with their children, and to adult learners wishing to expand their knowledge, either for their own enrichment or to improve their career options.

However, some of the delegates at the Stockholm Conference (WIPO, 1971: 886) (and some commentators) viewed that such an interpretation is restrictive because it clearly excludes adult education programmes and adult literacy campaigns, which are popular in many countries (Ricketson & Ginsburg, 2006: 792; Xalabarder, 2009: 14). In interpreting the scope of "teaching", the focus should be on the nature of the instruction and on the formal assessment (leading to accreditation, certification or qualification), not just on the award itself (Seng, 2009a: 7). This is important so that educational institutions offering adult education programmes, such as language proficiency courses, literacy programmes and vocational training, will come within its ambit, although not continuing education or refresher programmes generally (Seng, 2009a: 7). Fortunately, many countries seem to have readily taken a broad approach to the scope of teaching, and now include such programmes within their educational exceptions; this will be discussed in a later chapter.

Actual classroom and distance teaching

It is also questionable whether the term "teaching" refers to only actual classroom instruction, or whether it also extends to distance teaching. It has been viewed that there is no reason to limit the scope of "teaching" only to the classroom for the purposes of Article 10(2), and thus the word "teaching" extends to correspondence courses or Web-based courses where students receive no face-to-face instruction from a teacher (Ricketson & Ginsburg, 2006: 793). The inclusion of "broadcasts" in Article 10(2) also clearly implies the acceptance of distance education under the

exception (Xalabarder, 2003: 158). Thus, any means of distance teaching and learning conducted online, pod-casting or through digital means may also benefit from this teaching exception (Xalabarder, 2009: 14).

5.3.3 Beneficiary

Article 10(2) of the Berne Convention does not specify any particular beneficiary that could benefit from this exception. However, from the analysis of Article 10(2), this exception is directed at teachers, institutions, textbook authors etc., subject to the fulfilment of other conditions, namely that it must be by way of illustration for teaching purposes. Both public and private institutions conducting teaching activities are covered under this exception, although they may differ in their approach to any economic purpose (Xalabarder, 2006: 378). This was specifically considered by the Chairman of the Main Committee in the Working Group, who thought that it would be difficult to distinguish between public and private schools; he also contended that, in the framework of Article 10(2), the expression "in schools" covered both types of institution (WIPO, 1971: 887).

5.3.4 Works

a) Literary and artistic works

The wording of Article 10(2) of the Berne Convention seems to limit the teaching exception to only "literary or artistic works". Nevertheless, Article 2(1) of the Berne Convention reads as follows:

> "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works

> to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."

As defined in Article 2(1) above, the term "literary and artistic works" was given a very wide and broad definition to include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression".

b) Digital technologies

It has been well accepted that digital technologies are also covered under the exception (Xalabarder, 2006: 378-379). The reason behind all the subsequent Berne Convention revisions ("publications destined for educational or scientific purposes" as in Berne Act 1886, "educational or scientific publications" as in Brussels Act 1948, "publications intended for teaching or having a scientific character or in chrestomathies" as proposed in the Program for the Stockholm Conference 1967, and the current text approved which added "recordings and broadcasts") show that the such wording was to enable educators "to take full advantage of the new means of dissemination provided by modern technology" (Xalabarder, 2009: 14), and that there is no reason to argue that the wording should not extend to digital fixations of works (Ricketson & Ginsburg, 2006: 793).

Nevertheless, there is concern that different conditions should apply to digital technology due to the greater risks that it poses to authors" interests, especially when compared with works used in face-to-face teaching (Ricketson & Ginsburg, 2006: 794). The acceptance of the application of the exceptions to digital technology can also be seen in the Agreed Statement concerning Art. 10 WCT, where member states may:

> "… appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. … [and] devise new exceptions and limitations that are appropriate in the digital networked environment."

5.3.5 Other conditions

Article 10 (2) of the Berne Convention further signifies that the teaching exception can only be applied if it meets two important conditions, namely, a) "justified by the purpose" and b) "compatible with fair practice". These conditions make the provision more open-ended (Ricketson & Ginsburg, 2006: 791), and there is no assistance whatsoever on what the two conditions actually mean. With regard to the requirement of "compatible with fair practice", this phrase can be interpreted in a similar manner to that which appears and has been discussed under Article 10(1) of the Berne Convention (quotation exception). The expression "fair practice" implies that "the uses in question can only be accepted after an objective appreciation" (WIPO, 1971: 117).

a) Relationship of Art. 10(2) conditions with the three step test

There are two possibilities with regard to the relationship between the teaching purposes exception and the three step test.

The first possibility is that the three step test does not need to be applied to the teaching purposes exception. The Main Committee I (WIPO, 1971: 1134) remarked on the interpretation of the text of the Berne Convention, stating:

> "The Drafting Committee was unanimous in adopting, in the drafting of new texts as well as in the revision of the wording of certain provisions, the principle *lex specialis legi generali derogat*: special texts are applicable, in their restricted domain, exclusive of texts that are universal in scope. For instance, it was considered superfluous to insert in Article 9, dealing with some general exceptions affecting authors' rights, express

> references to Articles 10, 10*bis*, 11*bis* and 13 establishing special exceptions."

This line of interpretation demonstrates that the operation of the specific teaching exception within its specific sphere is unaffected by the more general provision in Article 9(2) (Gardiner, 2008: 297-298), meaning that the uses allowed under the teaching exception are therefore excluded from the requirement of the three step test (Ricketson, 2003: 21).

Thus, although Article 13 of TRIPs appears to apply to all types of exceptions, there is a general rule of interpretation that where there is a specific rule in an earlier treaty, then that earlier treaty continues and is not replaced by the general provision of a later treaty. On that basis, the teaching purposes exception continues to exist in an unqualified form because it provides, in effect, a special rule, and we do not need to apply the three step test in this particular situation. Thus, Article 10(2) of the Berne Convention, being a special rule dealing with a specific situation, particularly for teaching purposes, is implicitly preserved under TRIPs, where a broader or general rule of the three step test does not deal with this specific situation. Based on this structure of the Berne Convention, states may freely enact legislation on subjects covered under the specific exceptions without the restrictions of the three step test (Okediji, 2006: 14). Hence, the matter is left to member countries to consider what is regarded as "fair practice" and "justified by the underlying purpose" (Xalabarder, 2007: 380). The requirement of "fair practice" is "essentially a question for national tribunals to determine in each particular instance". Such flexibilities certainly provide an opportunity for member countries to find the right balance between the public interest (education) and that of the author, according to their different circumstances.

The second possibility is that Article 13 of the TRIPs Agreement applies the three step test to all exceptions to exclusive rights, as it is clearly expressed, and therefore we must apply the three step test in addition to the teaching purposes exception. Without clear interpretation and in the context of the TRIPs Agreement,

WCT and WPPT, some commentators have also viewed that it is advisable to employ the proportionality test inherent in the three step test in determining whether a particular quotation is "fair" (Ricketson & Ginsburg, 2006: 793; Senftleben, 2004: 243; Xalabarder, 2007). To this extent, this may require one to consider the kind and amount of work used, the quantity of copies made, and the specific implications of the technology, in order to find the right balance between the copyright owners" and the user's interests.

It may well be that when we apply the three step test in addition to the teaching purposes exception, we find ourselves going through the same exercise twice because we are only considering the same factors in relation to the teaching purposes exception and the three step test, but in a different language (see Figure 5.1 for illustration). Bringing the teaching purposes exception and the three step test together, it can be seen that although the two exceptions are not identical, there are compromises between those. Article 10(2) reiterates factors that are similar to the three step test, which are thus not likely to yield a different outcome in normal circumstances; both exceptions seem to have similar philosophies.

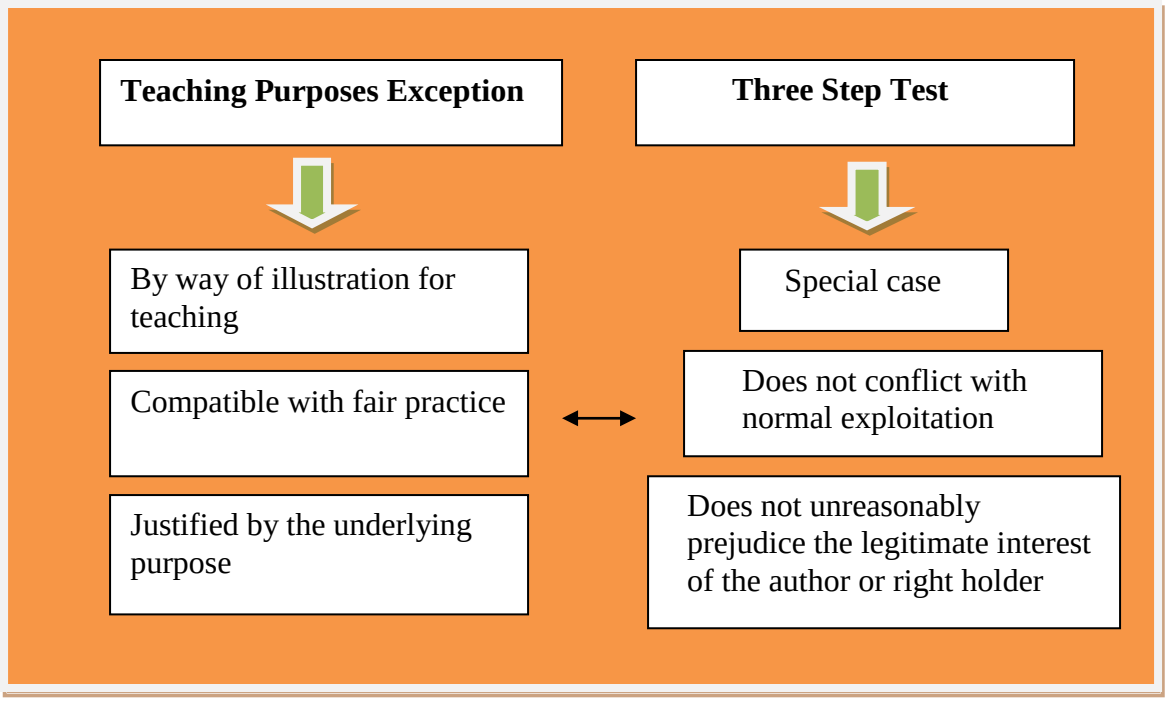

Figure 5.1: Relationship of teaching purposes exceptions with three step test

When the three step test and the inherent requirement of the teaching purposes exceptions are applied cumulatively (on the basis that TRIPs is cumulative with Berne), in effect the TRIPs Agreement may conceivably narrow the scope of the teaching purposes exception under the Berne Convention. This is based on a narrow reading of TRIPs on the assumption that Article 10(2) of Berne is not something that states need to comply with, as it is only permissive.

In terms of the application of the two conditions to teaching law courses in universities, it depends on the facts and circumstances of the case. Using copyright works without permission, nor paying any compensation for the purpose of teaching law by a private university, may not be considered "justified by the purpose". Similarly, utilizing a substantial amount of copyright works, even for the purpose of teaching, may not be considered as fulfilling the condition of "compatible with fair practice". Despite these two conditions, analysis made on the specific teaching exception provision in the Berne Convention shows that it is quite an open, flexible and technology-neutral exception, in the sense that it does not limit copying to any specific quantitative or qualitative restrictions on exempted uses (Xalabarder, 2007: 378). The provision also does not require any payment of remuneration; it is up to member states to implement it either as a free exception or limitation, as a remunerated legal license, or as a combination of both (Xalabarder, 2007).

b) Acknowledgement or right of paternity

Article 10(2) is further subject to the requirement in Article 10(3) of the Berne Convention that when copyright works are used for teaching purposes, whenever the source and the name of the author appears on the work, it must be mentioned. Article 10(3) reads as follows:

> "Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author, if it appears thereon."

The attribution of the source and authorship is consistent with common practice in educational scholarship (Seng, 2009a: 11). Article 10(3) satisfies the need of attributing copyright works used in quotations or educational activities.

However, inconsistent views have been taken on the question of whether the right of integrity or moral rights as referred in Article 6*bis* of the Berne Convention also applies.[60] Ricketson (2003: 16) initially viewed that the moral right under Article 6*bis* does not apply in respect of Article 10, as for practical reasons, there is a need for flexibility to modify and alter a work where necessary when it is quoted or utilized for teaching purposes. However, on the basis of the report of Main Committee I, which notes that delegates were generally agreed that article 6*bis* applied in respect of exceptions authorized by the Convention, including Article 10 (WIPO, 1971: 1165), it was later viewed that "while modifications within reason may be required when works are utilized for teaching purposes, this should not give *carte blanche* to educators to make deleterious, reputation-damaging alterations" (Ricketson & Ginsburg, 2006: 796).

[60] Article 6*bis* of the Berne Convention reads: "(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained. (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."

5.4 Relationship of teaching exception with quotation exception

The relationship between the teaching exceptions and quotation exception is important, as these two exceptions may overlap. The teaching exception in Article 10(2) is placed immediately below the quotation exception i.e. Article 10(1), which reads:

> "It shall be permissible to make quotations from a work which has already been lawfully available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries."

Unlike Article 10(2), which is permissive, Article 10(1) of the Berne Convention is obligatory, as it uses the phrase "it shall be permissible". This gives it a mandatory character that requires all member states to comply with its provision, at least in relation to foreign works claiming protection under the Berne Convention (Ricketson & Ginsburg, 2006: 788; Xalabarder, 2003: 160-161).

The word "quotation" is not defined in the Berne Convention but the ordinary meaning of "quotation", according to the Oxford English Dictionary (2008) amongst others, refers it to:

> "1) A reference (usually in a margin) to a passage of text by page, chapter, etc.
>
> 2) An observation; a matter noted.
>
> 3(a)) A passage quoted from a book, speech, or other source; (in modern use *esp.*) a frequently quoted passage of this nature.
>
> 3(b)) A short musical passage or visual image taken from one piece of music or work of art and used in another."

Masouye (1978: 58) explained the meaning of "quotation" under Article 10(1) as "including one or more passages from someone else's work in one's own. In other words, quotation consists of reproducing extracts from a work either to illustrate a theme or defend some proposition or to describe or criticize the work quoted from."

Quotations may not only be concerned with reproduction rights but could also be made during the course of "lecture, performance, or broadcast, as in a material form such as a book, article, or visual work of art" (Ricketson & Ginsburg, 2006: 788).

Article 10(2) does not limit the kinds of work that may be quoted only to literatures. Quotations may be made from a book, newspaper, a review, a cinematographic film, a recording or a radio or television programme (Masouye, 1978: 58). Nevertheless, the provision makes it a condition that quotations can only be taken from a work that has been "lawfully made available to the public", i.e. the work must be intended for the public in general and is made available either with the consent of the authors or through compulsory licensing (Masouye, 1978: 58). Thus, unpublished manuscripts or even works printed for a private circle may not be freely quoted (WIPO: 1971, 117). Compared to the teaching exception, the scope of works that may be used under the quotation exception is broader, as it does not confine works that can be used to only "published work", which under Article 3(3) excludes broadcasting and public performance from the scope of "publication" (Ricketson & Ginsburg, 2006: 785). The phrase "lawfully made available to the public" permits making quotations from works that have been made available by any means, such as dramatic or musical work performed in public or broadcast, distribution of recorded musical works, authorized by the author (Ricketson & Ginsburg, 2006: 786).

As provided in the conditions of the teaching exception, the quotation exception requires that the making of the quotation be "compatible with fair practice". What is meant by "compatible with fair practice" was not elaborated further but it was implied that "the use in question can only be accepted after an objective appreciation" (WIPO, 1971: 117). Although the word "quotation" would ordinarily suggest that the thing quoted would be part of a greater whole, rather than the whole itself, the Main Committee I in the Stockholm Conference rejected the French proposal to permit only "short" quotations, but left the matter to be

determined by the courts on an individual case basis, subject to the requirement of "fair practice" (WIPO, 1971: 1147). The size of the extract taken, compared to the work taken and that in which it is used, the extent of the new work in competing with the old work, cuts in sales and circulation etc., may be some of the matters that to be considered in determining "fair practice" (Masouye, 1978: 59). Quotation does not necessarily mean "short", as extensive quotation may be necessary in certain circumstances, such as to substantiate a criticism or to support a line of argument (Ricketson & Ginsburg, 2006: 785). In certain circumstance, the whole work may be quoted, as when pictures of particular schools of art, cartoons or short poems are necessary by way of illustration or as part of a wider work of commentary or review (Ricketson & Ginsburg, 2006: 788). The Study Group viewed that in order to determine a reasonable "quotation" that may be used, it should be based on "the text upon the rules generally accepted and developed in this field, and by emphasizing the principle that the right of quotation can only be exercised to the extent defined by its purpose" (WIPO, 1971: 116), a condition which is also required under the teaching exception.

Although Article 10(1) seems only to refer to "newspaper articles and periodicals", this quotation exception applies to all categories of works, including for "scientific, critical, informatory or educational purposes", as clearly understood in the preparatory work for the Conference (WIPO, 1971: 117) and in the discussions of the Main Committee I (WIPO, 1971: 860-861). The example of quoting from theses and books is also provided by the Study Group stating that "…it is generally recognized in the field of science that the right exists to quote from theses, books, etc., in conformity with certain principles, a right which must be considered as lawful from the point of view of copyright" (WIPO, 1971: 117). Quotations made in historical and other scholarly writing by way of illustration or evidence for a particular view or argument are also covered under Article 10(1) (Ricketson & Ginsburg, 2006: 786). While the teaching exception limits the use of the exception only "by way of illustration … for teaching" purposes, the quotation exception can be used for wider purposes, as explained by the Sweden delegate to the Main

Committee I, that quotation may be used not only for illustrating a text or to provide the basis for discussion, but also for "artistic effect" in general (WIPO, 1971: 861). In this sense, the purposes allowed under the quotation exceptions are much wider compared to the teaching exception.

Article 10(1) makes reference to a specific kind of quotation, namely "quotation from newspaper articles and periodicals in the form of press summaries". However, difficulties arise because the French phrase "*revue de presse*" has no equivalent meaning in the English language; it has been translated into "press summaries" but this makes little sense (Ricketson & Ginsburg, 2006: 787). It is unclear what Article 10(1) means when it refers the word "quotation" in the form of a summary, as the making of the summary is not the same as making a quotation, although a summary of a newspaper or periodical article may include a quotation from that article (Ricketson & Ginsburg, 2006: 787). The expression "*revue de presse*" in French, according to Ricketson (2006: 787):

> "is not really a summary of an article appearing in a newspaper; rather, it is a collection of quotations from a range of newspapers and periodicals, all concerning a single topic, with the purpose of illustrating how different publications report on, or express opinions about the same issue."

In the event where differences of opinion arise between the French and English interpretation of the Berne Convention, based on Article 37(1)(c) of the Berne Convention, the French text is to prevail.

A brief illustration of the overlapping relationship of teaching and quotation exception, can be seen in Figure 5.2.

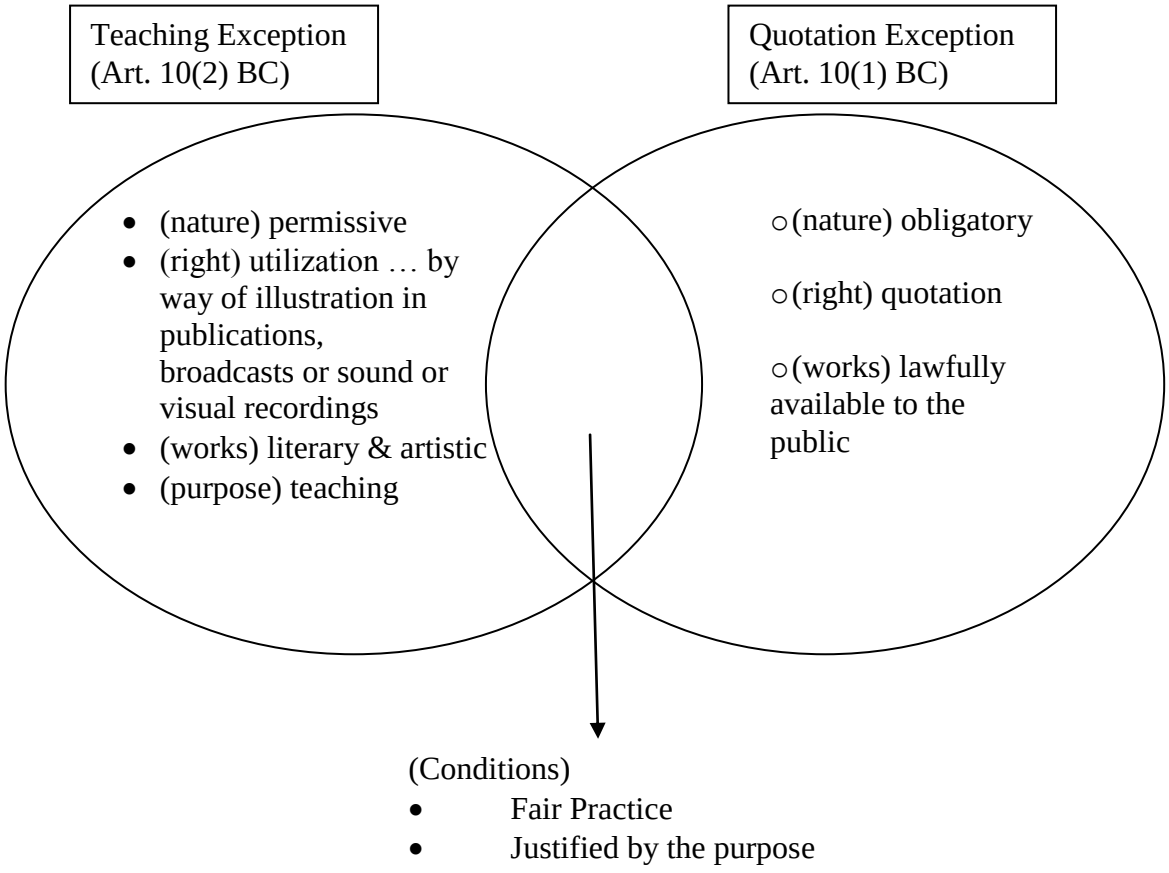

Figure 5.2: Relationship of teaching and quotation exception

Xalabarder acknowledged the different arguments pertaining to the relationship between Article 10(2) and 10(1). The first argument is that the scope of the quotation exception should not be extended to teaching uses, as the specific teaching exceptions have already been dealt with under Article 10(2) (Xalabarder, 2003: 161). Arguably, the mandatory quotation exception should not be reduced in the light of an optional teaching exception (Xalabarder, 2003: 161). Since quotations have already been covered by the broad and mandatory exception in the Berne Convention, the teaching exception is more concerned with teaching uses that do not fit under the quotation exception, such as when the quotation is not only

being used as an example but there is some logical imperative behind the incorporation of the quotation into a new work (Xalabarder, 2003: 160-161). A quotation is also regarded as "an integral part of intellectual activity" (Ricketson & Ginsburg, 2006: 783). By using the phrase "quotations … in the form of", Article 10(1) of the Berne Convention requires that the copyright work quoted be incorporated into new work; this does not necessarily apply to all teaching uses (Xalabarder, 2003: 160).

Quotations from other works may be used as evidence to support a certain argument. Similarly, illustrations are also used in teaching for the purpose of providing examples to support any argument or discussion. Thus, it can be deduced that in this kind of situation, the quotation exception provides a much broader scope for users to employ compared to the teaching exception.

Certain copyright works may also be used merely as an aid to attract attention, enhance understanding or create context in the course of organizing instruction or teaching. For example, showing an image of destitute child refugees in the Human Rights class would attract attention, compared to explaining their conditions. Showing a map or diagram during the Law of the Sea tutorials would also help students to better understand the subject matter. Such particular use may be permitted under both teaching and quotation exceptions, as the quotation exception permits using copyright works not only for illustrating a text or to provide the basis for discussion, but also for "artistic effect" in general (WIPO, 1971: 861).

In other circumstances, quotation may be used as reference, i.e. when the quotation itself is used as the subject of discussion, such as commonly made in commentaries, criticism or news reporting as well as teaching and scholarship. It is arguable whether the teaching exception may justify this kind of use, as it only permits use of work by way of illustration. By using the phrase "by way of illustration", it signifies that the copyright work can only serve to assist or supplement other work, implying that it is only secondary or in subordinate

position, which is of lesser importance, but not the main subject of discussion itself. Thus, it may be said that in this situation, the quotation exception may be applicable but not the teaching exception.

Nevertheless, there are instances where the teaching exception may be applicable but not the quotation exception, such as when a particular work has not been lawfully made available to the public, either because permission from the author cannot be obtained or there is no compulsory licensing with regards to the said work, such as unpublished manuscripts or works printed for a private circle, which may not be freely quoted. Here, the teaching exception applies rather than quotation exception.

From the interpretation and comparison between the teaching and quotation exceptions, it can be concluded that the quotation exception seems to be stronger (in the sense that the exception is obligatory) and of wider application. Although the quotation exception may in some cases provide a short cut to apply the exceptions for copyright protection, not all copyright works used in teaching activities can fall under the quotation exception. For instance, works which are not lawfully made available to the public cannot go by the quotation exception. Moreover, not everything under the teaching exception is necessarily a quotation. By just relying on the quotation exception alone is insufficient to facilitate teaching activities and thus the teaching exception still remains important.

5.5 Conclusions

From the above discussion, it can be concluded that Article 10(2) of the Berne Convention can facilitate the teaching of law courses in universities provided that it is flexibly interpreted. The wording under this provision is purposely couched to be open and flexible, so as to allow national lawmakers to take advantage of its flexibility and to apply the scope of the teaching exception according to their individual circumstances. A flexible interpretation of the word "utilization" in

Article 10(2) should grant a broad range of rights, namely reproduction, adaptation, translation, distribution, communication and making available to the public, and whatever rights are determined by national legislation. This will aid any act of the copying, distributing or communicating of copyrighted law materials to law students, as it falls under the copyright exceptions. This exception can also be applied for the purpose of teaching, notwithstanding it being in public or private universities or colleges. Moreover, this exception applies to both public and private educational institutions. Article 10(2) also covers a broad range of works that may be used under the teaching exception. This includes literary works, such as textbooks and law journals, or artistic works such as photographs and broadcasts as well as sound and visual recordings. This supports the use of a variety of law materials, which is important for teaching and learning law.

Article 10(2) requires the fulfilment of certain conditions, namely "justified by the purpose" and "compatible with fair practice", which are however worded in general terms and necessitate further interpretation by the courts. Hence, the provision still allows for national law to take advantage of the inherent flexibilities. Compared to Article 10(1) (quotation exception), the scope covered under the quotation exception seems wider but the teaching exception seems to accommodate any residual works that may not fall under the quotation exception solely for the benefit of teaching. Although the teaching exception is only permissive, it delineates the scope of the teaching purposes that may be carried out by national laws (Ricketson & Ginsburg, 2006: 791). Thus, it is for national law to determine the exempted use of works for teaching purposes, within the limits of Article 10(2) (Xalabarder, 2007: 380). While the exceptions provided under the international agreements are couched in general terms, so as to pose as guidance and a yardstick for member countries to make laws that suit their needs and circumstances, the next stage of this research is to identify the extent to which these generous provisions are fully utilized to their maximum potential, and the extent to which there are any similarities or differences between the exceptions adopted in individual countries. This will be addressed in subsequent chapters.

Chapter 6: National Exceptions for research and study purposes

6.1 Introduction

This chapter seeks to address Research Question Three, which relates to the similarities and differences in the copyright exceptions (relating to the research and study purposes) between the UK and Australia, which predominantly produce educational legal materials, and Malaysia, which predominantly consumes educational legal materials, as well as their significance. The exceptions to copyright works for the purpose of research and study are important for academics, researchers and students, as they can all use copyright works in order to further their research, to collect materials to prepare for teaching, for writing essays and assignments, or for studying for exams.

This chapter first discusses how the provisions relating to exceptions for research and private study are placed in the United Kingdom (UK), Australian and Malaysian statutes. Next, the similarities and differences between the copyright exceptions in these three common law countries will be analysed. The UK and Australia are chosen to represent those developed countries that play an important role in research and education. For the purposes of comparison, Malaysia is chosen to represent those developing countries that normally use the copyright materials available from the developed countries, especially in their higher education institutions. To compare the exceptions relating to research and study in the UK, Australia and Malaysia, five factors are considered, namely, rights, purposes, beneficiaries, works and other conditions. A comparative analysis of these three countries will be made to reveal the advantages and disadvantages of the exceptions for individual use in each country. Moreover, this comparison explores whether the advantageous applications in one country can help solve the problems found in the other countries. By comparing two developed (UK and Australia)

countries with a developing country (Malaysia), this thesis will reveal whether Malaysian copyright law is lacking or sufficiently facilitate research and study.

6.2 Research and study exceptions in the United Kingdom, Australia and Malaysia

The UK Copyright, Designs and Patent Act 1988 clearly provides, under Chapter III (Acts Permitted in Relation to Copyright Works), amongst its general exceptions to copyright protection, the exceptions for research and study (Section 29). Australia, however, has two elaborate and detailed provisions relating to research and study, as it has separate provisions dealing with original, literary, dramatic, musical and artistic works, and another group of provisions relating to subject matter other than works, as follows:

a) Part III Copyright on original literary, dramatic, musical and artistic works, Division 3 on Acts not constituting infringements of copyright in works, Section 40 includes provision regarding fair dealing for the purpose of research and study..

b) Part IV Copyright on subject matter other than works, Division 6 on Infringement of copyrights in subject matter other than works, Section 103A includes provisions regarding fair dealing for the purpose of research and study.

Unlike UK and Australia, Malaysia does not have a specific provision dedicated solely to exceptions for research and study. Instead, the copyright exception for research and study purposes is somewhat planted under Part III (Nature and Duration of Copyright) in a single paragraph, briefly mixed with the other general fair dealing exceptions for specified purposes (S. 13(2)(a) of the Copyright Act 1987). Another provision mentioning research and private study is also found in Part II (General Provisions) specifying copyrights in published editions of works (S. 9). The arrangement of the provisions relating to the exceptions in the Act itself makes it difficult for one to detect the exceptions to copyright protection easily, as

the acts permitted in relation to copyright works are not made clear in the table of contents in the Malaysian Copyright Act 1987, as is the case in the UK, or rather, acts not constituting infringements of copyright works, as in the Australian Act.

This first observation reveals the difference in emphasis or attention paid by the three countries regarding exceptions to copyright protection for the purpose of research and study. Seemingly, Malaysia does not place much attention on emphasizing what is permitted under the copyright law for users, irrespective of copyright protection. Copyright protection is not solely about protecting owners' rights *per se*, rather the establishment of copyright law is also about benefiting the users or the public interest.

6.2.1 Rights

a) Fair dealing

The UK (S. 29), Australia (S. 40(1)) and Malaysia (S. 13(2)(a)) similarly allow "dealing" with copyright materials for the purpose of research or study, provided that the dealing is "fair". Table 6.1 presents the relevant sections permitting "fair dealing" for research and study purpose in the three countries.

United Kingdom	Australia	Malaysia
Fair dealing (S. 29)	Fair dealing (S. 40.1) Fair dealing (S. 103C) Factors determining fair dealing (Ss. 40 and 103C(2))	Fair dealing (S. 13(2)(a))

Table 6.1: Rights permitted under research and study exceptions

None of the countries actually define "fair dealing". In *CCH Canadian v. Law Society of Upper Canada* [2004] SCC 13, the Supreme Court viewed, "[t]he word 'dealing' connotes not individual acts but a practice or system". Although the fair dealing provisions sometimes expressly refer to certain permitted acts, such as

copying, other acts of exploitation (such as performance and communication to the public) may also be deemed fair (Xalabarder, 2009: 57).

The UK expressly limits the fair dealing exception by requiring that it does not result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose (S. 29(3)(b)). An individual may thus be allowed to make one copy of an item under the fair dealing exception. In other words, the research and study exception cannot be used to justify classroom copying, especially when it includes a substantial part of copyright works. This restricts the practice of academics and researchers to the systematic single copying of a work and distributing it to others in order to gain feedback to their research or presentation.

Australia lists certain guidelines for courts when determining whether an act may constitutes "fair dealing" (S. 40(2) and S. 103C(2)). The factors for determining what constitutes "fair dealing" include the purpose and character of the dealing, the nature of the work, the possibility of obtaining the work within a reasonable time at an ordinary commercial price (e.g., it may be fair to copy more than a reasonable portion of a literary work if it is not available commercially, i.e. an out-of-print book), the effect of the dealing on the potential market for, or value of, the work, and, in the case where part only of the work is copied, the amount and substantiality of the part copied in relation to the whole work (S. 40(2)). These guidelines are similar to the non-exclusive list of factors to be taken into account in determining fair use under Section 107 of the US Copyright Act, except for Section 40(2)(c), which does not exist in the US legislation. The same guidelines are also used in Section 103C(2) to determine what constitutes "fair dealing" with respect to an audio-visual item used for the purposes of research or study. Hence, the determination of whether a particular use is "fair" is left to the users themselves, and ultimately to the courts. The problem of interpretation and application pertaining to the fair dealing provision will, accordingly, be for the courts to consider, based on the circumstances of each case.

The fair dealing exception for research and study in the Australian law is limited to other additional conditions. The reproduction of all or part of the work, or adaptation of literary, dramatic or musical work, contained in a periodical publication (such as newspapers, magazines and journals) is not permitted if another article in the publication is also reproduced for the purpose of a different research or a different course of study (S. 40(4)). For works not contained in an article in a periodical publication, only a reasonable portion of a work or adaptation can be reproduced (S. 40(5)). Further rules are tabled as to what constitutes a "reasonable portion", depending on whether the work is a published edition of a literary, dramatic or musical work or is in electronic form (S. 40(5)). With regard to literary works (excluding articles in periodicals), dramatic works and sheet music, a "reasonable portion" is defined as containing in an edition at least 10 pages a) not exceeding, in the aggregate, 10% of the number of pages, or b) one chapter. With regard to unpaginated works in electronic form (excluding computer programs or compilations such as databases), a reasonable portion may be defined as 10% of the number of words in the work, or one chapter. Nevertheless, there is no guidance on what may constitute a "reasonable portion" of works less than 10 pages in length, or of artistic works, or of musical works other than sheet music. A person is also not entitled to use the "reasonable portion" rule to make subsequent reproductions from the same work or adaptation (S. 40(6)).

The Report of the Copyright Law Committee on Reprographic Reproduction 1976 (para 2.65 – 2.66) was split into two opinions on the extension of Section 40 to permit fair dealing by way of reprographic reproduction for private or personal purposes. The first opined that it is not appropriate to make this copying legitimate, as this would lead to further erosion of copyright in the public mind, and that further changes to technology may extend the capacity of private individuals to make photocopies in other unforeseeable ways. The other, however, viewed that this extension would not make Australian law depart from world standards, and that the interests of copyright owners would remain sufficiently safeguarded through

the requirement of "fair dealing", which would be desirable in the interests of the general public.

Despite various provisions for assisting the Australian courts to decide on the application of the concept of fair dealing in Australia, uncertainty still exists. For example, in *TCN Channel Nine Pty Ltd v. Network Ten Pty Limited* [2001] FCA 108 at 108, Channel Nine claimed that Channel Ten had infringed Nine's copyright by showing extracts from twenty of its broadcast programs. Channel Ten argued that the parts taken were insubstantial and could not constitute infringement, and that even if that were the case, the use could be excused on the basis of fair dealing. When considering whether the use can be considered to be fair dealing for the purpose of criticism or review, Conti J. agreed with the relevant authorities that "fair dealing involves the questions of degree and impression; it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept; fairness is to be judged objectively in relation to the relevant purpose..." Although holding that the works were insubstantial, Conti J. reached a different conclusion as to whether the use was "fair" when he applied the principle to all twenty segments used by Channel Ten. When the case was brought to the Federal Court [2002] FCAFC 146 (unreported, Sundberg, Finkelstein and Hely JJ, 22 May 2002), it was decided that there had indeed been infringement of copyright works, however the three judges sitting together on this case were unable to agree about whether the use of each particular extract was a case of fair dealing. Each of the judges had the following to say:

> "Fair dealing involves questions of degree and impression, on which different minds can reasonably come to different conclusions…" (Sundberg, 2002: 2)
>
> "[I]t needs to be acknowledged that we are in the realm of decision-making where there is room for legitimate differences of opinion as to the correct answer. In some instances it might be impossible to say whether one view is demonstrably right and another view is demonstrably wrong…" (Finkelstein J, 2002: 16)

> "This is a matter on which different persons might legitimately hold different conclusions." (Hely J. 2002: 110)

When the case was finally decided for the fifth time and after four years, [2004] HCA 14 (11 March 2004) (McHugh ACJ, Gummow, Hayne, Kirby and Callinan JJ), the scope and application of the fair dealing defences still remain unresolved (Zwart, 2005). Such uncertainty had already been cautioned as early as when the Copyright Act 1911 was introduced; the term "fair dealing" was deemed to be "likely to lead to considerable litigation, but the interpretation of each case will be a matter of fact and not law" (Sims, 2010). It was also commented that the guidance from judicial and academic literatures revealed the concept to be "somewhat amorphous and unpredictable, offering little guidance to both copyright producers and users as to its limits" (Suthersanen, 2003: 589).

Australian courts have not paid much attention to the role of "fair dealing" and only a small number of cases have dealt with it (Zwart, 2003).[61] Often, references were made to UK and US cases (Schonwetter, 2005). In *University of New South Wales v. Moorhouse* [1975] 133 CLR 1 at p. 12, the High Court of Australia stated:

> "[t]he principles laid down by the Act are broadly stated, by reference to such abstract concepts as 'fair dealing' (S. 40) and 'reasonable portion' (S. 49) and it is left to the courts to apply those principles after a detailed consideration of all the circumstances of a particular case."

In the English Court of Appeal decision, *Hubbard v. Vosper* [1972] 2 QB 84 at p. 94, the defendant published a book which reproduced much material written by L. Ron Hubbard, the founder of Scientology. Here, Lord Denning acknowledged the

[61] *Commonwealth of Australia v John Fairfax & Sons* (1980) 147 CLR 39; *Commonwealth of Australia v Walsh* (1980) 147 CLR 61; *Copyright Agency v Haines* (1982) 42 ALR 264; *De Garis v Neville Jeffress Pidler* (1990) 18 IPR 292; *Wigginton v Brisbane TV Ltd; Queensland v TCN Channel Nine* (1992) 25 IPR 58; *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* [1999] FCA 1864; *TCN Channel Nine & Ors v Network Ten* [2001] FCA 108; *TCN Channel Nine & Ors v Network Ten* [2002] FCAFC 146 (unreported, Sundberg, Finkelstein and Hely JJ, 22 May 2002)

difficulties in defining fair dealing but outlined certain aspects to consider in determining what can be considered as fair, stating the following:

> "It is impossible to define what 'fair dealing' is. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take a long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But after all is said and done, it must be a matter of impression."

Lord Denning also considers "fair dealing" as a matter of degree and impression. He questions how much has been taken, whether the work is used to compete with the copyright owner's work, and whether the work taken is proportionate to what the author originally produced. He argues, however, that all these factors should be applied flexibly, depending on the type of work as well as the manner of reproduction. Megaw LJ. in the same case even viewed that in certain circumstances, it might be permissible to reproduce the whole work, particularly when the work is short.

A flexible approach to fair dealing (Dworkin, 1977) is also called for in the Report of the Committee to Consider the Law on Copyright and Designs (1977) which is also called the Whitford Committee's report. The Whitford Committee recommended, in para. 695, the following:

> "There should be a general exception covering all classes of copyright works and subject matters in favour of 'fair dealing' which does not conflict with the normal exploitation of the work or subject matter and does not unreasonably prejudice the copyright owner's legitimate interests."

The Whitford Committee's report also believes that the fair dealing provisions should be flexible and not proscribed. The Committee further observed that clarity

was unlikely to be achieved by including yet more express exceptions for special cases.

Judge J. Ungoed Thomas in *Nora Beloff v. Pressdram Limited and Another* [1973] F.S.R. 33 at p.60, viewed that "[t]o be fair dealing, the act must take place within the approved purposes". In other words, it is first important to consider whether the act of copying falls under research and study activities; if it does, then the only further consideration needed is to determine whether the act can be considered fair. In *Pro Sieben Media AG v. Carlton UK Television Ltd* [1998] E.C.C. pp. 112 and 118-119, Laddie J. described the circumstances in which fair dealing could be applied as a "loophole". He stated that the fair dealing provisions consisted of a collection of provisions that define, with extraordinary precision and rigidity, the ambit of various exceptions to copyright protection. Laddie J. concluded by stating:

> "Although it is apparent that these provisions are designed to address situations where there are thought to be public policy grounds for restricting the copyright owner's rights, it is the legislature which has specified where and the extent to which the public policy overrides the copyright. The courts must construe the provisions. Within proper limits, they may do so in a way which is designed to make reasonable sense. But the provisions are not to be regarded as mere examples of a general wide discretion vested in the courts to refuse to enforce copyright where they believe such refusal to be fair and reasonable."

When the case was brought before appeal, the Court of Appeal [1999] 1 W.L.R. pp. 605 and 613 observed that there had been little if any dispute in the Court of Appeal about the general principles applicable to fair dealing, and the Court agreed that, basically, the question of fair dealing revolves around the question of degree or of fact and impression.

Another set of guidelines on the factors that can be used in determining fair dealing can be seen in *Fraser-Woodward Ltd. V. British Broadcasting Corporation* [2005]

EWHC 472 (Ch) p. 517. In this case, Mann J. set out seven guidelines for assessing whether or not the use was fair dealing, namely: 1) the motives of the user, 2) the impression it gives based on the facts of the case, 3) whether the use is excessive, 4) the actual purpose of the work or any pretence in the purported purpose of the work, 5) the amount of the work used, 6) careful application or certain degree of care in relation to photographs, and 7) the reproduction should not unreasonably prejudice the legitimate interests of the author or conflict with the author's normal exploitation or the work. Here, the three step test under Article 9(2) of the Berne Convention was also included as part of the guidelines to be used in determining fair dealing. By applying the three step test, which is in accordance with international obligations when determining fair dealing, the copyright exception for the purpose of research and study seems to be further limited.

Over the years, the term "fair dealing" has been interpreted narrowly by the Courts (Sims, 2010). In *Newspaper Licensing Agency Limited v. Marks & Spencer Plc*, [1999] E.M.L.R. 369, Lightman J. opined that although the defendant's newspaper cuttings were generally only small parts of the newspapers as a whole, the defendant's conduct did not constitute "fair dealing". "There is a wholesale copying of material which goes far beyond what is necessary to report current events to M&S personnel." In *University Of London Press, Limited v. University Tutorial Press, Limited* [1916 U. 119.] p. 613, the judge held that the assertion that the republication of a copyright work was "fair dealing" because it was intended for the purposes of private study, and that the reason for producing a book of questions together with their answers was only for the use of students, in neither case fell within the description of "fair dealing". These cases show that what is fair is a subjective matter, and depends on the extent the work copied or added. The pattern of judges failing to take adequate account of the users' interests is detectable, and it has been argued that the judiciary is responsible for the overly restrictive approach taken towards the copyright exceptions in the UK (Burrell, 2001: 387-388). Thus, legislative reform for a more general exception alone is not enough without a change in the attitude of the judiciary (Burrell, 2001: 387-388).

The Supreme Court in *CCH Canadian v. Law Society of Upper Canada* [2004] SCC 13, outlined a series of factors that could be considered to help assess whether a dealing is fair. Drawing on the decision in *Hubbard*, as well as the doctrine of fair use in the United States, the Court proposed the following factors for assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations do not all arise in every case of fair dealing, this list of factors could provide a useful analytical framework for governing the determinations of fairness in most future cases. Nevertheless, it remains to be seen whether the English courts will take note of that Court's decision in their future decisions on fair dealing.

As no mention is made on the amount of copyright works that can be copied under the statutory exceptions, certain institutions in the UK do provide some guidelines in determining what constitutes "fair dealing", for example Cardiff University (2010). In the electronic environment, the Joint Information Systems Committee and The Publishers Association (1998) provide a set of guidelines; this is a result of the consensus views of a Working Party on the application of fair dealing in the CDPA and associated Statutory Instruments, to activities in Higher Education that involve the creation or use of electronic materials, as summarized in its webpage (JISC, 1999). For copying beyond the boundaries set forth by these guidelines, universities and schools in the UK need to obtain licenses from the UK Copyright Licensing Agency (CLA) for their staff and students (The Copyright Licensing Agency Ltd, 2011).

It is up to defendants to prove that the defence of fair dealing applies to them. In *Silitoe v. McGraw Hill Co (UK) Ltd* [1983] FSR 545, it was held that "the onus of showing that an exception applies is on the defendants". This was followed by the Australian Federal Court in *De Garis v. Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292.

In using "fair dealing", all three countries face a similar problem in that courts are left with the responsibility of deciding on which specific acts actually constitute copyright infringement. The differing interpretations on fair dealing also lead to users being left with a feeling of uncertainty as to what acts are legal. This problem will lead the users either to being too cautious in applying the copyright exceptions in their research and study, or, conversely, to adopting a lackadaisical attitude when using copyright works.

6.2.2 Purposes

The "fair dealing" that is permissible must relate to the specific purposes allowed and not to any other purposes. The act of using copyright works without permission or payment of compensation is allowed only if that act is made for research or private study, as defined in the statutes of the respective country. As Judge J. Ungoed Thomas observed in *Nora Beloff v. Pressdram Limited and Another* [1973] F.S.R. 33 at p. 60:

> "It is fair dealing directed to and consequently limited to and to be judged in relation to the approved purposes. It is dealing which is fair for the approved purposes and not dealing which might be fair for some other purpose or fair in general. Mere dealing with the work for that purpose is not enough; it must also be dealing which is fair for that purpose; whose fairness, as I have indicated, must be judged in relation to that purpose."

Hence, it is important to understand what research and private study really means in order to understand the boundaries of the fair dealing exceptions.

a) Research

UK (S. 29), Australia (Ss. 40 and 103C), and Malaysia (S. 13(2)(a)) all allow copyright exception for research purposes. Nevertheless, none of the countries actually provide any guidance on the meaning of "research". In the Federal Court

of Australia case, *De Garis v. Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR pp. 292 and 298-9, Beaumont J. viewed that "research" is intended to have a dictionary meaning. Referring to the Macquarie Dictionary, "research" may be defined as "1. diligent and systematic inquiry or investigation into a subject in order to discover facts or principles: research in nuclear physics…". The *De Garis* case was referred to in the New Zealand High Court case, *Television New Zealand v. Newsmonitor Services* [1994] 2 NZLR pp. 91 and 105. Here, Blanchard J. further adds, "[r]esearch involves the study of things, including written materials or those captured in electronic form". This approach to definition is similarly applied in *Copyright Licensing v. University of Auckland* (2002) 53 IPR pp. 618 and 629. A more recent case, *CCH Canadian v. Law Society of Upper Canada* [2004] SCC 13, para 51, adopted a broader interpretation viewing that " 'Research' must be given a large and liberal interpretation in order to ensure that users" rights are not unduly constrained … lawyers carrying on the business of law for profit are conducting research." The definitions of "research" seem to be broad in its scope and application. Nevertheless, the use of exceptions for the purpose of research is somehow limited by national laws through restricting it to only non-commercial or non-profit research only.

b) Commercial and non-commercial research purpose

The UK expressly provides that the fair dealing exceptions are permitted in a research for a non-commercial purpose only (S. 29(1)). The removal of commercial purposes from the fair dealing exceptions stems from Article 5(2)(b) of the EU Copyright Directive (2001). Yet, what is regarded as "commercial purposes" is not explained under the Statute, nor defined under the EU Directive. The absence of a definition as to what constitutes "commercial purposes" is because it was seen as too expansive to be limited by a definition (Wallace, 2004). Hence, it is up to the student or researcher on their own to decide whether a particular use of copyright work may constitute "commercial" use or not. The Joint Note from the British Library and the Copyright Licensing Agency (Copyright

Licensing Authority, 2003), a body that represents many copyright holders in the UK, provides guidelines on what would count as commercial copying, as follows:

> " 'Commercial' is a broader term than 'profit-making'. 'Commercial' is in practice synonymous with 'directly or indirectly income-generating'. It is also clear that the purpose at the time the request for a copy is made is what is important and so some genuinely unforeseen income at a much later date is not relevant to the question. Your intention at the time must be unambiguously non-commercial."

Thus, the status of the organization, whether commercial or non-commercial, is irrelevant, rather it is the "intention" at the time of the dealing with the copyright works that counts. Amongst the examples provided in the Joint Note, sponsored student copying of works for research that have commercial value, which may potentially be used for financial gain, and a university conducting research sponsored by a commercial organization, are both considered as being conducted for commercial purposes. The purpose of the copies is the determining factor in deciding whether the copying is for commercial or non-commercial use. The example scenarios listed in the Joint Note seems to offer a rather restricted interpretation of "commercial use" that would be useful for educational activities (Burrell & Coleman, 2005).

Other activities that are likely to be considered commercial include courses given by a university or other educational establishment where attendees pay a course fee intended to generate income for the university, and university lecturers speaking at conferences or events where their speeches are paid (Mackenzie & Walker, 2004). Yet, it is difficult to separate what is commercial and what is not, as certain research efforts may originate from many different sources and the defining purpose of the work can fluctuate between or even combine commercial and non-commercial aims (Wallace, 2004). The delineation between what constitutes commercial and what is not is blurred, and problems are sometimes encountered by private universities in balancing commercial and academic objectives (Alhabshi, 2005: 3).

Slightly different from the UK, Malaysia limits the scope of exception to "non-profit research" (S. 13(2)(a)). It is questionable whether the term "non-profit" is synonymous with commercial, as adopted in UK CDPA 1988. As described in the Joint Note, the term "commercial" is broader than "profit making". Hence, it can be assumed that the term "non-profit" used under Section 13(2)(a) is narrower than the term "commercial" used in the UK Act. Giving courses to students or giving lectures in a conference, or writing articles for journals without receiving any remuneration cannot be described as acts performed for profit. Only when a research is conducted not purely for academic purpose but with a view to commercialize it, may it be considered as research for profit, and thus not covered under the exception (Tee, 2008). Similar to the UK approach, the qualification "non-profit" must thus be read in relation to the research itself and not to the persons or entities conducting it (Tee, 2008). Hence, research conducted by corporations, companies and other business associations with no view to profit, which is rare, may be covered by this exception. In contrast to Section 13(2)(a), Section 9(4) does not limit the right to reproduce a typographical arrangement of a published edition for the purpose of non-profit research, only as what applies in literary, musical or artistic works. Hence, this provision allows commercial organisations to make reprographic copies of a typographical arrangement of a published edition when conducting research and private study.

Unlike in the UK and Malaysia, the Australian law does not restrict the use of research and study exception to non-commercial use, thus leading to two views regarding this matter. In *De Garis v. Neville Jeffress Pidler Pty Ltd*, (1990) 18 IPR 292 the Federal Court decided that the press-clippings and news monitoring service that provided copies of articles published in newspapers and magazines on nominated topics to its subscribers, for payment, was purely commercial in nature, and should be distinguished from research activity of the kind contemplated in Section 40. Khan and Hancock (2001: 512) also concluded that any copying or reproduction for commercial motives, despite some research involvement, is

unlikely to be protected. The Copyright Law Review Committee, in its Exceptions Report (1998), noted the opinion of Dennis Rose, the then Chief General Counsel to the Attorney General's Department, that research should be limited to activities that increase knowledge but not extended to commercial objectives stating (Ricketson & Creswell, 2002):

> "Research might well be limited to activities for the purpose of increasing knowledge in the community as a whole i.e. basic research, as distinct from research directed at particular commercial objectives such as product development or research in a government department for the purpose of advising a minister on proposed legislation."

A much broader view was applied in the *Television New Zealand v. Newsmonitor Services* [1994] 2 NZLR, para. 51 of the case, where Judge J. Blanchard commented that a business organisation is capable of engaging in research as well as private study "when its personnel endeavour is to place themselves in a better position to perform their function in or related to the organisation". Research and the phrase "research and development" is commonly referred to in business. Blanchard J. stated, "[r]esearch is ultimately intended to enable commercial exploitation … the product of the research is likely in some form to be made public". He contradicted the findings of the *De Garis* case by concluding that "a fair dealing for purposes of research can be something done for commercial gain". Similarly, Ricketson and Creswell (2002) considered that there is no reason for limiting the purposes of research to only activities that increase knowledge (i.e. not extendable to commercial objectives), as long as the activities described as research fall within the scope of the dictionary's meaning of research.

c) Study or private study

Another purpose in which using copyright works without payment or permission is allowed is when it is for the purpose of "private study". Australia and Malaysia similarly grant copyright exceptions for the purpose of "private study", while

Australia allows using copyright works for "study" purposes, which scope is wider than private study. Australia omitted the adjective "private" from the phrase "private study" in the Copyright Amendment Act 1980, pursuant to the recommendations of the Copyright Law Committee on Reprographic Reproduction (1976), namely the Franki Committee in para. 2.64, which reads as follows:

> "We are of the view that 'study' should not be limited by the word 'private'. Whilst it is difficult to understand the scope of what is comprehended by the term 'private study', the limitation seems to have been intended to distinguish use of copyright material for private study from use for classroom instruction. We think the distinction is, in many respects, an artificial one. We note that the Copyright Bill now before the United States Congress would permit fair dealing with a copyright work for purposes which, *inter alia*, include teaching and scholarship, which clearly covers classroom use. It is clear that the photocopying of material is of considerable assistance in enabling teachers and students to prepare material for classroom use, and that it is difficult to maintain a distinction between private study and other educational purposes. So long as the photocopying of material for educational use is qualified, for the purposes of Section 40, by the requirement of fair dealing, we think that the removal of the limitation to private study will not prejudice owners of copyright."

This amendment clarifies that the reproduction of copyrighted material is allowed for private study as well as for enabling teachers and students to prepare material for classroom use, as long as the conditions provided under Section 40 are fulfilled.

In *De Garis v. Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR pp. 292 and 298-9, the judge viewed that the word "study" is intended to have a dictionary meaning; the Macquarie definitions of the noun "study" includes the following:

> "1. application of the mind to the acquisition of knowledge, as by reading, investigation or reflection. 2. the cultivation of a particular branch of learning, science, or art, the study of law. 3. a particular course of effort to

> acquire knowledge; to pursue special medical studies … 5. a thorough examination and analysis of a particular subject …".

Based on these definitions, academics conducting their own research and copying others works in preparing their teaching materials, and students who collect research and study materials for their assignments and examinations can both rely on "research and private study exceptions" (Burrell, 2005). Nevertheless, copying for the purpose of research or study can be divided into two stages (Burrell, 2005: 117). The first refers to the early stages of writing, which may include the acts of obtaining or copying various extracts of earlier published and unpublished works. The second stage of research or study is when the results are presented, and the researcher wishes to make reference to source material (Burrell, 2005: 117). Research may not only refer to the one-way process of reading and analysing copyright works, but could also include two-way communication, through surveys, enquiries or interviews based on copyright works, presenting certain copyright works to other people in order to gain feedback or reflection about the studies, etc. The application of the "fair dealing" provision is not clear in this second stage.

d) Private study related to commercial or non-profit purposes

The UK expressly provides that "private study" does not include any study that is directly or indirectly for a commercial purpose (S. 178). In contrast to the UK, it was viewed that the removal of the adjective "private" from the phrase "private study" in Sections 40 and 103C of the Australian Act implies that research undertaken in educational institutions, governmental or commercial organizations, be it for commercial or public purposes, are all similarly considered activities that increase the level of knowledge in the organization or community (Ricketson, 1999). In *TCN Channel Nine Pty Ltd v. Network Ten Pty Limited* [2002] FCAFC 146, Hely J viewed that the fact that the program may have been prepared with a commercial motive, to entertain and achieve higher ratings, did not bar a finding of fair dealing.

In Malaysia, it is questionable whether private study must also be for non-profit purposes, as Section 13(2)(a) merely refers to "non-profit research", and there is nothing in the provision to suggest that private study must be for non-commercial purposes only, as clearly limited in the UK interpretation of "private study" (S. 178). In *Creative Technology Ltd v. Aztech Systems Pte Ltd* [1997] 1 SLR 621, CA p. 637, the Singapore Court of Appeal held that "private study" should be construed to refer only to individuals actually conducting a study. The court viewed that "study" had been qualified by "private" so as to prevent private educational institutions and libraries, for which special provisions had been made, from relying on the defence. The court also excluded private study conducted for commercial purposes from the defence. This decision was made with reference to Section 35(5) of the Singapore Copyright Act, which provides the specific exclusion of commercial research. Unlike Singapore, the UK and Australia, the Malaysian law does not make any specific provisions for educational institutions and libraries, other than Section 13(2)(f), (ff), (gggg) and (i), nor does it exempt commercial research by corporate bodies, companies and associations from the fair dealing defence. As Section 13(2) merely refers to "non-profit research", it can be argued that, in the absence of specific provisions to the contrary, private study can include private study conducted in conjunction with research for "profit" (Tee, 2008).

Appreciating the view taken by the Supreme Court of Canada in *CCH Canadian v. Law Society of Upper Canada* [2004] SCC 13, it is important that the purpose of the dealing is not interpreted restrictively, but it may constitute one of the factors to be taken into account in determining whether or not the dealing is fair. Yet, a permitted purpose does not *ipso facto* validate the infringing act, the dealing with respect to the copyright work must still be fair. As observed in *CCH Canadian v. Law Society of Upper Canada* [2004] SCC 13, at page 663,

> "… some dealings, even if for allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purpose."

The observations above demonstrate that Australia is very flexible in permitting the application of the research and study purposes, i.e. to include both commercial and non-commercial purposes. Further determinations on whether the use of copyright works in research and study for commercial purposes can be considered as fair dealing are left for the courts to decide. The UK, however, expressly limits the fair dealing for research and private study exceptions to commercial purposes only. Malaysia permits exceptions in non-profit research (which scope is slightly bigger than in the UK), however, it is uncertain whether private study for commercial purposes can be covered under the exception. Table 6.2 presents the different approach by the UK, Australia and Malaysia with regards to permitting use of exceptions when it relates to research or study for commercial and non-commercial or non-profit purposes.

United Kingdom	Australia	Malaysia
research for a non-commercial purpose (S. 29) or private study (S. 29) (not for commercial purpose (S. 178))	research or study (Ss. 40 & 103C)	non-profit research or private study (S. 13(2)(a))

Table 6.2: Purposes permitted under research and study exceptions

6.2.3 Beneficiary

The exception for research and study applies to not only individuals but also institutions, companies, organizations, whether public or private. In the Australian case of *Moorhouse v. University of New South Wales* (1975) 13 CLR 1, an educational institution was held liable for authorising copyright infringement through its provision of self-service photocopiers, despite having posted copyright warning notices next to the machines. On appeal, the court affirmed the previous judgement, and held that the University, in making available to a section of the public books in its library and by simultaneously providing in the library machines

by which copies could be made, had knowledge that substantial copying would occur, and was thus considered responsible for authorizing the use of the reprographic machine to illegally copy library books. The court also maintained that the University was aware that such "unlawful and undesirable practices" were commonplace within its premises. The court, moreover, was quite confident that one could not assume that library users would respect the limits placed by the fair dealing defence. Thus the possibility remains that educational institutions being held liable for copyright infringement can cause institutions to be too cautious in controlling what researchers and students can copy (Burrell & Coleman, 2005). An "educational institution" is interpreted in Section 10(1) of the Australian Copyright Act 1968 to explicitly and exhaustively mean an enumerated class of institutions, which range from pre-schools or kindergartens to full-time primary and secondary schools, from universities, colleges and technical and further education institutions to institutions that conduct correspondence courses or on an external study basis, to nursing schools, medical training schools, teacher and educational training schools.

a) Persons engaged in research and study themselves

The UK, Australia and Malaysia do not specify any particular beneficiaries that could benefit from the exceptions relating to research and study. Hence, one does not need to be enrolled or registered in any educational institutions to rely on the research and study exceptions, which is different from exceptions for teaching purposes which will be dealt in the next chapter. Any person conducting their personal research or under their own direction can rely on this exception for copying copyright materials. Various case laws, however, have shown that the exception is limited to the person conducting the study itself, and does not extend to others assisting the research or study. In *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch. 601, the defendants published a book of study materials which contained, *inter alia*, copies of the plaintiff's examination papers. Substantial useful additions of new materials were made by the defendants for the benefit of the students. The defendants argued their copying was fair

dealing as it was for the purpose of private study. The primary issue of this case was whether the examination papers were capable of being protected by copyright law, but the issue of fair dealing come as an afterthought. Here, Paterson J. dealt briefly with the fair dealing argument and held that the defendant's publishing of a work intended to be used by users for their private study was not fair dealing. Paterson J. in his decision however does not mention the case used by the defendant counsel, *Cary v. Kearsley* (1802) 4 (esp. 168 at 170; 170 E.R. 679 at 680), where Lord Ellenborough viewed that it is fair to adopt works of contemporary writers, embodying them into one's own work, making it a new work, stating:

> "[A] man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public: but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi* ? … while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science."

However, it was decided in *Scott v. Stanford* (1866-67) L.R.3 Eq. 718 at 722, where Lord Ellenborough's statement in *Cary v. Kearsley* was quoted with approval, that:

> "No man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information, when wholesale extraction of the vital part of copyright work exists, although he may append additional information to that already published."

Peterson J. decision in the *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch. 601 case has also been commented on as Paterson J. failed to consider the fact that the defendant's work was even more useful for students (Sims, 2010). Yet, had Peterson J. decided that the defendant's actions were non-infringing, textbooks, exam questions and other materials could then have been appropriated freely by others under the name of private study and this would have deprived the copyright owner of his right to fully profit from his efforts.

In *Sillitoe & Ors v. McGraw-Hill Book Co (UK) Ltd* [1983] F.S.R. 545, the authors and publishers sued the importers and distributors (from Canada) over a series of "study notes", intended as a supplementary aid for students. It was held that the defendants could not avail themselves of the research and private study exceptions because they were not engaged in private study or research, rather they were merely facilitating others. The defence of fair dealing for research may only be claimed by the researcher himself. The mere fact that a work is reproduced for the purposes of private study will not, in itself, mean that the use amounts to a fair dealing, and this position remains the same today (Garnett, Davies, & Harbottle, 2010). In short, the "private study" exception is not applicable to publishers as they are considered persons other than those doing the study, although they may claim that the copying is meant for students to use in their study. Similar to the UK position, the Australian Federal Court in *De Garis v. Neville Jeffress Pidler Pty Ltd* [1990] FCA 218, (1990) 18 IPR 292, held that the news clippings agency could not rely on the defence of fair dealing for research or study when supplying photocopied articles to clients because the company itself was not engaged in research or study and the dealing was purely commercial.

Australia expressly limits the beneficiaries when lecture notes are used. The fair dealing exceptions cannot be used by an enrolled external [62] student of an educational institution (Section 40(1A)), meaning that an externally enrolled student may only copy works or adaptations that the student locates and uses on their own initiative, such as in a local library, or the notes of other students, but not the lecture notes supplied by the lecturer or teacher (Ricketson, 1999). The rationale of this provision is perhaps because the lecture notes are meant to be sold to the external students, and if they are allowed to use the fair dealing exception, this objective would be futile. On the other hand, it can be implied that an internal

[62] External students are those who enrolled in external units of study designed for students to study on their own, generally without on campus attendance and online technology is used to ensure students will be able to access the same unit package as the internal students (Murdoch University Handbook, 2011)

student enrolled in an educational institution, or any user not enrolled in any educational institution, is allowed to use the fair dealing exception to copy lecture notes. Such provision is absent in the UK and Malaysian law.

b) Persons acting on behalf of persons conducting research or study

While it is settled that the defence may only be claimed by the person actually engaged in the study or research itself, it is questionable whether it applies to a person conducting an infringing activity on behalf of a person conducting research or study. The UK expressly allowed copying by a person other than the researcher or student himself, subject to certain conditions. Section 29(3) of the CDPA 1988 expressly stated as follows:

> "Copying by a person other than the researcher or student himself is not fair dealing if … (b) in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose."

This clarification is useful in the event of staff at the photocopying facility making copies of copyright works at the researcher's request. This exception, however, does not apply to a person who is merely conducting activities to facilitate the study, such as a publisher of a book or a teacher preparing materials for use by his students. This explanation is however absent in the Australian and Malaysian provisions. In the New Zealand case of *Longman Group Ltd v. Carrington Technical Institute Board of Governors* [1991] 2 NZLR 574, it was held that reproduction of works by a person on behalf of another would be precluded in the language of the exception for educational use. See also the Australian cases of *De Garis & Anor v. Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625 and *Copyright Agency Ltd & Ors v. Haines & Anor* [1982] 1 NSWLR 182 at 191. According to this decision, it may mean that it is illegal for a lecturer, teaching assistant or class

representative to photocopy notes containing substantial copyright materials for the students' use. This may also mean that the photocopy centre workers are infringing copyright law if they photocopy the copyright works for the students.

Section 36(1) of the Malaysian Copyright Act 1987 does include the notion of authorisation; it provides, "copyright is infringed by any person who does, or causes any other person to do, without the licence of the owner of the copyright, an act the of which is controlled by copyright under this Act", meaning that any third party who enables or empowers another person to commit copyright infringement would also be liable under the Act. This exposes the educational institutions, lecturers, workers in photocopy centres as well as librarians to liability for copyright infringement every time they assist or allow photocopying of copyright works for research and study purposes.

Thus, Malaysia fails to address the common practice of photocopying in its educational institutions. This limited application of fair dealing in the ordinary course of work occurring in the universities or educational establishments exposes them to being liable for copyright infringement. Seemingly, there is no sound reason why the defence may not be available in instances where librarians or photocopy personnel are requested to make copies of work, if it could be shown that such copying is only for private study or non-profit research (Tee, 2008). The rationale for restricting the defence to the actual user of the work may be for the purpose of ensuring that only single copies are made, and not multiple copies for circulation to more than one person, allegedly for any of the prescribed purposes (Tee, 2008). The rationale is not undermined merely because the copying or the infringing activity is conducted not by the actual user but by someone on his behalf (Tee, 2008).

Furthermore, the Supreme Court of Canada in *Law Society of Upper Canada v. CCH Canadian Ltd* [2004] SCC 13 also held that the defence of fair dealing may be available to a third party acting on behalf of a person undertaking the private

study or research by proving that the latter's dealing with the copyright work fell within the exception, or by relying on its own practices or policies, if any, as evidence that its dealing, though undertaken for the latter, were within the prescribed purposes. As such, the Court found that it was sufficient for persons or individuals relying on the fair dealing exception to prove that their own practices and policies or all individual dealings with the materials were research-based and fair. The different approach on the aspect of beneficiaries who could benefit from the research and study exception can be seen in Table 6.3.

United Kingdom	Australia	Malaysia
By the researcher or student By a librarian (or someone on his behalf) (S. 29(3))	(other than lecture notes) By an enrolled external student of an educational institution (S. 40(1A))	

Table 6.3: Beneficiaries allowed under research and study exceptions

6.2.4 Works

a) Literary, musical, artistic and dramatic works

The UK (S. 29(1)), Australia (S. 40(1)) and Malaysia (S. 13(2)(a)) allow fair dealing for research and study in literary, musical and artistic works. Malaysia (S. 3) defines "literary work" as including:

> "(a) novels, stories, book, pamphlets, manuscripts, poetical works and other writings; (b) plays, dramas, stage directions, film scenarios, broadcasting scripts, choreographic works and pantomimes; (c) treaties, histories, biographies, essays and articles; (d) encyclopaedias, dictionaries and other works of reference; (e) letters, reports and memoranda; (f) lectures, addresses, sermons and other works of the same nature; (g) tables or compilations, whether or not expressed in words, figures or symbols and whether or not in a visible form; and (h) computer programs; but does not

include official texts of the Government or statutory bodies of a legislative or regulatory nature or judicial decisions."

The UK defines "literary work" to mean any work, other than a dramatic or musical work, that is written, spoken or sung (S. 3(1)). Literary work also includes a table or compilation (other than a database), a computer program, preparatory design material for a computer program, and, separately, a database (S. 3(1)). Although computer program is treated as a form of literary work, computer programs are excluded from the scope of research and private study exception (Burrell & Coleman, 2005: 116). However, copying a computer program for the purposes of research or study may fall instead within Section 50B (decompilation of computer programs) or the new Section 50BA (observing, studying and testing computer programs), which is beyond the scope of this thesis. This exclusion creates serious problems for the exception for research and private study exception (Burrell & Coleman, 2005: 115). The UK (S. 29(1)) and Australia (S. 40(1)) together permit the use of exception for dramatic works, and Malaysia similarly protect dramatic works as it is covered under the definition of 'literary work' (S. 3).

Australia further provides a special provision allowing reproduction of all or part of the work or adaptation of literary, dramatic or musical work contained in a periodical publication such as newspaper, magazine or journal (S. 40(3)). This provision thus makes it clear that taking the whole work from a journal article is allowed for research and study purposes. A specific provision regarding "lecture notes" is also provided, allowing only the enrolled internal students of an educational institution to benefit from the exception (S. 40(1A)). The expression "lecture notes" were defined as "any literary work produced for the purpose of the course of study or research by a person lecturing or teaching in or in connection with the course of study or research" (S. 40(1B)). These detail clarifications are not available in the UK and Malaysian copyright laws.

b) Typographical arrangements of published editions

The UK (S. 29(2)) and Malaysia (S. 9(4)) both have specific provisions allowing copyright exception for typographical arrangements of published editions that protect the image on the page as well as the publisher's investment in the typesetting work (Laddie, Prescott, & Victoria, 1995: para 8.1). The choice of typesetting requires skill and the typesetting itself is often influential in gaining the interest of a particular article or newspaper (*Nationwide News Pty Ltd v. Copyright Agency Ltd* (1996) 136 A.L.R. 273 at 291). In *Newspaper Licensing Agency Limited v. Marks & Spencer Plc*, [1999] E.M.L.R. 369, p. 376, the judge noted that copyright in typographical arrangements is quite distinct from any copyright in the published edition as a literary, dramatic or musical work, and copyright in the typographical arrangement may subsist in respect of a work that is out of copyright.

c) Adaptation

The works covered by this exception for the purpose of research and study are much wider in Australia. Unlike the UK and Malaysia, Australia does not only allow application of the exception for literary, dramatic, musical or artistic work but also for the adaptation of the said works (S. 40(1)). "Adaptation" is defined as follows (S. 10):

> "(a) in relation to a literary work in a non-dramatic form a version of the work (whether in its original language or in a different language) in a dramatic form;
>
> (b) in relation to a literary work in a dramatic form a version of the work (whether in its original language or in a different language) in a non-dramatic form;
>
> (ba) in relation to a literary work being a computer program — a version of the work (whether or not in the language, code or notation in which the work was originally expressed) not being a reproduction of the work;
>
> (c) in relation to a literary work (whether in a non-dramatic form or in a dramatic form):

(i) a translation of the work; or

(ii) a version of the work in which a story or action is conveyed solely or principally by means of pictures; and

(d) in relation to a musical work — an arrangement or transcription of the work".

d) Audio-visual item

Australia also permits the application of the fair dealing exception to audio-visual items (S. 103C). An "audio-visual" item refers to a sound recording, a cinematograph film, a sound broadcast or a television broadcast. This important provision is absent in the UK, while Malaysia expressly excludes the application of the exception for sound recording, film or broadcast (S. 13(2)(a)), thereby disadvantaging users, as such works are useful for research and private study. The limitation existing in the UK law was clarified in the case of *Pro Sieben Media v. Carlton* [1998] FSR 43, 48, when the judge explained:

> "Section 29(1) of the Act provides a defence where there has been fair dealing for the purposes of research or private study. However it applies only to literary, dramatic, musical or artistic works or the typographical arrangement of a published edition. It does not apply to sound recordings, film and cable programmes. Thus it is possible to make copies of parts of plays for the purpose of studying drama, but no equivalent loophole exists in relation to copying film footage if the copier is studying the cinema and that is so even if the footage is of generally recognised historic importance."

Laddie J., pertaining to the same case, reported in [1998] ECC 112, p117-118, further stated:

> "Once copyright exists in a filmed or broadcast interview then, *prima facie*, an unlicensed third party cannot copy or broadcast a substantial part of it. He must go out and get his own interview. Depending on the nature of the copyright work, he may well be able to take some of the underlying facts

> referred to in the work but he may not copy the work itself. That is so even if the motives for wanting to copy are laudable, for example for educational, public service or other reasons. To this extent, *copyright gets in the way of disseminating information. That is and for a long time has been one of its effects. Copyright in a piece of written historical or scientific research to some extent hinders the spread of the knowledge or theories contained in them.*" [emphasis added]

Based on the above observation, the UK and Malaysia have a serious limitation with regards to the works applicable under the fair dealing exception for research and study purposes. Only a limited scope of works is covered and other works are excluded from the fair dealing exception. This may create certain disadvantages for users when conducting research or study, especially when different types of works are required. The Gowers Review Report (2006) in the UK however did recommend that the private copying for research purposes exception be expanded to cover all forms of content, which includes sound recordings, film and broadcast, not just literary, artistic, dramatic and musical works. The UK government consultation paper has also considered the best way to implement the Gowers Report, and views that potential misuse of rights may be limited by restricting the expansion to researchers and students registered with an academic institution, or who are taking specific courses and/or who are linked to a specific academic institution or by addressing the issue in some other way (UK Intellectual Property Office, 2008). Australia seems to be more flexible and considers a broad range of works that may be used by users when conducting their research and study. The broad category of works covered by the fair dealing exception in Australia compared to the UK and Malaysia can be seen in Table 6.4.

United Kingdom	Australia	Malaysia
A literary, dramatic, musical or artistic work (S. 29(1)) Typographical arrangements of published edition (S. 29(2))	A literary (excluding lecture notes), dramatic, musical or artistic work (S. 40(1)) An "audio-visual item" i.e. a sound recording, a cinematograph film, a sound broadcast or a television broadcast (S. 103C)	Literary, musical or artistic works (excluding sound recording, film or broadcast) (S. 13(2)(a)) Typographical arrangement of a published edition (S. 9(4))

Table 6.4: Works allowed under exceptions for research and study

6.2.5 Other conditions

a) Acknowledgement

The UK makes it a condition that there must be sufficient acknowledgment when using copyright works for research and study, unless this would be impossible for reasons of practicality or otherwise (S. 29(1B)). "Sufficient acknowledgement" is defined as (S. 178):

> "an acknowledgement identifying the work in question by its title or other description and identifying the author, unless it is published anonymously, or in the case of an unpublished work, it is not possible for a person to ascertain the identity of the author by reasonable inquiry."

Although there is no mention of requirement of acknowledgement in the Australian provision relating to fair dealing for research and study, it is understood that such is required and "sufficient acknowledgement" is interpreted in a similar fashion to the UK definition (S. 10(1)). In *Pro Sieben Media v. Carlton* [1998] FSR 43 (p.48 and 55), it was held that in the absence of sufficient acknowledgment, the fair dealing defence does not apply. The acknowledgement must be sufficient to allow a reasonably astute member of the relevant audience to understand who the author is. Although the requirement for a user to acknowledge the source of material will

ordinarily be unobjectionable, it will become a matter of concern if the absence of sufficient acknowledgement could automatically prevent the exception from applying, even if the defendant acted in good faith (Burrell, 2005: 60).

The Malaysian provision regarding "acknowledgement" when using copyright works for research and private study is slightly different, as it only prescribes the condition for acknowledgement of the title of the work and its authorship if the fair dealing for specific purpose exception is used in public (S. 13(2)(a)). This shows that acknowledgement is not required if the use of copyright works is at the early stage of writing notes, an article, essay or thesis, as the research and private study is merely for personal use. Nevertheless, when the research or private study advances to the second stage, for example when the notes, article, essay or thesis that may contain substantial quotes from earlier works is presented or distributed to other people; this act will require acknowledgement of the title of any work and its authorship. This condition seems to obviate the need for researchers having to acknowledge every single copyright work used, but on the other hand it can pose a trap in the event of the researcher intending to elevate his work to a further level through presentation or publication.

The common problem of lack of proper acknowledgement may arise due to careless note taking, lack of research skills, problems evaluating Internet sources, misconception of common knowledge, perception of online information as public knowledge, poor time management and organizational skills, time and work pressure as well as culturally based attitudes towards writing (University of Alberta Libraries, 2010). It is mainly Western culture that proposes the notion that words can be "owned". As explained by Bowden (1996):

> "Many non-Westerners have a very difficult time understanding that a person can 'own' discourse. For many Asian students in composition classes, proper acknowledgement of the language and ideas of others is a very difficult concept to understand, much less master … Furthermore, in the West, … there is a strong connection between ownership and selfhood, with the

implication that whatever one owns (language included) makes up one's personal identity."

All these reasons definitely cannot justify works presented to the public without proper acknowledgements. However, it is unfair to automatically prevent the exception of fair dealing for research and private study in the absence of acknowledgement, especially when the infringing work would do much good for the benefit of the public. This can be seen in the case of *Express Newspapers Plc v. News (UK) Ltd and Others* [1990] 1 W.L.R. 1320. Here, it was held that the fair dealing defence does not apply in the case where there is no sufficient acknowledgement, particularly in cases where acknowledgement is an ordinary conduct.

A similar narrow view was also taken in the case of *Sillitoe v. McGraw-Hill Book Co (UK) Ltd* [1983] F.S.R. 545, where the court decided that mere reference to a work and its author did not amount to sufficient acknowledgement. As Malaysia does not provide for situations where a work is published anonymously, it can be presumed that acknowledgement of the title alone will suffice. In *PCR Ltd v. Dow Jones Telerate Ltd* [1998] E.M.L.R. 407, a report was published without identifying the author. The court held that as the published work itself was anonymous, it was not necessary for the defendant to identify the author in order for there to be a sufficient acknowledgement. The works themselves were sufficiently identified in the defendant's article. Table 6.5 presents the importance of acknowledgment as pursued by the individual countries when utilizing exceptions for the benefit of research and study purposes.

United Kingdom	Australia	Malaysia
Sufficient acknowledgement (S. 29)		Acknowledgement of the title of the work and its authorship if such use is public (S. 13(2)(a))

Table 6.5: Other Conditions related to research and study exceptions

6.3 Conclusions

This chapter has answered the research question pertaining to the similarities and differences between the UK and Australia, which predominantly produce educational law materials, and Malaysia, which predominantly consumes educational law materials, with respect to research and study, as well as their significance. All three countries permit the fair dealing of copyright works for research and study purposes that benefit the users when accessing information and materials. The similarities may be due to the fact that Australia and Malaysia were both once colonies of the British Empire, and the "fair dealing" provision relating to research and private study, which originated in the establishment of the Copyright Act 1956, have been adopted by these two countries with few changes. This also indicates that the copyright laws in the respective countries do take into consideration the interests of the user in utilizing copyright materials against the rights of the copyright owners (to a certain extent). None of the countries define what "fair" really means. This identical approach is significant in that the legislature leaves it to the discretion of the court in deciding on what is best (according to the circumstances of each case); this is primarily based on the English Common Law tradition, which is case-based law, founded on judicial decisions and the doctrine of judicial precedent (*stare decisis*).

Australia expended extra effort in providing detailed guidance on the factors to consider when determining the issue of "fair dealing" (Ss. 40(2) and 103C(2)). This emphasizes the role of legislation as the primary method in law making, while the judges' role is only one of interpretation (i.e. not law making) when it comes to the interpretation of statutes. However, for the UK and Malaysia, it is left for the courts to determine what is "fair", based on judicial precedent; based on previous cases, determining what is "fair" under a particular situation remains a subjective issue. Flexible interpretation may assist researchers, students and academics in the course of research and study but a narrow approach to the interpretation of "fair dealing" may lead to acts constituting an infringement of copyright law. Hence,

this is still a grey area and uncertainties abound in this issue. Moreover, although Australia took the initiative to list factors to consider in assessing what is "fair", in some cases, it is still difficult to identify the "fairness" that may fall under the exception.

Significant differences exist between the UK and Australia as to the purposes allowed under the available exceptions relating to research and study, although both are predominantly producer countries of copyright works. The differences may result from the absence of a well-defined international standard governing fair dealing available in the major international treaties, namely the Berne Convention and TRIPs Agreement (Newby, 1999: 1645). The UK seems to protect the copyright owners' rights more in that it limits its copyright exceptions to only research for non-commercial purposes and private study. Malaysia, applies a restrictive position (similar to the UK), limiting the use of the exception to non-profit research, but it is unclear whether private study purposes can also include commercial purposes. The Australian provision is however silent on the matter, and leaves the matter to be decided on a case-by-case basis. Thus, different views prevail on whether the exceptions for research and study in Australia may include activities performed for commercial purposes as well. Yet, to pass the requirement of fair dealing for research or private study, many factors need to be taken into account, including the purpose, i.e. whether it is for non-commercial or commercial research and study, which is not easy to justify. By expressly excluding "commercial" criteria from fair dealing exceptions, difficulties may be encountered, especially in situations where researchers or students are funded by commercial organizations. The UNESCO Report (2009) on trends prevailing in higher education institutions disclosed that there is increasing trends of corporatization and privatization of public universities as one way of meeting financial challenges. Resisting the situation where higher education institutions need to venture into cost-benefit analysis turning it into "a market place" of goods and commodities rather than people and ideas (Kenny, Larkin, MacSithigh, &

Thijssen, 2009: 410) could be made easier by unburdening the educational institutions with various copyright restrictions.

All three countries have chosen not to proscribe any particular entity from benefiting from the exceptions, and thus, the benefiting entity could be an individual, institution, company, or organization, whether public or private. This means that a private body or organisation may still use the fair dealing exceptions when undertaking research or private study, provided that it is not for commercial gain, such as voluntary works. The problem, however, is that there may be conflicting interests, and it might also be difficult to differentiate the voluntary activities from the ordinary course of work. Nevertheless, the UK expressly requires that copying by a person other than the researcher or student himself must be subject to certain conditions (Article 29(3)). Australia does not take the same approach as the UK but it details a particular requirement: the use of literary work (other than lecture notes) is limited to only those persons who are associated with an approved course of study or research or who are enrolled external students of an educational institution. This provision prohibits such external students from copying the lecture notes supplied by the lecturer. However, they may copy or use literary works that they personally locate or obtain on their own initiative. Malaysia does not restrict any beneficiaries that may take advantage from the exception. This significantly aids anyone who needs to conduct non-profit research or private study, be they individuals, students, academics or organizations, in utilizing the exception.

With regard to works covered, Australia seems to have the most flexible approach; it allows the fair dealing exceptions to be applicable to a wider range of works, which include literary, dramatic, musical or artistic works (S. 40(1)) as well as "audio-visual items" such as sound recordings, cinematograph films, sound broadcasts or television broadcasts (S. 103C). This is unlike the UK exceptions, which do not cover other works such as non-authorial works or sound recordings, films or broadcasts; these can also be important in research and private study.

Malaysia employs a narrow approach (similar to the UK) by expressly excluding sound recording, film or broadcast from the types of work allowed under the exception (S. 13(2)(a)). This unnecessarily limits the activity of research and private study in Malaysia when the sources of work are only available in the form of sound recording, film or broadcast. This finding demonstrates that, despite Australia being a producer country of copyright works, it still pays due regard to the user's interests in accessing information from various types of work. This finding also demonstrates that the different types of work must be appropriately addressed in the provision relating to exceptions to research and study, as current technological developments offer much potential and a great many opportunities in accessing information from various sources of work.

All the countries analysed, whether producer or user country, require that there be sufficient acknowledgement of the work. This signifies that all the countries have essentially agreed that it is important to endorse the copyright owner's right to be identified with his/her work, and not to using another's work under the pretence that it is one's own. Oddly, Malaysia only requires acknowledgement if the work is used in public. This somehow implies that Malaysia is not very fussy or particular about acknowledging another's work when it is exploited for personal use only. While this might initially ease the students' or researchers' activities when preparing their work, this lackadaisical attitude and approach could cause many more problems and difficulties later on, especially when they plan to use or present their work in public; a great deal of extra effort might be needed to locate the sources of utilized works as well as to distinguish which work is taken from others and which is actually the researcher's own work.

In short, the Malaysian provisions on exception for research and private study have many similarities with the UK, despite the vast differences in their economies and politics, and in their social and cultural backgrounds. In certain circumstances, the Malaysian provisions are much more restrictive than the UK and Australia, despite

the need for its citizen to have a more flexible law and easier access to information and knowledge. The Australian copyright law seems to incorporate a much broader perspective, one that permits copyright exceptions for a wider range of copyright works, for research and study in both commercial and non-commercial areas, thereby providing greater advantages to users. The Australian provision also contains a more comprehensive explanation of the amount of work that can reasonably be copied, and regulates the factors determining fair dealing.

Chapter 7: National Exceptions for Teaching Purposes

7.1 Introduction

This chapter seeks to answer the research question pertaining to the similarities and differences in the exceptions relating to teaching purposes between the UK and Australia, which predominantly produce educational law materials, and Malaysia, which predominantly consumes educational law materials, as well as their significance. "Teaching" is defined under the Oxford Dictionary as, "1. showing the way; direction, guidance; 2. a. the imparting of instruction or knowledge; the occupation or function of a teacher; b. that which is taught; a thing taught, doctrine, instruction, precept; 3 delivering, handing over". Teaching thus generally involves the exchange of ideas (Shulman, 1987), whether in formal educational scholarship or informal ways. Teaching also includes communicating, showing, performing, and distributing teaching materials in order to facilitate students' learning as well as their preparation for assessments and examinations. To address the copyright exceptions for teaching, several provisions dealing with reproduction, communication to public, recording, performance and other activities related to teaching in educational establishments need to be examined.

This chapter first discusses the provisions for exceptions related to teaching within the United Kingdom (UK), Australian and Malaysian statutes. Then, comparisons are conducted on several factors, namely, rights, purposes, beneficiary, works and other conditions. By comparing the copyright exceptions relating to education in the UK and Australia, this chapter will detail all the most important similarities as well as the main differences between these three common law countries. This comparison will further analyse the level of emphasis in each country in advancing the copyright owners' rights, and will asses whether Malaysia, as developing country predominantly using copyright materials, is much more responsive to the user's interests in education. Certain advantages or disadvantages for users related

to the teaching exceptions will be revealed, and an analysis of the efficacious application of the teaching exceptions that may be followed by other countries will also be discussed.

7.2 Teaching exceptions in UK, Australia and Malaysia

The United Kingdom Copyright Design and Patent Act 1988 contains a group of sections under Chapter III (Acts Permitted in Relation to Copyright Works, particularly Ss. 32-36A) that deal specifically with exceptions to copyright protection in the context of education. Comparatively, the Australian Copyright Act 1968 allocates different parts for a) copyrights in original literary, dramatic, musical and artistic works (Part III), and b) copyright in subject matter other than works (Part IV). Under Part III, Division 3 Acts not constituting infringements of copyright in works, several provisions relate to using copyright works in the course of teaching or instruction, namely, Sections 40, 43A, 43B and 43C. Division 4B on Acts not constituting infringement of copyright in artistic works, Section 47J, is also relevant. Under Part IV, Division 6 on Infringement of Copyright in subject matter other than works, several provisions relate to teaching or instruction purposes, which are Ss. 109A, 110AA, 111A, 111B and 112. Hence the exceptions are divided into types of work and are distributed across many different provisions. In Malaysia the exceptions to copyright protection are dealt by only one single section (Section 13 of the Copyright Act 1987) listing a few circumstances related to teaching purposes, particularly distributed in sub-sections (f), (ff), (g), (k) of Section 13(2).

Based on the above observations, the UK provisions on exceptions to copyright for the purpose of education seem to be strategically organized. The Australian provisions on exceptions to teaching are however more elaborate, while Malaysia seems to be quite straightforward and brief, to the extent that the exceptions available are unclear and limited in many ways. These differences on outlining the

copyright exceptions for teaching purposes between the UK, Australia and Malaysia may also pose some difficulties for users in ascertaining the relevant exceptions available to protect their interests, especially when the teaching involves cooperation or academic networking at the international level.

7.2.1 Rights

a) Fair Dealing

Section 40 of the Australian Copyright Act relates to fair dealing for "study" purposes, which includes teaching or classroom use. This is explained by the Franki Committee, when the term "private study" was broadened to the word "study" during the 1976 amendment of the Act, which stated:

> "We are of the view that 'study' should not be limited by the word "private". Whilst it is difficult to understand the scope of what is comprehended by the term 'private study', the limitation seems to have been intended to distinguish use of copyright material for private study from use for classroom instruction. We think the distinction is, in many respects, an artificial one. We note that the Copyright Bill now before the United States Congress would permit fair dealing with a copyright work for purposes which, *inter alia*, include teaching and scholarship, which clearly covers classroom use. It is clear that the photocopying of material is of considerable assistance in enabling teachers and students to prepare material for classroom use, and that it is difficult to maintain a distinction between private study and other educational purposes. So long as the photocopying of material for educational use is qualified, for the purposes of Section 40 by the requirement of fair dealing, we think that the removal of the limitation to private study will not prejudice owners of copyright."

By granting the right of "fair dealing" for study purposes, which covers teaching or classroom use, the acts permitted for teaching in Australia extend to all kinds of exclusive rights, such as reproduction, communication, performance, showing or playing, distributing or renting, that are normally controlled by the copyright

owner, as long as they fulfil the requirement of "fair dealing". This issue was discussed in some depth in the previous chapter (on research and private study).

b) Reproduction

The UK (Ss. 32(1) and (2)) and Australia (S. 200(1)(a)) both permit the right to copy or reproduce work for educational purposes. Nevertheless, both countries restrict the method of copying to only manual copying (i.e. by hand), disallowing copying through reprographic process (S. 32(1)) or appliances capable of producing multiple copies (S. 200(1)(a)). Hence, the right to copy protects the old-fashioned teaching method only. Photocopied extracts of works cannot be used for the purpose of instruction or preparation of instruction; even photocopying material onto an acetate sheet for use on an overhead projector, and cutting and pasting material onto a PowerPoint slide, both of which are considered normal practice in the course of instruction, are prohibited (Burrell & Coleman, 2005). Regarding permission to copy by hand only, the 1976 Franki Committee, in reviewing Section 200(1)(a) in Australia, concluded that it was unsatisfactory to deny a teacher the right to use a modern photocopying machine to copy for educational purposes, and recommended that it be superseded with a statutory licensing scheme, but this suggestion was not taken up by the Australian government (Seng, 2009a: 34). It is also uncertain whether other modern devices such as projectors and cameras are allowed (Ricketson, 1999). For example, if a lecturer projects a copyright work in a "live webcast", it is questionable whether the use of the webcast equipment, which creates multiple "copies" of work on the students' computers is allowed. At this point, the use of works must be remunerated. Prohibiting copying by reprographic means would severely curtail the usefulness of the exception (Burrell & Coleman, 2005: 122).

In the UK, the exceptions on copying for the purpose of instruction do not restrict how much can be copied. Thus, it can be assumed that a teacher could copy a

whole poem on to the whiteboard, and the pupils in class could copy the whole poem into their notebooks (Burrell & Coleman, 2005: 121). For Australia, this matter is left under the determination of fair dealing of copyright work.

Seemingly, there is nothing in the Malaysian provisions that permits the copying of works for teaching, despite its importance and the fact that it is common practice in everyday teaching. Thus, the simple act of copying works on the whiteboard by the teacher is also not covered under the exceptions for teaching purposes in Malaysia. This demonstrates that a large loophole exists in the Malaysian exceptions for teaching purposes.

c) Multiple reproduction

The UK permits reprographic copying by educational establishments (S. 36). The UK broadly defines "reprographic process" to include copying "involving the use of an appliance for making multiple copies" and, in the case of works in electronic form, copying by electronic means (S. 178). Nevertheless, the permission for reprographic copies is subject to various conditions. Only passages of works can be copied and works taken must be from published literary, dramatic or musical works, so unpublished works are excluded. Copying must also be for the purpose of non-commercial instruction and sufficient acknowledgement must be made (S. 36(1)). Moreover, no more than one percentage of any work may be copied in a quarter of each year (S. 36(2)). The right also does not apply if there are available licences that authorize the copying in question (S. 36(3)). Hence, the UK allows multiple reproduction by educational establishments but in a very restrictive way.

In Australia, the act of multiple reproductions may fall under the provision of fair dealing for study purposes (S. 40). Whilst the Committee members who wrote the report on Reprographic Reproduction (1976: 17) were divided on the effect of the extension of Section 40 to reprographic reproduction, with respect to the erosion of copyright in the public mind against the safeguards provided by the fair dealing

provisions, it was recommended that the fair dealing provisions would indeed apply, whether the copying be done on a self-service or other machine and whether the machine be in a library or elsewhere. However, in principle, the Committee (1976: 17) viewed that multiple copying should not be carried out without remuneration to the copyright owner in any case where it represents a substantial use of his/her property, or it could prejudice the sales of that work, particularly if it has been specifically written for school use.

Cases related to fair dealing have shown that the activity of multiple reproduction, even if it is for the benefit of students, does not pass the requirement of fair dealing. For instance, in *University Of London Press, Limited v. University Tutorial Press, Limited* [1916] 2 Ch 601, it was held that the reason for producing a book of questions together with their answers was for the use of students, and that the republication of a copyright work for the purposes of "private study" did not fall within the description of fair dealing. Thus, if a lecturer reproduces copyright work solely for his/her students' use or merely to disseminate knowledge, that lecturer cannot argue fair dealing, which is the key defence in copyright infringement.

While the UK seems to allow the right to make multiple reproductions with various restrictions, and Australia left the matter under the consideration of fair dealing, which most probably disallows such an act, Malaysia does not seem to permit any right to copy for teaching purposes at all. Hence, none of the countries actually permits the common practice of photocopying works to be distributed for students' use without permission or payment. Reprographic copying is not permitted for teaching purposes in Malaysia. Malaysia defines "reproduction" as, "the making of one or more copies of work in any form or version, and in relation to an artistic work includes the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work". The term "reproduction" is defined very broadly in Malaysia, covering all forms or versions, but unfortunately copying is not permitted in the event of using copyright works for teaching purposes. This means that a lecturer can photocopy copyright

works for the purpose of research or preparation to teach but s/he cannot rely on the teaching exception if s/he needs to photocopy materials onto transparent acetate sheets for use on an overhead projector, since this involves the use of an appliance for making multiple copies. Similarly, s/he also cannot rely on the teaching exception if s/he cut and pastes material onto a PowerPoint slide to be used for teaching as it involves copying by electronic means. This shows that, compared to UK and Australia, Malaysia seems to have a serious loophole regarding its teaching exceptions.

d) Inclusion in a collection or anthology

The UK (S. 33) and Australia (S. 44) both permit the inclusion of a short passage or short extract from a published work in a collection, subject to further conditions. By referring to "short passage", it excludes other classes of copyright works such as photographs, video clips and sound recording under the exception. Both countries similarly require that the collection is intended for use in educational establishments and this must be so described in its title and in any advertisements issued by or on behalf of the publisher (S. 33(1)(a)). The short extract included must consist mainly of material in which no copyright subsists (S. 33(1)(b)) thereby potentially excluding passages of modern works in which copyright exists. The work from which the passage is taken must also not be intended for use in such establishments thereby excluding many publications by academics and be accompanied by sufficient acknowledgment (S. 33(1)). No more than two excerpts from works by the same author in collections published by the same publisher over any period of five years is permitted (S. 33(2)). It is however uncertain by what is meant by "short passage" and the term "mainly" (Burrell & Coleman, 2005: 124). Considering these various conditions in order for one to use this exception, it has been commented that it fails to protect the interest of educational establishment and there is not much to lose even if this exception is abolished (Burrell & Coleman, 2005: 124).

Malaysia also permits inclusion of collection of works if such inclusion is made by way of illustration for teaching purposes and by way of fair practice (S. 13(2)(f)). This is the only act expressly permitted when using copyright works for the purpose of teaching. The word "inclusion" denotes that copyright work must be used together with something else, forming only a part of something, i.e. it cannot be used as a work on its own. By just limiting the right to "inclusion" only, this is disadvantageous to teaching activities in Malaysia.

Malaysia however does not expressly limit the inclusion to only short extracts only, nor does it require other conditions, as required in the UK and Australia. However, Malaysia does limit it "by way of illustration for teaching purposes" and "by way of fair practice". Although the term "by way of illustration" may suggest that only some parts of works may be taken just for example purposes, the interpretation of "by way of illustration" in the Berne Convention does not exclude taking the whole work (Guibalt, 2003). Ricketson (2006) gives an example: in the case of a short literary work, it might be argued that it is necessary to reproduce the whole work if it is to be properly utilized for teaching purposes. This may mean that utilizing a substantial part of the work or even the whole copyright work for the purpose of teaching is permissible under Malaysian copyright law. Nevertheless, applying this exception must also be compatible with "fair practice". What is regarded as "fair practice" is left to the discretion of the courts on a case-by-case basis. There are views that fair practice should entail the criteria set in the general provision governing exceptions and limitations under Article 9(2) of the Berne Convention and Article 13 of the TRIPs Agreement, namely that any reproduction is a special case, does not conflict with normal exploitation of the work, and does not unreasonably prejudice the legitimate interests of the owner (Senftleben, 2004). Thus, the Malaysian provision seems to be more flexible regarding the inclusion of works in a collection, compared to the UK and Australia.

e) Recording, performing, showing and playing

The UK and Malaysia both expressly permit performing, playing or showing work (S. 34 (UK); S. 13(2)(k) (Malaysia)), recording (S. 35 (UK); S. 13(2)(g) (Malaysia)) by educational institutions. Australia also permits the recording of a sound broadcasts for educational purposes, subject to certain conditions (S. 40; S. 200(2); S. 200.2A & S. 200AB).

f) Right of use

A broad right to use copyright works is granted by the UK (S. 32(3)), the Australian (S. 200(1)(b)) and the Malaysian (S. 13(2)(ff)) laws for the purpose of examination. While Australia places no further conditions on the use of work for the purpose of examination, Malaysia (S. 13(2)(ff)) and the UK (S. 32(4)) both require that the reprographic copying of a musical work shall not be made use of by an examination candidate in performing the work. Hence, musical works in their original form must be used, not reproductions.

Australia provides an extra provision providing the right to use works for certain purposes, particularly by or on behalf of a body administering an educational institution, for the purpose of giving educational instruction, and not made partly for obtaining a commercial advantage or profit (S. 200AB(3)). This special provision usefully covers any acts performed for the purpose of instruction, and thus benefits the users' interests in obtaining education.

g) Right of communication

Through the fair dealing provision for study purposes (S. 40), Australian users may also communicate their works in teaching activities. This is clarified under Section 28 in that performance and communication of works or other subject matter in the course of educational instruction shall not be deemed as performance or communication in public and thus is not an infringement of copyright law. Before

the Copyright Amendment Act 2006, Section 28 only allowed literary, dramatic or musical works to be performed, or film or sound recordings to be played in class for the purposes of educational instruction. But after the amendment, the scope was extended to enable teachers and students to communicate literary, dramatic and musical works, film and sound recordings, television and radio broadcasts, and artistic works in a classroom (including a virtual classroom) (Browne, 2009: 453). "Communication" refers to making copyright material available online, or to electronically transmitting copyright material, while "making available" can include putting material on an intranet, and "electronic transmission" includes email, streaming or electronic reticulation (Browne, 2009: 453). Communication of copyright works applies when a signal is distributed by wire or wireless means, which can be received only by persons who possess the equipment necessary to decode the signal, such as cable transmission (WIPO). This extension is significant for Australian education as it allow teachers and students to display or project material from an interactive whiteboard or data projector to stream content from the Internet, or to play a DVD through a centralised reticulation system, for free, in the classroom for educational purposes (Browne, 2009: 453).

The UK and Malaysia do not seem to include the right to communicate the copyright works in their exceptions for teaching purposes. Hence, the UK and Malaysian users are disadvantaged, as the right to communicate copyright works for instruction purposes, which is pertinent in the context of technological development where teaching can be conducted through e-learning, are not readily available. Thus, in the UK and Malaysia, the right of "communication" lies solely with the copyright owner. The term "communication to the public" is defined under Section 3 of the Malaysian Copyright Act (as adopted from the WIPO Copyright Treaty 1996), as follows:

> "The transmission of a work or live performance through wire or wireless means to the public, including the making available of a work or live performance to the public in such a way that members of the public may

> access the work, or live performance from a place and at a time individually chosen by them."

By excluding "communication to the public", this means that the teaching exception does not extend to other modern methods of utilization, such as cable and satellite delivery of programs or transmission of online material or transmission by digital means. In other words, the teaching exception in the Malaysian copyright law does not apply to distance education or distance learning.

h) Right of temporary reproduction and proxy web caching

Moreover, Australia also takes into consideration new methods of teaching and learning, by allowing temporary reproductions to be made in the course of communication (Ss. 43A & 111A), temporary reproductions of work as part of a technical process of use (Ss. 43B & 111B), and the right of proxy web catching (S. 200AAA) although in a controlled manner. Similarly, in the UK, Section 28A, introduced in 2003 pursuant to the implementation of the InfoSoc Directive, provides that:

> "copyright in a literary work, other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process, and the sole purpose of which is to enable – (a) a transmission of the work in a network between third parties by an intermediary; or (b) a lawful use of the work; and which has no independent economic significance."

Overall, compared to the UK, Australia seems to provide broader rights in relation to exceptions for teaching purposes, compared to Malaysia. Australia seems to keep abreast of the technological developments employed in the course of giving and receiving instruction, compared to the UK and Malaysia. However, the rights

granted are with various conditions that made it difficult for users to apply the exceptions in their ordinary teaching activities. The summary of the similarities and differences of variable rights granted by each country in question can be seen in Table 7.1.

United Kingdom	**Australia**	**Malaysia**
Performance, playing or showing (S. 34)	Performance or causing to be seen or heard, or communicated to the public (S. 28)	Performance, showing or playing (S. 13(2)(k))
Recording (S. 35)	Record (Ss.200(2); 200(2A))	Recording (S. 13(2)(g))
Anything done (S. 32(3)) Copied… (S. 32(1))	Use (Ss. 200(1)(b); 200AB(3))	Use (S. 13(2)(ff))
Reprographic copying (S. 36)	Reproduction (S. 200(1)(a))	Inclusion (S. 13(2)(f))
Transient or incidental copies (S. 28A)	Temporary reproduction (Ss. 43A & 111A) Proxy web catching (S. 200AAA) Fair dealing (S. 40)	

Table 7.1: Rights granted for teaching purposes

7.2.2 Purposes

a) Study

Australia permits fair dealing of copyright works for the purpose of "study" (S. 40). The Franki Committee, in recommending that the word "study" be used in Section 40, commented on the difficulties of differentiating between private study and other educational purposes, and applied the term both for private study and for teachers and students to prepare materials for classroom use, subject to certain conditions.

b) "Instruction" or "teaching"

Australia and the UK both use the term "instruction" in their copyright exceptions rather than the word "teaching". The UK allows copyright exceptions in the course of instruction or preparation for instruction (S. 32.(1)) while Australia similarly permits using copyright works in the course of giving or receiving instruction (S. 28). By using the term "instruction", the exception goes beyond teaching or giving lessons in a classroom, neither does it confine the exception to educational establishments (Burrell & Coleman, 2005: 121). Thus, "instruction" may include training given by a company such as staff development or pupilage. In contrast, Malaysia uses the term "teaching" as used in the Berne Convention (S. 13(2)(f)). Based on the Stockholm Conference Committee's report (1967: 1148), the word "teaching" includes teaching at all levels (from elementary to university teaching), in both private and public institutions, as well as distance teaching (Ricketson & Ginsburg, 2006). This can be teaching in educational institutions and universities, municipal and State schools, and private schools but not education outside these institutions, for instance general teaching available to the general public, such as adult education facilities, adult literacy campaigns or training courses running within any organisation. As examination is also part and parcel of teaching or instruction, the UK (S. 32(3)), Australia (S. 200(1)(b)) and Malaysia (13(2)(ff)) all allow using copyright works for the purposes of examination. This shows that the exceptions cover a broader scope of "instruction" in the UK and Australia, compared to the limited scope of "teaching" in Malaysia.

c) Commercial or non-commercial

The purpose of instruction or preparation for instruction can also be for commercial or non-commercial purposes. The UK allows using copyright works when it relates to commercial purposes (S. 32(2A)) but extra conditions apply compared to instruction made for non-commercial purposes (Ss. 32(1) and (2)). This is due to the implementation of the EU Copyright Directive (Directive 2001/29/EC) (EUCD) to which the UK is bound. Article 5(3)(a) of the EUCD contains a specific

provision relating to teaching exception requiring certain conditions that must be followed, including that it only allow exemptions of teaching for non-commercial purposes. Article 5(3)(a) reads as follows:

> "…use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved."

Article 5(5) of the EUCD further requires that the specific teaching exceptions be applied only "in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder". Under this provision, member countries must ensure that the teaching exceptions granted in their national laws will not deprive the copyright holders from their major source of revenue. The circle of beneficiaries must also be narrowed down at the national level so that the economic core of a work's overall commercialisation, for instance of an academic work, remains untouched (Xalabarder, 2003: 165-167). It also requires that the use for teaching exceptions be subject to payment of equitable remuneration in order to fulfil international obligations (Xalabarder, 2003: 167). In this sense, the exceptions for instruction purposes in the UK are subject to various conditions, making it very difficult to access copyright works without payment or permission without infringing copyright.

By limiting that any research must be for a non-commercial purpose (S.29(1)), pursuant to the 2003 Regulations, any person or organisation copying articles for commercial purposes will no longer benefit from this exception. In the case of *Her Majesty's Stationery Office (HMSO) & Anor. v. Green Amps Ltd* [2007] EWHC 2755 (Ch), the defendants (who were a commercial company involved with renewable energy) had used a student's user account (limited by an on-screen "click wrap" license to education and other limited purposes) to copy digital map data from the Ordinance Survey for use in their business. This copying clearly was in breach of the license and in any event did not benefit from a fair dealing

exception. Since "commercial purpose" has a broad interpretation, even copying articles to write a book or article for which the author will be paid can be construed as a commercial purpose. Where a business is concerned, any copying for research purposes is likely to be for a commercial purpose (Stokes, 2009). For example, the Copyright Licensing Agency has warned that businesses and others copying works for commercial research will now need a license from them or an individual licence from the copyright owner (Cook & Brazell, 2004).

In Australia, whether educational institutions undertaking commercial activities can rely on educational provisions within the Copyright Act remains uncertain. This is because Section 40 providing for exceptions for study purposes (which includes teaching) is silent on this matter. Nevertheless, commentators have viewed that based on the court's comments in the *De Garis v. Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625 case, it appears that the Australian courts will take a narrow approach toward the inclusion of a commercial component in any of the uses, such as research or study, available under the fair dealing provisions. A commercial element would potentially prevent an individual claiming a fair dealing defence (Shelly, 2008).

Moreover, other provisions in the Australian law permit using copyright exceptions for non-profit instructions only (Ss. 28, 200(2)(a), 200AB(3)(c)). Yet, it is made clear that the non-profit requirement still applies although the teacher receives remuneration for giving instruction at a place of education (S. 28(2)). It has been submitted that the requirement of "place of education" (S. 28(2)) relates to whether the instruction is conducted for profit, and it does not actually require that performance must be held "at a place of education" (Seng, 2009a: 26). The term "place of education" is not defined in the Australian Copyright Act, but it is presumed that it includes primary, secondary and tertiary institutes of learning (Seng, 2009a: 26). Thus, under Section 28 performances organized by schools and educational institutions can be held in rented concert halls and theatres outside the school or institution, as long as they are pursuant to a course of giving educational instruction (Seng, 2009a: 26). Australia, through Section 200AB(3) introduced via

the Copyright Amendment Act 2006, specifically requires that educational uses must be made by or on behalf of a body administering an educational institution, made for the purpose of giving educational instruction, and not made partly for the purpose of the body obtaining a "commercial advantage" or "profit" (S. 200AB(3)).

Malaysian law is silent on whether the teaching exceptions can apply to both non-commercial and commercial purposes but requires that they be compatible with fair practice (S. 13(2)(f)). Nevertheless, it expressly provides that the copyright exceptions for performance, showing or playing of copyright work are limited to charitable or educational purposes (S. 13(2)(k))

d) Educational purposes

"Other purpose" includes using copyright works for educational purposes (S. 35(1) UK; S. 13(2)(k) Malaysia). In Australia, other purposes covered in relation to teaching or instruction includes "in the course of educational instruction" (S. 200(1)(a)) and "for educational purposes" (Ss. 200(2) & 200AAA(b)), as well as for the educational purposes of that institution or another educational institution (S. 200(2A)). In contrast to Section 200(2), Section 200(2A) is broader, as it permits the making of a record of a sound broadcast by or on behalf of an educational institution, and used for the "educational purposes of an educational institution" or that of another educational institution. This expression extends the exception to include not just the making or retention for use in connection with a particular course of instruction provided by the institution, but also for inclusion in the collection of a library of that institution (S. 10(1A)). Without limiting the meaning of the expression "educational purpose", Australia relates it to a use in connection with a particular course of instruction provided by the institution (S. 10(1A)) but other purposes could also be regarded as "educational" (Ricketson & Creswell, 2002). Yet, no judicial determination has actually been made regarding "other purposes" that can be considered "educational", such as the use of educational materials by university staff for a commercial purpose (Shelly, 2008).

From the observations above, all three countries permit using exceptions for teaching purposes. The relevant sections permitting use of exceptions for teaching or instruction purposes are summarised in Table 7.2 which also shows that the UK and Australia seem to broaden the scope of teaching by using the term "instruction". Malaysian users are at a disadvantage, as this means that the teaching exception only applies to formal classroom teaching and not other kinds of instruction. All the countries similarly permit using copyright works in teaching related to both non-commercial and commercial use. However, the exceptions for commercial use are subject to fair dealing or fair practice.

United Kingdom	**Australia**	**Malaysia**
In the course of instruction or of preparation for instruction (S. 32(1)) Activities of the establishment (S. 34(1)) For purposes of instruction (S. 36(1)) Examination (S. 32(3))	Study (S. 40) In the course of giving or receiving non-profit instruction (S. 28) For educational purposes (Ss. 200(2) & 200AAA) Educational purposes of an educational institution or that of another educational institution (S. 200(2A)) Giving educational instruction (S. 200AB(3)) Examination (S. 200(1)(b))	For teaching purposes (S. 13(2)(f)) For charitable or educational purposes (S. 13(2)(k)) Examination (S. 13(2)(ff))

Table 7.2: Purposes allowed for teaching exceptions

7.2.3 Beneficiary

a) Person giving (teacher) or receiving instruction (student)

The UK (S. 32(1)) and Australia (S. 28) clearly specify the persons eligible to use the exceptions for teaching or instruction purposes, namely, the person giving or receiving instruction, i.e. teacher or student. Section 32(1) in the UK extends broadly to any kind of instruction and is not confined only to educational establishments. This benefits the home teachers, college lecturers and training officers (or courses) employed by any organisation (Burrell & Coleman, 2005: 121). Nevertheless, the copyright exceptions cannot be used by anyone other than the person giving or receiving instruction, such as the teaching assistant, nor staff at any photocopying facility. Unlike the UK and Australia, Malaysia does not specify any beneficiary that could use the exception for inclusion of works for teaching purposes. It is unclear whether this exception applies to those giving instruction (teachers) only, or also to those receiving the instruction (student). This omission is significant, as it may give the impression that it only affects teachers, and that it limits the eligibility of the teaching exception to only those enrolled in the formal education system, by virtue of the word "teaching" used in the provision. This may cause difficulties to teaching or instruction outside the recognized formal education institutions, such as free legal workshops for the public, or not-for-profit health seminars conducted for the public benefit as well as teaching done in religious schools.

b) By or on behalf of an educational establishment

The UK (S. 34(1)(a)) and Australia (S. 28) permit performing, playing or showing work by a teacher or pupil in the course of educational instruction but the UK extends the beneficiary to include any person at the establishment for the purposes of instruction (S. 34(1)(b)). In Malaysia, performance, showing or playing of a work is permitted if it is made by institutions for educational purposes (S. 13(2)(k)). This seems to restrict the beneficiary to only institutions, and thus

cannot be used by teachers or students in their personal capacity, albeit for the purpose of education.

Recordings (S. 35) and reprographic copying (S. 36) may be made by or on behalf of an educational establishment. This means that the right to record or make reprographic copies is not limited to educational institutions only, but can also be made by a third party on behalf of the educational institution. This also implies that the right to record or make reprographic copies does not apply to individual teachers or students, even though it is for the purpose of instruction. Only educational establishments, such as schools and universities, are authorized to do so. This inhibits teachers and students in making use of the reprographic process in their own personal capacity in order to utilize teaching materials.

Attempts have been made to revise the UK provisions related to teaching exceptions, as discussed in the Gowers Review Report (2006), particularly the recommendation that Section 35 of the CDPA, which currently allows the recording and showing of broadcasts to students physically present at an educational establishment, be expanded to allow distance learning students to receive and view these recordings remotely. The Gowers Review also proposed changes to Section 36 of the CDPA, which permits educational establishments to copy passages from published works and provide handouts to students, to further extend the right to enable the communication of such passages using interactive whiteboards and electronically to distance learners. A government consultation, launched by Lord Triesman, Minister for Intellectual Property, considering how these recommendations can best be adjusted in the existing copyright law has also been reported and considered (UK Intellectual Property Office, 2008).

In Malaysia, the right vis-à-vis recordings is limited to "schools, universities or educational institutions" (S. 13(2)(g)). Malaysian law interprets "educational institution" as having the same meaning as assigned to it in the Education Act

1961[63] (S. 3), which is narrow compared to the 1996 Education Act which has repealed the former, referring "educational institution" to "a school or any other place where, in the carrying on of the work of an organization or institution, persons are habitually taught, whether in one or more classes, and includes a kindergarten and a distance education centre but does not include educational institutions, schools or any other institutions where the teaching is confined exclusively to the teaching of any religion; or any place declared by the Minister by notification in the Gazette not to be an educational institution".

Australia does not limit the right to reproduce or communicate works to only the person giving or receiving instruction, but also extends the benefit of the exception to the educational institution (S. 200(2A)). The term "educational institution" is defined broadly in Section 3. This means that teaching assistants and staff working at the photocopier in a university may all reproduce copyright works. However, this exception does not extend to the reproduction or communication of work outside the premises of an educational institution. Hence, this exception does not apply to individuals or voluntary workers giving training on legal rights or health awareness for the public benefit. Thus, it seems that Australia provides a wider scope of beneficiaries for the exceptions but still has some limitations or controls in its law in order to protect the copyright holders' interests.

With regards to the purpose of examination, the Act is silent on who can benefit from the exception as long as it is done by way of setting the questions, communicating the questions to the candidates or answering the questions (S. 32(3) UK). This implies that anyone can use the copyright exception in order to achieve the stipulated purpose.

[63]Education Act 1961 has been repealed by the 1996 Education Act.

United Kingdom	Australia	Malaysia
Copied: by the person giving or receiving the instruction (S. 32(1)(a)) Anything done: by way of setting the questions, communicating the questions to the candidates or answering the questions (S. 32(3)) Performance: by a teacher or pupil in the course of the activities of the establishment (S. 34(1)(a)), or at the establishment by any person for the purposes of instruction (S. 34(1)(b)) Reprography: by or on behalf of an educational establishments (schools and universities) (S. 36(1))	By a teacher or student (S. 28) Educational institution (S. 200(2A))	Use: by way of setting the questions, communicating the questions to the candidates or answering the questions (S. 13(2)(ff)) Performance: by a non-profit making club or institution (S. 13(2)(k)) Recordings: made in schools, universities or educational institutions … intended for such schools, universities or educational institutions (S. 13(2)(g))

Table 7.3: Beneficiaries allowed under exceptions for teaching purposes

7.2.4 Works

a) Literary, dramatic and musical works

The UK (Ss. 32(1), 34(1) & 36(1)) and Australia (Ss. 28 & 200(1)) similarly provide that literary, dramatic and musical works may be used under the copyright exceptions for instructional purposes. Malaysia allows using copyright exceptions for teaching purposes on musical works, and "collection of literary works" (Section 13(2)(f)), which also includes dramatic works in its interpretation (S. 3). By referring to "collection" of literary works, it is unclear whether it only refers to an assembly, combination or groups of selection of literary works only, and does not extend to dispersal or individual literary work. However, it seems absurd to think in this way of reasoning.

b) Sound recordings, cinematographic films or television broadcast, or sound broadcast

The UK (S. 34(2)) and Malaysia (S. 13(2)(f)) also allow the use of copyright exceptions for teaching purposes in works such as sound recordings, films or broadcasts. Although Australia similarly allows use of copyright exceptions for educational purposes in sound recordings, cinematographic films, or television or sound broadcasts (Ss. 28, 200(2), & 200(2A)), the exceptions are considered narrow, as they do not include video recordings. Moreover, this provision also does not encompass programmes for the general audience or even news reports that may have substantial educational value (Ricketson, 1999 at § 11.106). Comparatively, Section 200(2A) is broader than Section 200(2) in that it encompasses general sound broadcasts (rather than a broadcast intended to be used for educational purposes), and may be made for use in connection with another educational institution (Seng, 2009a: 35).

c) Computer systems, online materials & digital environment

Australia took a step further in that its provisions also cover computer systems by exempting proxy web caching by educational institutions of computer systems operated primarily to enable staff and students to gain online access for educational purposes to works and other subject matter (S. 200AAA). Section 200AAA is seen as providing a blanket defence for educational institutions (Seng, 2009a: 36). Moreover, in 2006, the Australian Copyright Act 1968 was amended to include Section 200AB, which enables educational institutions to assist users in using copyright materials in the online and digital environment for non-commercial purposes without the copyright owner's consent (Explanatory Memorandum, Copyright Amendment Bill 2006). Comparing the works covered by the exceptions relating to education in the three countries, it seems that Australia take into consideration the application of the exception to works in a much newer format, such as online materials or computer systems, which seems to be absent in

the UK and Malaysia. This represents a serious limitation to the copyright laws of the respective countries as many teaching or instructional activities are increasingly utilizing recent technological developments to their advantage. The significant similarities and differences on the application of exceptions for teaching purposes between the countries can be seen in Table 7.4.

United Kingdom	**Australia**	**Malaysia**
Literary, dramatic, and musical works, published and unpublished (Ss. 32(1), 34(1) & 36(1)) Sound recording, film, broadcast (S. 34(2))	Literary, dramatic or musical work; sound recordings, cinematographic films, or TV or sound broadcast (Ss. 40, 103C & 28) Literary, dramatic, musical or artistic work (Ss. 200(1)(a) & 200(1)(b)) Sound broadcast (Ss. 200(2) & 200(2A)) Computer systems (S. 200AAA)	Collection of literary or musical works (S. 13(2)(f)) Sound recording, film or broadcast (S. 13(2)(f))

Table 7.4: Works covered under teaching exceptions

7.2.5 Other Conditions

a) Acknowledgment

It is a requirement in the UK that when using copyright works under the exception, sufficient acknowledgement needs to be given, notwithstanding whether the copying is for commercial or non-commercial purposes (Ss. 32(1)(c) & 36(1)), unless such would be impossible for reasons of practicality or otherwise (S. 32(3A)). Malaysia also requires that the source and the name of the author that appears on the work used must be mentioned (S. 13(2)(f)). As this requirement is ordinarily not objectionable, and in fact commendable to do so for teaching purposes, it is also a concern that failure to mention the source and the name of the author would result in disallowing the work for use (Burrell, 2005: 60).

b) Fair dealing or fair practice

While in the UK, the requirement of "fair dealing" is applicable only for copying done for commercial purposes (S. 32(2A)) and not for non-commercial purposes, in Malaysia, the copyright exception provided for teaching purposes is subject to a condition that it is compatible with "fair practice" (S. 13(2)(f)). What is fair is a subjective matter and this question may lead to uncertainties; an explanation of this matter was dealt with in the chapter on research and private study with regard to "fair dealing". The uncertainty in knowing how much lecturers or students are entitled to copy under the teaching exception does create certain difficulties. The uncertainty of the matter, added to the possibility of educational institutions being held liable for copyright infringement, could cause either institutions to be too cautious in controlling what researchers and students can copy (Burrell & Coleman, 2005), or, even worse, individual researchers and students to ignore copyright law altogether, since they would not bother to follow a law that is unclear and vague.

To consider whether use can be considered as fair practice, it is also advisable that the act does not violate the criteria in the three step test provided under Section 9(2) of the Berne Convention. Under this test, copying must only be limited to works in certain special cases, it must not conflict with any normal exploitation of the work, and it must not unreasonably prejudice the legitimate interests of the author. However, by determining "fair practice" based on the criteria of the three step test, the condition could arise whereby the teaching exception cannot be applied without needing to pay or compensate the copyright owner. This differentiates teaching exceptions from other types of exception where use is free. In principle, only when the use of copyright work is remunerated, can the requirement of compatibility with fair practice (that would lead to free use) be satisfied. In this regard, it is likely that where large numbers of copies are made for an individual classroom for use by students, it will fail the three step test, thereby such copying would not be regarded as fair practice and thus not applicable under the teaching exception. Applying the three step test requirement may also suggest that the exception cannot be made for commercial purposes and must be fairly compensated. Similarly, the UK also

requires that copying published copyright works must satisfy the requirement of fair dealing. Further discussion on this is explained under the section on the three step test.

c) Subsequent dealings

Moreover, the UK also makes it a condition that copies made under the exceptions cannot be subsequently "dealt with", which means sold or let for hire, offered or exposed for sale or hire, or otherwise be made available to public (Ss. 32(5), 35(3) & 36(5)).

d) Audience and fees charged for performance

Furthermore, the performance, playing or showing of works can only be done before an audience consisting of teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment. The exception expressly excludes the parent of a pupil (S. 34(3)). Similar to the UK, Australia prescribes that performance of a literary, dramatic or musical work can only be performed to audiences that are limited to persons who are taking part in the instruction (which would include the teachers and students who are not performing) (S. 28(1)), who are directly connected with the place where the instruction is given (which would include technical support staff who set up the equipment) (S. 28(1)), and does not include parents or guardians of the students (S. 28(3)). Although the exclusion of parents and guardians would exclude school concerts and performance recitals as being outside the scope of the section, the Australian Copyright Law Review Committee, in its report, viewed that it would be inappropriate to extend the operation of the section, and thus such performance should be similarly treated as normal public performance (1998). In Malaysia, the performance, showing or playing of a work must be in a place where no admission fee is charged in respect of such performance, showing or playing (S.

13(2)(k)). However, this does not prohibit the use of the exception for charitable or educational purpose that seek voluntary donations.

e) Limitations on types of instructions

Copying sound recording, film or broadcast is also restricted in the sense that it can only be done in the course of instruction or of preparation for instruction, in the making of films or film sound-tracks (Article 32(2) UK), meaning that this provision can only be applied to media studies courses (Burrell & Coleman, 2005: 123), or to those that teach film making. This condition is similar in UK (S. 35(1)), Australia (S. 200(2)(b)) and Malaysia (S. 13(2)(g)). Australia seems to extend this right further by allowing the use of the recording in other educational institutions (S. 200(2)(a)). Recordings of broadcast by educational establishments that is done for non-commercial purposes can only be communicated within the premises of the establishment and not outside it (S. 35(1A)). The condition that the communication of such recordings is only permitted within the premises of an educational establishments does however make it unclear as to how this can be applied in the UK education and research networks such as JANET and UKERNA (Wallace, 2004).

f) Australian residual exception

Section 200AB, introduced in 2006, provides an innovative residual exception, based on the three-step test, providing:

> "that copyright in a work or other subject matter is not infringed by a use of the work or subject matter if the circumstances of the use amount to a special case, the use does not conflict with a normal exploitation of the work or other subject-matter and the use does not unreasonably prejudice the legitimate interests of the copyright owner."

This provision, interestingly, adopts the wording that appears in the three step test as provided Berne and TRIPs, with slight modification. Section 200AB can be

used as a defence against copyright infringement, and it is intended to provide room for flexibility in order to enable copyright material "to be used for certain socially beneficial purposes while remaining consistent with Australia's international copyright obligations" (Attorney-General's Department, Information Law and Human Rights Division, 2006, 2). Section 200AB provides an important and flexible provision for Australian education, as it does not specify exactly which copyright uses are permitted, rather, it provides guidelines for teachers to apply when deciding whether a particular use of material is to be allowed.

This flexible dealing is seen as a practical way of managing copyright in a digital world, as it provides the necessary flexibility for the online environment, where people can access, use and share material freely on the Internet (Browne, 2009: 454). Nevertheless, Section 200AB can only be used by universities in the event that the conditions of the educational licensing scheme are not meet. Thus, this section does not apply if other specific exceptions and statutory licences apply; the University cannot claim access under Section 200AB simply to avoid paying remuneration for the statutory licence under Part VB for Educational Institutions. A significant implication for this is that it treats the educational use of all online literary and artistic material as potentially remunerable (Browne, 2009: 454). Only special cases, which clearly fall outside the scope of the Part VB limitations, may be argued as non-infringing under Section 200AB. Hence, this provision may only be used in certain circumstances, for example, to allow the use of a work where the copyright owner's permission cannot be obtained because he or she cannot be identified or contacted, or where an educational institution wishes to continue using a teaching resource that is held in a form that has become obsolete and that is not commercially available in a form appropriate for contemporary teaching technology (CQ University, 2010). The Explanatory Memorandum to the Copyright Amendment Bill 2006 states that the aim of Section 200AB is to "provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia's obligations under international copyright treaties", and to further expand services to include

both "internal administration" as well as "providing services to users". While this amendment appears to make reproductions publicly accessible and to increase the confidence of institutions in digitising and publishing certain items online, it is still dependant on the interpretation of the three step test, although which sources will inform the interpretation of this provision by stakeholders and the judiciary, and to what degree, remains to be seen (Hudson & Kenyon, 2007). Nevertheless, Section 200AB has the potential to allow greater preservation activities by institutions, and to permit some public activities for which licensing is not possible, but it also depends on the user's level of knowledge in order to accomplish a practical application (Hudson & Kenyon, 2007).

The different conditions attached to the exceptions for teaching purposes required by each individual country is summarised in Table 7.5.

United Kingdom	**Australia**	**Malaysia**
Sufficient acknowledgment (Ss. 32(1)(c), 36(1) & 32(3A)) Copying is fair dealing (S. 32(2A)(a)) with the work and is not done by means of a reprographic process Copies not subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public (S.32(5)) Reprography: not more than one per cent unless authorized by license (S. 36) Recordings of broadcasts communicated within the premises of the establishment (S. 35)	Performance: audience is limited to persons taking part in the instruction, directly connected , and who are parents or guardians of the students (S. 28) The recording must not be used except in the course of instruction at that place (S. 200(2)(b)) Circumstances amounting to a special case: the use does not conflict with a normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the copyright owner (S. 200AB(1))	Mention source and name of the author (S. 13(2)(f)) Inclusion: compatible with fair practice (S. 13(2)(f)) Use: exclude the making of a reprographic copy of a musical work for use by a music examination candidate (S. 13(2)(ff)) Performance: is in a place where no admission fee is charged for such performance, showing or playing (S. 13(2)(k))

Table 7.5 : Other conditions on exceptions for teaching purposes

7.3 Conclusions

This chapter has addressed the fourth research question, which pertains to the similarities and differences in the exceptions relating to teaching between the UK and Australia, which predominantly produce educational law materials, and Malaysia, which predominantly consumes educational law materials, as well as their significance.

Based on the above analyses, Australia is the most flexible in terms of providing exceptions for teaching purposes. It has an open fair dealing provision for study purposes, allows reproduction, multiple reproductions, inclusion of works in collections, and the right to communicate works subject to several conditions. The scope of purposes allowed under the Australian exception also broadly covers study and instruction, and commercial and non-commercial purposes. The teaching exceptions benefit both teachers and students, and they also cover various different types of work useful for teaching activities, including works in new formats. Australia further provides for residual exceptions for the purpose of education by adapting the conditions laid down in Article 9(2) of the Berne Convention. Seemingly, careful thought and consideration have been made in outlining the elaborate provisions regarding exceptions for teaching purposes in the Australian law.

The UK is seemingly more organized in the set up of its exceptions for educational purposes, compared to Australia. In terms of allowing use of copyright works in teaching for commercial purposes, the UK is similar to Australia, as it permits the same, subject to fair dealing. However, the UK is less flexible in its exception, as it does not allow the right of communication, which is increasingly important in teaching activities, and does not extend the exception to new formats.

Malaysia, despite being a developing country, which may require easy access to materials for teaching purposes, turns out to have the narrowest exception. Not

only does it not permit the right of communication (as in the UK), but it also does not seem to allow reproduction or multiple reproductions for teaching purposes at all. It merely allows the "inclusion" of works for teaching, which is limited in many ways. The scope of purposes allowed is also confined to "teaching", which is narrower than the term "instruction" used in the UK and Australia. It is also silent on the beneficiaries that may apply the exception, thereby possibly leading to confusion as it only applies to teachers, not to students. Similar to the UK, Malaysia also has not included new formats of works that may benefit from the teaching exception. This has left users in teaching activities at a disadvantage, compared to Australian and UK users. Hence, some of the provisions that are absent in Malaysia but available in the developed countries, which could benefit users in Malaysia, should be considered for inclusion in the Malaysian provisions of exceptions for teaching.

Chapter 8: Analysis, Discussions and Conclusions

8.1 Introduction

This thesis has highlighted the fundamental problem of inequitable knowledge acquisition and sharing in the global community. Amongst others, this is contributed to by numerous regulatory, administrative, technical and logistical challenges that hamper access to materials for educational purposes. The fact that the ownership of copyright works is mostly concentrated in the developed world and disagreements in the standards for accessing those resources have also contributed to inequitable knowledge acquisition and sharing.

The exceptions and limitations provided in the international conventions have been recognised as a tool for balancing the rights of private and public interests, especially in important areas such as education. However, there is no universal all-encompassing exception for education. In this respect, Article 9(2) of the Berne Convention and Article 13 of the TRIPs Agreement provide the necessary conditions for any exceptions or limitations to copyright protection. Article 10(2) of the Berne Convention further presents the most direct exception relating to teaching activities. This thesis has thus aimed to analyse whether these particular provisions are sufficiently flexible to facilitate teaching, research and study, particularly in the context of legal education in Malaysia. This thesis has also compared and contrasted the laws of the UK and Australia (which are both predominantly exporters of educational materials) with Malaysia (which is predominantly an importer of educational materials) relating to the exceptions for teaching, research and study, and demonstrating to what extent the flexibilities provided under the international copyright law have been sufficiently utilized to accommodate teaching, research and study. The above aim is significant for decision makers, negotiators, private actors as well as civil society in order to make well-informed policy decisions regarding access to knowledge and information.

This is especially important as the education sector represents both a major contributor to and a consumer of copyright works.

The context of this research has revolved around copyright law and access to the materials used for studying law in Malaysian higher education institutions. As shown in Chapter Three of this thesis, Malaysia does not grant any copyright protection on "official texts of the Government or statutory bodies of a legislative or regulatory nature, or judicial decisions" or anything derived from them. Thus, focus is given in the application of copyright exceptions to the privately generated law materials that may be used when learning law at the higher education institutions. This thesis however has not analysed the exceptions of copyright works used in libraries and archives for teaching, studying and research purposes (for an analysis of such exceptions, please refer to the WIPO Study on Libraries and Archives). This study also has not discussed translation issues, laws on databases nor the licensing systems adopted by the relevant countries, which is also pertinent in respect of teaching, research and study.

8.2 Analysis

8.2.1 International exceptions on research, study and teaching

Chapter Four contributed to answering the first research question, which pertains to the extent to which the exceptions provided under Article 9(2) of the Berne Convention as well as Article 13 of the TRIPs Agreement facilitate or hinder law research and study in universities. Utilizing the methods of interpretation according to the Vienna Convention of the Law of Treaties, I have shown that the three step test was purposely couched in general terms for countries to utilize when making exceptions and limitations to copyright law for the benefit of the people. These ambiguities can be used by countries to adopt specific educational exceptions (Suthersanen, 2005) that can work to their national advantage.

I have also shown that the three step test application to research and study can be interpreted in both a narrow and a flexible manner so as to either facilitate or hinder legal education. The three conditions required by these important international agreements are created in an abstract manner so that they may be used as either sword or shield. The declaration on "A Balanced Interpretation of the 'Three-Step Test' in Copyright Law" launched by a group of European experts many of whom are long-standing supporters of the copyright system (Suthersanen, 2008) further suggest that states should have sufficient flexibility to shape copyright law to their own cultural, social and economic development needs.

A rigid interpretation of the steps constrains access to information and knowledge for research and private study, while a flexible interpretation opens up opportunities for countries, allowing them to use copyright works for research and private study. This finding shows that the international provisions actually leave the matter mostly for the countries to consider, i.e. to decide under what circumstances exceptions should be permitted to suit their national interest. It is thus the responsibility of the country itself to take advantage (Kojima, 2010; Yu, 2006: 410) of the flexibilities available in the international agreements and to determine what is best for securing the right balance between the copyright owner's and the user's interest. Limiting and restraining the flexibilities (Loon, 2009) inherent in the three step test only serves to undermine the true potential of the provision and raises an unfair and unnecessary burden for countries that have differing economic, social and political backgrounds, thereby creating implementation problems and reducing the integrity of the law itself. Interpreting the three step test flexibly does seem to facilitate the research and private study of law undergraduates and postgraduates in universities. Adding to the voluminous and detailed discussions in relation to the three step test (Ricketson, 2006; Senftleben, 2004), this study contributes further by discussing the application of the three step test to the publicly and privately generated law materials, which have different copyright implications when used in teaching, research and study.

Chapter Five further addressed the second research question, which relates to the extent to which the exceptions provided under Article 10(2) of the Berne Convention facilitate or hinder the teaching of law in universities. The analysis of Article 10(2) of the Berne Convention relating to the teaching exception in Chapter Five has demonstrated that the provision was worded in an open, flexible and technology-neutral manner, thereby supporting the teaching of legal education in universities. The provisions are not mandatory and it is left to the discretion of countries whether to apply the full scope of the teaching exception in their national laws. However, any teaching exceptions implemented in domestic laws must consider the conditions laid down by Article 10(2). A flexible interpretation of the word "utilization" in Article 10(2) grants a broad range of rights, namely reproduction, adaptation, translation, distribution, communication and making available to the public as well as any other rights determined by national legislation. This aids any act of the copying, distributing or communicating of copyrighted law materials to the law students as it falls under the copyright exceptions. This exception can also be applied for the purpose of teaching, whether in public or private universities or colleges. Article 10(2) also covers a broad range of works that may be used under the teaching exceptions. This includes literary works such as textbooks, law journals, or artistic works such as photographs, broadcasts as well as sound and visual recordings. This supports and even encourages the use of a greater variety of law materials, which is important for teaching and learning law.

Article 10(2) does not detail many particular conditions or requirements vis-à-vis the teaching exceptions. The only conditions therein, namely "justified by the purpose" and "compatible with fair practice", are worded in general terms, necessitating further interpretation by courts. Hence, the provision allows the national law to take advantage of the flexibilities. Nonetheless, the interpretation of 'teaching' under Article 10(2) also carries some degree of risk, as it limits the exceptions to only formal educational activities only. Hence, although the provision suitably covers the teaching of law courses to undergraduates and

postgraduates in universities, it is questionable whether this exception allows the use of copyright works by persons outside the formal education system, such as in informal instruction or legal education (e.g. pupilage or workshops conducted by legal aid bureaus); they might not be covered under the specific teaching exceptions. This finding contributes to field by challenging previous studies that have asserted that the teaching exception permitted under international treaties has open and flexible interpretations (Xalabarder, 2004).

Drawing together Chapters Four and Five, it can be concluded that for any copyright exceptions to teaching, research and study to stand, they must pass through several filters, set at the international level. With regard to access to the primary resources used in legal education, such as statutes and cases, these publicly generated materials are generally considered as government works, and Article 2(4) of the Berne Convention leaves it to individual countries to determine whether their governmental works should be copyright protected. As Malaysia expressly excludes "official texts of the Government or statutory bodies of a legislative or regulatory nature, or judicial decisions" from the definition of "literary work",[64] which therefore have no copyright protection, academics and students should not have any copyright issues in accessing these primary materials. Similarly, any works translated, adapted, arranged of transformed based on the "official texts of the Government or statutory bodies of a legislative or regulatory nature, or judicial decisions" are also not protected under the Malaysian copyright law, as they are considered as works ineligible for copyright.[65] However, with regard to privately generated materials, such as headnotes, case summaries, annotations, encyclopaedic works, and law dictionaries, journals and textbooks, whether prepared by law reporters or commercial legal publishers, which is equally important in serving as the first point of reference before one seeks out the relevant primary legal materials, the copyright exceptions require users of these copyright

[64] Section 3 Copyright Act 1987
[65] Section 8 Copyright Act 1987

works to go through certain filters before one can freely access these materials. See Figure 8.1 for illustration.

To use copyright works for research and study, the general three step test exception (Article 9(2) of the Berne Convention and Article 13 of TRIPs Agreement) can be used to act as a filter for ensuring that any intended use of a copyright work does not infringe copyright law. This exception is applicable for students, lecturers or researchers to study and analyse the law for their own personal use. With regard to the use of copyright works for teaching purposes, users may have to take into consideration the conditions set in the permissive teaching purposes exception (Article 10(2) of the Berne Convention). This teaching exception may sometimes overlap with the quotation exception, which is of mandatory effect and of wider application. Different opinions exist as to the application of the three step test vis-à-vis the use of copyright works for teaching purposes, which has been viewed as having a tendency to narrow the scope of "teaching purpose". Yet, it is possible that one would undergo a similar exercise or consider the same factors (as required under the three step test) when applying the teaching purposes exceptions. These filters may be used either to constrict the accessibility of materials necessary for legal education or to relieve the impact of copyright protection for the benefit of education, depending on the choice of interpretation of the relevant provisions. Commendably, it is mostly up to the local stakeholders (law enforcers, courts, jurists, activists and lawyers) to define the international rules and norms (Suthersanen, 2008: 2). This should be taken as an opportunity to ensure availability and access of materials for the benefit of the community.

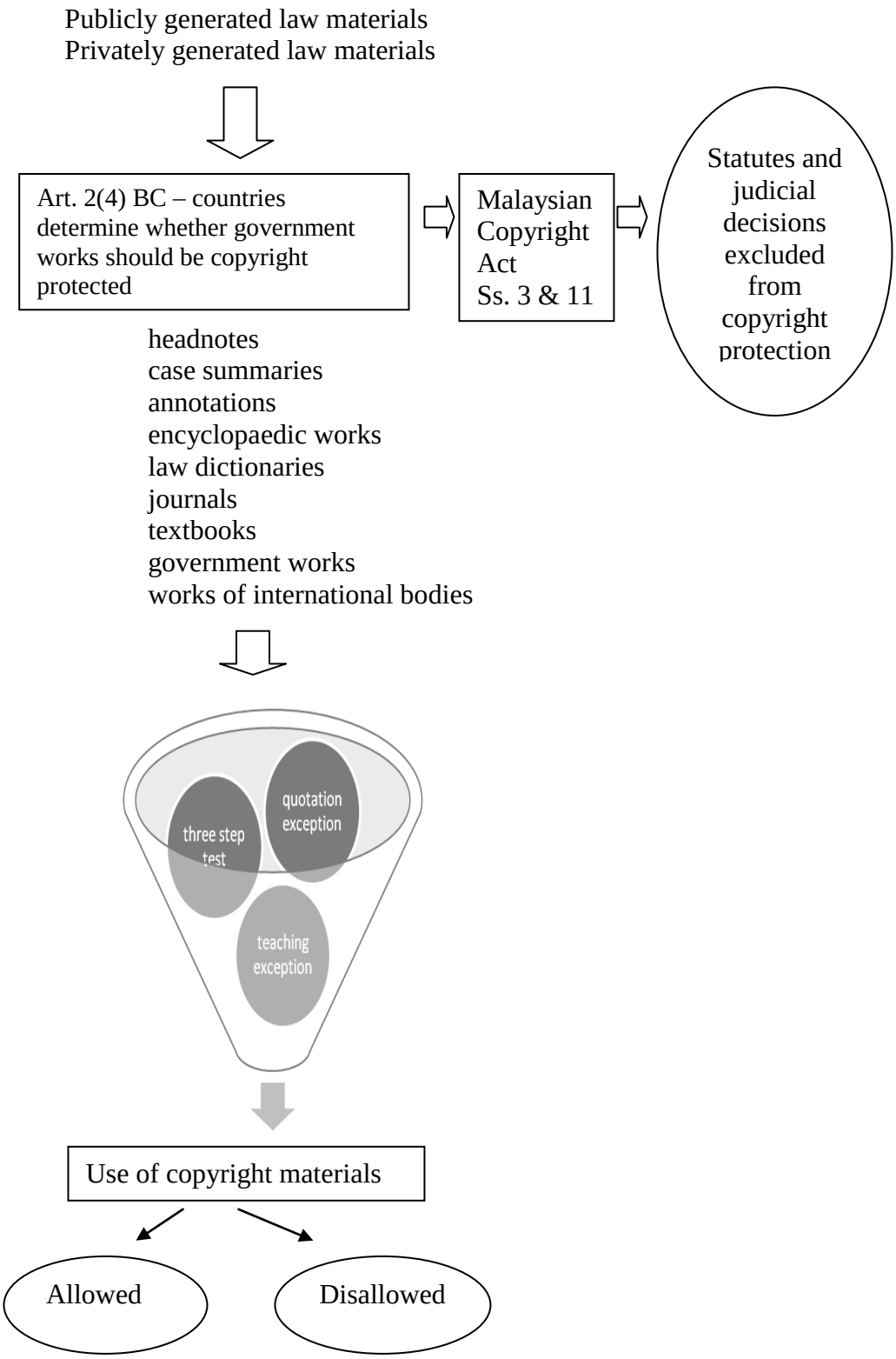

Figure 8.1: Filtering process for use of copyright works for teaching, research and study under the international copyright system

8.2.2 National exceptions for research, study and teaching

a) Research and private study

Taking the matter to the national level, Chapter Six addressed the third research question, which relates to the similarities and differences in the copyright exceptions (relating to the research and study purposes) between the UK and Australia, which predominantly produce educational law materials, and Malaysia, which predominantly consumes educational law materials, as well as their significance. It has been shown that there are significant similarities in the provisions of these countries. All three countries allow "dealing" with copyright works for research and private study. The general word "dealing" confers a broad range of rights on users, whether to copy, translate, adapt, or communicate copyright works when conducting research or private study. The dealing of copyright works must also be "fair", although none of the countries define what "fair" really means. This identical approach is significant in establishing that the legislature still leaves the discretion to the courts to decide on what is best, according to the circumstances of each case.

Nevertheless, Australia does provide detailed guidance on the factors to consider when determining the issue of "fair dealing" (Ss. 40(2) and 103C(2)). This emphasizes the role of the legislature as the primary method of law making, while the judges" role is only one of the interpretation, not law making, when it comes to the interpretation of statutes. However, for the other two countries, the UK and Malaysia, it is left to the courts to decide what is "fair", based on judicial precedent. Based on the cases analysed under Chapter Five, determining what is "fair" under a particular situation is a still a subjective issue. A flexible interpretation may assist researchers, students and academics in the course of researching and studying but a narrow approach to the interpretation of "fair dealing" may lead to acts constituting an infringement of copyright law. Hence, this is still a grey area, and uncertainties abound in this issue. Chapter Six also

discussed the fact that although Australia took the initiative to list the factors to consider when assessing what is "fair", in some cases, it remains difficult to determine the level of "fairness" that would actually fall under the exception. Chapter Six demonstrated that all the countries analysed, be they producer or user countries, require that there must be sufficient acknowledgement of the work, with Malaysia requiring acknowledgement only if the work is used in public. This signifies that all three countries essentially agreed that it is important to endorse the copyright owner's right to be identified with his/her work, and to disallow any production of another's work under the pretence that it is one's own work.

As to the purposes allowed under the available exceptions relating to research and study, Chapter Six revealed that there are significant differences between the approach taken by the UK and Australia, although both are producer countries. The UK seems to protect the copyright owner's right more, as it limits its copyright exceptions only to research for non-commercial purposes and to private study. Australia, on the other hand, is more flexible and responsive to the user's needs, as it allows broader copyright exceptions for research (whether public or private) and for study purposes (not limited to private study only). Interestingly, Malaysia, as a heavy user of copyright works, applies a restrictive position, similar to the UK, limiting the use of the exception to non-profit research and private study purposes only.

In terms of beneficiaries, all the countries are similarly silent on specifying any particular party that may benefit from the exceptions. Nevertheless, the UK expressly provides certain limitations on the beneficiaries eligible to use this exception. The UK requires that any copying by a person other than the researcher or student himself must be subject to certain conditions (Article 29(3)). Australian law, unlike in the UK, states that those who can use literary works (other than lecture notes) are limited only to those associated with an approved course of study, or to those external students enrolled for research at an educational institution. This provision prohibits such external students (who does not need be in campus

but rely on internet access to access same the course materials as by the internal students who study in campus) from copying the lecture notes supplied by the lecturer. However, they may copy or use literary works that they personally locate or obtain on their own initiative. Malaysia on the other hand, does not limit the beneficiaries that may benefit from the exception. This significantly aids anyone, be they individuals, students or academics, or organizations, that needs to conduct research or private study to utilize the exception.

As far as the works covered under the exceptions are concerned, the UK limits the exceptions to only literary, dramatic, musical or artistic works (S. 29(1)) as well as typographical arrangements of published edition (S. 29(2)). Hence, it does not cover other works, such as non-authorial works or sound recordings, films or broadcasts, which are also important in research and private study. Unlike the UK, Australia is much more flexible as it allows the exceptions to be applicable to a wider range of works, which include literary works, and dramatic, musical or artistic works (S. 40(1)) as well as "audio-visual items", such as sound recordings, cinematograph films, sound broadcasts or television broadcasts (S. 103C). This different approach between these two producer countries is significant as it demonstrates that it is not necessarily the case that a producer country seeks only to protect the copyright owner's right, without due regard to the user's interest in accessing information from a variety of types of work.

This finding also demonstrates that the different types of work must be appropriately addressed in the provision relating to the exceptions for research and private study, as current technological development offers much potential and many opportunities to access information derived from various sources and types of work. Surprisingly, Malaysia being predominantly a user country employs a narrow approach, similar to the UK. The Malaysian provision expressly excludes sound recordings, films or broadcasts from the types of work allowed under the exception (S. 13(2)(a)). Malaysia thus only allows the exception to apply to a limited range of works, namely literary, musical or artistic works (S. 13(2)(a)) and

to the typographical arrangement of a published edition (S. 9(4)). This unnecessarily limits the activities of persons engaged in research and private study in Malaysia when the required sources of work are available only as sound recording, film or broadcast. Although the Gowers Review Report (2006) in the UK recommended that the exception for research be expanded to cover all forms of content, not just literary, artistic, dramatic and musical works, it still remains to be seen if this recommendation can be brought into the UK copyright law. Notably, a change proposed for the UK might not be useful in the Malaysian context, and it is for Malaysia to determine what is best for its national circumstances.

In short, Malaysia's provision regarding the exceptions for research and private study is similar to the UK copyright law, despite real differences in culture, religion, economics and politics. However, the Australian copyright law seems to incorporate much broader provisions in that it permits copyright exceptions for a wider variety of types of copyright works for research and private study, for both commercial and non-commercial purposes. The Australian provision also contains a more comprehensive explanation of the amount of work that can reasonably be copied, and regulates the factors determining fair use. This approach may adequately safeguard the copyright owner's interest, as it limits what users can copy under the exception.

b) Teaching exceptions

Chapter Seven answers the fourth research question pertaining to the similarities and differences in the exceptions relating to teaching purposes between the UK, Australia and Malaysia, as well as their significance. The analysis in Chapter Seven shows that the countries have all couched their exceptions relating to teaching purposes in varying ways. As for the rights granted under the exceptions for teaching purposes, the UK grants the right to copy, perform and record, and allows the copying by reprographic means of copyright works for teaching purposes. This is a narrow approach compared to the Australia provision, which is

much broader. Apart from what is granted under UK law, Australia also grants the right to communicate, use or adapt copyright works for teaching purposes. This finding demonstrates that although a producer country is likely to be more protective of the owners of copyright works, this is not necessarily so, as the use of work for teaching purposes is also important in the country's public interest, notwithstanding whether it is a developed or developing country. Notably, Malaysia tends to be very restrictive in its approach to its provisions relating to teaching exceptions. The Malaysian exception only grants the right for "inclusion" of a work for the purpose of teaching. This seems to disallow the act of reproducing, copying, adapting, or communicating the copyright work for the purposes of teaching or instruction. The word "inclusion" also denotes that the copyright work must be used with other materials or as one part of a greater whole, and thus excludes using the work on its own. This is a very narrow approach towards teaching and learning in Malaysia.

The purposes in which the exception can be applied also differ significantly between the two producer countries, the UK and Australia. The UK allows copying in the course of instruction or preparation for instruction (S. 32(1)), which can be either for non-commercial or commercial purposes, in which the use for commercial purposes is subject to a set of conditions. Australia, on the other hand, provides its provision in a particular manner, identifying provisions applicable for different purposes, namely in the course of giving or receiving non-profit instruction, in the course of education, in the course of study provided by the institution, to be used for educational purposes (the educational purposes of an educational institution or that of another educational institution, and for educational purposes and as part of examination questions or in answer to such questions). Although Australia seems to have a lengthy and detailed provision relating to exceptions for the purpose of educational instruction (compared to the UK), the Australian provision implies a broader and more user-friendly provision. The Australian approach is preferable in the context of education, as it is more generous, allowing the user to access a wider range of teaching and learning

materials. Malaysia seems to take a simple approach by incorporating the phrase "by way of illustration for teaching purposes", as used in Article 10(2) of the Berne Convention. Based on the interpretation of the word "teaching", the provision is limited only to courses of an "official degree", thereby excluding adult education programmes or training that may be offered without formal assessment leading to accreditation, certification or qualification. This unnecessarily restrains educational development in Malaysia.

With regard to those who can benefit from the copyright exception, both the UK and Australia expressly provide that both the person giving and the one receiving the instruction (teachers and students) are eligible to benefit from the teaching exceptions. The Australian provision seems broader, as it clearly specifies both teachers and students as well as educational institutions as beneficiaries. Malaysia is silent on the beneficiaries who can make use of the teaching exception. Malaysia also uses the word "teaching", which could imply that the exception only applies to those enrolled in a formal education and is not applicable to those teaching outside the formal education system, such as institutions confining themselves to religious teaching, which are not gazetted as educational institutions. This approach again unnecessarily restricts teaching and learning, which is crucial in developing Malaysia.

In relation to the works permitted under the teaching exceptions, the UK limits the works to only literary, dramatic, musical or artistic works, sound recordings, films and broadcasts as well as passages from published work. This range of work is narrower than the works allowed under the Australian provision relating to instructional purposes, which also allows the use of works in much newer formats, such as published electronic literary or dramatic works as well as computer systems operated primarily to enable staff and students to gain online access. The attempts to revise the restrictive provision relating to teaching exceptions were considered in the Gowers Review Report (2006) and by the UK government consultation but it still remains to be seen whether the UK will support all the recommendations for

changes in relation to its copyright law. Comparatively, Malaysia takes a similar approach to the UK in limiting its teaching exception to only works in traditional form, and does not extend it to more advanced formats. For Malaysia, being a country that is constantly developing its educational system to being in line with the latest technological developments, this exception is important and should include other works in newer formats, such as digital and online materials.

Other conditions that govern the teaching exceptions in the UK, Australia and Malaysia vary in terms of the extent of copying allowed. The UK requires that there must be "fair dealing" (S. 32(2A)) if the copying is made for commercial purposes. Similarly, Malaysia also requires the requirement of "fair practice" (S. 13(2)(f)), however, the approach is narrower as it applies to "the act of inclusion" only, notwithstanding , whether the teaching is or is not for profit. In this respect, neither of the two countries actually describes or determines what is to be regarded as "fair", and thus leaves the matter to be dealt in the courts.

The UK also expressly prohibits copying by means of reprographic processes (S. 32), thereby restricting the act of copying to only being done by hand. Nevertheless, reprographic copies of passages from published literary, dramatic or musical works, made by or on behalf of an educational establishment for the purposes of instruction is permitted provided that such copying is accompanied by sufficient acknowledgement and that the instruction is for a non-commercial purpose (S. 36(1)); further, the copying is not to be more than one per cent of any work (S. 36(2)).

Malaysia does not have any further conditions on the use of works for teaching, other than specifying that the inclusion of copyright work must be compatible with fair practice, as the right for "inclusion" itself is already very narrow and restrictive. Thus, there is no need to provide any limitations to reproduction or communication whatsoever.

On the whole, with regards to exceptions relating to teaching or instruction, both of the predominantly producer countries of educational materials, the UK and Australia, take into account the needs of not only the owners of copyright work, but also the needs of students to access and use the work for learning purposes. Although the UK is a little restrictive on the rights granted for instructional purposes (but allows exceptions to be used in teaching for commercial and non-commercial purposes), Australia provides more flexible exceptions, granting more rights, covering more aspects of works, taking into account the new changes in educational delivery, and allowing a wider range of beneficiaries, but at the same time clearly limiting the extent or proportion that can be used under the teaching exceptions. Malaysia, being predominantly a user of educational materials, seems to have a narrow provision for teaching purposes, which is in stark contrast to its interest in having greater access to educational materials, and which could benefit Malaysian society as a whole. This is akin to the practice of some countries, such as the US, which significantly narrowed the scope of Article 10(2) of this Berne exception (Okediji, 2006:21).

Although WIPO has conducted studies on copyright limitations and exceptions for educational activities in North America, Europe, the Caucasus, Central Asia and Israel (Xalabarder, 2009) as well as some countries in the Asia-Pacific region (Seng, 2009), my research is nuanced in such a way that it describes in detail the similarities and differences in the UK, Australia and Malaysia with particular regard to the teaching, research and study of legal education.

Based on the evidence collected in Chapters Six and Seven, it has been found that all three countries similarly allow fair dealing for research and study purposes. The similarities between the UK, Australia and Malaysia are mainly because Australia and Malaysia are both former colonies of the British Empire, and so English law still has a great deal of influence in both countries, even so long after their independence. Thus, the "fair dealing" provision relating to research and private study that originated in the establishment of the Copyright Act 1956 in England has

been adopted by both countries, with few changes. History shows that the UK Imperial Copyright Act of 1911 was enforced in the colonial lands of Australia from 1st July 1912, repealing all previous legislation. This British Act remained in force until it is repealed by the current version of the Commonwealth Copyright Act in 1968. Since then, the Copyright Act 1968 has been consistently revised in response to various technological and industrial developments. However, the provision on fair dealing has not had much change. The Copyright Law Committee appointed in 1974 ("the Franki Committee"), in reviewing Australian Copyright Law amongst others, refers to earlier reports on copyright including the Report of the Copyright Committee 1951 of the UK (CMD 8662) ("the Gregory Committee"), which recommended most of the provisions now contained in the Copyright Act 1956 of the UK (Davison, Monotti, & Wiseman, 2008). The copyright law in Malaysia is also not homegrown, and mainly originates from British colonization; it was further shaped by the influence of other developing countries and by international agreements. However, it seems that not much research has been conducted to examine the implications of copyright law for Malaysian development.

The provisions in all three countries are similar in the sense that all three permit exceptions for teaching or instruction purposes. This is probably because the importance of education is recognized in all countries, despite their differing economic, social and political backgrounds. Such was true even before copyright exceptions were firstly negotiated in the international treaties; most countries already had copyright exceptions relating to education. The UNESCO World Conference on Higher Education 2009 (held in Paris) emphasized the importance of protecting higher education as a "public good", particularly in the face of pressure from international trade organisations wishing to define higher education as both a private good and a tradable commodity. Policymakers are also called upon to make decisions most carefully about how best to develop national higher education systems (Altbach, Reisberg, & Rumbley, 2009).

Differences seem to exists with respect to the detailed scope of the purposes allowed, the beneficiaries that may use the exception, the types of work covered by the exception as well as further details in determining what constitutes fair dealing. These differences may reflect each country's level of engagement with the matter; Australia has conducted numerous inquiries and studies into many aspects of copyright law, including the impact of reprographic reproduction on copyright law in Australia, examining the exceptions to the exclusive rights of copyright owners (Simplification of Copyright Act: Part 1, 1998), and the status of Crown Copyright (2005). This latter was made through the Copyright Law Review Committee (CLRC), an advisory body for copyright reform, which began its deliberations in 1983. Studies were also conducted by that Committee at the time when Australia was a net importer of copyright works, and thus it was aware that no radical steps were to be taken; in commencing the review, the Copyright Law Committee on Reprographic Reproduction (1976: 9) reminded itself that the primary purpose of copyright law was:

> "...to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. On the other hand, as copyright in the nature of a monopoly, the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered."

This suggests that Australia has always been mindful of the effect of copyright law on the public interest, as the country was a net importer of copyright works before rising to being a net producer of copyright works. However, in recent years, the Australian provision can be said to have been narrowed as it now reflects the standards set by international agreements and multilateral treaties, and the US – Australia Free Trade Agreement.

Similarly in the UK, studies have been conducted into how to manage the issue of the reprographic copying of copyright works for the purpose of education, pursuant

to the development of photocopying in the 1970s (Piccioto, 2002). The UK government's Green Paper on the issue (1981: 10) viewed that it would be impractical and unreasonable to narrow the "fair dealing" exception in the era of modern technology. However, certain clarifications were made to prevent abuse, and this was endorsed in the White Paper (1986), which was later enacted in the 1988 Act. The Malaysian context, however, is different in the sense that people have only recently become aware of the concept of copyright, and ignorance about any exceptions and limitations to copyright is widespread. There are not many experts in the area, and not many studies have been made into the question of the suitability of the country's copyright law or into framing the most appropriate exceptions to copyright needed in the Malaysian context.

The comparisons made between the provisions of the UK, Australia and Malaysia for the purpose of teaching or instruction show that the UK and Australia, being mainly exporters of copyright materials, have a different approach to this matter. This might possibly be because Australia's geographical circumstances have necessitated the development of distance learning; its multicultural society also makes it more friendly and adaptable to the varying interests and perspectives of users. Malaysia, on the other hand, is quite similar to the UK in terms of its geographical circumstances, however, Malaysia's main focus is to develop its economy as speedily as possible, and in so doing, it seems that its copyright law is merely a simple adaptation of the law of the former colonial power, without much consideration of the matter, largely due to the country's lack of expertise. Hence we can see that the Malaysian copyright provision, particularly on exceptions to education, is very simple and fails to address many important aspects. Overall, the teaching exceptions in the UK and Malaysia are similarly restrictive for users. This is despite the fact that there is no level playing field between the countries. The UK provides many alternatives for users to access its laws and other resources useful for teaching, while Malaysian users have few options, resulting in widespread copyright abuse. This poses the question as to whether Malaysia has taken the right step in restraining its exceptions for the purpose of teaching,

research and study. The UK also has a sufficiently robust licensing system that monitors the conflict of interest between the owners and the users, whereas, this is not effectively used in Malaysia.

To varying degrees, Chapter Seven shows that the countries seem to have precariously limited themselves in terms of the flexibilities offered under Article 10(2) of the Berne Convention. This is evident when the details of the teaching exceptions are analysed. Major differences in the three jurisdictions with respect to teaching exceptions apply in terms of the scope of teaching allowed (whether for commercial or non-commercial purposes), the rights permitted, the tools used for copying, and the extent of copying allowed. The differences in the countries' treatment of exceptions to copyright law relating to teaching might have resulted from taking into consideration various other factors; the following factors could have influenced the present position on exceptions to copyright law in UK and Australia:

1. The UK and Australia already have in place a licensing system to address the issue of reprographic copying by educational institutions.
2. While the cost of making copies through photocopying machines is relatively high, compared to Malaysia, buying books is not prohibitively expensive; it is affordable for students and researchers to buy original copies.
3. Various government documents are provided online, and are made easily available for use and download.
4. The UK has websites dedicated to teaching law, where materials and resources are provided for use by lecturers, especially new lecturers.

The above factors justify, to a certain extent, the narrow approach to the exceptions and limitations in copyright law. Users have many other alternatives to help them to reasonably access and use copyright work without much restraint.

Comparatively, Malaysia is in the opposite position; although there is a licensing system, it is not functioning effectively. The cost of photocopying is minimal

compared to buying original copies, especially when the resources are from overseas. Some government documents are also difficult to access online. Another factor that may contribute to the widespread practice of copying for teaching, research and private study is that the educational system utilizes two languages: Malay and English (the latter is the country's second language). Those not fluent in English may need to refer to several different resources before they are able to fully understand and grasp the meaning of an article, law or case. Hence, it is far more economical to obtain photocopies rather than to buy original copies, of which only certain parts are to be used. In short Malaysian users face many more difficulties in accessing copyright works for teaching, research and study. Unfortunately, the analysis in Chapter Seven shows that the Malaysian provisions on exceptions to copyright law for the purpose of teaching, research and study have several deficiencies and gaps, and are in need of substantial revision. The teaching exceptions also seem to be very restrictive towards users wishing to utilize materials for teaching, research and private study purposes. Hence, broader exceptions to copyright might be particularly efficacious for Malaysian academics and students.

Notwithstanding the fact that Acts, Statutes and judicial decisions are not copyright protected, Malaysian users are not helped because these materials are not made widely or easily available. On the other hand, these materials are made available by private commercial publishers, although they tend to add other related materials or original works, thereby making their publications subject to copyright protection; this is by no means improper, and it assists users in finding the relevant authorities easily and speedily.

8.3 Discussions

From the analyses in Chapters Four, Five, Six and Seven, it can be concluded that the flexibilities provided under the international copyright conventions, through their open and generalized wordings, have not been fully utilized by national laws.

The countries analysed seem to have adopted provisions of limitation that are in favour of the copyright owner's interest. While countries may each have their own standards and perspectives in determining what level of copyright exceptions and limitations are most appropriate in their country, important differences in their interpretations of the conventions have emerged; this is understandable because the relevance and the benefits of the exceptions and limitations may vary from one country to another. However, the flexibility allowed under the international provisions, allowing the conventions to be adapted to specific local requirements that can take account of the economic and social concerns affecting research, study and teaching, have not been utilized even by Malaysia, a predominantly user country. The failure to utilize the flexibilities provided under the international law has occurred to such an extent that it may severely limit the activities of those engaged in teaching, research and study. Member states, especially developing countries, should exploit the flexible wording of the international conventions so as to promote and encourage teaching, research and private study, ultimately for the county's benefit. This concurs with the view that the problems lie neither in international copyright law in general nor in the three step test in particular, but simply in the lack of political will on the part of stakeholders (Hilty, 2010: 86).

Despite the expansion of copyright protection into many subject areas over time, there has not been much development or change in the area of exceptions and limitations provided under the international conventions. Yet, recent years have seen the provisions on exceptions and limitations under international agreements gradually being adopted or incorporated into national laws. The implementation of the international provisions at the domestic level may take into consideration various different local interests, after consultation with the relevant authorities or elected representatives of the people. While the state remains responsible for the obligations to which it subscribed at the international level, it is also responsible for protecting the interests of its people. Such adoption also does not prevent national laws from adopting stricter protective measures, but nor does it prevent them from limiting or restricting the flexibilities allowed under the international provisions.

The reason for a more restrictive approach taken by a predominantly producer country may be due to pressure from copyright owners, lobbying for stronger protection in copyright law; the publishing industry is concerned that copyright piracy is a threat to their scientific and academic journals, from which they make significant profits. At the same time, there has also been a growing concern that the international provisions relating to exceptions and limitations to copyright law be read in a broad and flexible manner.

It is good for the international copyright law institutions to establish lawmaking mechanisms that are dynamic, and current with the technological and cultural growth that it engenders. However, they must also keep faith with the notion of the cultural diversity that underlies both domestic and international principles. To do so, countries should avoid seeking dynamic lawmaking from WTO panels but instead should make use of the private international litigation available to make a beneficial contribution to internationalization in ways that are dynamic, more balanced, and more respectful or national difference, through the application of purely national norms (Dinwoodie, 2001).

The comparison on the exceptions for research and study does not only challenge the thinking that the three step test is taken to be a tool that restricts a country's liberty to make exceptions for their nationals, but it also shows that countries are free to exercise discretion in certain matters that are important for their growth and development. Differing attitudes towards the rights, purposes, beneficiaries, works and other conditions may give rise to different impacts for each country. For example, the UK and Australia already have in place licensing systems to support activities performed the purpose of education, and hence, they have strict and detailed provisions of exceptions for research and study; this lessens the number of cases that may rely on the exceptions and limitations defence. While there are still many open questions as to the reasons for the differences between the UK, Australian and Malaysian provisions, it is clear that the inadequacy of the provisions on exceptions to copyright protection in Malaysia creates significant

problems for users seeking defence against copyright infringement conducted for research and private study. There are probably other factors too that hinder using copyright works for research and study, such as technology protection measures. This comparison shows once more that the exceptions for research and study are also not always the most suitable form of defence, even when resulting from failed negotiations or contracts. This suggests that the outcome has a negative consequence on the objectives of copyright law, which is to encourage the dissemination of knowledge.

Although illegal copying will always exist, especially in Malaysia where piracy is rampant due to the various economic, social and cultural factors described earlier, certain measures and reforms could play an important role in reducing it. In Malaysia, in respect of the legislature's measures to control exploitation, the exceptions and limitations to copyright law should be broadened to cover many more areas, especially the new methods of teaching and learning, for the benefit of educational activities. This is particularly important in the context of the nation's development of ICT, which is highly emphasized under the Ninth Malaysian Plan and the Malaysian Superhighway Corridor (MSC) initiatives; Vision 2020 also emphasizes the use of ICT as the main impetus in bringing Malaysia into the digital and global 21st Century.

One might view that the problems pertaining to exceptions to copyright are only a small issue and lack importance. Nevertheless, I argue that exceptions and limitations to copyright protection play an important role in balancing the owners' rights and the interests of the public in accessing information. It is important to remember that the primary purpose of copyright law is not so much to protect the interests of the authors/creators, but rather to promote the progress of science and the useful arts. This is all the more important when no efficient licensing system, nor means of governing or guiding the process of negotiating the owner's right against the user's interest, is readily available. As this balance is greatly needed in the realm of educational delivery, clearer and more appropriate exceptions are

needed in order to secure a more equitable and legally safe educational environment; these are also necessary to deal effectively with copyright failures or copyright infringement. By having a more appropriate exceptions and limitations to copyright law, the public interest or consumer rights will once again emerge as the most powerful authority in Malaysia, which was the original aim of copyright law.

At the end of the day, the law should provide the best possible means for maintaining the balance between conflicting interests. It should lay down the path for users and owners to follow when negotiating their rights and interests. By being too rigid and narrowly construed, and by being slanted towards the copyright owners' interests, users will find always ways to circumvent the law, as they deem it unfair. On the other hand, by being too generous to the public interest, owners who have taken the effort to produce materials for the public good will be unfairly prejudiced. Reconciling these two interests by looking at the complementary nature of copyright and the right of access to information is desirable (Geiger, 2010: 2). Although I always think that, in many circumstances, giving is much better than receiving, the law should not encourage society to expect everything to be given to them; sometimes they do indeed need to earn and work for what they want. Nevertheless, the law should also not encourage society to expect rich rewards for everything they do, as it will create a greedy and materialistic mentality. Rather, the role of law is to remind everyone that whatever one possesses, part of it is owned by other members of the same society too. This can be achieved by restricting copyright owners' control to a certain extent, so that the works may benefit the public without unduly prejudicing the owners.

With proper exceptions and limitations, the public would be more respectful of copyright law, changing the mentality of users about copyright and teaching them to respect and observe copyright law, as it looks after the users' interests. Such change of attitude can be evident in the recent study done in Australia where it was found that the introduction of the new exception of "time-shifting" and "format-shifting" in the 2006 amendments to Australia's Copyright Act 1968 which legalize

use of digital devices for users has encouraged a greater respect for copyright law generally and more legal behaviour rather than encouraging consumers to think they could commit other online infringements without being punished (Vaile, 2010: 62). This is especially important as the international expansion of intellectual property regimes has been largely the result of the processes of colonisation and coercion, as detailed earlier; TRIPs itself has been criticized for not being a product of democratic bargaining, and questions have been raised about both the efficacy of its norms and its legitimacy, leading to feelings of unfair treatment that will not easily disappear (Drahos, 2002b: 180). Copyright owners will also follow and observe a copyright law that is balanced fairly, and will not be greedy or disrespectful of the rights of others; they will also then have a measure of trust in those who have an opportunity to use their works.

Tighter regulation, and merely adopting and following others, will not benefit the country or change the people into respecting the law. This is evident in Malaysia, which has not placed much emphasis on the importance of copyright law, rather it has merely relied on the models of other countries as well as international treaties. Pressures by international players have also caused a stricter law than necessary to be enacted, although the law has rarely been enforced or respected. Given that the TRIPs Agreement has ways to impose trade sanctions on countries that act against it, and considering Malaysia's aspiration to becoming a developed country by 2020 as well as its plan to use IP as a tool for economic growth, it is important for Malaysia to address the issue of access to information for the purpose of education. Malaysia should have laws that can be adapted to changing circumstances, and a copyright law that encourages people to recognize, respect and acknowledge its importance, i.e. a copyright law that considers the interests of both copyright owners and users.

8.3.1 Future challenges

New challenges will arise in the future, and the balancing role of copyright exceptions and limitations will be very much needed to face the coming challenges

(Akester, 2010: 372). Challenges could come in the form of new means of copying as well as new means of protecting works through technology, or in the form of decreasing funds being available to support access to law documents online.[66] For instance, the UK Centre for Legal Education, providing a wealth of information and resources on teaching and learning in law, will cease activity in its present form at the end of July 2011, following the decision of the Higher Education Academy (2011) to discontinue funding to subject centres. This will negatively impact the teaching and learning of law in the UK. Fortunately, the UK still has important databases, such as Bailii and UKCLE, to support legal education. Unfortunately, such an advantage is not available in the Malaysian environment. Copyright law must consider the real conditions in society (Hilty, 2007: 353). Accessing resources is always a dilemma when one has insufficient funds, especially in the educational context, as there is always a battle between the copyright owners and the users. Most of the time, users have to comply with the owners' demands, and this is why the law needs to provide better provisions relating to exceptions, ones that can balance the negotiating process at least, particularly for the purpose of education.

At the end of the day, individual countries and their public will be affected, and thus, it is important that the balancing exercise proposed between copyright protection and access to information (Geiger, 2010) suits the circumstances of each country. Any norm-setting activities should take into account the different levels of development and balancing the costs and benefits as recommended in the 45 Adopted Recommendations under the WIPO Development Agenda (2007). Cluster B of the WIPO Development Agenda (2007) recommendations also emphasized the need to consider the preservation of the public domain and the need for deep analysis of the implications and benefits of a rich and accessible public domain, which in the context of this research relates to legislative materials. In a globalized society, the copyright problem presents wider implications, beyond what is

[66] In an email by Leith (2011). Law schools are requested to provide Bailii with funds so that it will not be lost, opening the opportunity for commercial providers to significantly increase their charges to the academic community.

happening in Malaysia. Cases in the UK and Australia will also be referred to, especially in areas that are newly developed. It is thus necessary to regulate the law appropriately so that it does not become a coercive system.

In order to ease the need for information exchange, especially in the context of education, it is hoped that more investment is forthcoming, aimed at encouraging experts to support the public by providing access to law information. At the same time, the importance of the exceptions and limitations to copyright protection must be stressed, and certain amendments should be made in relation to the Malaysian position. This is pertinent especially when future developments may put users in a disadvantaged position, as cautioned by Hugenholtz (1997: 14-15), as follows:

> "There is good reason to expect that in the future much of the protection currently awarded to information producers or providers by way of intellectual property will be derived from contract law. Some even say, contract law will make copyright entirely obsolete. In a world where all information users are contractually bound to information providers, the need for protection *erga omnes* may, indeed, be rather limited. Especially in view of the expanding scope of copyright, this development may call for copyright exemptions that cannot be overridden by contract."

8.3.2 Recommendations

Based on the analyses and comparisons, and responding to the fifth research question, whether the implementation of these copyright exceptions and limitations in Malaysia is appropriate for the purposes of teaching, research and study of law in Malaysian universities, seemingly the answer is in negative. After analysing and comparing the provisions relating to teaching, research and private study between the UK, Australia and Malaysia, some useful lessons can be learned by Malaysian policy makers. It seems that the Malaysian Copyright Act is somewhat ambiguous and lacks predictability. Moreover, the Malaysian copyright law does not address a number of key issues, especially regarding works in newer formats, and persons

eligible or protected under the exceptions. The rights and works covered under the exceptions are also unsatisfactorily disadvantageous toward educational activities, contrary to the more flexible approach by the more predominantly producer countries of educational materials.

Through the analysis of the exceptions relating to teaching, research and study in the UK, Australia and Malaysia, the findings assist in the elucidation and application of the general principles of international law, which international, and occasionally national, courts are directed to apply. Article 38(1)(c) of the Statute of the International Court of Justice (ICJ) directs the International Court to apply, *inter alia*, "the general principles of law recognised by civilised nations". The phrase "general principles of law recognised by civilised nations" refers to the principles that find expression in the municipal laws of various nations, which can be ascertained only by the comparative method (Schlesinger, 1988: 36). Nevertheless, the comparative method only facilitates, clarifies and informs a particular situation, it does not replace the judicial function (Cruz, 1999).

The approach taken by Australia seems appropriate in dealing with exceptions relating to teaching, research and study. Nevertheless, a thoughtless adoption of the Australian approach would be inappropriate, burdensome and even ungovernable, given the disparity in development between Australia and Malaysia. Copying the legal structure or laws of developed countries will not accomplish this, given the fundamental social and cultural differences between the inhabitants of the West and the lesser developed countries. The change must come from a more fundamental level. Ultimately, each country, given its unique system and culture, will need to cultivate notions of value and attitudes that will give rise to uniquely tailored laws that will engender greater individual economic well-being. Adopting laws that mirror different cultural and political assumptions in totality may only create resentment, lax enforcement, dependent technological systems, and other unforeseen problems (Smith, 1999: 98). The United Nations recommends that intellectual property rights "be implemented in such a way as to promote dynamic

competition through the acquisition and local development of technology in an environment that is conducive to growth" (Smith, 1999: 98). Dynamic competition cannot be achieved through stringent rules that hinder access to knowledge and learning materials. The regulatory system should preserve the values on which the copyright system was built, which is to encourage learning. Hence it should not hinder access to knowledge, but instead actively promote it (Geiger, 2006a: 373).

Thus, it is necessary for Malaysia to develop its own approach, taking into consideration its international treaty obligations as well as its national particularities. Hence, with regard to exceptions for research and study purposes, it is recommended that:

a) The exception should apply to both commercial and non-commercial research purposes.
b) The exception should not be limited to "private study" but should be extended to broader activities of "study".
c) The exception should cover any sound recordings, films and broadcasts that are used in the course of instruction, as well as other newer forms of work such as electronic works and computer systems.
d) Factors determining whether a particular dealing is "fair", such as the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing, should be used as points of consideration, and not taken as being exhaustive.
e) The defence of fair dealing should also be available to a third party acting on behalf of a person undertaking the study or research so long as the act falls within the exception or by relying on its common practice being within the prescribed purposes.

With regard to teaching exceptions, the following are recommended:

a) The right of "inclusion" of copyright work be changed to the right to "utilize".

b) The phrase "by way of illustration … for teaching purposes" be changed to "giving or receiving instruction", so that it may expressly cover both teacher and student at the same time, and also apply to instruction conducted outside the formal educational institutions, as long as it is not for commercial purposes.
c) The beneficiaries of the exceptions should also cover persons acting on behalf of educational institutions.
d) The exceptions should cover newer forms of copyright work, such as electronic libraries or dramatic works as well as computer systems utilized in educational activities.
e) Guidelines should be provided to determine what is "fair" when using a work for educational purposes, but not in any exhaustive or restrictive manner; nor should they be burdened with minute details of what proportion of a work can be copied.

Some may argue that a flexible and friendly approach toward users' interests will be detrimental and prejudicial to copyright owners. This in turn may possibly discourage authors or publishers from producing more works for the benefit of the public. To answer this, I argue that in this era of rapid technological development, users already have many ways and alternatives for accessing information. The point is whether such information is authoritative, valid and true. Users should not be denied access to materials that, under the original purpose of copyright law, should be disseminated to them, which serve the objectives of government's information policy and enhancing democracy within society (Guibault, 2002: 69). Laws and court decisions should not result in forcing users into actions that infringe copyright; this is not advantageous to society. Given the scarcity of laws protecting users' interests vis-à-vis owners' interests, as evident in the Malaysian context, as well as the other means that owners have at their disposal to control their work (e.g. through technology), it would be useful to have a more flexible provision on the exceptions and limitations to copyright law, so as to set fair boundaries on what owners and users legally do.

Although previous studies on copyright and access to knowledge, has stressed the need for a more flexible and workable approach to the exceptions within Malaysian copyright law (Azmi, 2008; 2002), my research has addressed another issue; copyright works sometimes include publicly generated law materials, i.e. freely available materials have been incorporated into privately generated materials, thereby leaving users with not much option but to succumb to the demands of private interest when seeking to access public materials.

8.3.3 Final remarks

The exceptions relating to teaching, research and private study remain an essential instrument for safeguarding free expression and for promoting future development, especially regarding education as well as scientific progress. It is taken as a fact that those who argue for broader exceptions and limitations are at the same time proponents of copyright infringement and theft. They are also regarded as promoting piracy and free-riding by taking advantage of other's people labour. Over the years, Malaysia has taken the initiative to launch various anti-piracy efforts to uphold copyright law. These efforts include the amendment of several laws and holding talks with countries where the product was originally produced, such as the US. The raids by Malaysian enforcement agencies also indicate the country's stand in seeking to wipe out the widespread infringement of copyrighted materials, notwithstanding whether it involves entertainment or educational materials. Another indication of this firm stand is the amendment towards stricter rules governing copyright and the increasing number of cases filed. (Krishnasamy, 2006). Nevertheless, the anxiety to protect copyright law must also be hand in hand with clear understanding and the awareness that copyright law could inflict upon the area of knowledge distribution (Wahid, 2008).

It is important to look back at the history of copyright (Peifer, 2008: 688) and remember that the original purpose of the establishment of copyright law was to encourage the dissemination of knowledge, through a system based on private gain.

This crucial value in which copyright system was built needs to be preserved by regulation that does not hinder access to knowledge but instead, promote it (Geiger, 2006a: 373). Reconciling to the earlier studies proposal (Guibault, 2002: 304) that statutory exceptions such as quotation exceptions or to make reproductions for research purposes be made mandatory at least in standard form contracts, the provisions on exceptions and limitations are pertinent and crucial to achieving this original purpose, and therefore should be fully utilized to their maximum potential. This can be done through open and global reconsideration, taking into account the opinions of interested persons (Geiger, et al., 2009: 432). This is especially when the interests of authors may sometimes differ from those who undertake to exploit their works (Wahid, 2011a) such as in the case of legislative materials exploited by the commercial publishers. These provisions should not be seen as exceptions but should be taken to be the rights of the people, which must be seriously considered. This is all the more so when copyright owners have much more power and opportunity to control their works through digital rights management, which can technologically encrypt or "lock" their works, leaving users little chance to utilize the exceptions in their favour. Moreover, one should not take for granted the shared responsibility (Sithigh, 2006: 412) in supporting true education which take place in educational institutions.

8.4 Conclusions

This thesis has assessed the various provisions relating to teaching, research and study, both at the international and the national level. It has shown that the exceptions, which are broad and flexible at the international level, have been narrowly interpreted when incorporated into domestic legislation. A liberal approach in interpreting and implementing copyright obligations in individual countries is pertinent so that it suits different needs of each country (Wahid, 2011b). Taking into account the needs of teaching, research and study, I have addressed the ways in which to make the copyright laws in Malaysia friendlier

towards the users of copyright materials. In the age of information society, the necessity of adapting copyright limitations and liberal interpretations of existing regulations to permit the development of true knowledge economy has been increasingly encouraged (Geiger, 2008: 943). Based on my findings, I believe that Malaysia's circumstances require it to adopt a more flexible approach to the provisions on exceptions to copyright law for the purpose of teaching, research and study. This is especially so when innovation could be stifled if obscure agencies were given the opportunities to control education (Kenny, et al., 2009: 117). Seemingly, law makers have only thought of extending protection for the benefit of copyright owners, with little regards for the users' interests (Dusollier, Poullet, & Buydens, 2000: 15). By enlarging the scope of the exceptions, the issue of balance within Malaysia's copyright law could be sufficiently redressed. Nonetheless, having a supportive legal system alone would be insufficient unless it is coupled with sufficient public investment for education, resources and the will power (Ginsburg, 2000: 26; Wadlow, 2007: 45) to make it work which only then Malaysia can successfully acquire innovative economic development.

REFERENCES

Abbot, F. (2003). *Course on Dispute Settlement in International Trade, Investment and Intellectual Property*. New York: UNCTAD.

Anderson, T. M., & Hviid, M. (1999). Prices and Information Under Imperfect Competition. *Scottish Journal of Political Economy, 46*(3).

Antons, C. (2009). Malaysia. In P. Goldstein & J. Straus (Eds.), *Intellectual Property in Asia: Law, Economics, History and Politics*. Germany: Springer.

Azmi, I. M. (2002). Digital Technology, Copyright and Education: The Malaysian Perspective. *International Islamic University Malaysia Law Journal, 10*(13).

Azmi, I. M. (2008). Institutional Repositories in Malaysia : The Copyright Issues. *International Journal of Law and Information Technology*

Azmi, I. M., & Abdul Rahman, S. A. (2008). *Project on Copyright and Access to Knowledge: Country Study - Malaysia*. Kuala Lumpur.

Akester, P. (2010). The New Challenges of Striking the Right Balance Between Copyright Protection and Acce4ss to Knowledge, Information and Culture. *European Intellectual Property Review, 32*(8), 372-381.

Alexander, S., & Baird, D. (2003, 30 March - 1 April 2003). *The Wrinkle in Your Research and Teaching: Copyright, DMCA, Guidelines, and Public Domain.* Paper presented at the Eight Annual Mid-South Instructional Technology Conference: Teaching, Learning & Technology: The Challenge Continues, Murfreesboro, Tennessee.

Alexandra, A., & Miller, S. (1999). Copyright in Teaching Materials. *Educational Philosophy & Theory, 31*(1), 87-97.

Alhabshi, S. O. (2005, 4-7 August, 2005). *E-Learning Experience in Malaysia.* Paper presented at the Second International Conference on eLearning for Knowledge-Based Society, Bangkok, Thailand.

Altbach, P., Reisberg, L., & Rumbley, L. (2009). *Trends in Global Higher Education: Tracking an Academic Revolution*. France: UNESCO.

Annual Report (2008). Kuala Lumpur: Intellectual Property Corporation of Malaysia.

Annual Report (2009). Kuala Lumpur: Intellectual Property Corporation of Malaysia.

Anonymous. (2009, 04/05/2009). 12 Nations top US list on copyright piracy. *The Star*. Retrieved from http://article.wn.com/view/2009/05/04/12_nations_top_US_list_on_copyright_piracy/

Antons, C. (2004). Harmonisation and Selective Adaptation as Intellectual Property Policies in Asia. In C. Antons, M. Blakeney & C. Heath (Eds.), *Intellectual Property Harmonisation within ASEAN and APEC* (pp. 109 -121). The Hague: Kluwer Law International.

Atlas, D. Y. (1998). Taming the Wild West: the scope of copyright protection for compilations after Matthew Bender & Company, Inc. v. West Publishing Co. *European Intellectual Property Review, 20*(2), 81-86.
Barbosa, D. B. (2005). Counting Ten for TRIPs: Author rights and Access to Information - A Cockroach's View of Encroachment.
Barbosa, R. G. (2007). Revisiting International Copyright Law. *Barry Law Review, 8*, 43.
Bossche, P. v. d. (2008). *The Law and Policy of the World Trade Organization: Text, Cases and Materials*. Cambridge: Cambridge University Press.
Bowden, D. (1996). Stolen Voices: Plagiarism and Authentic Voice. *Composition Studies/Freshman English News, 24*(1-2), 5-18.
Braunstein, Y. M. a. o. (1977). *Economics of Property Rights as Applied to Computer Software and Data Bases*. New York: New York University.
Brennan, D. J. (2002). The Three-Step Test Frenzy: Why the TRIPs Panel Decision might be considered Per Incuriam. *Intellectual Property Quarterly, 2*.
Brenton, S. (2009). E-Learning - An Introduction. In H. Fry, S. Ketteridge & S. Marshall (Eds.), *A Handbook for Teaching and Learning in Higher Education: Enhancing Academic Practice* (3rd ed.). New York: Routledge.
Browne, D. (2009). Educational Use and the Internet – Does Australian Copyright Law Work in the Web Environment? *SCRIPTed, 6*(2).
Burkitt, D. (2001). Copyrighting culture - the history and cultural specificity of the Western model of copyright. *Intellectual Property Quarterly, 2*, 146-186.
Burrell, R. (2001). Reining in copyright law: is fair use the answer? *Intellectual Property Quarterly, 4*, 361-388.
Burrell, R., & Coleman, A. (2005). *Copyright Exceptions: The Digital Impact*. New York: Cambridge University Press.
Cadastral Template – Country Data (2003). Retrieved 20/03/2009 from http://www.cadastraltemplate.org/countrydata/my.htm
Cahir, J. (2004). The withering away of property: the rise of the internet information commons. *Oxford Journal of Legal Studies, 24*(4), 619-641.
Cahir, J. (2005). The Moral Preference for DRM Ordered Markets in the Digitally Networked Environment. In F. Macmillan (Ed.), *New directions in copyright law* (Vol. 1): Edward Elgar Publishing Limited.
Cardiff University. (2010). Information Services: Copyright - 'Fair Dealing' Guidelines. Retrieved 27/02/2010, from <http://www.cardiff.ac.uk/insrv/resources/guides/copyright/inf036.pdf>
Catherine, B. (2007). Reconciling Crown Copyright and Reuse of Government Information: An Analysis of the CLRC Crown Copyright Review. *Media and Arts Law Review, 12*.
Chon, M. (1996). New Wine Bursting from Old Bottles: Collabortive Internet Art, Joint Works, and Entrepreneurship. *Oregon Law Review, 75*.
Chon, M. (2007). Intellectual Property "From Below": Copyright and Capability for Education *UC Davis Law Review, 40*, 803.
Chong, J. W. C. (1998). Malaysian Intellectual Property Laws and their Compliance with the TRIPs Agreement. *The Journal of World Intellectual Property, 1*(6).

Colebatch, C. (2008). *Crown Copyright and the Privatization of Information*. Paper presented at the World Library and Information Congress:74th IFLA General Conference and Council. Retrieved 15/12/2009, from <http://ifla.queenslibrary.org/IV/ifla74/papers/087-Colebatch-en.pdf>

Colston, C. (2002). Challenges to Information Retrieval - a Global Solution? *International Journal of Law and Information Technology, 10*(3), 294 - 326

Colyer, A. (1997). Copyright Law, the Internet, and Distance Education. *American Journal of Distance Education, 11*(3), 41-57

Consumer International Asia Pacific Office. (2006). *Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Law*. Kuala Lumpur: Consumer International.

Cook, T., & Brazell, L. (2004). *Copyright Directive, The UK Implementation*. Bristol: Jordans.

Cooper, B. D. (1990). Role of Publishing Houses in Developing Legal Research and Publication: The United States. *American Journal of Comparative Law Supplement, 38*, 611-640.

Copyright Law Review Committee. (1998). *Simplification of the Copyright Act 1968: PART 1 Exceptions to the Exclusive Rights of Copyright Owners*. Canberra: Attorney General's Department.

Copyright Licensing Authority. (2003). Note on Changes to UK Copyright Law: A Joint Note from the British Library and The Copyright Licensing Agency Ltd. Retrieved 03/07/2009, from http://www.cla.co.uk/data/corporate_material/submissions/2003_cla_and_bl_joint_note_on_changes_to_copyright_law_nov03.pdf

Correa, C. (2000). *Fair Use in the Digital Era*. Paper presented at the UNESCO's INFOethics 2000 Congress on the Theme "Right to Universal Access to Information in the 21st century" Retrieved 28/09/2009, from http://www.consumidoresint.org/a2k/index.php?option=com_content&task=view&id=28&Itemid=33

Correa, C. (2007). *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPs Agreement*. New York: Oxford University Press.

Cox, N. (2006). Copryight in Statutes, Regulations, and Judicial Decisions in Common Law Jurisdictions: Public Ownership or Commercial Enterprise? *Statute Law Review, 27*(185).

Cox, N. (2008). Copyright in Primary Legal Materials in Common Law Jurisdiction *Australian Intellectual Property Journal*((forthcoming)) Retrieved 23/03/2009, from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899412

CQ University. (2010). Fair Dealing. *Copyright at CQ University* Retrieved 06/01/2011, from <http://content.cqu.edu.au/FCWViewer/view.do?page=5695>

Craig, C. (2005). The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform. In M. Geist (Ed.), *In the Public Interest: The Future of Canadian Copyright Law* (pp. 437-461). Toronto: Irwin Law.

Crews, K. D. (1990). *Copyright Policies at American Research Universities: Balancing Information Needs and Legal Limits* Unpublished Dissertation, University of California, Los Angeles

Crews, K. D. (1993). *Copyright, Fair Use and the Challenge for Universities: Promoting the Progress of Higher Education*. Chicago: University of Chicago Press.

Crews, K. D. (2002). *New Copyright Law for Distance Education:The Meaning and Importance of the TEACH Act* (Prepared for: the American Library Association). Indianapolis: Indiana University School of Law. Retrieved 02/07/2010, from http://www.ala.org/Template.cfm?Section=Distance_Education_and_the_TEACH_Act&Template=/ContentManagement/ContentDisplay.cfm&ContentID=25939#newc

Crews, K. D., & Ramos, J. (2004). *Comparative Analysis of World Copyright Law: Issues for University Scholarship.* Paper presented at the "Copyright Management for Scholarship" Conference, Zwolle, Netherlands. Retrieved 4/08/2010, from http://copyright.surf.nl/copyright/files/International_Comparative_Chart_Zwolle_III_rev071306.pdf

Cruz, P. D. (1999). *Comparative Law in a Changing World*. London: Cavendish Publishing Limited.

Davies, G. (2002). *Copyright and the Public Interest* (2nd ed.). London: Sweet & Maxwell.

Davies, G., & Harbottle, G. (2007). *Copinger and Skone James on Copyright* (15th edition ed.). UK: Sweet & Maxwell Ltd.

Davison, M. J., Monotti, A., & Wiseman, L. (2008). *Australian Intellectual Property Law*. Melbourne: Cambridge University Press.

Deazley, R. (2004). *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775).* Oregon: Hart Publishing.

Delzell, B. (1995, 8-10 November 1995). *Does Copyright Infringe on Freedom To Exchange Ideas?* Paper presented at the Conference of the Council for Higher Education Computing Services, Roswell, New Mexico.

Depoorter, B., & Parisi, F. (2002). Fair Use and Copyright Protection: A Price Theory Explanation *International Review of Law and Economics, 21*(4), 453-473.

Deskins, J. W. (1965). On the Nature of the Public Interest. *The Accounting Review, 40*(1), 76-81.

Dinwoodie, G. B. (2001). The Development and Incorporation of International Norms in the Formation of Copyright Law. *Ohio State Law Journal, 62*.

Drahos, P. (2002a). Developing Countries and International Intellectual Property Standard-setting. *The Journal of World Intellectual Property, 5*(5), 765-789.

Drahos, P. (2002b). Negotiating Intellectual Property Rights: Between Coercion and Dialogue. In P. Drahos & R. Mayne (Eds.), *Global Intellectual Property Rights: Knowledge, Access and Development*. Wiltshire: Palgrave Macmillan.

Drahos, P., & Braithwaite, J. (2003). Three Tests of US Trade Policy on Intellectual Property Rights. *nthposition*. Retrieved 12/09/2010, from http://www.nthposition.com/threetestsofustrade.php

Dusollier, S., Poullet, Y., & Buydens, M. (2000). *Copyright and Access to Information in the Digital Environment*. Paper presented at the Third UNESCO Congress on Ethical, Legal and Societal Challenges of Cyberspace Infoethics. Retrieved 09/03/2009, from *webworld.unesco.org/infoethics2000/documents/study_poullet_en.rtf*

Dutfield, G., & Suthersanen, U. (2004). *Harmonisation or Differentiation in Intellectual Property Protection? The Lessons of History*. Geneva: Quaker United Nations Office.

Dutfield, G., & Suthersanen, U. (2008). *Global Intellectual Property Law*. Cheltenham, UK: Edward Elgar.

Dworkin, G. (1977). The Whitford Committee Report on Copyright and Designs Law. *The Modern Law Review, 40*(6), 685-700.

Education Guide Malaysia (2011). 11th Edition, *The National Higher Education System*. Retrieved 25/04/2011, from http://www.studymalaysia.com/education/art_education.php?id=nationaledu

Faruqi, S. S. (1992). Government, Administrative, Transparency: Malaysia. *Current Law Journal, 4*(xxiii).

Ficsor, M. (2002a). How much of What? The "Three-step Test" and Its Application in Two Recent WTO Dispute Settlement Cases. *Revue Internationale du Droit D'auteur (RIDA)*(192), 111-251.

Ficsor, M. (2002b). *The Law of Copyright and the Internet*. Oxford: Oxford University Press.

Fine, C. R., & Castagnera, J. O. (2003). Should There be Corporate Concern? Examining American University Intellectual Property Policies. *Journal of Intellectual Capital, 4*(1), 49-60.

Fisher, W., Palfrey, J., McGeveral, W., Harlow, J., Gasser, P. & Jaszi, P. (2006). *The Digital Learning Challenge: Obstacles to Educational Uses of Copyright Material in the Digital Age*, Berkman Center for Internet and Society, Harvard University.

Fitzgerald, B. (2008). Copyright 2010: The Future of Copyright. *European Intellectual Property Review, 30*(2), 43-49.

Fong, C. M. (2007). The Role of Curriculum in Malaysian Legal Education. *Masalah Pendidikan, 30*(2), 11.

Fook, L. S. (2009). Ministry of Higher Educations's lackadaisical attitude on UPM plagiarism case does little to uphold academic integrity and excellence. Retrieved 08/07/2011, 2011, from http://dapmalaysia.org/english/2009/sep09/bul/bul3922.htm

Foong, K. K. (2008). *Funding Higher Education in Malaysia*. Paper presented at the DPU/EABER Conference on Financing Higher Education and Economic Development in East Asia. Retrieved 12/01/2009, from WPS_DPU_2008_44.pdf

Fox, H. G. (1947). Copyright in Relation to the Crown and Universities with Special Reference to Canada *The University of Toronto Law Journal, 7*(1), 98-136

Ganley, P. (2004). Digital Copyright and the New Creative Dynamics *International Journal of Law and Information Technology 12*(3), 282-332.

Gardiner, R. K. (2008). *Treaty Interpretation*. New York: Oxford University Press Inc.

Garnett, K., Davies, G., & Harbottle, G. (2010). *Copinger and Skone James on Copyright* (16th Edition). London: Sweet & Maxwell.

Garnett, K., James, J. R., & Davies, G. (1999). *Copinger and Skone James on Copyright* (14th Edition). London: Sweet & Maxwell.

Gasaway, L. N. (2001). Impasse: Distance Learning and Copyright. *Ohio State Law Journal, 62*, 783.

Gaubiac, Y. (2001). Exceptions and Limitations to Copyright within the Meaning of Article 13 of TRIPs. *Communication - Commerce Electronique*. Retrieved 24/02/2010, from http://portal.unesco.org/culture/en/files/10018/10668256431Gaubiac_E.pdf/Gaubiac%2BE.pdf

Geiger, C. (2006a). Copyright and Free Access to Information: for a Fair Balance of Interests in a Globalised World. *European Intellectual Property Review, 28*(7), 366-373.

Geiger, C. (2006b). The Private Copy Exception, An Area of Freedom (temporarily) Preserved in the Digital Environment. *International Review of Intellectual Property and Competition Law, 37*(1), 74-81.

Geiger, C. (2006c). Three-Step Test, A Threat to a Balanced Copyright Law? *International Review of Intellectual Property and Competition Law, 37*, 683-699.

Geiger, C. (2007a). From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step Test. *European Intellectual Property Review, 29*(12), 486-491.

Geiger, C. (2007b). The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society. *E-Bulletin*, (January - March), 1-21. Retrieved 8/02/2009, from http://portal.unesco.org/culture/en/files/34481/11883823381test_trois_etapes_en.pdf/test_trois_etapes_en.pdf

Geiger, C. (2008). Rethinking Copyright Limitations in the Information Society: the Swiss Supreme Court Leads the Way. *International Review of Intellectual Property and Competition Law, 39*(8), 943-950.

Geiger, C. (2009). Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions. *International Review of Intellectual Property and Competition Law, 40*(6), 627-642.

Geiger, C. (2010). The Future of Copyright in Europe: Striking a Fair Balance Between Protection and Access to Information. *Intellectual Property Quarterly, 1*, 1-14.

Geiger, C., Griffiths, J., & Hilty, R. M. (2008). Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law. *European Intellectual Property Review, 30*(12), 489-496.

Geiger, C., Hilty, R. M., Griffiths, J., & Suthersanen, U. (2010). Declaration A Balanced Interpretation of the "Three-Step Test" in Copyright Law. *JIPITEC, 1*. Retrieved 12/03/2011, from www.jipitec.eu/issues/jipitec-1-2-2010/2621

Geiger, C., Macrez, F., Bouvel, A., Carre, S., Hassler, T., & Schmidt-Szalewski, J. (2009). What Limitations to Copyright in the Information Society? A Comment on the European Commission's Green Paper "Copyright in the Knowledge Economy". *International Review of Intellectual Property and Competition Law, 40*(4), 412-433.

Geller, P. E. (2009). Rethinking the Berne-Plus Framework: From Conflicts of Laws to Copyright Reform. *European Intellectual Property Review, 31*(8), 391-395.

Gervais, D. J. (2005). Towards A New Core International Copyright Norm: The Reverse Three-Step Test *Marquette Intellectual Property Law Review, 9*(1), 1-35.

Gervais, D. J. (2008). *The TRIPs Agreement: Drafting History and Analysis* (Third ed.). London: Thomson Reuters (Legal) Limited.

Gil, G., Sulston, J., & Boyle, J. (2005). Free ideas. *Economist, 377*(8448), 67.

Ginsburg, J. (2000). International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code? *The Journal of the Copyright Society of the United States, Millenium Volume*.

Ginsburg, J. (2001). Towards Supranational Copyright Law? the WTO Panel: Decision and the "Three-Step Test" for Copyright Exceptions. *Revue Internationale du Droit d'Auteur, 187*(3).

Glynn, S. L. J. (2001). The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act *Virginia Law Review, 87*(5), 813-920.

Goburdhun, K. (2006). *Access to Knowledge in Africa: How to Free a Continent from the Shackles of Copyright.* Unpublished Unpublished LLM in International Commercial Law, University of Kent, Kent.

Goldstein, P. (2001). *International Copyright: Principles, Law, and Practice*. US: Oxford University Press.

Goldstein, P. (2008). Berne in the USA. *International Review of Intellectual Property and Competition Law, 39*(2), 216-221.

Gonzalez, A. G. (2005). The Digital Divide: It's the Content, Stupid: Part 2. *Computer and Telecommunications Law Review, 11*(4), 113-118.

Gowers Review Report (2006). Retrieved 14/11/2011, from http://www.hm-treasury.gov.uk/gowers _review_index.htm

Greenleaf, G. (2009). National and International Dimensions of Copyright's Public Domain (An Australian Case Study). *SCRIPTed, 6*(2), 259.

Griffiths, J. (2009). The "Three-Step Test" in European Copyright Law - Problems and Solutions. *Intellectual Property Quarterly, 4*, 428-457.

Griffiths, J. (2010). Rhetoric and the "Three-Step Test": Copyright Reform in the United Kingdom. *European Intellectual Property Review, 32*(7), 309-312.
Guanhong, T. (2004). A Comparative Study of Copyright and the Public Interest in the United Kingdom and China. *SCRIPTed, 1*(2).
Guibault, L. (2000). Contracts and Copyright Exemptions. In P. B. Hugenholtz (Ed.), *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management* (pp. 125). The Hague: Kluwer Law International.
Guibault, L. (2002). *Copyright Limitations and Contracts - An Analysis of the Contractual Overidability of Limitations on Copyright*. The Hague: Kluwer.
Guibault, L. (2003). The Nature And Scope Of Limitations And Exceptions To Copyright And Neighbouring Rights With Regard To General Interest Missions For The Transmission Of Knowledge: Prospects For Their Adaptation To The Digital Environment. *e-Copyright Bulletin*, 1-48. Retrieved 02/04/2009, from http://portal.unesco.org/culture/en/files/17316/10874797751l_guibault_en.pdf/l_guibault_en.pdf
Gutowski, R. J. (1999). Comment. *Buffalo Law Review, 47*.
Harms, L. T. C. (2000). Offering Cake for the South. *European Intellectual Property Review, 22*(10), 451-453.
Hawin, M. (2004). Parallel Importation of Copyright Material: A Comparative Analysis of the Position in Several Asian Countries. *Asia Law Review,* Vol. 1, No. 1, Korea Legislation Research Institute. Retrieved 15/11/2011, from http://www.e-alin.org/file/attach/upload_1917743736955511936.pdf
He, H. (2009). Seeking a Balanced Interpretation of the Three-Step Test - an Adjusted Structure in View of Divergent Approaches. *International Review of Intellectual Property and Competition Law, 40*(3), 274-308.
Heide, T. (1999). The Berne Three Step Test and the Proposed Copyright Directive. *European Intellectual Property Review*.
Higher Education Academy (2011), *Future of UKCLE. R*etrieved 07/07/2011, from http://www.ukcle.ac.uk/about/future/
Higher Education Expenses and Cost-Sharing in Malaysia (2007) Retrieved 14/11/2011, from gse.buffalo.edu/org/inthigheredfinance/files/Country_Profiles/Asia/Malaysia.pdf
Hilty, R. M. (2006). Five Lessons About Copyright in the Information Society: Reaction of the Scientific Community to Overprotection and What Policy Makers Should Learn. *Journal of the Copyright Society of the U.S.A., 53*, 103.
Hilty, R. M. (2007). Copyright Law and Scientific Research. In Torremans, P. L. C. (Ed.), *Copyright Law: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar.
Hilty, R. M. (2010). Declaration on the "Three-Step Test": Where Do We Go From Here? *JIPITEC, 1*.
Hinze, G. (2008). WIPO: Action Needed to Expand Copyright Exceptions and Limitations. Retrieved 09/08/2009, from

http://www.twnside.org.sg/title2/intellectual_property/info.service/2008/twn.ipr.info.080303.htm
Hong Xue. (2008). Copyright Exceptions for Online Distance Education. *Intellectual Property Quarterly, 2*, 213-229.
Hudson, E. (2010, 9-11 February 2010). *Fair Use and Section 200AB: What Overseas Experience Teaches Us About Australian Copyright Law*. Paper presented at the VALA2010 15th Biennial Conference and Exhibition Melbourne, Australia. Retrieved 29/02/2011, from http://www.vala.org.au/vala2010/papers2010/VALA2010_120_Hudson_Final.pdf
Hudson, E., & Kenyon, A. T. (2007). Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions. *SCRIPTed, 4:2*, 197.
Hugenholtz, P. B. (1997). *Fierce Creatures - Copyright Exemptions: Towards Extinction?* Paper presented at the Rights, Limitations and Exceptions: Striking a Proper Balance, IFLA / IMPRIMATUR Conference. Retrieved 7/08/2009, from www.ivir.nl/publications/hugenholtz/PBH-FierceCreatures.doc
Hugenholtz, P. B., & Okediji, R. G. (2008). *Conceiving an International Instrument on Limitations and Exceptions to Copyright*: Institute for Information Law University of Amsterdam. Retrieved 05/07/2009, from http://www.soros.org/initiatives/information/articles_publications/publications/copyright_20080506
Hunt, R., Williams, P., Rowlands, I., & Nicholas, D. (2009). *Copycats? Digital Consumers in the Online Age*. London: University College London.
International Intellectual Property Alliance (2009). *Special 301 Report on Copyright Protection and Enforcement: Malaysia*. Retrieved 19/08/2010, from http://www.iipa.com/rbc/2009/2009SPEC301MALAYSIA.pdf
Internet World Stats. (2010). Malaysia: Internet Usage Stats and Marketing Report. Retrieved 07/03/2011, from http://www.internetworldstats.com/asia/my.htm
Jehoram, H. C. (2005). Restrictions on Copyright and Their Abuse. *European Intellectual Property Review*, *27*(10), 359-364.
Jehoram, H. C. (2009). Is There a Hidden Agenda Behind the General Non-Implementation of the EU Three-Step Test? *European Intellectual Property Review, 31*(8), 408-410.
Johnstone, R., & Vignaendra, S. (2003). *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee (AUTC)*. Canberra: Higher Education Group, Department of Education, Science and Training.
Joint Information Systems Committee (JISC). (1999). Summary of Guidelines: Copying Electronic Fairly or Not? Retrieved 25/03/2011, from http://www.jisc.ac.uk/aboutus/committees/workinggroups/disbanded/fairdealing/summary.aspx
Joint Information Systems Committee and Publishers Association. (1998). Guidelines for Fair Dealing in an Electronic Environment Joint Information Systems Committee and the Publishers Association. Retrieved

25/03/2011, from http://www.ukoln.ac.uk/services/elib/papers/pa/fair/intro.html

Kenny, A., Larkin, C., MacSithigh, D., & Thijssen, J. (2009). *Irish Education Policy for a Globalised World: A Policy for Chasing Black & White Swans*. Dublin: The Swan Group.

Khairul, H. (2010). *Hey, Malaysian! Your FAQs on How to Shop @ Amazon.com Answered Here*. Retrieved 14/11/2011, from http://themalaysianreader.com/2010/09/04/hey-malaysians-your-faqs-on-how-to-shop-amazon-com-answered-here/

Khan, A. N., & Hancock, P. (2001). Copyright Law in Australia: Fair Dealing for Research and Study Purposes. *Journal of Law & Education, 30*(3), 505-523.

Kinokuniya (2011). Retrieved 17/08/2011, from https://bookweb.kinokuniya.co.jp/guest/cgi-bin/bookseaohb.cgi?ISBN=0199214875&AREA=05&LANG=E

Knapper, C. (2001). The Challenge of Educational Technology. *The International Journal for Academic Development, 6*(2), 93-95.

Knights, R. (2000). *Limitations and Exceptions under the "Three-Step Test" and in National Legislation - Differences between the Analog and Digital Environments* Paper presented at the Regional Workshop on Copyright and Related Rights in the Information Age. Retrieved 19/06/2009, from http://www.wipo.int/edocs/mdocs/copyright/en/wipo_da_mvd_00/wipo_da_mvd_00_4.doc

Kur, A., & Levin, M. (Eds.). (2011). *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPs*. Cheltenham: Edward Elgar Publishing Limited.

Koelman, K. J. (2006). Fixing the Three-Step Test *European Intellectual Property Review*.

Kojima, T. (2010). *Copyright Limitations and the Three-Step Test in the Digital Era: How to Preserve National Autonomy?* Paper presented at the Contemporary Issues in International Economic and Business Law Joint Hokkaido-Kyushu Universities Seminar. Retrieved 12/01/2011, from http://www.law.kyushu-u.ac.jp/programsinenglish/seminar2010/kojima.pdf

Krishnasamy, N. (2006). *Country Paper on Copyright Issues in Malaysia*. Paper presented at the 12th ABU Copyright Committee Meeting and Seminar in Brunei. Retrieved 29/07/2009, from www.abu.org.my/abu/index.cfm/elementid/32480/-Malaysia

Kuksa, I. (2008). Virtual Reality in Theatre Education and Design Practice – New Developments and Applications. *Art, Design & Communication in Higher Education, 7*.

Laddie, H., Prescott, P., & Victoria, M. (1995). *Modern Law of Copyright and Designs* (2nd ed. Vol. 1). Sutton: Butterworth.

Laing, A. C. (2006). Copyright in the Age of Mass Digitisation. *Entertainment Law Review, 17*(5), 133-138.

Legco panel on Trade and Industry (1997). Retrieved 14/11/2011, from http://www.legco.gov.hk/yr96-97/english/panels/ti/minutes/ti140197.htm

Leith, P., & Fellows, C. (2010). Enabling Free On-line Access to UK Law Reports: The Copyright Problem. *International Journal of Law & Information Technology, 18*(72).
Litman, J. (1994). Exclusive Right to Read. *Cardozo Arts & Ent. LJ, 13*(29).
Loon, N. L. W. (2009). Exploring Flexibilities within the Global IP Standards. *Intellectual Property Quarterly, 2*, 162-184.
Lopez, F. Z. (2002). The Right of Reproduction, Publishing Contracts and Technological Protection Measures in the Digital Environment. *Copyright Bulletin, XXXVIN3*.
Lucas, A. (2010). For a Reasonable Interpretation of the Three-Step Test. *European Intellectual Property Review, 32*(6), 277-282.
Lucchi, N. (2007). The Supremacy of Techno-Governance: Privatization of Digital Content and Consumer Protection in the Globalized Information Society. *International Journal of Law & Information Technology, 15*(2), 192-225.
Mackenzie, J., & Walker, K. (2004). Copyright Restrictions Increased: The Effect on Education. 2009, Retrieved 18/04/2010, from http://www.out-law.com/page-332
Makri,S. (2008). *A Study of Lawyers' Information Behaviour Leading to the Development of Two Methods for Evaluating Electronic Resources.* Doctoral Dissertation. London: University College London Retrieved 12/07/2011, from www.ucl.ac.uk/uclic/people/s_makri/makriphdthesis
Marlin-Bennett, R. (2004). *Knowledge Power: Intellectual Property, Information and Privacy*. London: Lynne Rienner Publishers, Inc.
Marsnik, S. J. (2004). A Delicate Balance Upset: A preliminary Survey of Exceptions and Limitation in U.S and European Union Digital Copyright Laws. *International Business Law Review, 4*.
Masouye, C. (1978). *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971)*. Geneva: WIPO.
Mathur, S. K. (2003). Trade-Related Aspects of Intellectual Property Rights and Copyright Provisions:Some Issues with Special Reference to Developing Countries. *The Journal of World Intellectual Property, 6*(1), 65-99.
Matsushita, M., Schoenbaum, T. J., & Mavroidis, P. C. (2006). *The World Trade Organization: Law, Practice, and Policy*. Oxford: Oxford University Press.
Matsuura, K. (2009). *The Future of Knowledge Acquisition and Sharing.* Paper presented at the UNESCO Future Forum on Knowledge Acquisition and Sharing. Retrieved 30/01/2011, from unesdoc.unesco.org/images/0018/001824/182432e.pdf
Matthews, D. (2002). *Globalising Intellectual Property Rights: The TRIPs Agreement* London: Routledge.
Mazeh, Y. (2002). *Present and Future Priorities in Copyright Law: A Scoping Study*. Oxford: Oxford IP Research Center at St Peter's College.
McCracken, R. (2001). Copyright and E-Learning. Paper presented at the Cambridge-MIT Institute university workshop on Copyright and E-Learning. Cambridge.

Mendis, D. (2003). The Historical Development of Exceptions to Copyright and its Application to Copyright Law in the Twenty-First Century. *Electronic Journal of Comparative Law, 7.5*.

Malaysian Universities Guide (2011). *Everyday Expenses and its Cost*. Retrieved 14/11/2011, from http://www.universitymalaysia.net/study-in-malaysia/everyday-expenses/

Ministry of Higher Education. (2009). Introduction. Retrieved 07/03/2011, from http://www.mohe.gov.my/educationmsia/index.php?article=mohe

Ministry of Higher Education Malaysia. (2006). *Report: The Committee to Study, Review and Make Recommendations Concerning the Development and Direction of Higher Education in Malaysia: Towards Excellence*. Putrajaya: Ministry of Higher Education Malaysia.

Ministry of International Trade and Industry (2011). *Free Trade Agreement: Malaysia's FTA Involvement*. Retrieved 17/11/2011, from http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_ccec2a77-c0a81573-f5a0f5a0-6f87fd6f

Mohd Awal, N. A. (2004). Legal Education in Malaysia: Where is it Heading? Retrieved 17/09/2009, from http://www.aals.org/international2004/Papers/Awal.pdf

Mohd Labib, H. (2000). *Perceptions of Copyright Law and Its Implementation in Academic Libraries in Malaysia.* International Islamic University Malaysia, Kuala Lumpur.

Monotti, A., & Ricketson, S. (2003). *Universities and Intellectual Property : Ownership and Exploitation* Oxford: Oxford University Press.

Murdoch University Handbook, (2011) Retrieved 20/03/2011 from http://print.handbook.murdoch.edu.au/study/index.php?section=2a_study#units

National Higher Education Action Plan 2007-2010 (2007). Ministry of Higher Education, Malaysia. Retrieved 12/11/2011 from http://www.mohe.gov.my/transformasi/

Nemire, R. E. (2007). Intellectual Property Development and Use for Distance Education Courses: A Review of Law, Organizations, and Resources for Faculty. *College Teaching, 55*(1), 26-30.

Nessen, P. v. (1985). Law Reporting: Another Case for Deregulation *Modern Law Review, 48*(4), 412-433.

Newby, T. G. (1999). What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law? . *Stanford Law Review, 51*(6), 1633-1663

Nicholson, D. R. (2006). Intellectual Property: Benefit or Burden for Africa? *International Federation of Library Associations and Institutions, 32*(4).

Noordin, S. M. (2009). Hak Untuk Mengetahui Undang-Undang dan Mendapat Maklumat Perundangan. *SCRIBD*.

Noordin, S. M. (2005). Legal Research Facilities in Malaysia. *Legal Information Management, 5*(2), 115-120.

Noordin, S. M., & Keng, L. P. (2009). Update: An Overview of Malaysian Legal System and Research. Retrieved 6/01/2010, from http://www.nyulawglobal.org/globalex/Malaysia1.htm

Nordemann, W., Vinck, K., Hertin, P., & Meyer, G. (1990). *International Copright and Neighboring Rights Law: Commentary* New York: Weinheim.

Numa Droz (1986) *Minutes of the Sixth Meeting of the Conference for the Protection of Authors' Rights*, 18 September 1884, in WIPO, 1886-Berne Convention Centenary.

OECD (2007). *OECD Education at a Glance 2007* – Indicator C3: Who Studies Abroad and Where? Retrieved 12/11/2011, from http://www.oecd.org/document/30/0,3343,en_2649_39263238_39251550_1_1_1_1,00.html

Okediji, R. G. (2000). Toward an International Fair Use Doctrine. *Columbia Journal of Transnational Law, 39*.

Okediji, R. L. (2003). New Treaty Development and Harmonization of Intellectual Property Law. In C. Bellman, G. Dutfield & R. M. Ortiz (Eds.), *Trading in Knowledge: Development Perspectives on TRIPs, Trade and Sustainability*. London: Earthscan Publication.

Okediji, R. L. (2005a). *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries in the Digital Environment*. Geneva: ICTSD.

Okediji, R. L. (2005b). Sustainable Access to Copyrighted Digital Information Works in Developing Countries. In K. E. Maskus & J. H. Reichman (Eds.), *International Public Goods and Transfer of Technology under a Globalized IP Regime* (pp. 142 -187). Yew York: Cambridge University Press.

Okediji, R. L. (2006). The International Copyright System: Limitations, Exceptions and Public Interest Considerations to Developing Countries. Retrieved 09/03/2008, from http://scholar.google.com/scholar?num=30&hl=en&lr=&q=related:lb2413f0B2gJ:scholar.google.com

Otike, J. (1997). Legal Information Needs of the General Public with Special Reference to Developing Countries. *Library Review, 46*(1).

Oxford English Dictionary (1989). Second edition, Retrieved 12/07/2011 from http://www.oed.com/view/Entry/91580.

Oxford English Dictionary (2008), Third edition, Retrieved 21/07/2011 from http://www.oed.com/view/Entry/156901.

Papadopoulou, M. D. (2010). Copyright Limitations and Exceptions in an E-Education Environment. *European Journal of Law and Technology, 1*(2).

Peifer, K.-N. (2008). The Return of the Commons - Copyright History as a Helpful Source. *International Review of Intellectual Property and Competition Law, 39*(6), 679-688.

Perlmutter, S. (2001). Convergence and the Future of Copyright. *European Intellectual Property Review, 23*(2), 111-117.

Perlmutter, S. (2002). Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts. *Loyola of Los Angeles Law Review, 36*, 323-335.

Peukert, A. (2005). A Bipolar Copyright System for the Digital Network Environment. *Hastings Communications and Entertainment Law Journal, 28*(1).

Phang, L. A. (2009, 14 September). UPM Duo in Plagiarism Scandal. *The Sun*. Retrieved 18/08/2010, from http://www.scribd.com/doc/19755552/TheSun-20090914-Page01-Upm-Duo-in-Plagiarism-Scandal

Philips, J. J., Durie, R., & Karet, I. (Eds.). (1997). *Whale on Copyright* (5th ed.). London: Sweet & Maxwell.

Picciotto, S. (2002). Defending the Public Interest in TRIPs and the WTO. In P. Drahos & R. Mayne (Eds.), *Global Intellectual Property Rights: Knowledge, Access and Development*: Palgrave.

Poon, W. C., Low, K. L. T., & Yong, D. G. F. (2004). A Study of Web-Based Learning Environment in Malaysia. *The International Journal of Educational Management, 18*(6), 374-385.

Power, T. (1997). Digitisation of Serials and Publications: the Seminal Objective of Copyright Law. *European Intellectual Property Review, 19*(8), 444-461.

Prabhala, A., & Schonwetter, T. (2006). Commonwealth of Learning Copyright Audit. Retrieved 12/12/2009, from http://www.co.org/resources/knowServices/copyright/Pages/lawEduc.aspx

Puay Tang. (1997). The Use of Copyright as a Measure of Innovation: Software Applications in the Digital Age. *Intellectual Property Quarterly, 1*, 71-91.

Reichman, J. H., & Okediji. (2009). *Empowering Digitally Integrated Scientific Research: The Pivotal Role of Copyright Law's Limitations and Exceptions*. Paper presented at the Conference of the Engelberg Center on Innovation Law & Policy & Max Planck Institute for Intelellectual Property, Competition and Tax Law. Retrieved 28/02/2010, from http://www.law.nyu.edu/centers/engelbergcenter/conferences/ceilingsworkshop/index.htm

Rens, A., Prabhala, A., & Kawooya, D. (2006). Intellectual Property, Education and Access to Knowledge in Southern Africa. Retrieved 12/08/2008, from www.iprsonline.org/unctadictsd/docs/06 05 31 tralac amended-pdf.pdf

Report of the Committee to Consider the Law on Copyright and Designs (1977). Cmnd 6732.

Report of the Copyright Law Committee on Reprographic Reproduction (1976). Canberra. Retrieved 20/03/2011, from http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_CopyrightLawReviewCommittee_CLRCReports_CopyrightLawCommitteeonReprographicReproduction

Reproduction of Bills and Explanatory Notes to Bills of the United Kingdom Parliament (2000). Retrieved 20/09/2010, from www.hmso.gov.uk/copyright/guidance/gn_14.htm

Ricketson, S. (1987). *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*. London: Kluwer.

Ricketson, S. (1988). The Shadow Land of Berne : A Survey of the Hidden Parts of the Berne Convention: Part 3. *European Intellectual Property Review, 11*(2), 58-65.

Ricketson, S. (1999a). The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties. *Intellectual Property Quarterly, 1*, 56-94.
Ricketson, S. (1999). *The Law of Intellectual Property: Copyright, Designs & Confidential Information* (2nd ed.). Sydney: Lawbook.
Ricketson, S. (1999b). Simplifying Copyright Law: Proposals from Down Under. *European Intellectual Property Review*, *21*(11), 537-550.
Ricketson, S. (2002). The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions. Retrieved 17/03/2009, from www.copyright.org.au/pdf/ccs/CCS0202.pdf
Ricketson, S. (2003). *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (No. SCCR/9/7). Geneva: World Intellectual Property Organization.
Ricketson, S., & Ginsburg, J. (2006). *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Second ed.): Oxford University Press.
Ricketson, S., & Monotti, A. (2003). *Universities and Intellectual Property: Ownership and Exploitation*. Oxford: Oxford University Press.
Robbie, G. (1996). Crown Copyright - Bete Noire Or White Knight? *The Journal of Information, Law and Technology 2*, 1.
Sandy, N. (2004). *Practical Copyright for Information Professionals: The CILIP Handbook*. London: Facet Publishing.
Scassa, T. (2005). Recalibrating Copyright Law?: A Comment on the Supreme Court of Canada's Decision in CCH Canadian Limited et al. v. Law Society of Upper Canada. Retrieved 25/08/2009, from
Schonwetter, T. (2006). *The Three Step Test within The Copyright System*. Paper presented at the The Fourth Pan-Commonwealth Forum on Open Learning (PCF4). Retrieved 17/05/2010, from http://pcf4.dec.uwi.edu/viewpaper.php?id=58&print=1
Senftleben, M. (2004). *Copyright, Limitations and The Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law*. The Hague: Kluwer Law International.
Senftleben, M. (2006). Towards a Horizontal Standard for Limiting Intellectual Property Rights? WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law. *International Review of Intellectual Property and Competition Law*, *37*(4), 407-438.
Senftleben, M. (2010). The International Three-Step Test: A Model Provision for EC Fair Use Legislation. *JIPITEC*, *67*(Para 1), 67 - 82.
Seng, D. (2009a). *WIPO Study on the Copyright Exceptions for the Benefit of Educational Activities for Asia and Australia*. Geneva: WIPO. Retrieved 13/07/2010, from http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130249
Seng, D. (2009b). *WIPO Study on the Copyright Exceptions for the Benefit of Educational Activities for Countries in the Asia-Pacific (Summary)*.

Geneva: WIPO. Retrieved 26/07/2010, from www.wipo.int/edocs/mdocs/copyright/en/sccr.../sccr_19_www_130576.doc
Shelly, M. (2008). Commercial Activities and Copyright in Australian Universities. *Education and the Law*, *20*(3), 175-191.
Sims, A. (2010). Strangling Their Creation: the Courts' Treatment of Fair Dealing in Copyright Law since 1911. *Intellectual Property Quarterly, 2*, 192-224.
Sinclair, I. (1984). *The Vienna Convention on the Law of Treaties* (2nd ed.): Manchester Univeratiy Press.
Sithigh, D. M. (2006). Students Contributions to Academic Values. *Higher Education Europe*, *31*(4), 409-413.
Smith, E. H. (2001). *The Reproduction Right and Temporary Copies: The International Framework, the U.S. Approach and Practical Implications*. Paper presented at the Softic Symposium. Retrieved 02/03/2010, from http://www.softic.or.jp/symposium/open_materials/10th/en/smith-en.pdf
Smith, M. W. (1999). Bringing Developing Countries' Intellectual Property Laws to TRIPs Standards: Hurdles and Pitfalls Facing Vietnam's Efforts to Normalize an Intellectual Property Regime. *Case Western Reserve Journal of International Law, 31*(1).
Sookman, B. (2010). Copyright Reform for Canada: What Should We Do? A Submission to the Copyright Consultation. *Computer and Telecommunications Law Review, 16*(1), 15-26.
Sterling, J. A. L. (1995). Crown Copyright in the United Kingdom and Other Commonwealth Countries. *I.P.J., 10*(157).
Sterling, J. A. L. (2003). *World Copyright Law*. London: Sweet & Maxwell.
Stokes, S. (2009). *Digital Copyright: Law and Practice*. Oxford: Hart Publishing.
Story, A., Darch, C., & Halbert, D. (Eds.). (2006). *The Copy/South Dossier: Issues in the Economics, Politics and Ideology of Copyright in the Global South*. Kent: The Copy/South Research Group.
Sun, H. (2005). Copyright Law Under Siege: An Inquiry Into the Legitimacy of Copyright Protection in the Context of the Global Digital Divide. *International Review of Intellectual Property and Competition Law, 36*(2), 192-213.
Sun, H. (2007). Overcoming the Achilles Heel of Copyright Law. *Northwestern Journal of Technology and Intellectual Property, 5*(2).
Suthersanen, U. (2003). Copyright and Educational Policies: A Stakeholder Analysis. *Oxford Journal of Legal Studies, 23*(4), 585-609.
Suthersanen, U. (2005). *The Right to Knowledge*. Paper presented at the UNCTAD / ICTSD / BA Regional Arab Dialogue: "Intellectual Property Rights (IPRs), Innovation and Sustainable Development". Retrieved 16/08/2009, from http://www.iprsonline.org/unctadictsd/docs/Suthersanen_A2K.pdf
Suthersanen, U. (2008). A2K and the Wipo Development Agenda: Time to List the "Public Domain". *Policy Brief Number 1*. Retrieved 13/04/2010, from *www.unctad.org/en/docs/iprs_pb20091_en.pdf*
Taggart, M. (1984). Copyright in Written Reasons for Judgment. *Sydney Law Review 4, 10*(2), 319-329.

Tawfik, M. (2005a). International Copyright Law and 'Fair Dealing' as a "User Right". *E-Copyright Bulletin*. Retrieved 20/06/2009, from http://portal.unesco.org/culture/en/files/27422/11514150881Myra_e.pdf/Myra_e.pdf

Tawfik, M. (2005b). International Copyright Law: W[h]ither Use Rights? In M. Geist (Ed.), *In the Public Interest: The Future of Canadian Copyright Law*. Ontario: Irwin Law Inc.

Tee, K. L. (2004). Copyright Law in Malaysia: Does the Balance Hold? *Journal of Malaysian and Comparative Law, 2*.

Tee, K. L. (2008). *Copyright Law in Malaysia* (Third ed.). Kuala Lumpur: Lexis Nexis.

The 45 Adopted Recommendations under the WIPO Development Agenda (2007) Retreived 20/05/2010, from http://www.wipo.int/ip-development/en/agenda/recommendations.html

The Copyright Licensing Agency Ltd. (2011). Licences for Education. Retrieved 25/03/2011, from http://www.cla.co.uk/Licencesforeducation

Tjaden, T. J. (2005). *Access to Law-Related Information in Canada in the Digital Age.* Unpublished Dissertation, University of Toronto, Canada. Retrieved 18/08/2009, from www.legalresearchandwriting.ca/images/TedTjaden-Introduction.pdf

Tomasevski, K. (2006). The State of the Right to Education Worldwide: Free or Fee: *2006 Global Report*, Copenhagen. Retrieved 12/11/2011, from http://www.katarinatomasevski.com/

Torremans, P. (2008). *Holyoak and Torremans Intellectual Property Law* (5th ed. ed.). Oxford: Oxford University Press.

Trebilcock, M. J., & Howse, R. (1999). *The Regulation of International Trade*. London: Routledge.

Tuhumwire, I. & Okello-Obura, C. (2010). Assessment of Legal Information Needs and Access Problems of Lawyers in Uganda. *Library Philosophy and Practice*. Retrieved 12/08/2011, from http://www.webpages.uidaho.edu/~mbolin/tuhumwire-okello-obura2.htmUK Intellectual Property Office (2008). *Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions*. Retrieved 14/11/2011 from http://www.ipo.gov.uk/consult-copyrightexceptions.pdf

UNCTAD. (2007). *Defining the Public Interest in Intellectual Property: A Joint UNCTAD - Stockholm Network - PIIPA Event*. Geneva. Retrieved 17/09/2009, from http://www.unctad.org/sections/dite_totip/docs/dite_pcbb_ias0051_en.pdf

UNCTAD-ICTSD. (2005). *Resource Book on TRIPs and Development* Cambridge: Cambridge University Press.

UNCTAD-ICTSD (2009). *Limitations and Exceptions to Copyright: Recent Developments and the Way Forward*. Retrieved 14/11/2011 from http://www.iprsonline.org/ictsd/Dialogues/2009-05-29/2009-05-29_desc.htm

UNESCO. (2009a). Retrieved 21/12/2010, from <http://portal.unesco.org/education/en/ev.php-URL_ID=34168&URL_DO=DO_TOPIC&URL_SECTION=201.html>

UNESCO (2009b). *Global Education Digest 2009*. Retrieved 12/11/2011, from http://www.uis.unesco.org/Education/Pages/tertiary-education.aspx

United Nations High Commisioner for Human Rights. (2000). Intellectual Property Rights and Human Rights: Sub-Commission on Human Rights Resolution 2000/7. Retrieved 05/01/11, from http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument

University of Alberta Libraries. (2010, 13 July 2010). Guide to Plagiarism and Cyber-Plagiarism. Retrieved 18/02/2011, from http://guides.library.ualberta.ca/content.php?pid=62200&sid=457755

Vaile, D. (2010). Shifting Sands? In J. Malcolm (Ed.), *Access to Knowledge for Consumers: Reports of Campaigns and Research 2008-2010*. Kuala Lumpur: Consumers International.

Vautier, K. M. (2004). Economic Considerations on Parallel Imports. In Heath, C. (Ed.), *Parallel Imports in Asia*, The Hague: Kluwer Law International.

Vaver, D. (1995). Copyright and the State in Canada and the United States. Retrieved 16/10/2010, from http://www.lexum.com/conf/dac/en/vaver/vaver.html

Vuyst, B. d., Fairchild, A. M., & Meyer , G. (2003). Exceptions to Intellectual Property Rights: Lessons from WTO-TRIPs Panels. *Murdoch University Electronic Journal of Law, 10*(4).

Wadlow, C. (1998). *Enforcement of Intellectual Property in European and International Law* London: Sweet & Maxwell.

Wadlow, C. (2007). " 'Including Trade in Counterfeit Goods': The Origins of TRIPs as a GATT Anti-Counterfeiting Code". *Intellectual Property Quarterly, 3*, 350-402.

Wadlow, C. (2008). Review of Paul Torremans et al: Intellectual Property and TRIPs Compliance in China: Chinese and European Perspectives. *Journal of Intellectual Property Law and Practice, January*, 740-741.

Wadlow, C. (2011). Intellectual Property as an 'Investment' in international law: A Question of Access to Medicines vs Access to Justice. *Journal of Comparative Law, 4*(2), 79-95.

Wagner, & Karen. I. (1998). Intellectual property: Copyright implications for higher education. *The Journal of Academic Librarianship, 24*(1), 11-19.

Wahid, R. (2008). International Copyright Law and Access to Information in Developing Countries. *Communicare, 8*(1).

Wahid, R. (2011a). *Copyright Ownership of Online Course Materials: By the People for the People*. Paper presented at the BILETA Conference 2011: Harnessing Technology's Full Potential; Minimising Potential Threats. Retrieved 20/03/2011, from http://www.law.mmu.ac.uk/bileta/position-papers/

Wahid, R. (2011b). The Fairness of 'Stealing' Knowledge for Education. *Journal of International Commercial Law and Technology, 6*(2), 86-95.

Wallace, M. (2004). *The Information Society Directive (UK implementation): the End of Educational and Research Use of Digital Works?* Paper presented at the Conference: 19th BILETA Annual Conference 2004. Retrieved 12/04/2009, from http://www.bileta.ac.uk/Document%20Library/1/The%20Information%20Society%20Directive%20(UK%20implementation)-%20the%20end%20of%20educational%20and%20research%20use%20of%20digital%20works.doc

Wallace, M. (2006). An Investigation Into Copyright Concerns as a Barrier to the Widespread Development of E-Learning Practice Within Scottish Further Education Colleges. *Information & Communications Technology Law, 15*(1), 79-119.

Westkamp, G. (2007). *The Implementation of Directive 2001/29/EC in the Member States*. London: Queen Mary Intellectual Property Research Institute.

Wiese, H. (2002). The Justification of the Copyright System in the Digital Age. *European Intellectual Property Review, 24*(8), 387-396.

Wilkinson, M. A. (2005). Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries. In M. Geist (Ed.), *In the Public Interest: The Future of Canadian Copyright Law*. Ontario: Irwin Law Inc.

Winterton, J. (2010, 10-15 August 2010). *Open Access: Free Access to Primary Legal Materials.* Paper presented at the World Library and Information Congress: 76th IFLA General Conference and Assembly, Gothenburg, Sweden.

WIPO (1971) *Records of the Intellectual Property Conference of Stockholm*, June 11-July 14, Vol.I

WIPO (1971) *Records of the Intellectual Property Conference of Stockholm*, June 11-July 14, Vol.II

WIPO. Understanding Copyright and Related Rights. Retrieved 25/01/2010, from http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html#perform

WIPO. (1990). Accession by Malaysia. Retrieved 19/08/2010, from WIPO: http://www.wipo.int/treaties/en/html.jsp?file=/redocs/notdocs/en/berne/treaty_berne_130.html

WIPO. (2011). Frequently Asked Questions. Retrieved 05/01/2011, from http://www.wipo.int/copyright/en/faq/faqs.htm#protect

Wright, R. (2009). The "Three-Step Test" and the Wider Public Interest: Towards a More Inclusive Interpretation. *The Journal of World Intellectual Property, 12*(6), 600-621.

WTO Panel Report. (2000). *United States - Section 110(5) of the US Copright Act*. June 15, 2000, WT/DS/160/R

Xalabarder, R. (2003). Copyright and Digital Distance Education: The Use of Pre-Existing Works in Distance Education Through the Internet. *The Columbia Journal of Law & the Arts, 26*(101).

Xalabarder, R. (2004). Copyright Exceptions for Teaching Purposes in Europe. *IN3:UOC. (Working Paper Series: WP04-004)*. Retrieved 26/08/2008, from http://www.uoc.edu/in3/dt/eng/20418/20418.pdf

Xalabarder, R. (2007). On-Line Teaching and Copyright: Any Hopes for an EU Harmonized Playground? In P. Torremens (Ed.), *Copyright Law: A Handbook of Contemporary Research*. Cheltenham, UK: Edward Elgar Publishing.

Xalabarder, R. (2009). *Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel*. Geneva: WIPO. Retrieved 12/06/2010, from http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393

Yaakub, N. I. (2000). *Internet-Based Learning in Malaysia: Islamic Law*. Paper presented at the 15th Bileta Conference: Electronic Datasets and Access to Legal Information. Retrieved 30/12/2009, from <http://www.bileta.ac.uk/Document%20Library/1/Internet-Based%20Learning%20in%20Malaysia%20-%20Islamic%20Law.pdf>

Yu, P. K. (2006). TRIPs and Its Discontents *Marquette Intellectual Property Law Review, 10*, 369-410.

Zwart, M. D. (2003). Seriously Entertaining: The Panel and the Future of Fair Dealing. *Media and Arts Law Review, 8*(1).

Zwart, M. D. (2005). Case Note: TCN Channel Nine v Network Ten (No 2). *Media and Arts Law Review, 10*(249).

Zwart, M. D. (2007). A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age. *Intellectual Property Quarterly*(1), 60-91.