

# **A Cobweb of Exception to Copyright Law for Research Purposes**

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**Abstract.** Access to copyrighted materials and resources for research purposes have been increasingly conducted across borders. In certain circumstances, access to copyright materials that may be needed for research purposes may be restricted due to copyright law. International copyright conventions do provide exceptions to copyright law for research purposes as what has been generally covered under the ‘three step test’. However, this rule may be interpreted either narrowly or flexibly by member countries, which leads to different countries adapting different laws pertaining to it. This paper analyses the Malaysian copyright provision relating to copyright exceptions that may be used for research purposes and its recent amendments made in 2012 as compared to Australia and the United Kingdom provisions. This paper will discuss the implications of the recent amendment and further explains the future direction researchers could take to ensure the legality of their actions when using copyrighted materials for research purposes.

## **1. Introduction**

A work created or authored, whether entertainment or informational is no longer confined to a single jurisdiction, but can be easily disseminated around the world through the Internet. In today’s globalized world, materials and resources available in other jurisdictions may be highly relevant to another person across the world. Apart from private individuals, various multinational corporations produce, distribute content and often operate their businesses across national borders. In addition to this, collaborative projects and research cooperation between higher education institutions in various countries have constantly been designed, funded and developed.

The problem immensely occurs when many higher educational institutions are being privatized, research funding is cut down and many available funds to support access to research materials online are decreasing. A very good example is when the UK Centre for Legal Education, that has been providing a wealth of information and resources on teaching and learning in law has to cease their activity in 2011, following the decision of the UK Higher Education Academy<sup>1</sup> to discontinue their funding to the Centre. Unfortunately, in many instances, users have to comply with the owners' demands just so that they would be able to utilize the copyright materials and complete their research in a satisfactory manner.

## 2. Exceptions to copyright protection

Despite the fact that copyright protection is expanded and strengthened to protect copyright owners' work, copyright law does provide certain exceptions for the interest of the users. In certain circumstances, users may use copyright works freely without the need to seek permissions nor payment to the copyright owners such as if the use falls under the three step test, 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.<sup>2</sup> However, this paper will specifically discuss on available copyright exceptions that may apply to the use of copyright works for research purposes.

The role of copyright exceptions is extremely important especially for developing countries as they are considered as "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".<sup>3</sup> Copyright exceptions also have the role of balancing the negotiating process between copyright owners and copyright users especially in a world where all information users are contractually bound to information providers.

## 3. Copyright Exceptions for Research Purposes

It is important to identify what 'research' actually means before the provisions on the exceptions available for research purposes are analysed. There are no clear definitions on the meaning of "research" provided by neither international copyright agreements nor local provisions. Nevertheless, Beaumont J. in *De Garis v. Neville Jeffress Pidler Pty Ltd*,<sup>4</sup> viewed that the term "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...". When this case was further referred to in the New

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<sup>1</sup> Higher Education Academy (2011), Future of UKCLE. Retrieved 07/07/2011, from <http://www.ukcle.ac.uk/about/future/>

<sup>2</sup> Consumer International Asia Pacific Office. (2006). Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Law. Kuala Lumpur: Consumer International.

<sup>3</sup> 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>  
<sup>4</sup> (1990) 18 IPR pp. 292 and 298-9

Zealand High Court case, *Television New Zealand v. Newsmonitor Services*,<sup>5</sup> Blanchard J. further adds that, “[r]esearch involves the study of things, including written materials or those captured in electronic form”. Moreover, in *CCH Canadian v. Law Society of Upper Canada*,<sup>6</sup> the court 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.” Hence, the definitions of “research” seem to be broad in its scope and application.

Accordingly, Burrell and Coleman<sup>7</sup> explain that copying for the purpose of research or study can be divided into two stages. The first stage occurs when the researcher obtains or copies various extracts of earlier published and unpublished works for his own reference and understanding at the very early stages of writing. The second stage of research or study happens when the results are presented either through publications or conference presentations, and the researcher wishes to make reference to source material<sup>8</sup>.

Thus, research includes not only 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.

#### **4. Exceptions for Research Purposes in International Agreements**

There are no particular provision in the international agreement that specifically allow free use of copyright works for research purposes but such exception falls under the general provision governing exceptions and limitations in national legislations, particularly Article 9(2) of the Berne Convention as well as Article 13 of the TRIPs Agreement which contain similar wordings with slight modification. Due to the openness and abstract criteria of the wordings,<sup>9</sup> the same were also incorporated in Article 10 of the WIPO Copyright Treaty and Article 16 of the WIPO Performances and Phonograms Treaty.<sup>10</sup>

Under these provisions, countries may make exceptions to copyright protection that suits their national interests provided that it fulfils certain conditions. This requirement which is commonly referred to as the ‘the three step test’ becomes the controlling mechanism at the international level. Article 9(2) of the Berne Convention 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

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<sup>5</sup> [1994] 2 NZLR pp. 91 and 105

<sup>6</sup> [2004] SCC 13, para 51

<sup>7</sup> Burrell, R., & Coleman, A. (2005). *Copyright Exceptions: The Digital Impact*. New York: Cambridge University Press.

<sup>8</sup> Burrell, R., & Coleman, A. (2005). *Copyright Exceptions: The Digital Impact*. New York: Cambridge University Press.

<sup>9</sup> 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.

<sup>10</sup> Ficsor, M. (2002b). *The Law of Copyright and the Internet*. Oxford: Oxford University Press.

exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The three step test basically permits copying in various forms and is sufficiently general to cover any technological means of copying. The provision also do not specify any particular purposes that may fall under this exception, as they were deliberately created in abstract terms for countries to apply it within their national laws to suit their national interests.

The three step test however requires that exceptions be made in ‘certain special case’ only. This refers to activities that has clear reason of public policy or other exceptional circumstances such as public education, public security, freedom of expression, the needs of disabled persons, or the like provided that it does not curtail author’s rights in an arbitrary way.<sup>11</sup> Fair dealing exception for research purposes may be regarded as “special case” simply because its scope has traditionally been considered fairly limited.<sup>12</sup> Nevertheless, the question whether research conducted for personal or private use may qualify as special case in the sense of the three step test is a debatable issue<sup>13</sup> especially when applied in digital environment where it may become too broad a category to be regarded as a “special case” under the three step test.

The second important conditions required by the three step test are that national limitations or exceptions ‘must not conflict with a normal exploitation of the work’, meaning 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.”<sup>14</sup> For example, countries cannot allow exception for novels and schoolbooks which are normally exploited by printing and selling to the public, even if payment is made to the copyright owner under compulsory licence.<sup>15</sup> The 1967 Stockholm Conference general report has also provided a clear illustration by stating that:

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 are made, photocopying may be permitted without payment, particularly for individual or scientific use.

The third condition ‘does not unreasonably prejudice the legitimate interest of the author/ right holder’ were said to have provided some flexibility for countries.<sup>16</sup> It was

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<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> Wahid, R. (2011) *Exploring Flexibilities Within the International Copyright System for Teaching, Research and Study*, PhD Thesis, University of East Anglia, Norwich, United Kingdom.

<sup>14</sup> WIPO (1971) *Records of the Intellectual Property Conference of Stockholm*

<sup>15</sup> Masouye, C. (1978). *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971)*. Geneva: WIPO.

<sup>16</sup> 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

asserted that “unreasonable prejudice to the legitimate interests of the author” may be avoided by the payment of remuneration under a compulsory license.<sup>17</sup> Nevertheless, some commentators viewed that such requirement may restrict the availability of uncompensated exceptions.<sup>18</sup>

Analysis of the three step test reveals that the provision is ambiguous, vague and open-ended, therefore giving rise to differing interpretations. Narrow interpretation may lead to strong protection of copyright owners while broad interpretation will render more flexibility and afford greater freedom for copyright users. The abstract nature of the three step test thus allows certain degree of freedom for countries to react adequately and to craft inevitable exception in order to address important social or cultural needs.<sup>19</sup> The wording of the three step test was purposely couched in an open manner so as to curb limitations on the exclusive right of reproduction but at the same time respecting the interest of member states that have various long-standing limitations to reproduction right.<sup>20</sup> Thus, it is very much up to the individual states to creatively utilize the flexibilities provided by the international agreements to their maximum potential.

## 5. Exceptions for research purposes in national laws

The application of international copyright agreements at the national level varies from one country to another.<sup>21</sup> National legislator assess the extent of exceptions adopted for the benefit of educational and research institution differently<sup>22</sup> and they retain a great measure of discretion in the way they interpret and implement their international copyright obligations.<sup>23</sup>

The United Kingdom<sup>24</sup>, Australia<sup>25</sup> and Malaysia<sup>26</sup> have all permitted copyright exception for research purposes but with certain conditions attached.

### 5.1 Fair dealing

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05/07/2009, from  
[http://www.soros.org/initiatives/information/articles\\_publications/publications/copyright\\_20080506](http://www.soros.org/initiatives/information/articles_publications/publications/copyright_20080506)

<sup>17</sup> WIPO (1971) *Records of the Intellectual Property Conference of Stockholm*

<sup>18</sup> 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](http://www.soros.org/initiatives/information/articles_publications/publications/copyright_20080506)

<sup>19</sup> Heide, T. (1999). The Berne Three Step Test and the Proposed Copyright Directive. *European Intellectual Property Review*.

<sup>20</sup> 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.

<sup>21</sup> 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](http://copyright.surf.nl/copyright/files/International_Comparative_Chart_Zwolle_III_rev071306.pdf)

<sup>22</sup> Sterling, J. A. L. (2003). *World Copyright Law*. London: Sweet & Maxwell.

<sup>23</sup> Tawfik, M. (2005). 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.

<sup>24</sup> Section 29 of Copyright, Designs and Patents Acts 1988

<sup>25</sup> Section 40 and section 103C of Copyright Act 1987

<sup>26</sup> Section 13(2)(a) of Copyright Act 1987

Malaysia, through Copyright (Amendment) Act 2012 has demonstrates its commitment in ensuring stronger protection for copyright owners and is practically combating copyright piracy in the country.<sup>27</sup> Simultaneously, the Amendment has also enhanced its copyright exceptions particularly with regards to educational institutions, libraries, archives, handicapped and visually impaired persons.<sup>28</sup> Earlier provision on fair dealing exception embodied in Section 13(2)(a) of the Malaysian Copyright Act 1987 has previously exclude the right of exclusive control ‘by way of fair dealing for purposes of non-profit research ...’. This provision has however been amended into:

fair dealing including for purposes of research, private study, criticism, review or the reporting of news or current events: Provided that it is accompanied by an acknowledgement of the title of the work and its authorship, except that no acknowledgement is required in connection with the reporting of news or current events by means of a sound recording, film or broadcast;

Malaysia does not define what it means by ‘fair dealing’ but the amendment provide a new subsection namely subsection 13(2A) that underline certain factors that may be used to determine fair dealing. Section 13(2A) reads as follows:

For the purposes of paragraph 2(a), in determining whether a dealing constitutes a fair dealing, the factors to be considered shall include - (a) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes; (b) the nature of the copyright work; (c) the amount and substantiality of the portion used in relation to the copyright work as a whole and (d) the effect of the dealing upon the potential market for or value of the copyright work.

The non-exclusive list of factors to be taken into account under Section 13 (2A) is very similar to the guidelines used to determine fair use under Section 107 of the US Copyright Act. Hence the determination of what is considered ‘fair dealing’ is very much left to the users and ultimately the courts to consider based on the circumstances of each case.

Comparing this with the Australian copyright provision particularly section 40(2) and section 103C(2), the fair dealing exception for research purpose in Australia is further limited to various other conditions. This includes an extra consideration as to whether there is a possibility of obtaining the work within a reasonable time at an ordinary commercial price. Australia copyright provisions are tabled even further as to what constitutes ‘reasonable portion’ for copying in such a detail manner.

Comparatively, while the United Kingdom also allows fair dealing for research purposes as stipulated under Section 29(1) of the Copyright, Designs and Patent Act 1988, it is silent on the factors that needs to be considered when determining fair dealing for research purposes. Thus, it leaves the question for courts to determine according to the circumstances of the case. Over time, the English courts have approach

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<sup>27</sup> Kuok Yew Chen and Edwin Lee Yong Cieh, Keeping Copyright relevant, *The Sun Daily*, 11 June 2012, Monday

<sup>28</sup> Annie Cheng (2012) MyIP Buletin April 2012. Retrieved 20/09/2013 from <http://www.myipo.gov.my/documents/10192/141264/ipbulletin032012.pdf>

the matter in different ways and common factors that the court considers are the type, nature and amount of the work used, the quantity of copies made, the effect of dealing on the market, whether the defendant's purpose could have been achieved by other means, and even what happens to a copy after it has been made.<sup>29</sup>

In *Hubbard v. Vosper*,<sup>30</sup> for example, Lord Denning list down three factors that needs to be considered namely the number and extent of the materials, the use made of them as well as the proportions. Nevertheless, Lord Megaw in the same case viewed that reproducing the whole work might be permissible particularly if the work is short. Yet, it often happens that many courts approach the question of fair dealing narrowly and in a restrictive manner such as in the case of *University of London Press Limited v. University Tutorial Press Limited*.<sup>31</sup> As such, what is considered fair dealing is still subject to different interpretations and open to uncertainties.

Seemingly, the practical implication that Malaysia may have from the newly inserted 13(2A) provision is that the courts will have clearer guidelines on how to determine fair dealing. Users may also have better perception on when they can use the exceptions for research purposes. Nevertheless, the matter is still open to various interpretations and still far from clear. As we could see from Australian experience, despite their detail and lengthy provisions available for courts to decide on the concept of fair dealing, what is considered fair is still uncertain and debatable.

The difficulties in ascertaining what is fair dealing can be illustrated in *TCN Channel Nine Pty Ltd v. Network Ten Pty Limited*.<sup>32</sup> In deciding whether Channel Ten had infringed Channel Nine's copyright by showing extracts from twenty of its broadcast programs, three judges 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...<sup>33</sup>

[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...<sup>34</sup>

This is a matter on which different persons might legitimately hold different conclusions.<sup>35</sup>

Even when the case was finally decided for the fifth time and after four years,<sup>36</sup> the scope and application of the fair dealing defences still remain unresolved.<sup>37</sup>

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<sup>29</sup> Wahid, R. (2011b). The Fairness of 'Stealing' Knowledge for Education. *Journal of International Commercial Law and Technology*, 6(2), 86-95.

<sup>30</sup> [1972] 2 QB 84

<sup>31</sup> [1916] 2 Ch 601

<sup>32</sup> [2001] FCA 108

<sup>33</sup> Sundberg, J. [2002] FCAFC 146; 55 IPR 112 (20 May 2002) at pg. 2.

<sup>34</sup> Finkelstein J. [2002] FCAFC 146; 55 IPR 112 (20 May 2002) at pg.16

<sup>35</sup> Hely J. [2002] FCAFC 146; 55 IPR 112 (20 May 2002) at pg.110

<sup>36</sup> [2004] HCA 14 (11 March 2004)

<sup>37</sup> Zwart, M. D. (2005). Case Note: TCN Channel Nine v Network Ten (No 2). *Media and Arts Law Review*, 10(249).

## 5.2 Non commercial

Previously, Malaysia under section 13(2)(a) permitted fair dealing only in “non-profit research” but the 2012 Amendment omitted the word ‘non-profit’ in section 13(2)(a) and left the issue ‘whether such dealing is of a commercial nature or is for non-profit educational purposes’ as one of the factors that courts need to consider when determining fair dealing. This amendment somehow does not limit the exception for research purposes to non-profit or non-commercial research only, as it normally does before the amendment. It actually allow fair dealing for research purposes, no matter whether it is conducted with the intention of obtaining commercial gain or without such intention to do so.

This approach somehow departs from the approach taken by the United Kingdom that limits copyright exceptions for research purposes to research for non-commercial purposes only. The definition as to what constitutes ‘commercial purposes’ is however absent as it was regarded as too expansive to be limited by a definition.<sup>38</sup> Again, it is left for the researcher or student to decide whether a particular use of copyright work may constitute “commercial” use or not.

Nevertheless, according to the British Library and the Copyright Licensing Agency,<sup>39</sup> a body that represents many copyright holders in the UK, the term ‘Commercial’ is broader than ‘profit-making’ and in practice it is synonymous with ‘directly or indirectly income-generating’. It further describes that what matters is the intention or purpose at the time the request for a copy is made which must be unambiguously non-commercial and any genuinely unforeseen income at a much later date is not relevant to the question. This include copying of works made by a sponsored student for research that have commercial value, which may potentially be used for financial gain, and a university conducting research sponsored by a commercial organization. Here, the status of the organization is irrelevant whether it is commercial or non-commercial but more emphasis is put on the intention of copying. Some commentators<sup>40</sup> viewed that the scenarios illustrated in the Joint Note to explain ‘commercial use’ seems restrictive and would possibly limit activities that might be useful for educational development.

Other activities that may be considered commercial include courses organized by educational establishment which requires the attendees to pay certain fees intended to generate income as well as speakers at a conference or events where their speeches are paid.<sup>41</sup> Yet, there is no fine line on what can be considered as commercial and non-

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<sup>38</sup> 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](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)

<sup>39</sup> 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](http://www.cla.co.uk/data/corporate_material/submissions/2003_cla_and_bl_joint_note_on_changes_to_copyright_law_nov03.pdf)

<sup>40</sup> Burrell, R., & Coleman, A. (2005). *Copyright Exceptions: The Digital Impact*. New York: Cambridge University Press.

<sup>41</sup> 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>



commercial and this is encountered by private educational institutions that need to balance both commercial and academic objectives.<sup>42</sup> Uncertainties may emerge 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.<sup>43</sup>

Through the 2012 Amendment, Malaysia has taken a similar path with Australian that does not restrict the exception for research only to non-commercial use only, which is a good move. By doing so, again, the matter is ultimately left to the court to decide according to what is fair based on the circumstances of the case. The implication of this particular change may lead to two conflicting views on the issue. Some may take the narrow view that exceptions should only apply to non-commercial research. For example in *De Garis v. Neville Jeffress Pidler Pty Ltd*,<sup>44</sup> the Federal court held that 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 not be considered as fair dealing permitted for research purposes.

On the other hand, some may argue that it is common that research is linked with development and as stated by Blanchard J. in *Television New Zealand v. Newsmonitor Services*,<sup>45</sup> ultimately it is intended that the product be made public and to enable commercial exploitation. As such, there is no reason to limit the purpose of research to those activities that increase knowledge only.<sup>46</sup> Here, the Malaysian court will have more flexibility in determining what is considered fair dealing for research purposes as the exception is no longer confined to non-profit research only, which is of very limited scope.

## 6. Researchers at work

Based on the above discussion, the fair dealing exception for research purposes is an extremely complex principle that may render it difficult for layman to tell in advance whether or not certain use may be considered as fair dealing. Hence, it may not be a very reliable provision that could protect oneself from committing copyright infringement. While the entangled, obscure and confused cobweb of copyright exceptions for research purposes still remains, at the end of the day, it is upon the researchers or copyright users to decide what actions or exercise they could take to ensure the legality of their actions when using copyrighted materials for research purposes.

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<sup>42</sup> 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.

<sup>43</sup> 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](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)

<sup>44</sup> (1990) 18 IPR 292

<sup>45</sup> [1994] 2 NZLR, para. 51

<sup>46</sup> 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](http://www.copyright.org.au/pdf/ccs/CCS0202.pdf)

First and foremost, it is important that the users are aware of the scope of copyright law and its exceptions. It is crucial to understand that copyright does not only protect published work but also unpublished work and works in an electronic format which includes letters, email messages, works in electronic database and materials online.<sup>47</sup> Thus, one needs to be careful when taking things from the internet or elsewhere because copyright protection for original creative work is automatically granted. Researchers should also have good knowledge on what works are in public domain as these works are not copyrighted and may be used freely. As for Malaysia, this may include government works, text of laws, judicial opinions and other government reports.

It is advisable that researchers or users try to obtain works available from the creative commons rather than works from organizations that may aggressively protect and enforce their copyright. Most importantly, users and researchers themselves should always take the initiative to share their work freely such as through open access as well as supporting and calling for law that will provide better access to information. The copyright exceptions should not just be observed as irregularities but should be taken to be the rights of the people, which must be seriously considered.

## 7. Conclusion

The copyright exception for research purposes is pertinent in order to safeguard free expression as well as to promote future development, especially when it involves education as well as scientific progress. The general provision governing copyright exceptions, namely the three step test has been purposely couched in an open and abstract manner making it possible for countries to create copyright exceptions that will work to their national advantage<sup>48</sup> and ultimately benefit the people at large. It is thus suggested in the declaration on “A Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law” that states use this flexibility to shape their own copyright law according to their own cultural, social and economic development needs.

Nevertheless, as already analysed earlier, the use of copyright exceptions for the purpose of research is somehow limited by national laws through various conditions being imposed before certain act can qualify as copying for research purposes and free from copyright regulation. The fair dealing requirements were cautiously guarded with various considerations and the scope of research may potentially be limited to non-commercial research purposes only. One might argue that such preconditions or elements are necessary to protect the copyright holders and to stop free-riders from taking advantage of other’s people labour but the anxiety to protect copyright owners must also correspond with the greater need of people to access information and understanding on how such law could dispense upon the area of knowledge distribution.<sup>49</sup>

Through the copyright amendment 2012, Malaysia has attempted to clarify the matter by outlining the factors that needs to be considered in determining fair dealing.

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<sup>47</sup> Sandy, N. (2004). *Practical Copyright for Information Professionals: The CILIP Handbook*. London: Facet Publishing.

<sup>48</sup> 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](http://www.iprsonline.org/unctadictsd/docs/Suthersanen_A2K.pdf)

<sup>49</sup> Wahid, R. (2008). *International Copyright Law and Access to Information in Developing Countries*. *Communicare*, 8(1).

This provides certain guidelines for court to deal with the issue. Nevertheless, as we could see from the Australia experience, despite very detail description of what fair dealing amounts to, it is still difficult for one to decide what is fair dealing. Mere replicating the legal structure or laws of developed countries will not be sufficient in dealing with the question of what shall be the appropriate means of providing exceptions for research purposes. This is because Malaysia or any other country will have a fundamentals social, economic and cultural difference with the developed countries such as the United Kingdom and Australia. Adopting laws that totally mirror different cultural and political assumptions would only led to resentment, lax enforcement and other unforeseen problems.<sup>50</sup>

It is thus crucial for individual country itself to cultivate its own notion of values and attitudes that will bring about tailored laws which will generate individual economic well-being. It is recommended by the United Nation 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”.<sup>51</sup> This could only be achieved if the regulatory system maintain and preserve the original values on which the copyright system was built,<sup>52</sup> which is to encourage and promote learning<sup>53</sup> and not retaining stringent rules that hinder access to knowledge and learning materials.

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<sup>50</sup> 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).

<sup>51</sup> 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).

<sup>52</sup> Wahid, R. (2011) *Exploring Flexibilities Within the International Copyright System for Teaching, Research and Study*, PhD Thesis, University of East Anglia, Norwich, United Kingdom.

<sup>53</sup> 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.