

A Summary of the *Copyright Amendment Act 2006*

The *Copyright Amendment Act 2006* ('the Amendment Act') has amended the *Copyright Act 1968* ('the Act') in a number of ways that will significantly affect educational institutions. In general, the changes are highly favourable to the education sector.

The Amendment Act is a response to the Digital Agenda Review and Fair Use Inquiry, the Technological Protection Measures Exceptions Inquiry, proposals to amend the jurisdiction of the Copyright Tribunal and conditions imposed by the Australia-US Fair Trade Agreement.

The Amendment Act received Royal Assent on 11 December 2006. All of its provisions are now in force.

Below is a summary of the main provisions of the Amendment Act that impact on educational institutions.

Educational Exceptions

(i) Flexible Dealing (s 200AB(3))

The new flexible dealing provisions allow educational institutions to use all forms of copyright material for the purpose of educational instruction, provided that the use complies with a 3-step test, which is the standard set by international copyright treaties, of which Australia is a signatory. 'Use' would include copying, communication and other acts ordinarily covered by copyright.

In order to comply, the use must be non-commercial and:

- be limited to 'certain special cases';
- not conflict with 'normal exploitation' of the work; and
- not 'unreasonably prejudice' the interests of the copyright owner.

Some activities that will now be covered by this new flexible dealing exception are:

Example 1: A teacher can convert an educational resource from a VHS to a DVD, **provided that a DVD of the resource is not commercially available.**

Example 2: A teacher can create a captioned version of DVD for playing to a class that includes hearing impaired students, **provided that a captioned version of the DVD is not commercially available.**

Example 3: A teacher can download a podcast to play in the classroom, provided that the podcast is made available for free.

We are currently reviewing international case law in relation to the 3-step test in order to determine the scope of this provision, and we will report to you in due course. We will also provide you with further examples of activities that will be permitted under this section.

In the meantime, Schools and TAFEs should seek advice about whether the section applies in a particular situation.

(ii) Fair Dealing for Research and Study (ss 40(3)-(8))

The amendments to this section provide clarification rather than making substantive changes. The law dealing with limitations on copying for research and study has been clarified as follows:

(i) a ‘reasonable portion’ means:

Work or Adaptation	Amount that is a reasonable portion
A literary, dramatic or musical work, or of an adaptation of such a work, contained in an article in a periodical publication	All of it
A literary, dramatic or musical work (except a computer program), or an adaptation of such work, that is contained in a hard copy published edition of at least 10 pages	(a) 10% of the number of pages in the edition; or (b) if the work or adaptation is divided into chapters – a single chapter
A published literary work in electronic form (except a computer program or an electronic compilation, such as a database), a published dramatic work in electronic form of such a literary or dramatic work	(a) 10% of the number of words in the work or adaptation; (b) if the work or adaptation is divided into chapters – a single chapter

(ii) a person can copy more than a reasonable portion, including a whole work for research or study, by reference to the following factors (which were already contained in the section 40(2) of the Act):

- the purpose and character of the dealing;
- the nature of the work or adaptation;
- the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- the effect of the dealing on the potential market for, or value of, the work or adaptation; and
- in a case where only part of the work or adaptation is reproduced, the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

A new sub-section 40(7) clarifies that a person cannot automatically reproduce more than one 'reasonable portion' from the same work under section 40. If they want to copy another reasonable portion, they will have to assess whether that copying would be fair by reference to the above factors.

Digital Agenda

(i) Proxy Caching (s 200AAA)

The new caching provisions clarify that proxy caching is permissible and not a remunerable activity. This was a welcome inclusion in the Amendment Act, as earlier versions of the Bill did not adequately deal with proxy caching. It was important for the education sector to clarify that proxy caching does not infringe copyright, as this issue is central to CAL's case against Schools in the Copyright Tribunal. CAL argued in the Tribunal that proxy caching involved the reproduction of a work, which was a remunerable activity.

The new provision confirms that proxy caching does not infringe copyright.

(ii) Reading from the Internet (s 22(6A))

CAL also argued in the Tribunal that reading from the Internet infringed copyright. It argued that the act of clicking on a hyperlink was a communication to the public. Section 22(6A) confirms that a student reading from the Internet or clicking on a hyperlink to gain access to a webpage does not exercise the right of communication, and these activities are not remunerable under the Part VB statutory licence.

(iii) Section 28 (Sub-sections (5)-(7))

The new sub-sections of section 28 significantly extend the scope of the section.

Previously, section 28 allowed a literary, dramatic or musical work to be performed, or a film or sound recording to be played, in class for the purposes of educational instruction. The new provisions will extend the scope of this section to enable teachers and students to communicate:

- literary, dramatic musical works;
- film and sound recordings;
- television and radio broadcasts (including works embodied in those broadcasts); and
- artistic works to the class. This would allow, for example, use of a centralised reticulation system to play a video or DVD.

The new provisions will also allow teachers and students to display or project material in the classroom, for example on an electronic whiteboard or using a data projector. This means that the act of 'displaying' or 'projecting' should no longer be included in the Schools EUS survey, as it is now a non-remunerable activity.

Statutory Licences

(i) Insubstantial Copying (s 135ZMB (1A) and (2))

The Amendment Act introduced two changes in relation to insubstantial copying.

Firstly, if an electronic work is paginated (such as a PDF document that looks like the hard copy version), a teacher can now copy 1 or 2 pages of that work, without having to count the number of words to ensure the section copied is less than 1% of the words in the work. If the electronic work is not paginated (such as a web page), the teacher will still have to count the words to make sure they copy less than 1% of the total words.

Secondly, the Amendment Act imposes a new requirement in Part VB that in order for any copying of works in an electronic form to be regarded as insubstantial, and therefore non-remunerable, the works must be consecutive. This is the only issue that did not represent a positive outcome for the education sector. It is disappointing that this provision has been included. It means that if a teacher copies paragraphs 1 and 3 from a website, even if the total number of words copied is less than 1% of the total work, paragraph 3 will not be considered insubstantial, and will therefore be remunerable under Part VB.

This could have a significant financial impact on Schools' payments under the Part VB statutory licence. It also places a more onerous standard on education than is applied to the general public and other industries using copyright material.

(ii) Records Notices (see ss 135K(2A) and 135ZX(2A))

The Act currently contains a default record keeping scheme for both the Part VA and VB licences. The Amendment Act retains these provisions, but introduces a new ability for educational institutions and collecting societies to agree on aspects of the records notice scheme other than the default scheme. If the parties cannot agree the Copyright Tribunal may make a determination about these additional issues.

(iii) Podcasts and Webcasts (s 135C)

The Part VA licence has been broadened to include free-to-air podcasts and webcasts. This means that educational institutions can now copy and communicate podcasts, provided that the podcasts originated as free-to-air broadcasts.

(iv) Electronic Anthologies (s 135ZMDA)

This section provides that educational institutions can copy and communicate up to 15 pages from any anthology published in an electronic form. This only applies to paginated electronic anthologies.

Other Relevant Amendments

(i) Copyright Tribunal (s 157A)

A party to Tribunal proceedings will now be able to require the Tribunal to have regard to Australian Competition and Consumer Commission ('ACCC') guidelines. The ACCC is in the process of developing guidelines in relation to collecting societies and copyright licensing. The ACCC has released draft guidelines for public comment. Submissions on the guidelines are due on 31 January 2007.

(ii) Technological Protection Measures (Part V Division 2A and Subdivision E)

Prior to the introduction of these amendments, it was an offence to deal in Technological Protection Measures (TPMs), but not to use them. It is now also an offence to use a circumvention device to break a TPM. There is an exception to this rule for education – it is possible for an educational institution to break a TPM on its premises to copy or communicate works in electronic form under the Part VB licence.

The exception does not extend to the Part VA licence. However, there is a mechanism established to allow us to request the Government to extend the exception to cover Part VA if there is evidence that TPMs are having an adverse impact on the ability to use the Part VA licence.

(iii) Parody and Satire (s 40)

A new fair dealing exception has been created for parody and satire. This exception is not subject to the 3-step test.

Other Issues Not Included in the Amendment Act

(i) Strict Liability Provisions

The Government previously proposed a number of strict liability provisions which may have made Schools and TAFEs liable for the criminal activities of students and staff. Fortunately, these provisions are not included in the Amendment Act.

(ii) Safe Harbour

Internet Service Providers are afforded some protection against liability for authorisation of infringement by users by simply hosting websites that may contain infringing material. This same protection does not extend to education institutions, and the Amendment Act has not altered this situation.

This summary provides an overview of the key amendments relevant to Schools and TAFEs. Some of the amendments are quite complex, and we will be preparing a more detailed explanation of those provisions, including examples of how they are likely to be applied.

For further information see the SmartCopying website at www.smartcopying.edu.au or contact your local copyright manager.