

Copyright Amendment Act 2006: what's changed for universities?

The *Copyright Amendment Act 2006* ("the Amendment Act"), which came into force on 1 January 2007, amended many parts of the *Copyright Act 1968* ("the Act") which are relied on by universities or otherwise impact on their day to day operations.

This document contains a broad overview of the changes which are of most interest to universities. Relevant AVCC documents – including the FAQ's and the University IT Systems Resource Paper – are currently being updated to take account of these changes. The documents will be circulated shortly and will contain more detailed information regarding each of the changes discussed below.

1. Clarification of the status of browsing, linking and caching

The Amendment Act contains two changes directed towards clarifying the status of browsing, linking and caching.

The first is s 22(A), which provides that a person is not responsible for determining the content of a communication (and thus not responsible for having exercised the right of communication to the public) merely because the person clicks on a link to gain access to material which has been communicated by another person.

The second is s 200AAA, a new educational institution caching exception which provides that educational institutions who cache for efficiency purposes are not infringing copyright.

Each of these amendments were a direct response by the government to Copyright Tribunal proceedings brought by *Copyright Agency Limited* ("CAL") against schools in which CAL sought payment from schools for caching by schools and browsing by students. The amendments have, for the most part, foreclosed any attempt by CAL to seek remuneration from universities and schools for caching, browsing and linking.

The AVCC has lobbied strongly for a number of years for the caching exception and this is a major achievement for the sector.

2. New classroom performance exception

Section 28 of the Act, which contains an exception for classroom performance of works and other subject matter, has been extended to apply to the communication right as well as the performance right. Previously, it was not permissible to rely on s 28 of the Act in circumstances where a work, broadcast etc was delivered to students via a networked system (for example, where material was being delivered to students in remote classrooms or campuses). On this basis, Screenrights had reserved its right to seek payment from educational institutions for the act of delivering broadcasts to students via a networked system. This anomaly in the Act has now been dealt with following much lobbying by the AVCC and other education sector groups. The amended exception is subject to the same limitations as previously applied to s 28: ie the exception is only available where:

- (a) the work, broadcast etc is being performed (ie shown to students) in class or otherwise in the presence of an audience which does not include parents, members of the public etc; and
- (b) the work etc is performed by a teacher in the course of giving educational instruction (not being instruction given for profit) or by a student in the course of receiving educational instruction.

Example:

A lecturer is preparing to deliver a lecture to students situated on two campuses. The lecturer will be using a video-conferencing system to deliver the lecture. Whereas previously the lecturer could not have included commercially hired or purchased audio-visual material in a lecture which was being delivered via technology of this kind (as this is not covered by the Part VA statutory licence and was not, until 1 January 2007, covered by s 28 of the Act) the lecturer can now do so.

3. New educational "certain purposes" exception

New s 200AB is an exception which can be relied on by educational institutions for certain purposes where no other exception is available.

Depending on the circumstances in each case, such purposes *might* include format shifting. This exception will be subject to an institution satisfying the court that the exception is warranted, in each case, pursuant to the so-called "three step test". This test, which is contained in various international copyright treaties, is generally applied to determine whether domestic copyright legislation complies with international treaties. Previously, no government has incorporated the three step test into its domestic copyright legislation.

It is likely to be many years before Australian courts develop a jurisprudence which allows copyright lawyers to advise with any certainty as to the likely application of the new exception. However, the Department of Attorney General has given the following examples of uses which *may* be permissible:

- A library using a work without the copyright owner's permission because the copyright owner could not be identified or contacted.
- An educational institution converting into another format a video cassette of teaching material because the material is no longer commercially available.

4. Podcasts of broadcasts included in Part VA

The Part VA statutory licence, which allows universities to copy and communicate broadcasts, has been extended to include broadcasts which have been made available online by the broadcaster, including podcasts of broadcasts. The ABC in particular makes a significant number of its broadcasts available online. Universities will now be able make better use of existing technology by using the digital version of a broadcast when making broadcast material available to students.

5. Insubstantial copying and communication of works in electronic form

The provisions which relate to insubstantial copying and communication of works in electronic form have been amended as follows:

Firstly (and subject to the further proviso discussed below), if the work to be copied/communicated is in a format whereby the content of the pages is unlikely to change regardless of the system used to view, reproduce or communicate them (eg a pdf document, where the pagination is "fixed"), then it is permissible to copy/communicate 1 or 2 pages of the work or up to 1 per cent of the pages if there are more than 200 pages. It will be recalled that previously it was necessary to do a word count of an

electronic document in order to ensure that the copying/communication did not exceed 1 per cent of the *words* of the work. The amendment reflects the reality that many electronic documents are in a format where the pagination is "fixed". The new method of calculating insubstantial amounts in respect of such documents will make the lives of academics and copyright officers a little easier. If the work is not paginated in a fixed form then the test remains (subject to the further proviso below) that up to 1 per cent of the words can be copied/communicated in reliance on this exception.

Secondly (and less favourably to educational institutions), it will no longer be permissible to copy or communicate passages from different parts of a work in order to make up the 1-2 pages or 1 per cent of the words. The passages to be copied or communicated in reliance on this exception must be continuous. This change is not expected to cause undue inconvenience to universities (as opposed to schools) given that the amount of 1 and 2 page copying in universities is not significant.

Example:

Lecturer A wants to copy two consecutive paragraphs from page 4 of an electronic work and six consecutive paragraphs from page 6 of the same work. Only the first two paragraphs (or the second six paragraphs) can be copied in reliance on the insubstantial copying/communication provision in s 135ZMB of the Act, as the passages do not appear consecutively. It is no longer permissible to "cherry pick" from different parts of a work when relying on this exception, even if the total amount copied/communicated does not exceed two pages or one per cent of the work. Of course, the lecturer can still rely on the Part VB licence to copy up to 10 per cent of the work.

6. Records notice provisions

The provisions relating to record keeping with respect to Part VA and Part VB have been amended to provide for universities and the relevant collecting society (ie Screenrights or CAL) to agree to amend the prescribed record keeping provisions contained in the Copyright Regulations. If the parties cannot reach agreement on this, either party can approach the Copyright Tribunal to seek to have the Tribunal make a determination about this.

7. Technological protection measures

The technological protection measure ("TPM") provisions in the Act have been expanded and brought into line with the US Digital Millennium Copyright Act ("DMCA"). The most significant change is that there is now a prohibition on *use* of an anti-circumvention device or service to circumvent an access control TPM. Previously, the only prohibition was on the commercial *supply* of such devices/services. Examples of an access control TPM include a password that prevents access to an electronic document and encryption that prevents unauthorised access to streamed music or video. TPM's which control geographic market segmentation are not intended to be caught by these new provisions. It remains to be seen how successfully the drafters of the legislation have been in "carving out" an exception for region coding.

The new provisions are subject to certain limited (but important) education sector exceptions. These include an exception allowing an educational institution to use a circumvention device or service in order to access a protected work for the purpose of exercising its rights under Part VB of the Act (but not Part VA). It is not permissible, however, for one institution to supply another with a circumvention device or service. This means that an institution can only take advantage of the exception if it is in a position to manufacture its own circumvention device.

8. Electronic anthologies

Following much lobbying by the AVCC and other education sector groups, the Act has been amended to extend the anthology provision in Part VB of the Act to electronic anthologies, provided that these are in a format whereby the pagination is fixed (eg pdf).

9. Other

The Amendment Act included other changes which, where relevant, will be discussed in the FAQ's and other documents to be circulated by the AVCC shortly. These include changes to the library copying provisions, new time-shifting and format-shifting exceptions (which apply to personal users only) and new criminal enforcement provisions.

The Amendment Act did not address education sector concerns regarding the failure to include universities in the *Copyright Act* safe harbours, however the AVCC has been assured by the Department of Attorney General that this is still on the government's agenda. The AVCC will also continue to press for a government response to the Copyright Law Review Committee recommendations on copyright and contract which have not, to date, been the subject of copyright law reform.