

Print and Graphic Copying and Communication Guidelines

Failure to follow these GUIDELINES could lead to copyright infringement action.

Introduction

These **GUIDELINES** provide information about copyright. They are not comprehensive. The full text of the *Copyright Act 1968* (updated to incorporate the Digital Agenda amendments), and the relevant Copyright Regulations, should be consulted, and legal advice obtained, if particular questions concerning copyright arise.

What does copyright cover?

Material protected by copyright is divided into two broad categories of subject matter: **works**, and **subject matter other than works**. Print and graphic material which is copied in universities will generally fall into the first category.

Works

The category of works is further divided into:

- literary works (which include computer programs);
- dramatic works;
- musical works; and
- artistic works.

For a work to receive copyright protection it must be "original" and it must be "reduced to material form".

The originality requirement requires only that the author of the work has used some skill, and has not copied ingenuity and labour in making the work; not that the thought or idea embodied in the work be novel or new. Copyright protects the expression of the thought, not the originality of the thought or idea.

It follows from this that until a work is "reduced to material form", there is nothing for copyright protection to attach to. A speech given extempore, for example, would not attract copyright protection. A written speech, on the other hand, would be protected as a literary work.

Infringement of copyright

Copyright is a bundle of exclusive rights to do, or authorise others to do, certain acts in relation to the protected material. The scope of the rights depends on the subject matter.

An **infringement** of copyright occurs where an act comprised in the copyright is done in relation to a "substantial part" of a work or other subject matter. "Substantial part" is not defined in the Act, but in deciding whether or not an act amounts to an infringement, courts have placed a greater emphasis on the quality of what is used than the quantity.

The exclusive rights enjoyed by owners of copyright in **literary, dramatic and musical** works are the rights to do or authorise the following acts:

- reproduce the work in material form;
- publish the work;
- perform the work in public;
- to communicate the work to the public;
- make an adaptation of the work; and
- do any of these acts in relation to an adaptation of the work.

The exclusive rights in relation to **artistic** works are more limited, and consist of the rights to:

- reproduce the work in a material form;
- publish the work; and
- to communicate the work to the public.

For Universities, the most relevant of the exclusive rights are the **reproduction** right and the **communication** right.

When print and graphic material is copied, there is a reproduction of any work or works comprised in the material.

The communication right is exercised when a copyright work is **made available to the public on line** (e.g. uploaded onto a university server in a form which can be accessed by students) or **electronically transmitted to the public** (e.g. forwarded as an electronic file or email attachment).

When and how can Universities copy or communicate copyright material?

There is no copyright infringement if:

- the copyright is owned by the University;
- the material has been supplied to the University with an express licence to copy and/or communicate;
- you obtain permission from the relevant copyright owner;
- the proposed copying and/or communication falls within any of several exceptions in the *Copyright Act* that allow limited amounts of copying and communication without payment; or
- the copying and/or communication is covered by the "statutory licence" for copying and communicating print and graphic material in universities. Universities make payments, through Copyright Agency Limited (CAL) for copying and communicating under the statutory licence.

The following sections of these **GUIDELINES** will help you decide whether your proposed copying or communication falls within one of the exceptions to copyright law (Part 2) or within the statutory licence (Part 3). If it does not, there may be a copyright problem and you must not make the copies, or communicate the work, without first consulting the University Copyright Officer, copyright.officer@acu.edu.au.

To use these **GUIDELINES** you will need to know what you propose to copy or communicate (for example, who wrote and published it), how much of it you will copy or communicate and how many copies you will make; and what will happen to those copies (to whom will they be distributed or communicated and for what likely purpose).

You should then ask yourself these questions:

1. Has the person who owns the copyright given the University permission to copy and/or communicate the work? If so, you can proceed to copy/communicate without addressing the following questions. If not, then:
2. Does your proposed copying and/or communication fall within any of the exceptions to the *Copyright Act* such as “fair dealing”. If so, then you can proceed without regard to the Part VB statutory licence. For any copying/communication which is within neither of questions 1 or 2:
3. Does your proposed copying/communication fall within the statutory licence? If it does, you will need to read and comply with the obligations set out in Part 3, including the marking and notice requirements. If not, do not copy or communicate without seeking further advice from the University Copyright Officer.

Exceptions allowing for the copying or communication of copyright material without infringement

Copying/communication which is authorised by the copyright owner

Some universities enter into licence agreements with the owners of copyright in works. If you have a licence from all relevant copyright owners authorising copying and/or communication, then it is not necessary to use the Part VB statutory licensing scheme. Permission to copy might also be granted by academics or others in relation to their work, if they own the copyright. Note, however, that the mere fact that a person is the author of work does not mean that he or she retains copyright. This may have been assigned to the publisher of the work.

Examples of copying which has been authorised or licensed include the copying of Blackline Masters, copying from some electronic journals purchased under licence by the university library, copying certain court decisions and copying for which sector-wide licences have been obtained. The AVCC will be advising universities from time to time when such sector-wide permissions have been negotiated. In each case the licence terms must be observed.

Licences entered into prior to the enactment of the *Digital Agenda Act* may not expressly include the right to communicate works. If you are in any doubt as to whether the university is authorised to communicate a copyright work, you should consult your copyright officer.

Multiple copies of an insubstantial portion

Multiple copies of an insubstantial portion (usually 1 or 2 pages) of a literary or dramatic work can be made for free in certain circumstances. The copying must be carried out on the premises of the university for the purposes of a course of education provided by it. In the case of a **work which is in hard copy form**, the exception does not apply to the making of a copy of more than two of the pages of a work in an edition of the work unless:

- (i) there are more than 200 pages in the edition; and
- (ii) the total number of pages copied does not exceed 1% of the total number of pages in the edition.

In the case of a **work which is in electronic form**, this exception does not apply if more than 1% of the total number of words is copied.

A **further limitation** is that a period of more than 14 days must elapse before a person relying on this provision can seek to copy any other part of the same work in reliance on it.

The insubstantial portion provision does **not apply to artistic or musical works**.

Communication of an insubstantial portion

An insubstantial portion of a work can also be communicated without the need for payment. The communication must be carried out on the premises of an educational institution for the

purposes of a course of study provided by it. The exception does not apply to the communication of more than 1% of the total number of words in the work.

Two further limitations apply:

- a period of 14 days must elapse before a person relying on this provision can communicate any other parts of the work in reliance on this provision; and
- the parts of the work previously made available on-line must be taken down before a person can make another part of the work available in reliance on this provision.

Copying for examinations

Literary, dramatic, musical and artistic works are able to be copied without infringement as part of a question to be answered in an examination, or in an answer to such a question. This exception applies to copies only, not communications.

Fair dealing

The fair dealing provisions of the *Act* are an exception to the exclusive rights of copyright owners. They allow some copying and/or communication for certain purposes to be done for free without infringing copyright.

Fair dealing for the purposes of criticism or review

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not infringe copyright in the work if it is for the purpose of criticism or review, whether of that work or another work, **provided** there is sufficient acknowledgment of the work copied. Any acknowledgment should identify the author (unless the author is anonymous or has agreed or directed that they not be named) and identify the work from which the copies are taken by its title or other description.

An example of how this provision might be relied on by a university lecturer is where a work is copied for inclusion in a conference paper for the purpose of commenting critically on the material. Without the protection of the fair dealing provision this copying might – assuming a "substantial amount" was used – amount to an infringement of copyright.

In order to obtain the protection of this section, the purpose of the dealing must be criticism or review. If the court considers that the real purpose of the dealing was to capitalise on publishing another creator's material, the protection will be lost.

This category of fair dealing will very rarely apply to multiple copying for distribution to students. But it may apply to copying you do for yourself or for other staff. It may also apply to communications between academics for the purpose of academic criticism and discussion.

Fair dealing for the purpose of research or study

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of copyright if it is for the purpose of research or study.

If you are copying for yourself, for other staff or for distribution to on-campus students, the first question is whether the copy is made for the purpose of research or study. (Copying and communicating for external students is in a special category, discussed later.)

Consider first the use or uses to which the copy is likely to be put. If it is part of the research function, such as preparing an article or book chapter, or part of an academic's general reading to maintain current awareness in his or her field, then it is very possibly made "for the purpose of research or study". Some teaching functions, such as preparation of new courses, or copying of an article or other material for an individual student or small group of students to study, could also fall within the test. But multiple copying for distribution or other use in teaching will not usually be considered to be "for the purpose of research or study", so be cautious before concluding that copying for teaching purposes does fall in this category.

It may be that in practice very few instances of communication will fall within this purpose, although a communication between two academics for the purpose of joint research will most likely satisfy the test.

Remember that once you have decided that a particular copying or communication is for this purpose, you still have to consider whether it is fair.

Copying for external students

The exception to copyright infringement for fair dealing for research or study applies more strongly to enrolled external students. Any copying or communication of literary works (which includes print material other than artistic works or music and, possibly, plays) which is for the purposes of or associated with a course of research or study by an enrolled external student is permitted, provided it is fair. But you must be careful. If the material you copy for the external students includes artistic works, then you cannot assume that copying to be covered by the exception. The scope of the fair dealing provision as it relates to copying for external students is currently the subject of a legal challenge by CAL against the universities.

If CAL is successful, universities may be required to do some or all of this copying under the statutory licence. This could have effect in relation to any copying (or communicating) done under the record-keeping notice.

Copying for off-shore students

If copies are made in Australia for enrolled off-shore students, they are licensed copies (unless an exception applies) and should be reported during the period of a sample. If the copies are not made in Australia, Australian copyright law will not apply.

Fairness

For any copying or communication which is for research or study (or in the special case of external students for the purposes of or in association with a course of study by external students), you must ask whether the copying is "fair". Fairness is the paramount consideration. The *Copyright Act* contains some important guidelines.

First, if you **copy** less than 10% of the pages of a published work (or less than 10% of the words of a published work in electronic form) or one chapter, or one article in a periodical, and you are sure that you meet the test of "research or study" or use by external students, then that copying is taken to be fair, and is automatically protected by the *Act*. You do not record that copying. (Note that this deeming provision applies to copying only, **NOT** communications. The *Act* provides no guidance on how much of a work can be communicated in reliance on the fair dealing provisions. It may be that the fair dealing exception is of little practical use with respect to communications.)

If you **copy** more than 10%, one chapter or one article, then in determining whether the copying or communication is a fair dealing a court is directed to consider:

- 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 upon the potential market for, or value of, the work or adaptation; and
- in a case where part only of the work or adaptation is copied – the amount and
- substantiality of the part copied taken in relation to the whole work or adaptation.

John Cameron Executive Director, University Services

27 February 2006