



ARTICLE

A07n07

The Copyright Amendment Act 2006

Article for *Synergy* magazine

Ian McDonald

April 2007

The Copyright Amendment Act 2006 was passed by the federal Parliament in early December 2006, and came into operation shortly after that date.

This article provides some background information to the amendments generally, and then outlines those provisions which affect schools.

Please note that this article provides general information only, and is no substitute for legal advice. If you are concerned as to the exact implications of some activity you are either involved in or contemplating, please seek specific advice.

Background

In order to understand the Copyright Amendment Act 2006 as a whole, it is helpful to be aware of the principal developments in copyright which have occurred over the past ten to twelve years.

In 1996, the wording for two new treaties sponsored by the World Intellectual Property Organization (WIPO) was agreed to at the international level. These treaties – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty – set out how copyright should operate within the context of contemporary digital communication technologies, particularly in light of the development of the internet.

In 2000, the Australian Parliament amended the Copyright Act by passing what are generally referred to as the “Digital Agenda amendments”. Generally, these amendments were intended to bring Australian copyright law into line with the obligations set out in the new WIPO treaties. The amendments both extended copyright owner rights, and extended the various exceptions which, for example, libraries and schools may rely upon to use copyright material without permission.

Many of the Digital Agenda amendments were highly controversial, so the government promised to review the legislation after three years. In 2004, the government published a report commissioned from a private law firm as part of that review. It also published its response to the report, and announced various changes which it wanted to make to the Copyright Act as a result of its wider review. In part, the Copyright Amendment Act 2006 embodies these responses.

However, the Copyright Amendment Act 2006 principally derives from the free trade agreement which the government was negotiating with the United States during 2003 (AUSFTA), and which was signed in May 2004. For example, the provisions in the Copyright Amendment Act 2006 concerning “technological protection measures” (and which deal with hacking and cracking into digital copyright material) are a direct result of Australia’s obligations under the AUSFTA.

The new “special case” provision also came about as a result of the AUSFTA, but indirectly, as follows.

The AUSFTA was highly controversial in many respects. Insofar as intellectual property issues were concerned, some interest groups argued that the Agreement was too favourable to copyright owners. To meet the criticism, the Australian government announced an enquiry into whether or not Australia should adopt a general “fair use”

exception to infringement, changing the previous approach of introducing specific exceptions to infringement as particular needs were identified.

I am not aware that any of the submissions on behalf of the educational sectors supported the wholesale introduction of a US-style approach to copyright exceptions (known as a “fair use” approach) to **replace** the existing provisions. Submissions from the educational sectors repeated arguments they had made to the review of the Digital Agenda amendments concerning the existing educational provisions, but also asked for greater flexibility in defining when they could use copyright material without permission.

Amendments to the scheme administered by Screenrights

As readers would be aware, Screenrights administers a scheme in the Copyright Act which permits schools and other educational institutions to copy from radio and TV, and to “communicate” copies for their educational purposes.

The 2006 amendments included an amendment which operates as an “add-on” to that scheme. As a result, educational institutions are now allowed to copy radio and TV programs made available from the websites of broadcasters, in the same way as they are allowed to copy from TV and radio. The resulting copies can then be used in exactly the same way as material copied from radio or TV.

Examples of the types of material covered by the “add-on” include podcasts and vodcasts of programs.

A couple of points to note about the amendments:

- educational institutions may copy podcasts and vodcasts which are made available on websites of **free-to-air radio and TV broadcasters only** – and **not** similar material from, for example, the websites of newspapers or of subscription broadcasters;
- the provisions do **not** cover any material that is not being or has not been broadcast by the relevant broadcaster (in other words, the provisions do not cover any textual material or any supplementary audio or audiovisual material made available on the site, but not broadcast);
- the material being copied can be a program that **is being** or **has been** broadcast, so you can copy both archived copies of broadcasts **and** material being simultaneously “communicated” both over the web and over radio or TV;
- as with anything you copy from radio or TV under the Screenrights administered scheme, you may copy the podcast or vodcast into any format you like, including, for example, DVD and mp3 formats;
- also, as with material copied from radio and TV, you may “communicate” relevant pod and vodcasts – for example, by making them available through Learning Management Systems such as Clickview and through secure parts of the internet (provided you restrict access and use the relevant notices);
- if you copy material under contract (for example, because you have to click your agreement to terms and conditions governing access to material made available on a broadcaster’s site), those terms and conditions (not the Screenrights scheme) will determine whether or not you may copy the material at all, and what you can do with any material you are allowed to download.

Amendments to the Scheme administered by CAL

As readers would be aware, CAL administers schemes in the Copyright Act which permit schools and other educational institutions to copy and “communicate” textual material, images such as photos, drawings and graphs, and notated music.

The Copyright Amendment Act 2006 made some relatively minor changes to these schemes, the most important of which is likely to be the introduction of a provision into the “electronic use” scheme concerning anthologies of literary and dramatic works which have been published in electronic form.

As a result of the amendment, educational institutions can copy and communicate an individual literary or dramatic work from such an anthology for their educational purposes without first having to check for separate publication and commercial availability, provided the work occupies no more than 15 pages of the anthology.

As with the hardcopy anthology rule, note that the anthology provision does **not** cover pieces of music in anthologies: to copy these, you would need to consider either how the other provisions in the CAL scheme apply, or how the AMCOS print music licence applies.

Reticulating to classrooms

For some considerable time, the Copyright Act has contained a provision – section 28 – which deems classroom activities such as playing music, showing films, and reading out stories and poems not to be “public” for copyright purposes.

As a result of the amendments, section 28 now also provides that communication of copyright material (for example, by reticulating a film into a classroom) merely in order to facilitate a performance in class is not a “communication to the public”.

There are a couple of points to note about the amended section:

- the section still only applies where “educational instruction” is taking place, so does not cover situations where material is being reticulated for wet weather entertainment or as an end of term treat;
- the provision also applies in situations where distance students are “sitting in” on a class; and
- the section covers the playing or performance of relevant copyright material, together with any “communication” which facilitates this, but does **not** cover any **copying** of material that has to be done in order to load the relevant material into the Learning Management System being used (in these situations, another provision of the Act may be available, such as the Screenrights scheme if the material was copied from TV or radio, or, in some cases, the new “special case” provision, discussed below).

Passive caching of websites

An entirely new provision of the Act relates to the caching of websites. The amendments made, however, are essentially of technical interest only and likely to be disappointing to schools.

The educational sector, supported by Screenrights, had asked for the Act to be amended to permit primary schools to actively cache websites – that is, to take them offline for later use, thereby providing a safe learning environment.

However, despite the fact that the new provision is headed “active caching for educational purposes”, the amendment only covers **temporary** caching, such as occurs on an institutional level when the institution uses proxy web servers.

In particular, the new provision does **not** cover the use of website caching software such as *WebWhacker*, which allows for websites to be actively archived offline.

Section 200AB: the new “special case” provision

A new exception now allows the use of copyright material for specified purposes, provided the use meets certain additional criteria. We are referring to this new provision as the “special case” provision, although we understand it is also being referred to as the “flexible dealing” provision (reflecting its origins in the “fair use” review).

Before being able to rely on the provision, you need to meet a **threshold test**: that no other exception or statutory licence either applies to the use you want to make of the copyright material, or that could apply, if the conditions of that exception or statutory licence were met. So if, for example, the use of the material is dealt with under the schemes administered by CAL and Screenrights, you cannot rely on the new provision.

If you meet the threshold test, you may then only rely upon the provision if you are doing so for one of the following **three purposes**:

- maintaining or operating a library or archives;
- giving educational instruction; or
- obtaining a copy of material in a form which assists a person with a disability.

In addition, the use must satisfy **three conditions**, drawn from the conditions of the international “three-step test”. This test governs the exceptions to copyright infringement that countries may, under various treaties, have in their copyright legislation. Indeed, certain phrases in the new “special case” provision (those in quotation marks below) are stated to have the same meaning as in one of these treaties – the TRIPS Agreement.

The three conditions are that the use of the relevant copyright material must:

- amount to a “special case”;

- not “conflict with a normal exploitation” of the copyright material; and
- not “unreasonably prejudice the legitimate interests” of the relevant copyright owner(s).

Lastly, you may not rely on the provision in order to gain a commercial advantage or profit.

The drafting of the section is particularly complex, and there are a number of uncertainties as to how the new provision should be interpreted and how it applies. Note also that, as a result of what I have referred to here as the “threshold test”, schools wanting to rely on the section need to be very sure that the way they want to use the material is not already addressed in another provision.

As a general comment, the application of the special case exception will depend on the way the copyright material is to be used, and will depend on there being no licence or commercial copy available. The more specific and temporary the use of the copyright material is, the more likely that it might be covered by the new exception. It’s likely, however, that schools wanting to rely on the provision in particular situations will need to get advice about whether it is applicable.

Australian Copyright Council

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



Australian Government



The Australian Copyright Council has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.

© Australian Copyright Council 2007