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# The 2006 copyright amendments: all under control?

Article for *Connections*

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The Copyright Amendment Act 2006 made wide-ranging changes to the Copyright Act, introducing provisions that:

- allow individuals to “format-shift” different types of copyright material for personal purposes and to “space-shift” sound recordings they own;<sup>1</sup>
- allow individuals to “time-shift” TV and radio broadcasts to watch or listen to them later;
- allow the use of copyright material for the purposes of parody and satire;
- add to and amend the special provisions for libraries and archives;
- add to and amend the special provisions for educational institutions; and
- tighten up the provisions in the Act relating to the technological protection of copyright material.

The amendments stem from three distinct sources – a review of the Copyright (Digital Agenda) Amendment Act of 2000 (which dealt with how copyright should operate in a digital communications environment); the Free Trade Agreement which Australia entered into in 2004 with the United States; and pressure from organisations who use a lot of third-party copyright material, who argued that the Free Trade Agreement was overly beneficial to copyright owner interests, and that new exceptions should be introduced.

Most of the amendments came into operation on 11 December 2006, while the provisions relating to technological protection came into operation on 1 January 2007.

I won't discuss all the amendments in this article, but a year after the introduction of the provisions, how have they bedded down, and what do they mean for educational institutions?

## The provisions for “time-shifting”, “format-shifting” and “space-shifting”

The introduction of the “time-shifting”, “format-shifting” and “space-shifting” provisions got a lot of press coverage at the end of 2006, and certainly a lot of the statements made in relation to the Copyright Amendment Act 2006 as a whole by the Attorney-General, Mr Philip Ruddock, emphasised that common activities of “ordinary Australians” should not infringe copyright.

There are a number of points to note about these provisions from the point of view of schools.

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<sup>1</sup> “Format-shifting” includes changing a purchased video to a digital format, such as DVD and copying books, magazines and periodicals into a different “form” (for example, to view it on a computer screen). “Space-shifting” relates to making copies of sound recordings such as cassette tapes and CDs – there is no requirement that the copy be in a different form.

These provisions may only be relied upon by individuals wanting copyright material for personal purposes; they are **not** provisions upon which teachers or administrative staff can rely in order to do things for school.

Teachers and school staff can, however, continue to record material from TV and radio for school purposes under the scheme in the Act administered by Screenrights. There is no requirement under the Act that this be done on the school premises, although some schools have had administrative policies in place to this effect. Teachers and other staff can therefore still copy at home for school purposes, provided they comply with administrative requirements, such as marking any analogue copies.

That said, there are a number of “management” issues in relation to what teachers and other school staff might do with copies made under the new “personal use” provisions.

While there’s no prohibition in **using** a personal time-shifted copy in class, it would be better if teacher’s didn’t bring personal time-shifted copies to school. This is to prevent staff inadvertently, for example, lending the personal copies to colleagues or students – an action that would make the personal time-shifted copy an infringing copy under the new “personal use” provision.

Similarly, teachers and other staff can play in class copies of CDs and films they have “space-shifted” and “format-shifted” for themselves under the new provisions. However, if they were, for example, to lend to a colleague or student either a copy they have “space-shifted” and “format-shifted”, or the commercially-produced copy they used to make the copy, they would be infringing copyright. Also, if they were inadvertently to play the CD or film for wet-weather entertainment, rather than just as part of a class, the copy would become an infringing copy.

In addition, if teachers were regularly in the habit of bringing in “space-shifted” and “format-shifted” copies from their personal collections, an argument could be mounted that they really weren’t copying just for personal use at all.

### Fair dealings for the purpose of parody or satire

Although it’s a general provision, in the right circumstances, the new “fair dealing” provision for parody or satire can be relied upon in the school context.

This new provision augments the other “fair dealing” provisions which relate to dealings with copyright material for particular purposes – for research or study; for reporting news; for criticism or review; and for the giving of certain types of professional advice.

In the school context, the new provision may well be relied upon by schools when students, teachers or parents, stage revues, for example, and when copyright material included in commemorative CD-ROMs or in publications is given a parodic or satirical slant.

There have not yet been any decided cases on this new provision, but the definitions of “parody” and “satire” set out in the *Macquarie Dictionary* are probably a reliable guide to the way a court would approach what types of uses of copyright material are covered by this exception:

“Parody”:

**1.** a humorous or satirical imitation of a serious piece of literature or writing. **2.** the kind of literary composition represented by such imitations. **3.** a burlesque imitation of a musical composition. **4.** a poor imitation; a travesty.

“Burlesque” (used as an adjective):

involving ludicrous or debasing treatment of a serious subject.

“Satire”:

**1.** the use of irony, sarcasm, ridicule, etc in exposing, denouncing, or deriding vice, folly etc. **2.** a literary composition, in verse or prose, in which vices, abuses, follies etc are held up to scorn, derision, or ridicule. **3.** the species of literature constituted by such composition.

The new exception provides a defence to a claim that **copyright** has been infringed. However, you still need to consider relevant creators’ **moral rights**, as there is no specific equivalent defence to a claim that someone’s moral rights have been infringed by a parody or satire.

A parodic or satirical use of material will not necessarily cause prejudice to a creator’s honour or reputation. However, if you think there’s a risk in relation to your use of someone else’s material, you may often be able to rely on the defence that your actions are “reasonable” in the circumstances.

If in doubt, however, get legal advice.

### The new “flexible dealing” or “special case” exception: section 200AB

Of particular interest is a new provision, section 200AB, which was introduced to give educational institutions, libraries and archives (including galleries and museums), and people with disabilities with what was described as some “flexibility” in relation to when they may use copyright material without permission.

In some ways, the provision is similar to the “fair dealing” provisions in the Copyright Act. However, the section is much more restrictive than any of the “fair dealing” provisions, and is distinguished by the fact that it expressly provides that it may only be relied on if there is no other provision in the Act that deals with the situation.

The provision is not a particularly easy one to understand; there are a number of uncertainties as to what particular parts of it mean, or how these parts are likely to be interpreted, were a case to go before the courts. The provision can be approached in several different ways, but the way I find useful is to look first at whether or not you are able to satisfy four threshold issues:

- **you must be the sort of person entitled to rely on the provision** (people in schools and in libraries qualify, as do people assisting individuals with difficulty hearing, seeing or viewing copying material);
- **your use of the copyright material must be for a purpose set out in the provision** (this includes “giving educational instruction” and “maintaining and operating a library”);
- **the situation must be one where no other provision in the Act deals with your situation** (such as the schemes administered by Screenrights and CAL); and
- **you must not use the material for a “commercial advantage or profit”** (cost recovery is permissible).

Secondly, you can only use the material if you satisfy what in the international context is often referred to as the “three-step test”:

- your proposed use must not **“conflict with a normal exploitation”** of the material by the copyright owner;
- your proposed use must not **“unreasonably prejudice”** the interests of the copyright owner (under the provision, you are entitled to prejudice those interests, but not **unreasonably**); and
- the circumstances in which you are using the material (including all of the above circumstances) must amount to a **“special case”**.

Certainly, the provision is forbidding. Nonetheless, since its introduction, the school sector has been very active in getting together written material to help you assess when you are likely to be able to rely on the section: see the fact sheets on the “smartcopying” website at <http://www.smartcopying.edu.au>. The Copyright Council has also published a practical guide to the provisions – B130, *“Special case” exception for educational instruction & libraries*.

It’s worth bearing in mind that the provision was never meant as a “no-gaps” provision for educational institutions or libraries when it comes to the use of third-party copyright material. It plugs some of the gaps left by other provisions in the Act, but is not an alternative to those provisions. Also, as noted above, it only applies where the circumstances of the case amount to a “special case”, and then only in relation to gaps which the copyright owner him or herself does not fill by a “normal exploitation” of his or her material, and then only if reliance on the provision is not “unreasonably” prejudicial to the copyright owner.

### Other provisions relating to educational institutions

The Copyright Amendment Act 2006 also included a range of other very specific exceptions for educational institutions. Many of these are not entirely “new”, but extend, clarify or modify existing exceptions.

The most useful of these may be the extension to the TV and radio copying scheme administered by Screenrights. As a result, you can now copy free-to-air broadcasts that have been made available online (for example, podcasts) in the same way as you can copy broadcasts.

A couple of points to note about this extension:

- you can only copy material from free-to air broadcasters (not, for example, podcasts made available on newspaper, magazine or other sites); and

- you can only copy what the free-to-air broadcaster is broadcasting or has broadcast (not, for example, additional material that hasn't been broadcast).

Also, in some cases, you may have agreed to terms and conditions before getting access to the online material that are contractually binding; if the terms or conditions preclude copying other than for personal use, for example, you couldn't rely on the extended Copyright Act scheme. Just signing up for a podcast, however, won't necessarily mean that you've entered into a contractually binding agreement. Again, if in doubt, get advice.

We understand that you are not restricted to copying material from Australian broadcasters under the scheme; you may also copy podcasts and vodcasts of material that has been broadcast on overseas TV or radio stations and then posted to their websites. However, we understand that you can only do this if the country is a signatory to the Rome Convention (New Zealand, Britain and other members of the EU and the Philippines are; the United States, Indonesia and Malaysia are not); and then only if the TV or radio station you are copying from is equivalent to one of our national, commercial or community free-to-air broadcasters.

Three of the other amendments directly relating to educational institutions are also worth commenting on.

Firstly, the "anthology rule" in Part VB of the Act, administered by Copyright Agency Limited (CAL) now applies both to works in anthologies published in **electronic form** (for example, as an e-book in pdf format) as well as to works published in **hardcopy anthologies** (such as short stories, one act plays and poems).

There is a proviso that the "pages" in the electronic anthology must be unlikely to change, regardless of how it is viewed or copied, so generally you couldn't rely on the exception to copy from webpages in html. Otherwise the principal features of the anthology rule are the same for hardcopy and electronic forms are the same:

- it only applies to published anthologies of literary and dramatic works (and not, for example, to anthologies of music or to art books);
- you may only copy an entire work under this rule if it is no more than fifteen pages long; and
- in addition to printing, scanning, photocopying and the like, you may also email the file to students, and post the work to a secure part of your website or to your intranet.

Secondly, there's an amendment to the "performing or screening in class" exception (section 28). This provision now allows "communicating" material (for example, from a central server or learning management system such as "ClickView" or BlackBoard) so material can be seen in class. Note, however, that the amended exception doesn't actually cover **copying** the material onto the central server or learning management system, so in many cases, unless the new section 200AB applies, you may be restricted in what you can post centrally. (You could generally, for example, copy onto such systems material copied from radio and TV under the provisions in the Act administered by Screenrights; and material copied under the Part VB provisions administered by CAL.)

Thirdly, there's a provision that states that educational institutions don't need permission for the temporary reproductions and copying that occurs when they capture copyright material from websites in a proxy-cache or a proxy server that they control. (Proxy servers are often used to facilitate efficient later access to material by people using the institution's network).

There are two points to note about this amendment:

- the provision only relates to **temporary** copies made available when students or staff go to a website, and then revisit the same site later (in these cases, unless he or she instigates a "refresh" of the page, the computer will generally retrieve the copy of the pages held in the proxy server rather than from the web); and therefore,
- the provision does **not** permit **actively** capturing and storing websites offline for later use (for example, using programs such as "WebWacker").

### Provisions relating to Technological Protection Measures (TPMs)

The Copyright Amendment Act 2006 strengthened the provisions that enable copyright owners and exclusive licensees to take action when people interfere with technological protection measures (TPMs) they have adopted to try to protect their material. These amendments stem from Australia's obligations under the Free Trade Agreement with the United States.

There are two types of TPMs:

- TPMs that protect against copying copyright material; and
- TPMs that control access to the material in the first place.

Generally, the provisions entitle copyright owners and exclusive licensees to take action against people who manufacture, import and trade in “devices” and computer programs that are designed to circumvent these types of protection. However, while no one is legally prevented from circumventing any “**copy control**” TPM, the Act now generally gives both copyright owners and exclusive licensees the right to take action if an **access control** TPM is circumvented.

Both the Copyright Act and the Copyright Regulations list various situations in which an access control **can** be circumvented. The situations include:

- when making acquisition decisions, and the material is not otherwise available to be assessed;
- when making replacement copies of things that have been in the library, but have been lost, stolen or have deteriorated or been damaged, and where a replacement copy is not commercially available.

However, the ability to rely on section 200AB is not among the situations which allow you to circumvent an access-control TPM. The practical effect of this will be most clearly felt in relation to commercially-produced copies of DVDs, which almost invariably are protected by access-control TPMs. In other words, even if you can rely on section 200AB to make a “flexible dealing” or “special circumstances” use of a DVD, you may still be liable for circumventing an access-control TPM if you need to disable the access-control in order to copy the DVD.

## 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.



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

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