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

a. 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.

b. 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:

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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.