

# AUSTRALIAN COPYRIGHT LAW OVERVIEW

15 May 2018

## INTRODUCTION

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This information sheet has been prepared by the Australian Copyright Council, Australian Society of Authors, Australian Publishers Association and Copyright Agency as a brief to assist the Standing Committee on Industry, Science and Technology in its review of Canada's Copyright Act by.<sup>1</sup> It is intended to provide some information about aspects of Australian copyright law that are relevant to issues under review.

There is also information on a large range of matters relating to Australian copyright law on the website of the Australian Copyright Council ([www.copyright.org.au](http://www.copyright.org.au)).

## CURRENT COPYRIGHT FRAMEWORK

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Australian copyright law allows a range of activities without the permissions usually required. These 'exceptions' include a number of statutory licences, which allow uses of content without permission provided there is fair payment to rightsholders.

The Australian Copyright Council publishes an information sheet that lists all the exceptions in the Copyright Act, including 'fair dealing' exceptions: see [here](#).<sup>2</sup> The statutory licences are listed on page 14. They include a statutory licence for education.

### Statutory licence for education

Under the statutory licence, teachers can copy and share text and 'still' images (e.g. photographs, illustrations), and anything broadcast on television or radio. They can also copy and share sheet music under the licence, (but most schools have a separate licence with APRA AMCOS (a copyright management organisation for music) for photocopying sheet music that they have purchased.

Teachers can get content from any source to copy and share under the education licence. This includes content that is:

- digital or printed
- online or offline
- from Australia or overseas

Teachers are not required to buy the content before they copy or share it. For example, their source might be something that they have borrowed, or a photocopy made in a different job.

The following is a guide to how much of a publication can be copied and shared under the licence:

- book: a chapter or 10% of pages
- journal, newspaper, magazine: an article from an issue

Teachers can copy an entire work (such as an image or a poem), or an entire book, under the licence if it is not available for purchase on its own.

Under the current agreement with representatives for the school sector, the sector pays Copyright Agency (the Australian copyright management organisation for writers, artists and publishers) about

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<sup>1</sup> [www.ourcommons.ca/DocumentViewer/en/42-1/INDU/news-release/9752040](http://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/news-release/9752040)

<sup>2</sup> [copyright.org.au/ACC\\_Prod/ACC/Information\\_Sheets/Exceptions\\_to\\_Copyright.aspx?WebsiteKey=8a471e74-3f78-4994-9023-316f0ecef4ef](http://copyright.org.au/ACC_Prod/ACC/Information_Sheets/Exceptions_to_Copyright.aspx?WebsiteKey=8a471e74-3f78-4994-9023-316f0ecef4ef)

AUD\$17 per student per year. The current agreement with Universities Australia, for its 39 university members, is a flat rate of AUD\$31.6m per year for the sector. Copyright Agency distributes this revenue to rightsholders whose works have been copied and shared under the licence.<sup>3</sup> Both agreements expire at the end of 2018, and negotiations for new agreements are in train.

### Other provisions for education

The Copyright Act also has some specific exceptions for education (most of which pre-dated the statutory licence) such as:

- use of content in exams; and
- performing music or showing films in class.

There is also a 'flexible' exception (section 200AB), introduced in 2006, that is intended to allow educational uses that are not covered by other exceptions or licensing arrangements. It allows uses that meet the 'three-step test' that forms part of international copyright treaties such as the Berne Convention. A use for educational instruction (in an educational institution) is allowed by section 200AB if:

- (a) the circumstances amount to a special case;
- (b) it does not conflict with a normal exploitation of the work; and
- (c) it does not unreasonably prejudice the legitimate interests of the owner of the copyright.

There is an information about its operation in schools on the website for the school sector [here](#).<sup>4</sup>

### Fair dealing exceptions

There are 'fair dealing' exceptions for the following:

- research or study
- criticism or review  
parody or satire
- reporting the news
- professional advice
- access by or for people with a disability

To rely on one of these exceptions, a person must show that the use was:

1. for the designated purpose; and
2. fair.

For example, in [De Garis v Neville Jeffress Pidler](#),<sup>5</sup> the court held that a company's commercial press clipping service was not research or study (even if this was its clients' purpose), and moreover its activities were not 'fair'.

### Fair dealing for research or study

There are two sections of the Australian legislation that allow fair dealing for research or study: section 40 applies to 'literary, dramatic, musical and artistic works', and section 103C applies to 'audio-visual items'. Each requires that the following five factors be taken into account for determining if a use is 'fair':

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<sup>3</sup> There is more information about revenue collected and distributed by Copyright Agency in its annual reports: [copyright.com.au/about-us/governance/annual-reports/](http://copyright.com.au/about-us/governance/annual-reports/)

<sup>4</sup> [http://www.smartcopying.edu.au/docs/default-source/Info-Sheets-PDFs/updated-\(2018\)-flexible-dealing-information-sheet80E6FE6D2238.pdf?sfvrsn=0](http://www.smartcopying.edu.au/docs/default-source/Info-Sheets-PDFs/updated-(2018)-flexible-dealing-information-sheet80E6FE6D2238.pdf?sfvrsn=0)

<sup>5</sup> <https://jade.io/citation/1269468>

- (a) *the purpose and character of the dealing;*
- (b) *the nature of the work or adaptation;*
- (c) *the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;*
- (d) *the effect of the dealing upon the potential market for, or value of, the work or adaptation; and*
- (e) *in a case where part only of the work or adaptation is reproduced—the amount and substantiality of the part copied taken in relation to the whole work or adaptation.*

Section 40 also provides that the following are taken to be fair (without consideration of the five factors):

- an article from a periodical publication;
- a ‘reasonable portion’ of a published work, which includes:
  - 10% of the pages, or a chapter, from a published edition of 10 pages or more; and
  - 10% of the words, or a chapter, from literary or dramatic work published in ‘electronic form’.

### **Relationship between education statutory licence and fair dealing for research or study**

The relationship between the education statutory licence and fair dealing for research or study was the subject of a judgment of the Federal Court in 1982, in [Haines v Copyright Agency](#).<sup>6</sup> The case concerned a memorandum from the Director General of Education of New South Wales that suggested that schools could choose to rely on fair dealing for research or study instead of the newly-introduced statutory licence for education. The court found that the memorandum was misleading. It said:

*... it is important to the proper working of the sections [the statutory licence for education and fair dealing for research or study respectively] that a distinction be recognised between an institution making copies for teaching purposes and the activities of individuals concerned with research or study. The memorandum was in relevant respects addressing itself to the former situation.*

*A misleading aspect of the document is its failure to emphasise that what can be done under s.40 [fair dealing for research or study] must satisfy the requirement that it be a fair dealing. There is not the freedom of choice or equality of options which it postulates.*

The arrangements for management of the statutory licence for education incorporate a distinction between student-initiated research or study, and institution-initiated activities. For example, the surveys in schools to collect information about ‘electronic use’ ask teachers to record when they instruct students to print, copy or save digital material.

### **Special provisions for libraries**

There are a number of special exceptions for libraries. They apply to:

- supplying copies to clients (document delivery)
- supplying copies to other libraries for their collections
- viewing on ‘dumb terminals’ on library premises
- preserving items in the collection

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<sup>6</sup> <https://jade.io/article/148690>

- administrative purposes

In addition, the flexible exception described above for education (section 200AB) also applies to libraries. It allows libraries to do anything associated with maintaining or operating the library, which is not covered by a specific exception, provided the activity meets the ‘three-step test’.

## RECENT AMENDMENTS

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There have been two recent developments to update Australia’s copyright legislation, both with broad support from all relevant stakeholders.

The Copyright Act was amended in 2017 (with effect from December 2017) to:

- simplify the statutory licence for education;
- extend the exception for exams to online exams;
- simplify and update the provisions that enable libraries and other collecting institutions to make ‘preservation copies’ of material in their collections such as manuscripts;
- simplify and update the provisions that allow the making of accessible format versions for people with disabilities; and
- introduce a fixed term of protection for unpublished works (this change takes effect from 1 January 2019).

In December 2017, the Government introduced a bill to provide ‘safe harbour’ protection for education institutions, libraries and organisations assisting people with a disability, in relation to network services they provide for staff, students and clients. That Bill has been passed by the Senate, and is expected to be passed by the House of Representatives in late May 2018.

## FUTURE REFORM

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In August 2017, the Government responded to a report from the Productivity Commission on intellectual property arrangements. The Government response to the Commission’s recommendations regarding copyright is available on the Department of Communications and the Arts website [here](#).<sup>7</sup> It says that the Government would undertake public consultation in 2018 on options for reforming the Copyright Act in relation to:

- flexible exceptions;
- use of orphan works; and
- the extent to which licence terms prevent the exercise of copyright exceptions.

The Department released a [Consultation Paper on copyright modernisation](#) on 19 March 2018.<sup>8</sup> It is currently conducting stakeholder roundtables on issues in the consultation. Submissions are due by 4 June 2018.

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<sup>7</sup> <https://www.communications.gov.au/departmental-news/government-response-productivity-commissions-intellectual-property-report>

<sup>8</sup> <https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation>