

# Educational Copying under the Copyright Act

## 1. Introduction

This is an introduction to educational copying under the Statutory licensing provisions of the *Copyright Act*. For further information on educational copying, contact IBIBS Coordinator ([library@ibibs.edu.au](mailto:library@ibibs.edu.au)). For answers to specific legal questions, contact IBIBS Legal Office ([legal@ibibs.edu.au](mailto:legal@ibibs.edu.au))

IBIBS compliance with the **Digital Agenda Act**. This Act came into force on the 4 March 2001 and includes a new right of communication by copyright owners that is exercised when copyright material is:

- **made available online** (e.g. uploaded onto a Higher Education Institution server in a form which can be accessed by students). If a work is uploaded onto a server in a form which is not able to be accessed it is **not** being "**made available**" within the meaning of the Act.
- electronically transmitted to the public e.g.:
  - forwarded as an electronic file or an email attachment
  - copied to a CDROM

It is not necessary for IBIBS to seek the permission of copyright owners in order to make works available online (or copy digitally) within the limits imposed by the Act, unless the Higher Education Institution has already entered into contracts with information providers which impose restrictions on how the Higher Education Institution can make material available.

For example, if the Higher Education Institution has purchased CDROMs for use in the Library, the terms of the contract may include restrictions on copying the CDROMs or on making them available for use by students. These restrictions arise not because of the Act, but because of contractual terms that the Higher Education Institution has agreed to in order to obtain access to material. In other cases, these terms may grant broader rights to copy and communicate than are contained in the Act.

While the Statutory Licence provisions have been extended to allow Higher Education Institutions to digitise analogue material and to copy existing digital material, there are a number of strict requirements that must be met:

- the requisite copyright notice must be affixed to material made available online
- restrict online access to the Higher Education Institution community
- the 10% rule for electronic copying and making available online treats the entire Higher Education Institution as a single site, instead of individual subjects as is the case for print material (does not apply to journal articles)
- track the digital copying for annual payment to copyright collecting societies

To ensure copyright compliance in respect of book chapters, the Library, on behalf of the IBIBS shall develop a repository for **all** book chapters being digitised and placed online

throughout IBIBS. Academics who wish to provide online access to book chapters as part of their course readings, must arrange through the Library for the files to be placed on the repository website server. Academics are also encouraged to place digitised journal articles on this repository **called IBIBS BookBank**.

### 3. Copying or communicating copyright material

There is no copyright infringement if:

- the copyright is owned by the IBIBS;
- the material has been supplied to the Higher Education Institution 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 higher education institutions / universities. These institutions make payments, through Copyright Agency Limited (CAL) and Screenrights for copying and communicating under the statutory licences.

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 or within the statutory licence. If it does not, there may be a copyright issues/ problem and you must not make the copies, or communicate the work, without first consulting the Higher Education Institution's Copyright Legal Officer.

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 Higher Education Institution 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" (This is explained later in this document). If so, then you can proceed without regard to the Part VA or Part VB statutory licence.

For any copying/communication which is within neither of questions 1 or 2:

- 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 section 6, including the marking and notice requirements.

### 4. Permission by copyright owner

## 4.1 By agreement

Copyright owners may agree to material being copied beyond the limitations imposed by the Copyright Act. This may occur by writing to copyright owner seeking permission. The request should specify should cover the extent of the copying and/or the number of copies. It is good practice to obtain permission in writing (letter, email, fax). The copyright material itself may contain statements regarding copying. Some Web pages have such a statement. Such statements should be included in the copy made.

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.

## 4.2 By licence

Higher Education Institution libraries, enter into licence agreements with the owners of copyright material. Higher Education Institution libraries lease access to databases and electronic journals. In the first instance, these licences are subject to contract law. In many cases they contain clauses covering the copying of material that exclude the jurisdiction of the Copyright Act. This information will be available in the copyright compliance database. Until then, contact the Library for the details of each licence.

In the absence of such clauses, the Copyright Act applies.

# 5. Exceptions under the Copyright Act

## 5.1 Multiple copies of an insubstantial portion

An insubstantial portion of a literary or dramatic work is defined as:

- one or two pages if it is hardcopy and less than 200 pages;
- no more than one percent of the total number of pages in the literary or dramatic work if there are more than 200 pages in hardcopy;
- no more that one per cent of the words in the work if the work is in electronic form

*But note the following provisos:*

- Copying or communicating the whole of a work will never fit within the insubstantial portion exemption. Accordingly, copies and communications of an entire article in a periodical publication, or the entire text of a pamphlet, cannot fall within the exemption.
- The exemption does **not apply at all to artistic or musical works, and radio and television broadcasts**. The copying of cartoons (and possibly graphs), as well as sheet music, will therefore fall outside the exemption.
- The copying or communication must be carried out on the premises of the Higher Education Institution.
- 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.

- Any parts of a work previously made available online in reliance on the insubstantial portion provision must be taken down before a person can make another part of the work available in reliance on this provision.
- The sections do not require that copying or communication done pursuant to the section include an acknowledgment of source. However, in any infringement action, the Higher Education Institution will be better placed if it can substantiate the availability of the defence or exception. This will be a question of proof which will be made difficult if the source is not clear. It may be that as a matter of internal practice any copying or communication for which the exemption is to be should include a reference to its source. The need to take account of the right of attribution introduced by the moral rights changes to the Copyright Act will mean that it is important to attribute author and source wherever practicable in any case.

## **5.2 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.

## **5.3 Fair dealing for the purposes of criticism or review**

A fair dealing with works and radio and television broadcasts 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 Higher Education Institution 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. If instead of being shown at a conference the copy was communicated by uploading it onto the academic's web-page (still for the purpose of commenting critically on the material) this might also amount to a fair dealing.

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.

## **5.4 Fair dealing for the purpose of research or study**

A fair dealing with works and radio and television broadcasts 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. (see 5.4.2 *Copying and communicating for external students*)

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 (see 5.4.2).

#### **5.4.1 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 (explained below). 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.**

#### **5.4.2 Definition of fairness in relation to research or study**

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.

#### **5.4.3 Print material only:**

If you copy:

- less than 10% of the pages or one chapter (whichever is the greater) of a published work in hardcopy, or
- less than 10% of the words of a published work in electronic form, 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.

#### 5.4.4 All material:

For print material if you **copy** more than 10%, one chapter or one article, and for all other types of material, 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 item;
- the possibility of obtaining the item within a reasonable time at an ordinary commercial price;
- the effect of the dealing upon the potential market for, or value of, the item; and
- in a case where part only of the item is copied - the amount and substantiality of the part copied or communicated in relation to the whole item.

Note that this 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.

## Statutory Licences

The Copyright Act contains provisions for three types of Statutory Licences for the purpose of educational copying.

**Part VA** covers the copying and communication of **broadcasts** (television, radio, cable and satellite). Copying and/or communication done in reliance on the provisions of Part VA will not infringe the copyright in a broadcast, or in any work, sound recording or cinematographic film included in a broadcast. However, it excludes commercial videos, etc, and Web casts.

**Part VB** covers the copying and communication of **print and graphic works** for the educational purposes of the Higher Education Institution.

Part VB covers all copying of print and graphic works (photocopying, copying to slides, microfiche or overhead transparencies, scanning into electronic form and copying from the web) provided it is for the educational purposes of the Higher Education Institution and otherwise complies with the strict rules set out in the Act and the Regulations. Book chapters made available online pursuant to Part VB must be placed only on Bookbank, the repository managed by the Library on behalf of the IBIBS.

Each year, selected universities/higher education institutions are sampled in order to provide data to aid the distribution of royalties paid by universities, as well as assess the current level of copying for any future licence negotiations.

Records should be kept of the date when copyright material is first placed online. A fresh copy is deemed to be made every 12 months. This information will be required when the Higher Education Institution is sampled.

**Part VC** covers the retransmission of free-to-air broadcasts for educational purposes. Screenrights is the interim copyright royalty collecting agency. The Higher Education Institution does not currently have a Part VC agreement.

There are a number of strict requirements for compliance with the Statutory licences:

- Remuneration notices
- Must be used for educational purposes of the Higher Education Institution only
- Notice to users (in some cases)
- Maintaining records of copying