

Copyright amendment bill 2016: exposure draft

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INTRODUCTION

On 23 December 2015, the government released an 'exposure draft' of a Bill that would make a number of amendments to the Copyright Act.¹

The bill would:

- simplify the statutory licences 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 'original versions' such as manuscripts;
- introduce a fixed term of protection for unpublished works that are currently covered by copyright indefinitely;
- simplify and update the provisions that allow the making of accessible format versions for people with disabilities; and
- extend the 'safe harbour' provisions that limit the remedies for infringement against online service providers.

SIMPLIFICATION OF THE STATUTORY LICENCES FOR EDUCATION

Background

The proposed amendments reflect a joint proposal put to the government, at the government's invitation, by education authorities, Copyright Agency and Screenrights (the collecting society for broadcast content).

It was agreed that the proposal would not affect commercial negotiations about licence fees, but would remove unnecessary and overly prescriptive provisions in the legislation.

There is a brief overview of the current statutory licence at the end of this document.

The amendments

The amendments would retain the key elements of the current statutory licence:

- obligation to pay;
- obligation to provide reasonable assistance to enable the collecting society to collect and distribute equitable remuneration;
- entitlement for collecting societies to inspect educational institutions for compliance; and
- requirements for governance of collecting societies.

The main substantive change is a new approach, based on an international standard in the major copyright treaties, for dealing with the amount of a work that can be copied.

How 'much' of a publication could be copied

The amendments would allow the amounts of works that could be copied to be determined by agreement between Copyright Agency and education authorities (or by the Copyright Tribunal in the absence of agreement). The amount of a work that is copied must not 'unreasonably prejudice the legitimate interests' of the copyright owner. This is a phrase used in the major copyright treaties and in an existing exception in the Copyright Act.

Copyright Agency has agreed with education authorities that the amendments would not affect copying in education institutions covered by current agreements. Copyright Agency has an

¹ communications.gov.au/have-your-say/updating-australias-copyright-laws

agreement with the university sector until the end of 2016; with the school sector until the end of 2017; and with the TAFE sector until the end of 2018.

Provisions affecting distribution of licence fees

The amendments would remove provisions that require remuneration paid to Copyright Agency for the copying of text with accompanying images to be 'split' in a particular way between the owner or owners of copyright in the text component, and the owner or owners of the copyright in the images respectively.

Since those provisions were introduced, other measures dealing with distribution of licence fees have been introduced, in particular the jurisdiction for the Copyright Tribunal to review distribution arrangements and the Code of Conduct for collecting societies.

Copyright Agency's distributions would continue to include a proportion for images, based on information about the availability and use of images for various classes of licensees.

EXAM EXCEPTION

The Copyright Act currently allows the reproduction of a work as part of the questions to be answered in an exam, or in an answer to a question. The exception is for actual testing, not for practice tests.

The amendments would also allow 'communication', so that the exception could apply to online exams.

'PRESERVATION COPIES' OF 'ORIGINAL VERSIONS' IN LIBRARIES

The amendments consolidate and update existing provisions that allow preservation of items in collections of libraries, archives and other collections such as those held by public galleries and museums.

The amendments would allow institutions to preserve items in their collection:

- that are original versions (e.g. manuscripts); or
- for which a version consistent with preservation 'best practice' cannot be purchased.

They would also allow the institution to:

- enable people to view the preservation copy on a 'dumb' terminal on the premises, that does not enable copying or communication (e.g. by email); and
- provide a copy of an original version to researcher for research done on the premises.

FIXED TERM OF PROTECTION FOR UNPUBLISHED WORKS

The Copyright Act currently applies to some unpublished works indefinitely. The amendments would introduce a fixed term of protection that would apply to works still unpublished on 1 January 2018.

ACCESSIBLE FORMAT VERSIONS FOR PEOPLE WITH DISABILITIES

The amendments would make changes to the existing provisions that allow accessible format versions for people with disabilities, including vision, hearing and intellectual disabilities.

Institutions assisting people with disabilities (including educational institutions) must first check that a suitable accessible format version is not available for purchase.

Individuals, and people assisting them (such as libraries), must meet the 'fair dealing' criteria.

The government intends to introduce regulations to allow Australian institutions to provide accessible format versions to institutions in other countries. It is also planning to introduce

regulations to allow the circumvention of technological protection measures to enable the making of an accessible format version 'where necessary'.

EXTENSION OF 'SAFE HARBOUR' PROVISIONS FOR ONLINE SERVICE PROVIDERS

The Copyright Act currently includes 'safe harbour' provisions that limit the remedies a court can order against an online service provider for infringements using its services, provided the service provider has taken certain steps to inhibit infringement.

The amendments would extend the 'safe harbour' provisions to service providers other than 'carriage service providers', so that they are available to providers such as educational institutions, libraries, Google and eBay.

Content industries have raised concerns about these amendments.

TIMING

The Bill must be introduced into either the House of Representatives or the Senate and passed by both houses of Parliament. Bills may be referred to a Parliamentary Committee for review.

A Federal election is due in 2016. If the Bill is not passed before the election, it would need to be reintroduced into the next Parliament.

CURRENT OPERATION OF STATUTORY LICENCES FOR EDUCATION

The statutory licensing scheme for education in Part VB of the Copyright allows Australian teachers to copy and share text, images and print music without a copyright clearance if:

- the educational institution is covered by an agreement to pay fair compensation; and
- the use is for educational purposes (e.g. in connection with a course of instruction).

Copying and sharing allowed

The scheme applies to any content from any source (printed, digital or online), from anywhere in the world, and to any form of copying or sharing (including printing, scanning, emailing, recontextualising and making available from learning management system).

In some cases, a teacher may only use a 'reasonable portion' of a work that is separately published and available for purchase. A chapter or 10% of a book is regarded as a 'reasonable portion'. The scheme also allows teachers to copy an article from a periodical publication (or more than one on the same subject matter) and a work of 15 pages or fewer from an anthology. Some copying is allowed but excluded from fair compensation arrangements. This includes copying of two pages or 1% on the premises of the institution, and images with text.

Management of the scheme

Copyright Agency is appointed by the Australian government to manage the scheme.

Nearly all schools, universities and TAFEs are covered by agreements with peak bodies (such as Universities Australia), and more than 1,000 independent colleges and registered training organisations are individually licensed.

Compensation paid under the scheme

In 2014–15, the scheme generated more than \$101M (\$62M from schools, \$31M from universities, \$3M from TAFE and \$5M from other education providers). Copyright Agency distributes the money paid by the education sector to content creators, mostly based on surveys of usage in statistical samples of schools and universities carried out by an independent research company. In 2014–15, Copyright Agency's expenses were 13.6%.

Distribution of licence fees

Licence fees are distributed in accordance with a scheme of allocation that takes into account, amongst other things, different types of content (such as poetry, short stories and images) and different types of use (such as use in coursepacks, making available on a learning management system). Distributions of licence fees from schools and universities are based on information about usage provided in surveys of copying and sharing in those sectors. Recent distributions of licence fees from TAFEs and independently licensed institutions were based on data indicating content available for use in those sectors.

Distribution arrangements can be referred to the Copyright Tribunal for review.

Statutory licence for broadcast content

There is a similar statutory licence for broadcast content in Part VA of the Copyright Act. The Government has appointed Screenrights to manage that licence.