AV-CC

INFORMATION ACCESS FOR UNIVERSITIES:

COMMENTARY AND ANSWERS TO FREQUENTLY ASKED QUESTIONS ABOUT COPYRIGHT

(Includes commentary on the Music Licence)

This is an UPDATED version of the FAQ's. It replaces all previous FAQ documents. .

March 2007

Contents

1. Introduction

The purpose of this introduction is to provide a very brief context to the questions and answers which follow which may help newly appointed Copyright Officers who are using this resource for the first time.

Australia's copyright law is contained in the *Copyright Act* 1968 ("the Act") which has been amended and added to with increasing regularity over the years. Recent reforms and additions have resulted from the Digital Agenda Review in the late 1990s and the Australia/US Free Trade Agreement which was concluded in 2004. Australia is a signatory to the *Berne Convention* and other international treaties governing the protection of copyright works and in general the Act includes provisions to make it compliant with Australia's international obligations under these conventions and treaties.

The Act allows for and protects copyright in original works and other subject matter including literary, dramatic, musical and artistic works; computer software; films and video recordings; and sound recordings. This is not an exhaustive list of copyright subject matter. In each case copyright arises automatically when the subject matter is created or published provided certain criteria are met. Under the relevant conventions and treaties, Australia extends copyright protection to citizens or residents of most countries in the developed world, as well as those of many developing nations.

From 1 January 2005, copyright subsists in published works (other than photograph) for 70 years after the end of the calendar year in which the author dies. Copyright in a work which has not been published before the death of the author, and copyright in subject matter such as films and sound recordings, lasts for 70 years from the calendar year in which the material is first published.

Copyright gives the owner a bundle of exclusive rights. These differ depending upon the type of work or subject matter involved. Most relevantly those exclusive rights will include the rights of reproduction, of (electronic) communication to the public and of public performance (including causing a recording or film to be seen or heard in public). There are no formal requirements of deposit or registration in order for copyright to subsist in a work or subject matter in Australia.

The general rule is that the author of a work is the first owner of copyright. However, where a work is made by the author in the course of employment then the first owner is usually the employer. Copyright in certain commissioned photographs and portraits belongs to the commissioning party although with some restrictions on how they can use their copyright and in the case of copyright in commissioned films, videos and sound recordings the copyright will belong to the person who commissions them. All these ownership rules can be varied by agreement and there are separate rules for ownership where works are commissioned by or created for the Crown.

In December 2000 Australia enacted moral rights and included them in the Act. These rights are personal to the author and cannot be assigned. They are a right to be identified as author, a right to object to derogatory treatment prejudicially affecting the author's honour or reputation and the right to take action against false attribution.

There are a variety of exceptions which permit the use of copyright material without the express voluntary licence of the owner. Some amount to compulsory licences, for which the owner receives payment, others are free exceptions. Examples include:

(a) Fair dealing. The fair dealing exceptions allow for free use but are restricted, requiring the user to demonstrate that the use was both fair and for one of a narrow list of permitted purposes (most significantly, criticism or review, research or study, or the reporting of news).

(b) Special exception for educational institutions. From 1 January 2007, educational institutions have the benefit of a new free exception which can be relied on in certain special cases. This will be discussed in more detail below.

(c) Statutory licences which allow for the copying and communication of works, and copies of films and sound recordings from broadcasts (including podcasts of broadcasts), for the educational purposes of educational institutions. These statutory licences are remunerated and are discussed in more detail below.

(d) The performance of works, sound recordings and films in class for teaching purposes is free and is taken outside the public performance right of the copyright owner(s).

(e) The right to make insubstantial copies. The exclusive rights are only infringed if they are exercised with respect to a *substantial* part of a copyright work. In the case of the reproduction right the Act also quantifies when small amounts of copying and communication will not infringe if the copy/communication is made for the purpose of a course of education.

(f) Statutory licences which allow the remunerated use of copyright material to assist those with reading or intellectual disabilities. For example, these licences would allow literary works to be transcribed into Braille.

The key statutory licences for universities are the Part VB licence (discussed in sections 2 to 4 below) allowing for the multiple reproduction and communication of works and periodical articles and the Part VA licence (discussed in section 5 below) allowing for the copying and communication of broadcasts.

Finally, there is a voluntary licence with the relevant collecting societies representing the owners of copyrights in music and sound recordings to which many universities are parties (discussed in section 9 below). It covers the use of music at university events, Music-on-Hold and certain copying and communication of sound recordings for teaching and educational purposes.

2. Part VB – Print and Graphic Copying and Communication: General

2.1 Introduction

The Part VB licence permits universities to make reproductions, both hard copy and electronic, of literary, dramatic, musical and artistic works, and to communicate them, for the educational purposes of the institution provided that this is done in accordance with certain procedures set out in the Act and that equitable remuneration is paid for the reproduction and communication. Equitable remuneration must be either agreed between the universities and the relevant collecting society (CAL) or determined by the Copyright Tribunal.

There is currently an agreement between CAL, the AVCC and the universities which provides for the amount to be paid by all universities and for a monitoring system which generates information which is required by CAL for the distribution of that amount as between various copyright owners. This statutory licence allows for individual copyright owners to grant express licences authorising the use of their material by universities which could allow for uses beyond those allowed by the statutory licence. In particular, the statutory licence only allows for the reproduction and communication of *reasonable portions* of works (unless they cannot be obtained commercially) whereas an express licence may permit the use of more.

Currently, 37 universities are parties to the agreement with CAL which expires on 31 December 2007. A fixed amount is paid each year which is later allocated between the universities. The amount is increased annually to reflect movements in the CPI. Each year six universities have their hardcopy copying monitored for 12 weeks and they together with another two universities also have their electronic copying and communications monitored for 12 weeks.

Part VB covers **all copying and communication** 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 university (or another university with a remuneration notice) and otherwise complies with the strict rules set out in the Act and the Regulations.

Some parts of the Part VB licence apply only to *published works*: the provisions relating to articles in periodical publications and the anthology provisions. However, ss 135ZL and 135 ZMD (the provisions which allow for copies/communications to be made of works in hardcopy or electronic form) apply to works whether *published or unpublished*.

2.2 The communication right

One of the rights comprised in copyright is the right of a copyright owner to control **communications** of a work to the public. Communication is defined in the Act as meaning each of "**making available online**" and "**electronically transmitting**".

- A work is made available online when it is uploaded onto a server in a form which is able to be accessed. 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.

- A work is electronically transmitted when it is sent as a file attachment or an email to another person.

It is important to keep in mind that as with the "reproduction right" the "**right**" is the copyright owner's right. Copyright works cannot be communicated, other than in accordance with the strict rules contained in Part VB, in the absence of some other licence or defence.

It is **NOT** necessary for the university to seek the permission of copyright owners in order to make works available on-line (or copy digitally) within the limits imposed by the Part VB licence, **UNLESS** the university has already entered into contracts with the copyright owner which impose restrictions on how the university can make material available. For example, if the university has purchased CD-ROMS for use in the library, the terms of the contract may include restrictions on copying the CD-ROMS or on making them available for use by students. These restrictions arise *not* because of Part VB, but because of contractual terms that the university 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 Part VB.

2.3 What is a communication?

Q: Is the provision of a hyptertext link (hotlink) to a URL of a specific document a communication?

A: No – you do not communicate a work by linking to it (eg by incorporating a hypertext link to the work in a webpage, or directing students to a URL for a specific work). However, linking to a work which has been made available online without the consent of the copyright owner (ie in breach of copyright) *may* give rise to liability. This is because it is possible that a court would find that in providing a hypertext link to the work you were inviting or authorising people to download that work. Anyone who clicked on that link and downloaded the work would be infringing copyright in the work and you could be held liable for authorising that infringement. The safest course is to exercise caution as to the sites you provide links to. In particular, never link to a site which you know contains material which has been made available online without the authority of the copyright owner.

Q: ***Does a person who clicks on a hypertext link exercise the communication right?***

A: In Copyright Tribunal proceedings involving the schools in 2006 CAL sought to argue that the mere act of clicking on a hypertext link to view material online amounted to an exercise of the right of communication. CAL had hoped to persuade the Tribunal that teachers who directed students to view material online were authorising those students to exercise the communication right. As a result of lobbying by the education sector, the *Copyright Amendment Act* 2006, which came into force on 1 January 2007, contained a new s 22 (6A) which makes clear that a person is not taken to be exercising the right of communication merely because the person takes one or more steps for the purpose of:

(a) gaining access to what is made available online by someone else in the communication; or

(b) receiving the electronic transmission of which the communication consists.

Q: If one staff member sends another staff member a document (article or chapter of a book) as an email attachment, is this a communication within the meaning of the Act?

A: The communication right applies to communications "to the public". There is no definition of "public" in the Act. A staff member who sends a work as an email attachment to a group of students has clearly exercised the communication right by "electronically transmitting" the work “to the public.” However, private communications from one person to another are not intended to be caught by this right. (Note however, that if something has to first be copied in order to be communicated, there may, in the absence of a defence such as fair dealing, be an infringement arising from this reproduction.) Until the courts offer further guidance on this question, some uncertainty will remain about the extent to which the electronic transmission of works between academics is likely to amount to a communication within the meaning of the Act.

2.4 Copying and communication limits – how do they apply?

Part VB contains strict limits on how much of a work can be copied and communicated in reliance on the statutory licence. Failure to comply with these limits can expose the university to infringement action.

When **copying from works that are in hard-copy form** (whether hard-copy to hard-copy (eg photocopying) or hard-copy to electronic form (eg, scanning a chapter of a book or a journal article into digital form), the following limits apply:

- in relation to articles contained in a periodical publication, the whole or part of an article can be copied. The licence does not extend to copying of, or of parts of, two or more articles contained in the same periodical publication *unless* the articles relate to the same subject matter. Note that a *different* test applies in relation to copying articles in a periodical publication in reliance on the fair dealing exception contained in s 40 of the Act: here there test for determining whether more than one article can be copied from the same periodical is whether or not the articles relate to the same research or course of study.

- in relation to a literary or dramatic work contained in a published anthology, and comprising not more than 15 pages of the anthology, the whole or part of that work can be copied. An example would be an essay contained in an edited collection of essays; and

- in relation to all other copying of literary, dramatic or musical works, a "reasonable portion" of the work can be copied. The Act deems that where a literary, dramatic or musical work which is published as a published edition (for example, a book or play) is copied, then provided no more than 10 per cent of the **pages** in the edition, or one chapter (whichever is more), is copied, the amount will be taken to be a "reasonable portion." If more than this is copied, this will not be a "reasonable portion" unless the person doing or requesting the copying is satisfied, after reasonable investigation, that copies (other than second-hand copies) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

- In relation to artistic works (other than incidental artistic works), if the work has not been separately published (eg as a 35mm slide), the whole of the work can be

copied or communicated. If the work has been separately published the work cannot be copied unless the person doing or requesting the copying is satisfied, after reasonable investigation, that copies (other than second-hand copies) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

When **copying or communicating a work which is already in electronic form** (eg an electronic journal from a CD ROM – assuming that the copying and/or communication is not already paid for and governed by a subscription agreement - or the Internet), the following limits apply:

- in relation to articles contained in a periodical publication, the whole or part of an article can be copied or communicated. The licence does not extend to copying or communication of, or of parts of, two or more articles contained in the same periodical publication *unless* the articles relate to the same subject matter;

- in relation to a literary or dramatic work contained in a **paginated** electronic anthology (eg pdf or such other format whereby the content of the pages is unlikely to change regardless of the system used to view, reproduce or communicate them) and comprising not more than 15 pages of the anthology, the whole or part of that work can be copied. An example would be an essay contained in an edited digital collection of essays;

- in relation to musical works, 10 per cent of the work (unless the work has been separately published and the person who makes the reproduction is satisfied, after reasonable investigation, that the work is not available in electronic form within a reasonable time at an ordinary commercial price);

- in relation to all other copying of literary or dramatic works, a "reasonable portion" of the work can be copied. The Act deems that where an electronic copy of a literary or dramatic work which is published as a published edition (for example, a book or play) is copied, then provided no more than 10 per cent of the **words** in the edition, or, if the work is divided into chapters, one chapter (whichever is more), is copied, the amount will be taken to be a "reasonable portion." If you take more than that, it generally will not be a "reasonable portion", unless the person doing or requesting the copying is satisfied, after reasonable investigation, that copies (other than second-hand copies) of the work cannot be obtained within a reasonable time at an ordinary commercial price; and

- In relation to artistic works, the whole of the work can be copied. There is no need to inquire as to whether or not the work has been separately published and is available for purchase.

A **very important limitation** on the right to communicate works pursuant to Part VB is that if a university wishes to make available on-line a reasonable portion of a work (other than an article contained in a periodical publication) it can only do so if no other part of the same work continues to be made available at the same time. In other words, if the Arts faculty has copied a chapter of Patrick White's Voss, and made this available on-line, no other faculty in the university can make another part of the same work available on-line in reliance on the Part VB licence until this first part is taken down. Failure to comply with this limit will result in loss of the licence for the second (and subsequent) portions of a work made available on-line.

NOTE: The protection against infringement afforded by Part VB **will be lost** if the copy is, with the permission of the University, used for a purpose other than the educational purposes of the institution; made, sold or otherwise supplied for a financial profit; or given to an educational institution which does not at that time have a remuneration notice in force.

Q: Can 10 per cent of a work be made up of smaller sections from different parts of the document?

A: Yes.

Q: What should we use as a general rule for determining 10 per cent of a html document/site?

A: The 10 per cent limit applies to a "work" *other than* a computer program or electronic compilation such as a database. It is *not* permissible to copy up to 10 per cent of a database/electronic compilation. Until the courts provide some guidance on the application of the copying limits to works in electronic form there will remain considerable uncertainty as to how those limits apply in the online world.

Where the work which is intended to be copied is a document as that term is generally understood, then in most cases it should be possible to do an automatic word count of the document in order to ascertain how much can be copied. If no such facility is available, then will be necessary to manually count the number of words in the document.

Q: Do the copying and communication limits apply to the university as a whole, to each member of staff, or each subject being taught?

A: The answer, as it relates to **copying of works, and electronic transmission of works**, is unsettled. It is unclear, for example, whether it is open to two lecturers, teaching the same subject, to each copy or electronically transmit a different 10 percent of a work. The AVCC suggests the safer approach – which seems to have been accepted to date - is to adopt the view that the copying and transmission limits should be applied per subject, i.e. regardless of how many lecturers are teaching "Contracts 101" in a given semester, no more than 10 percent of a work (unless the work is unavailable for purchase within a reasonable time at an ordinary commercial price) should be copied or electronically transmitted to students by those lecturers (when their copying is aggregated).

However, there is no such uncertainty regarding the limits as they apply to communicating a work (other than a journal article) by **making it available online:** these very clearly apply to the **university as a whole**. For example:

> If the Arts faculty has copied a chapter of Patrick White's Voss, and made this available on-line, no other faculty in the university can make another part of the same work available on-line in reliance on the Part VB licence until this first part is taken down. Failure to comply with this limit will result in loss of the licence for the second (and subsequent) portions of a work made available on-line.

Q: If a chapter of a book is made available online, can a lecturer email a different chapter of that same book to his/her students?

A: The answer to this question depends on whether the lecturer was responsible for making the first chapter of the book available online. If so, the lecturer cannot email a different chapter of the same book to his or her students unless the lecturer is satisfied, after reasonable investigation, that the book is not available within a reasonable time at an ordinary commercial price. If the chapter which was made available online was made available by someone else within the university, the lecturer can – subject to what is said above regarding copying and communication limits – email a different chapter to his or her students.

Q: If scanning a book in circumstances where it has not been previously scanned, can the entire book be scanned and stored providing distribution to students will only involve one chapter or 10%?

A. No - you cannot scan an entire book. As scanning is just another form of copying, you must scan within the copying limits contained in the Act. As a general rule, this is one chapter of a work or 10% of the pages.

Q. Is it OK for teachers to make multiple copies of a complete test from a book of practice tests for use with a class preparing for an exam? Some of the tests may be 10 or so pages long. That may be more than 10% of the work, but would one test count as one chapter?

A. One test would probably count as one chapter.

Q. A lecturer in constructing a study package (study guide and resource reader) has used less than 10% of a text in the reader but a number of quotes and graphics from the text in the study guide. Over the two books she would have used more than 10% of the text. Do we look at the cumulative use of the text material or assess use according to what is contained in each individual book?

A. The lecturer is only entitled to copy up to 10 per cent of the text for this one group of students. The lecturer cannot "get around" the copying limits contained in Part VB by splitting this material between the study guide and the reader.

Q. A lecturer would like to copy several articles on the same subject matter from one Special Edition journal. Given the articles are on the same subject matter is this acceptable practice?

A. Yes – provided that the articles are on the same subject matter. In any dispute with the copyright owner or CAL there may be an argument regarding the interpretation of "same subject". As a guide, however, it would probably not be permissible to copy more than one article in a law journal simply because all the articles related to law. If, on the other hand, there were two or more articles on a particular legal topic, it would probably be permissible to copy each of these.

Q. Do the rules relating to the use of journal articles apply to conference proceedings, ie can we use more than one article from a set of conference proceedings provided the articles are on the same subject matter?

A. It depends. If conference proceedings are published annually, they may be a periodical publication, and thus it may be permissible to copy more than one article if all are on the same subject matter. However, most conference proceedings are unlikely to fall within the definition of "periodical publication", with the result that only one article, or 10 per cent of the total pages, can be copied.

Q. How can we ascertain whether a book is still available or is out of print? Can we rely on advice from a book retailer? We have tried emailing and faxing publishers but it has been very hard to get responses.

A. If the retailer confirms in writing that it is out of print and you keep a record of that confirmation, that should be sufficient.

Q. Can the whole of a back issue of a journal be copied on the basis that it is no longer obtainable?

A. No. The provisions in s.135ZL(2) and 135ZMD(2) do not apply to periodicals.

Q. Our Technical Services Section are currently operating under a set of guidelines that I think are incorrect. According to their current guidelines, they do not make copies of publications that are out-of-print and unavailable for purchase if a copy of the publication is already held by the library. Copies are only made when a publication is out-of-print, unavailable for purchase and when a copy is not currently held by the Library. It is my understanding that current ownership of a publication is not a relevant issue in terms of the right to produce a copy of an out-of-print publication. Is this correct?

A. You can make a copy of a publication which is out of print and unavailable for purchase, regardless of whether a copy is already held by the library.

2.5 Types of 'works'

From time to time the question of whether a particular work is a literary work or an artistic work will arise. The answer to this question may determine whether the university can copy the entire work or whether it is prohibited from copying more than a reasonable portion (ie 10 per cent) of the work.

Literary works are defined as **including**:

- a table, or compilation, expressed in words, figures or symbols; and
- a computer program or a compilation of computer programs;

Artistic works are defined as **meaning**:

- a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
- a building or model of a building, whether the building or model is of artistic quality or not; or
- a work of artistic craftsmanship.

Certain works – such as charts, graphs, tables and diagrams can be difficult to categorize.

As a general rule, a work which is intended to be "read" (eg a table containing words or figures) will be a literary work, while a work which is merely intended to be appreciated by the eye (eg a drawing or picture) will be an artistic. Some artistic works (eg maps) may also contain literary works within them (eg tables of scale, commentary etc).

2.6 How do the "insubstantial portions" (s.135ZG and s 135ZMB) provisions operate?

The insubstantial portion provisions contained in ss 135ZG and 135ZMB allow for an educational institution to make multiple copies of and to communicate an insubstantial portion of a literary or dramatic work without the need to pay equitable remuneration.

The *Copyright Amendment Act* 2006, which came into force on 1 January 2007, introduced a change to the insubstantial portions provisions as they apply to works that are in **electronic form.**

For works which are being copied from a hardcopy format, the test remains that an insubstantial portion is one or two pages of a literary or dramatic work or no more than one percent of the total number of pages in the literary or dramatic work if there are more than 200 pages.

For works that are being copied or communicated from a work which is electronic form, the following rules apply:

- if the work is paginated (eg in pdf or other format whereby the content of the pages is unlikely to change regardless of the system used to view, reproduce or communicate them) an insubstantial portion is one or two pages of a literary or dramatic work or 1 per cent of the pages if there are more than 200 pages; and
- if the work is **not** paginated, an insubstantial portion is no more than one per cent of the *words* in the work .

But note the following provisos:

- Where the exception is being relied on to copy or communicate works which are in electronic form, it is no longer permissible to copy/communicate passages from different parts of the work in order to make up the one or two pages/one per cent of the words. Material which is copied/communicated in reliance on this exception must appear consecutively.

- 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 works or musical works. 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 university.

- 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 on-line 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, a university 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.

2.7 What electronic copying is allowed under Part VB?

Q: Can an academic print newspaper articles from a CD-ROM and make them available to students in a printed book of readings.

A. Yes, provided the CD-ROM has not been purchased under a contract which prohibits this.

Q. Is it necessary to determine whether something has previously been digitised before scanning under the Part VB licence?

A. No. Part VB allows universities to scan into digital form whatever material they want, provided the copying limits contained in the Act are complied with and the copying is for educational purposes.

Q. Is it an infringement of copyright to up-load a CD-ROM (which has been provided free for teaching purposes) on to a password protected network or website so that students can access it?

A. If the copyright owner granted permission for the CD-ROM to be made available to students (by being copied and then made available online) in this way, then there is no infringement of copyright. In the absence of such permission, then the University is unlikely to be able to rely on the Part VB licence to up-load more than 10 per cent of the CD-ROM on to a server.

Q. What risks should this University consider when establishing an infrastructure to support electronic copying and communication?

A. When establishing an infrastructure to support digital copying, the university should ensure that the required copyright warning notices are placed on or near scanners and library terminals, that each licensed electronic copy and communication carries the required warning notice, and that the material being communicated is password protected and can only be accessed by students and staff of the university. Copyright works made available on-line in reliance on Part VB must NOT be available for access by the general public.

Q: Must the rights management information be digitised each time we digitise an article from a periodical publication? Usually the rights management information will not be on the article, but rather on the front page of the journal.

A: The provisions in the Act which prohibit the removal or alteration of rights management information attached to a copy of a work apply to **electronic** rights management information. There is no requirement in the Act to copy information about the ownership of copyright etc that appears at the front of a work in printed form.

If the work being copied is actually an electronic version – with electronic rights management information attached – then the university must not remove this information without the permission of the copyright owner. If the electronic work has been commercially purchased by the university it will also be necessary to comply with whatever restrictions have been imposed in the contract.

2.8 When is there an implied licence to copy from the Internet?

Q. In what circumstances can a university assume an implied licence to copy material that is on the Internet? Does "an implied licence to copy" mean that the whole of the work can be (i) printed out for your own use, (ii) printed out and multiple copies made for teaching purposes, (iii) included in an electronic version of a coursepack or other teaching material which is communicated to students?

Does "an implied licence to copy" mean that no payment need be made to CAL?

A. It is unsafe to assume that there is an implied licence to copy unless it is absolutely clear that notwithstanding that the owner of copyright has not said so expressly, he or she grants permission for the work in question to be copied without payment. This will depend very much on the facts of each particular case.

Quite apart from the question of any "implied" licence, material published on the Internet – particularly material intended for educational use – will sometimes contain an express permission to make multiple copies, without payment, within certain limits and for certain purposes. Depending on the terms of such a licence (in particular whether it can be construed as including the right to communicate as well as the right to copy), the material may be included in an electronic coursepack or otherwise communicated to students. It would be prudent to keep a print-out of the terms of the licence.

Provided universities comply with these limits, this copying can be done for free and without the need to rely on the Part VB licence. See Section 3.2 of this document for information on how to deal with this copying during the period of a hardcopy survey.

In many circumstances, it will be simpler to provide students with the URL to web-based material. The student is then able to browse the material on-line without the university having copied anything.

2.9 What copyright warning notices must be given when copying or communicating electronically?

The Act imposes strict obligations on universities to bring copyright obligations to the attention of staff and students.

Each licensed electronic copy and licensed communication MUST contain the following prominently displayed electronic notice:

COMMONWEALTH OF AUSTRALIA

Copyright Regulations 1969

WARNING

This material has been copied and communicated to you by or on behalf of [insert name of university] pursuant to Part VB of the *Copyright Act* 1968 (**the Act**).

The material in this communication may be subject to copyright under the Act. Any further copying or communication of this material by you may be the subject of copyright protection under the Act.

Do not remove this notice.

This notice MUST appear either before or at the same time as the material being communicated appears on the screen.

Q: Does this notice have to accompany a print-out?

A: No.

2.10 What about works that are out of copyright? Does the "published edition" copyright prevent them from being copied?

Copyright in a published work continues until 70 years after the death of the author. A work which is out of copyright can be copied in whole or in part without any infringement of copyright in the work. There may be copyright in the published edition (layout etc of the particular publication) of a printed work. However, provided the copying of the out-of-copyright work is for the educational purposes of the institution, there is no infringement of any rights held by the publisher to the published edition – s 135ZH.

2.11 Can we copy or communicate unpublished works in reliance on Part VB?

See the discussion above in Section 2.1

2.12 When can a university copy for "subscribers" for a fee?

Q. One of our Units copies the contents pages of journals into a publication which they then send out to their subscribers for a fee. Do they need the permission of the publishers to do this? Is there a further issue if the lists are published on the Internet?

A. If the "subscribers" are students or academic staff, and the publication is made available to them by the university for educational purposes, and there is no intention to make a profit on the publication, it will be covered by Part VB of the Act. If the publication is made available to these subscribers on a password protected website or via password protected e-mail, it is also covered by Part VB.

If the university proposes to make the copies under Part VB, and make this material available on the Internet in such a way that it can be accessed by the general public, or if the subscribers are not students or staff of the university, or of another university with a remuneration notice in place, then the copying **and communication** may well fall outside Part VB, and the university will need to seek the permission of the copyright owners for both activities.

2.13 What are the rules regarding copying and communication of artistic works?

See the discussion in section 2.4 above regarding copying limits generally under Part VB.

Q: Artistic works in hardcopy form can be copied without further inquiry provided that they have not been "separately published". What does "separately published" mean?

A: There is no definition of this term in the Act. As a practical guide, if the artistic work cannot be purchased as a 35 mm slide or in some other similar format (eg by one of the Australian art galleries), then it is safe to treat it as having not been separately published.

Q: Can we copy a number of artistic works from a book as long as they make up less than 10 per cent of the book?

A: Provided that the artistic works intended to be copied have not been separately published, then subject to the proviso which follows, it is permissible to copy *all* of the artistic works contained in a book: the 10 per cent limit which applies to literary works is not relevant. However, if the book contains words as well as pictures (and is therefore subject to protection as a literary work as well as containing various artistic works), and the words are copied, then it may be that there is an infringement of the literary work if in copying a large amount of photos it is the case that more than 10 per cent of the pages of the book are copied also.

Q. A book contains text and a number of images. I wish to copy only the images for educational purposes. Is it OK to copy all the images if the total copying does not exceed 10 per cent of the pages in the book? Or can I only copy 10 per cent of the images?

A. If the copying is confined to the images – and none of the text is copied – then there is a *reasonable argument* that all of the images can be copied in reliance on Part VB, provided, of course, that the person doing the copying has satisfied himself/herself that the artistic works have not been separately published and are not available for purchase within a reasonable time at an ordinary commercial price.

A more conservative approach would be to say that as the images are contained in a book, then no more than 10 per cent of the pages in the book can be copied. Such an approach should certainly be followed if any of the text is copied along with the images.

The 10 per cent limit – if it applies at all – applies to the number of pages in the book only, and not to the number of images. There is no provision that would restrict the copying to 10 per cent of the *images* in the book.

Q. Books and journal articles include a range of "incidental artworks"; graphs, photographs, line drawings etc. With some of these, there may be a statement that "this work was reproduced with the permission of....". For most artworks it is not clear if the copyright owner of the book or journal article produced the artwork themselves or if it has been created by someone else and just reproduced. My assumption would be that artworks labelled "reproduced with permission of ...." cannot be copied or communicated as the copyright belongs to the producer and not to the copyright owner of the book or article; i.e., the 10% or 1 chapter rule from a book rule does not permit copying or communication of such artworks. Is this correct?

A. No. Sections 135ZM and 135ZME of the Copyright Act provide that under the Part VB statutory licence a university can copy or communicate a page that includes an incidental artwork, regardless of who owns the copyright.

Q. Can I copy artworks where there is no indication of the creator/copyright owner?

A. Yes. While it is a requirement of the Sampling System that universities provide full bibliographic details of works copied during the period of a survey, if no such details are available there is no prohibition on copying.

Q. Can I adapt or modify someone else's artwork to create my own artwork without breaching copyright? What degree of modification is required before a breach of copyright is not occurring?

A. Each case would need to be considered on its merits. If the modification is so extensive that, on a side by side comparison, it appears that the modified work does not incorporate a substantial part of the original work, then there is no infringement of copyright. Another way of thinking about this is to say that if such a small amount of the original work is taken that the taking amounts to less than a substantial part, then there is no infringement. It is important to note, however, that the test of substantiality is concerned more with the quality of what is taken than the quantity. If the "essence" or original aspect of the original work is taken, then there will have been a reproduction of a substantial part, and thus, in the absence of an exception, copyright in the original will have been infringed.

As for relevant exceptions:

- if the copying (modification) is undertaken by or on behalf of the university for the educational purposes of the university, then Part VB licence can be relied on; and
- if the copying (modification) is undertaken by a staff member of student for his or her own research or study, then the copying might amount to a fair dealing.

Modifications which might adversely affect the integrity or reputation of the particular author or artist should be avoided as these might infringe the moral rights provisions in the Copyright Act. These are discussed below in Section 8.

Q. Can the university copy a film still published in a book, and a film still copied on a postcard, and use them in a brochure to explain and advertise a course?

A. For the reasons set out, this is not advisable. A film still is an artistic work and can be copied under the Part VB licence if the copying is for the educational purposes of the university, and the artistic work has not been separately published. If the film still has been published on a postcard, the university would be required to satisfy itself that the postcard is no longer available for purchase – a very difficult thing to do. Also, it is arguable whether the purposes of explaining or advertising a course is "copying for the educational purposes of the university", and the copyright owner may bring an action for infringement.

Q. If a lecturer makes a slide of printed visual material (eg, horticultural illustrations of gardens, vineyards, orchards, forests and the like), to show in class, can he then make a copy of this slide available to his students online?

A. Yes, subject to the restrictions discussed above in relation to copying artistic works (ie, they can only be copied without further inquiry if they have not been separately published. If they have been separately published, the university must make the relevant investigations to ensure that they cannot be purchased within a reasonable time at an ordinary commercial price.)

Q: Can a lecturer make a slide of visual material downloaded and printed from the Web and show this in class to illustrate the lecture?

A: Yes. As the artistic work in this example is in electronic form, there is no need to make the investigations discussed above.

Q: Can I reproduce a photograph from a book for the purposes of including this in a handout to students, even though I am taking no other work from the book?

A: An artistic work (other than an incidental artistic work) can be copied without further inquiry provided the university has satisfied itself that the work has not been separately published. If the artistic work has been separately published, it can only be copied without permission if the university has satisfied itself, after reasonable investigation, that copies (other than second hand copies) cannot be purchased within a reasonable time at an ordinary commercial price.

2.14 How does the Part VB licence apply to the taping of a recital, performance or lecture?

Q. If a work is read or performed in a lecture (for example, a poem is read out), and the lecture is audio-taped by either the university or a student, is copyright infringed?

If a transcript of the lecture, or the audio, is put on a subject web site, is copyright infringed?

A. If the work is out of copyright, e.g. the author of the poem has been dead for 70 plus years, there is no problem copying or communicating in this way. If the work is still in copyright, it is necessary to consider the rights which will be exercised as a result of the activity you have described. The following considerations apply:

(a) In reading the work to the class, the lecturer will "perform the work in public". The exception contained in s 28 of the Act will apply to this activity, provided, of course, that the requirements of s 28 are met. These include a requirement that the lecturer is performing the work in the course of giving educational instruction (not for profit) and the audience is limited to students and does not include parents etc.

(b) In taping the lecture (or authorising students to do so), the lecturer has engaged in the reproduction right. If the audio is then made available to students online, the lecturer has also exercised the right of communication to the public. If the work is contained in an anthology, and comprises not more than 15 pages in the anthology, it can be copied and communicated in reliance on Part VB. (Part VB was amended from 1 January 2007 to include a digital anthology provision.

(c) If the work is **not** contained in a printed anthology, then unless the university has satisfied itself that the work has not been separately published, no more than 10 per cent of the work can be reproduced or communicated in reliance on Part VB. In the absence of some other exception, the university would technically be exposed to a copyright infringement action by the owner of copyright in the poem were it to allow a staff member or student to tape the lecture/make a transcript or audio-recording of the lecture available online.

(d) It is possible that the university could rely on the new special purpose exception contained in s 200AB (and discussed below at section 7) in order to engage in the activity you describe. This exception can only be relied on where no other exception or statutory licence is available. You should consider the discussion at section 7 of these FAQ's in determining what steps should be taken when relying on s 200AB.

2.15 Who are "staff" and "students" of the university for the purposes of Part VB?

From time to time, the AVCC is asked this question. There is nothing in Part VB which restricts a university relying on it to copy/communicate only for staff and students of that university. The Part VB licence applies to copying and communication, by a university, for the *educational purposes* of that university or of another educational institution with a remuneration notice in place. Visiting academics etc can rely on the Part VB licence in

respect of copying and communication undertaken by them for the educational purposes of the university in the same way as full-time members of staff can.

The Remuneration Agreement between CAL and the AVCC provides that the payment which is made by Universities to CAL is in respect of copying and communication, by or on behalf of universities or their Affiliated Institutions, in reliance on the Part VB licence, including copying and communication for or in connection with TAFE Students or Continuing Education Students (as defined in the Remuneration Agreement).

2.16 Can the Part VB licence be relied on for copying and communicating for off-shore students?

The Part VB licence applies to copying and communication which takes place in Australia for the educational purposes of either the university doing the copying (or communicating) or of another university with a remuneration notice in place.

Material can be copied for and communicated to offshore students, as long as the students are enrolled as students of a university with a remuneration notice in place.

Q. Our university prepares a course, which is taught on-line, for an organisation which is based off-shore. The students, who are enrolled as students at our university, are employees of the organisation which has commissioned the course. If the material for the course is copied on to CD-ROMS by our staff in Australia, in reliance on the Part VB licence, and these CD-ROMS are sent off-shore, up-loaded onto a server and accessed in this way by the off-shore based students, is there any breach of copyright involved?

A. The copying on to the CD-ROM would be covered by Part VB. If the up-loading onto the server took place off-shore, any reproduction involved in this activity would not be subject to Australian copyright law, but may infringe copyright in the jurisdiction where the copying takes place.

Alternatively, your university could make the material available to the off-shore students by way of a hypertext link to a site located on a server based at your university in Australia. Provided the material was only able to be accessed by students who were enrolled at your university, and was made available for the educational purposes of your university, both the initial copying on to CD-ROM and the up-loading on to your server would be covered by the Part VB licence. The appropriate copyright warning notice should be attached in such a way that it appears whenever the material is able to be accessed.

2.17 Copying with permission of copyright owner – must you mark?

Q Should copies which have been made with the permission of the copyright owner (as opposed to in reliance on Part VB) be marked to indicate this? How should they be marked?

A. There is no requirement in the Act to mark copies which are not made in reliance on Part VB. However, it is good practice to mark copies which are made with the permission of the

copyright owner. The reason for this is that it assists in establishing the circumstances of the copying if this is ever challenged down the track. There is no particular form required.

2.18 Can you charge students for copying of material?

Q Can we charge students for copied material, eg course packs?

A. The only restriction imposed by the Copyright Act on charging students for material copied under the Part VB licence is that there should be **no intention** by the university **to make a profit** on the copies which are sold. However, note that the Higher Education Support Act 2004 does impose certain restrictions on charging fees to students.

2.19 Printery issues

Q. Is a pdf file copy that is produced to facilitate the final print copies for the students counted as a copy, or is this regarded as a temporary file that is used to produce the final print copies?

A. As a practical matter, the view has been taken that this intermediate "copy" should not be counted as a copy made in reliance on Part VB unless the copy is retained by the university.

Q. From the printery viewpoint it would be more efficient to retain the pdf file of a collection of readings on their system. Changes to a set of readings in subsequent years, i.e, deletion of some readings and addition of further readings, can be made by simply removing pages from the existing file and adding additional page images to the file for the new readings. Is retention and modification of this file allowed in the way described?

A. Retention and modification of the pdf file is allowed. This copy would be reported during the period of an EUS.

Q: In the case of material copied under Part VB, the Act provides that the benefit of the statutory licence is lost if the copies are sold or otherwise supplied with the consent of the university "for a financial profit". Where the majority of a university's copying is done by a commercial print shop (whether located on campus or outside the university), is it permissible for the print shop to make a profit on the copying it undertakes?

A: The Federal Court has determined that the relevant question is whether the university had *intended,* at the time that the copied material was sold, that the material be sold for a profit. This was in the context of a case which considered whether universities were acting in breach of the Part VB licence when they sold coursepacks containing material copied pursuant to Part VB. Provided that the intention at the time of selling the coursepacks was to recover costs only (and not to make a profit) then the fact that the coursepacks were sold to students did not result in the loss of the Part VB licence.

Unfortunately, this case did not shine any light on the question whether it is permissible for a university to engage a commercial printery to undertake copying on its behalf pursuant to Part VB. While the question is not without doubt, there is a reasonable likelihood that provided that the price charged to students for the copied material is set on a cost recovery basis only, then the fact that a for-profit entity is undertaking the production of course materials by and on behalf of the university will not result in the loss of the Part VB licence. For better caution,

any contract between the university and the commercial printer should make clear that payment to the commercial entity is for services rendered (ie the production of course materials) as opposed to delivery of a product. Further, the university, and not the commercial printer, should be the party selling the copied materials to students.

2.20 Copying from anthologies

Q: Can a lecturer rely upon s135ZL (the provision relating to reproduction of works in hardcopy form) to copy a reasonable portion of a work within a hardcopy anthology, if that work comprises more than 15 pages within that anthology?

A: Yes.

Q: In circumstances where the compilation that makes up an anthology is protected by copyright, it seems to me that s135ZL (the provision relating to reproduction of works in hardcopy form) would impose limits on how much of the anthology itself may be copied. Consequently, would it be best to advise lecturers not to copy more than 10% of an anthology in circumstances where s135ZK (the provision relating to reproduction of works published in printed anthologies) may otherwise allow a greater portion to be copied?

A: The question highlights a potential conflict between the operation of s 135ZK and s 135 ZL. Section 135ZK allows a university to copy a work of not more than 15 pages from a printed anthology without the need to make any further inquiries. However, in the event that this work amounts to more than 10 per cent of the pages of the *compilation*, there is, on one view, a breach of s 135ZL. It is the AVCC's view that given the clear legislative intention of s 135ZK, a court is not likely to find that a university which has brought itself within s 135ZK has nevertheless infringed copyright by reproducing more than 10 per cent of the compilation.

Having said that, the AVCC considers that a court might take a different view if the facts were that the 10 per cent limit had been breached as a result of *more than one* work being copied from the anthology by the same lecturer. This is notwithstanding that there is nothing on the face of s 135ZK which prohibits a lecturer from copying more than one work from the same anthology.

In summary, as a practical guide there is no obligation to keep within 10 per cent of the words of the compilation if s 135ZK can nevertheless be relied upon and provided that no more than one work is being copied from the anthology by the same lecturer. Of course, there is nothing to prevent the same lecturer from copying more than one work from the same anthology in reliance on s 135ZK if this does not result in the lecturer copying more than 10 per cent of the pages of the anthology.

Q: The Australian Copyright Council states that educational institutions cannot copy an entire work from a hardcopy anthology if the work is separately published and is commercially available (Educational Institutions: Text, Images and Music, Feb 2002, p 9). I cannot understand how the ACC came to this conclusion, and consequently I wish to confirm that the commercial availability of a work within an anthology has no bearing on whether that work can be copied, assuming the work does not comprise more than 15 pages within the anthology.

A: The AVCC does not agree with this view of the Australian Copyright Council. It is true that if a work has been separately published and is commercially available, then no more than 10 per cent of the work can be copied in reliance on s 135ZL (the provision relating to reproduction of works in hardcopy form). However, there is no requirement in s 135ZK (the provision relating to reproduction of works published in printed anthologies*)* to ensure that the work you are copying in reliance on that section has not been separately published. See the discussion above relating to the potential conflict between ss 135ZK and 135ZL.

Q: Can academics copy from an electronic version of an anthology?

A: The *Copyright Amendment Act* 2006 introduced new s 135ZMDA which extends the Part VB licence to electronic anthologies provided that the anthology is in a form (eg pdf) in which the content is unlikely to change regardless of what system is used to view or print the work and provided the work comprises no more than 15 pages in the anthology. If the electronic anthology from which a staff member wishes to copy does not satisfy the requirement set out above regarding form (eg if it is an html document and not a pdf document) then the anthology provision cannot be relied on. However, staff can copy such a work in reliance on the provision applying to copying of *works* in electronic form – s 135ZMD. In many cases, this provision will enable staff to copy the entire work. Provided the work the staff member wishes to copy (eg a poem) has not been separately published, they can copy the whole of the work without further inquiry. If the work has been separately published, they cannot copy more than 10 per cent of the words of the work unless they are satisfied, after reasonable investigation, that the work is not available in electronic form within a reasonable time at an ordinary commercial price.

3. Part VB – Print and Graphic Copying: Questions Which Relate To The Hardcopy Survey

Monitoring of copying in hardcopy form (eg. photocopying and slide copying) will be carried out at the same time as but separately from monitoring of electronic copying and communication.

3.1 Statutory exceptions to licensed copying

Q. How do we deal with insubstantial portions (s.135ZG - one or two pages, or no more than 1% of original material) when taking part in a survey and copying at a monitored photocopier?

A. Staff should be directed to enter the copying on the Published Material Record Form. ACNielsen will deduct an agreed percentage (3%) of the total estimated licensed copying to account for this. Also, when copies of the material copied have been provided to ACNielsen, any copying of quotations and extracts of three paragraphs or less will be excluded from processing by CAL.

Q. How do we deal with legislation, law reports and unreported judgments (Section 182A) when taking part in a survey and copying at a monitored photocopier?

A. Staff should be directed to enter the copying on the Published Material Record Form. This copying will be identified and excluded during processing by CAL.

Q. How do we deal with fair dealing copying (ss.40, 41, copying done for the purposes of research, study, criticism or review) when taking part in a survey and copying at a monitored photocopier?

A. Staff should be directed to enter the copying on the Published Material Record Form.

Q. How do we deal with copying done under ss.49 and 50 (InterLibrary Loans) when taking part in a survey and copying at a monitored photocopier?

A. Staff should be directed to enter the copying on the Published Material Record Form and mark it clearly ILL. This copying will be identified and excluded during processing by CAL.

Q. How do we deal with copying done for examinations (s.200(1)(b)) when taking part in a survey and copying at a monitored photocopier?

A. Staff should be directed to enter the copying on the Published Material Record Form and mark it clearly "for examination". This copying will be identified and excluded during processing by CAL. Alternatively staff can use the Unpublished Material Record Form for this copying. No bibliographic details will be required and the copying will not be counted.

3.2 What about if we have a free licences, or are copying or communicating copyright free material?

Q. How do we deal with material for which the university has a free licence to copy, when taking part in a survey and copying at a monitored photocopier?

A. Enter the copying on the Published Material Record Form. Each surveyed university will be required to provide a list of all copyright free licences to ACNielsen prior to the university's training session. This copying will be identified and excluded during processing by CAL.

Q. How do we deal with material for which individuals have permission to copy (that the university administration may not know about) when taking part in a survey and copying at a monitored photocopier?

A. Use the Unpublished Material Record Form for this copying. No bibliographic details will be required and the copying will not be counted.

Q. How do we deal with copying of material which is out of copyright (i.e. author has been dead for 70 years) when taking part in a survey and copying at a monitored photocopier?

A. Enter the copying on the Published Material Record Form. This copying will be identified and excluded during processing by CAL.

3.3 Print-on-demand

Q. Our bookshop provides a print on demand service for students which means that we don't need to print all course-packs at the beginning of a semester and can thus avoid costly print over-runs. How should the printing on demand be reported to CAL.

A. If the copying takes place during a survey period, it should be reported to CAL in the usual way as course-pack copying. If the copying takes place outside of a survey period, there is no requirement that it be reported to CAL.

3.4 Copying and communicating for students with a print disability – how does the Part VB licence apply?

Q. Does the current Agreement with CAL cover copying and communicating for students with a print disability?

A. Yes. Division 3 of Part VB of the Act deals with copying and communicating for such students. Copies made in compliance with Division 3 are accordingly covered by the Agreement with CAL. There is no requirement for a separate remuneration notice. There are reporting requirements and other provisions which you need to be familiar with. (See section 14 below for more information on copying and communicating for students with disabilities.)

4. Part VB – Print and Graphic Electronic Copying and Communication: Questions which relate to the Electronic use System

Q. Are we required to keep records of electronic copying and communications all year long?

A. Subject to one exception, it is only during a period that a university is being monitored for electronic use (probably no more than once every 5 years) that the university is required to keep such records. The exception is that the university must be in a position to know whether material which has been made available online pursuant to Part VB has remained online for more than 12 months. The reason for this is to enable the university, in the event that it is monitored, to be able to record any 12 month "roll-over" copies/ communications.

Q. How do I know whether I personally am required to keep records during the EUS?

A. The university will be notified well in advance of EUS monitoring whether staff are required to keep records during the monitoring period. EUS monitoring is focussed on central facilities and staff at the departmental level will rarely be involved.

Q. The EUS requires the university to indicate, where material is made available online, whether it was intended to be made available generally or was intended to be read by a specific group of staff or students. If a contract lecturer asks for an article to be made available online with the intention that his 100 contracts students read it, but he knows it may also be of interest to students studying torts, how should the question be answered?

A. Staff should be directed to indicate "S" for specific and then indicate '100' at field "L" (the number of staff/students intended to read the material). On the example above, there would be no need to provide any information regarding the torts students.

Q. Is there a requirement to report Inter-Library Loan and other Library copying during the EUS?

A. The only copying and communication that is required to be reported during the EUS is electronic copying/communication which takes place in centres (staff will be notified in advance which locations at the university are "centres") and which is done pursuant to Part VB or which is for external students. Other fair dealing copying and ILL copying does not need to be reported.

Q. The EUS requires us to indicate whether material is copied/ communicated for internal students, external students, staff or other. What if we are copying for internal AND external students?

A. Staff should be directed to indicate *one only* of these categories. If the copying is intended for internal students as well as external students, staff should be directed to estimate the numbers of each and provide two separate entries.

Q. Can a University be required to repeat the EUS if it is not conducted properly?

A. Yes it can.

5. Part VA – Audio-Visual Copying and Communication: Questions Which Relate to Sampling

5.1 Introduction

The Part VA statutory licence is intended to meet the needs of universities in relation to copying and communication of material from broadcasts. It does not cover copying or communication of material direct from commercially hired or purchased CDs, videos or DVDs: it applies only to broadcasts (eg radio, television, cable and satellite) and, from 1 January 2007, to podcasts of broadcasts and broadcasts which have otherwise been made available online by the broadcaster for download without payment. The Part VA licence covers the broadcast of both films, video material and sound recordings.

The copyright owners are represented by a collecting society being Screenrights. As with the Part VB licence, the Part VA licence does not exclude the possibility of express voluntary licences.

The amount of equitable remuneration has been agreed with Screenrights as a lump sum payment by the university sector. A sampling system has been agreed in order to produce the information which Screenrights needs to distribute the equitable remuneration paid by universities amongst copyright owners.

5.2 Digital practices – what can we do under the Part VA licence?

Q. Can I make a copy of a program off air (say The Planets) and put it onto a CD-ROM disk which I will distribute to my distance education students?

A. Yes. Each CD-ROM is a separate copy and must be marked.

Q. Is the permission of a copyright owner required before a "tape" can be digitised in order that it be made available to a class through a computer?

A. If the tape is of an off-air broadcast, no permission is required either to make a digital copy or to make that copy available online to students. Both of these acts are covered by Part VA.

If the material in question is commercially hired/purchased, the permission of all relevant copyright owners must be obtained. It is important to ensure that the permission covers both copying *and* communication.

5.3 Do we need to record copying by students for student presentations?

Q. Can a student copy from TV/Radio/Satellite/Cable and use the material in a tutorial?

A. A student is entitled to copy in reliance on the fair dealing provisions contained in s 103C (fair dealing for the purpose of research or study) or s103A (fair dealing for the purpose of criticism or review). If the student is required to make the copy as part of his or her assessment, the purpose is likely to fall within s 103C. If the student has made the copy for the purpose of stimulating a class discussion on the subject matter, the purpose may well fall within s 103A. (These purposes may overlap).

Alternatively, if the student has been directed to make the copy for the university for the purpose of teaching students, the copy can be made in reliance on Part VA.

If the former, the student should retain the tape and it should not be marked (but it should have identification and sources cited). If it is the latter the tape should be marked as having been copied pursuant to Part VA for the educational purposes of the university.

5.4 Can we copy from "unauthorised" tapes?

Q. Staff sometimes provide a personal tape containing copies they have made under the section 103C fair dealing provisions, but which includes a segment or program which they have copied on behalf of the university and which they want to use for teaching purposes.

A. The university can make a further copy of that part of the original copy that is to be used for teaching, and mark it as being copied pursuant to Part VA.

Q. Can the university make a Part VA licensed copy from an original which was made for another legitimate purpose (e.g. fair dealing)?

A. Yes. Once a copy of the original copy is made for the educational purposes of the university, then this copy, of course, must be marked. The university is free to return the original copy to the academic without making any record of the original copying. It is not necessary that the original copy be wiped.

Q. Can we make further copies of tapes of off-air broadcasts from many years ago?

A. There is no need to make further copies – these old tapes of off-air broadcasts can be shown to students at your university. If you chose to make further copies, any new copy should be marked.

Q. An academic who is doing a research project has asked me to tape a series of programs. He will not use the copies for the educational purposes of the university, will never show them to a class, and will only use the tapes for the purpose of his own research. My understanding of the licence is that we are only covered to copy for educational purposes. Could you let me know if I am correct?

A. The copying you have described above would not be covered by the Part VA licence, and thus need not be marked as having been copied by or on behalf of the university pursuant to Part VA. The academic may be able to copy the programs under s 103C of the Copyright Act. There have not been any cases deciding the question whether a person can rely on the fair dealing provision where someone else does the copying for them (ie as agent on their behalf). If the university does this it would be advisable to keep a record of the circumstances of the request. Whether the dealing is "fair" will depend on the circumstance of each case. (See Section 6 below for more detail on the fair dealing exceptions.)

5.5 How should we record copying for conversions to PAL (Australian) format?

Q. Our audio-visual resource area is often asked to do format conversions, for the University's educational purposes, of material which has either been purchased or copied (possibly off-air or possibly from another source) overseas. In most cases it would be impossible to commercially obtain the video in PAL (Australian) format. Is there any provision for such copying in the Act?

A. If the original tape has been made from a broadcast which went to air overseas, the original taping is not a matter for the Part VA licence as no act involving one of the rights comprised in the copying (e.g. reproduction) takes place in Australia. If the academic then returns to Australia and wishes to make a reproduction (in order to convert to PAL format) then – provided this is for the educational purposes of the university – it is within the Part VA licence. This copy made in Australia should be marked.

There is no exemption or provision in the Part VA scheme that allows you to convert commercially purchased material obtained or copied overseas to PAL (Australian) format for educational purposes. Because the copy is not initially taken from a broadcast, it is not covered by the Part VA licence. However, the new s 200AB "special purposes" exception introduced in the *Copyright Amendment Act* 2006 (and discussed below at section 7) arguably applies to this type of format conversion, particularly if the material to be copied is not available for purchase in Australia in the required format.

5.6 Can we copy from commercially purchased or hired video tapes?

Q. Is it ever permissible to make a copy of a purchased or hired sound recording or film or videotape?

A. The Part VA statutory licence only covers copying of broadcasts (including podcasts of broadcasts). It does not cover copying of audio-visual material obtained via other means such as commercial purchase or hire.

There are fair dealing provisions in ss.103A, 103B and 103C of the Copyright Act which allow fair dealing copying of any audio-visual material for the purposes of research, study, criticism, review, or reporting news. (Note, however, that these fair dealing exceptions will rarely if ever be available to the university, as opposed to an individual lecturer or student for his or her own research or study or criticism/review.) A number of factors would be taken into consideration by a court in any individual case to determine whether the dealing was fair. One of those factors is whether the item can be purchased within a reasonable time at an ordinary commercial price.

If it is possible to purchase – for an ordinary commercial price – a copy of the videotape etc then it will almost certainly not be "fair" to simply make a copy of the entire tape, whether this is for the teacher's own research or study or to show to students in the classroom. However, s as discussed above, if the purpose of the copying is to obtain a copy of a videotape which cannot be hired or purchased in Australia (or cannot be hired or purchased in a *format* which enables it to be shown to students in the classroom), then the "special purpose" exception in s 200AB of the Act arguably applies. This exception, of course, is available to the *university*.

Q. If the Library confirms that a commercially produced video-cassette program is no longer available for commercial purchase, are we entitled to make a copy of this program?

A. Part VA does not cover copying of commercially purchased/hired videos, even if the video is no longer available for commercial purchase/hire. However, as discussed above, if the video is no longer available for commercial purchase, the "special purpose" exception in s 200AB of the Act arguably applies.

5.7 Can we copy for off-shore students?

Q. We have a staff member who wants to take a copy of a TV broadcast up to Hong Kong to show to students of our university.

A. There is no problem showing the tape to students enrolled with the university, no matter where they are, if it is for the educational purposes of the university.

5.8 Can we copy satellite broadcasts?

Q: Can we copy satellite broadcasts, originating from overseas but received and copied in Australia, in reliance on Part VA?

A: Yes**.**

5.9 Can we copy broadcasts for use in a videoconference?

Q. I have a lecturer who has recorded information from TV on video 7 days ago. She would now like to show this video at a video-conference session. Can she do this without infringing copyright?

A. Yes. From 1 January 2007, s 28 of the Act applies to the communication right. This means that audio-visual material, broadcasts etc can be communicated (via a video-conference facility) in reliance on s 28, provided that the teacher is giving educational instruction (not for profit) and the audience is limited to students and does not include parents etc.

6. Fair dealing

6.1 The legislative framework

The discussion which follows relates to the fair dealing exceptions only. In section 7, below, we discuss the new "special purpose" exception contained in s 200AB of the Act.

The fair dealing exceptions contained in the Act are an important part of the balance which is struck between the rights of copyright owners and copyright users.

The exceptions of potential relevance to universities are:

s 40 – *fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of research or study*

s 41 – *fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of criticism or review*

s 41A - *fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of parody or satire*

s 103A – *fair dealing with an audio-visual item for the purpose of criticism or review*

s 103AA *fair dealing with an audio-visual item for the purpose of parody or satire*

s103C – *fair dealing with an audio-visual item for the purpose of research or study*

For the purpose of ss 103AA, 103A and 103C, an audio-visual item means a sound recording, a cinematographic film, a sound broadcast or a television broadcast.

For these exceptions to apply, the dealing must be either for the purpose of research or study or criticism and review, **and** it must be fair.

6.2 The fairness test

A dealing by way of copying a literary, dramatic or musical work, or adaptation of such work, for the purpose of research or study, is *deemed* to be fair if no more than a "reasonable portion" is copied. (Note: This deeming provision does not apply to communications. Nor does it apply to dealings with audio-visual works.)

In determining the amount which is deemed to be a "reasonable portion" for the purpose of s 40, you do not (from 1 January 2007) refer to the definition of "reasonable portion" contained

in s 10(1) of the Act, but rather to the table which is set out in s 40 (5) of the Act. That table provides that for the purposes of s 40 "reasonable portion" **means** the amount described below:

Work or adaptation	Amount that is reasonable portion
A literary, dramatic or musical work (except a computer program), or an adaptation of such a work, that is contained in a published edition of at least 10 pages	10 per cent of the number of pages in the edition; or if the work of adaptation is divided into chapter - a single chapter
A published literary work in electronic form (except a computer program or an electronic compilation such as a database), a published dramatic work in electronic form or an adaptation published in electronic form of such a literary or dramatic work	10 per cent of the number of words in the work or adaptation; or if the work or adaptation is divided into chapters – a single chapter

It is still permissible to copy one whole article contained in a periodical publication, but from 1 January 2007 the test for determining whether *more than one article* can be copied in reliance on the fair dealing exception has changed. Whereas previously more than one article could be copied only if the articles dealt with the same subject matter, it is now permissible to copy more than one article from the same periodical publication if the articles relate to the same research or course of study.

Q: If a teacher wants to copy in excess of the limits set out in s 40(5) and deemed to be fair, might the copying still amount to a fair dealing within the meaning of s 40?

A: Yes. However, in cases where the deeming provision cannot be relied on, it can be difficult to determine whether a particular dealing is fair. The Act contains a check list of criteria which are relevant to the question whether a dealing by way of reproducing a work/audio-visual item for the purpose of research or study is fair. The relevant factors are:

- the purpose and character of the dealing;
- the nature of the work/adaptation/audio-visual item;
- the possibility of obtaining the work/adaptation/audio-visual item within a reasonable time at an ordinary commercial price;
- the effect of the dealing upon the potential market for, or value of, the work/adaptation/audio-visual item; and
- in a case where part only of the work/adaptation/audio-visual item is copied - the amount and substantiality of the part copied taken in relation to the whole item.

For the criticism and review exception to apply, a sufficient acknowledgment must be made of the work/audio-visual item which is copied. The question of whether the dealing is *fair* is a question which will depend on the particular facts of each case.

6.3 The purpose test

As a general rule, the relevant purpose is the purpose of the person doing the copying. While there are arguably some exceptions to this rule, these should be dealt with on a case-by-case basis.

6.4 Parody and satire – when will this new exception apply?

The terms *parody* and *satire* are not defined in the Act. However, a court is likely to take into account the dictionary meaning of these terms in determining the scope of the exception. The Macquarie Dictionary includes the following definitions:

"Parody"

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

"Burlesque"

> 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.

It can be seen from the above definitions that both parody and satire can involve (and often will involve) a derogatory treatment of a work. As discussed below in section 8, an author's rights with respect to his or her work also include the moral right of integrity: ie the right to object to alteration or other derogatory treatment of the work that would be prejudicial to the author's honour or reputation. While the new parody and satire dear dealing defence does not override the moral rights contained in Part IX of the Act, those rights are subject to "reasonableness" exceptions. It is likely that a court will, in determining whether a particular use infringes the moral right of integrity, take into account whether or not the use in question was a fair dealing for the purpose of either s 41A or s 103AA.

As to the question of what is "fair" with respect to a dealing in reliance on the parody and satire exception, the Act contains no guidance. Clearly, the amount of the work which is used will be relevant to determining whether the use was fair. As to what other factors might be relevant, the Supplementary Explanatory Memorandum to the *Copyright Amendment Bill* 2006 (which introduced the new exception) contained the following:

> *The parody and satire exceptions will apply where a person or organisation can demonstrate that the use for the purpose of parody or satire is a fair dealing. …It is*

appropriate to require that a use for the purpose of parody and satire should be "fair". Parody, by its nature, is likely to involve holding up a creator or performer to scorn or ridicule. Satire does not involve such direct comment in the original material but, in using material for a general point, should also not be unfair in its effects on the copyright owner.

6.5 Can the fair dealing exceptions be relied on to copy/communicate for someone else?

As noted above, while the Act is silent on this question, the courts have held that in determining whether the purpose test has been satisfied, the relevant purpose is the purpose of the person doing the copying/communication.

It is arguable, however, that in certain circumstances, a person can copy/communicate on behalf of another in reliance on the fair dealing exceptions. An example may be a teacher making a copy at the request of and on behalf of a student who is disabled etc and therefore unable to make the copy/communication for his or her self. Each case needs to be considered on its own facts. As discussed further below, the new "special purposes" exception contained in s 200AB of the Act may also apply to such situations.

6.6 Do the fair dealing exceptions apply to communications as well as reproductions?

While the deemed fairness test contained in s 40 (5) of the Act (discussed above) applies only to dealings by way of a **reproduction for the purpose of research or study**, the fair dealing exceptions generally apply to any act which falls within the scope of the copyright owner's rights.

Q: Where a lecturer is presenting at a conference, can she rely on s 103A of the Act (ie fair dealing with an audio-visual work for the purpose of criticism or review) in order to play audio-visual material such films?

A: Provided that:

(a) the lecturer's *purpose* in showing the film is to criticise or review either the film or another film, work etc; and

(b) the lecturer provides a sufficient acknowledgement of the film which is shown; and

(c) the dealing is "fair"

then the defence will be available.

Of course, the difficult question is: how can you be sure that you've satisfied the fairness requirement? The Act provides no guidance on this question. (While the Act contains a checklist of relevant factors for determining if a dealing with an audio-visual item for the purpose of *research and study* is fair (s 103C(2)), there is no such guidance provided with respect to fair dealing for the purpose of criticism and review. Each case will turn on its own facts, but as a general rule, the amount taken will be relevant to the question whether the dealing in this particular instance was fair.

Q: Can a lecturer rely on the fair dealing exception contained in s 103C of the Act (ie fair dealing with an audio-visual item for the purpose of research or study) to include an image or other work in a conference presentation where the presentation is a research-related activity?

A: Arguably, if the audience was limited to individuals who shared the research interests of the lecturer in question, then the dealing described above would be for the relevant purpose. It is possible, however, that a court would find that that such a use was either not for the relevant purpose or not fair. Legal advice should be obtained before seeking to rely on the fair dealing exception as it relates to research and study in circumstances where the work in question will be made available to an audience (as opposed to one or two individuals who are marking the work). It is also *possible* that the new "special purposes" exception in s 200AB would apply, provided that there was a reasonable argument that the lecturer was, in giving the conference presentation, acting by or on behalf of the university (the fact that a lecturer's terms of employment would generally require him or her to participate in academic conferences may support such an argument. It may also be relevant that academic speakers at conferences are generally "badged" in promotional material etc as being from a particular university) and provided that the lecturer could be said to be engaged in "giving educational instruction". However, as we discuss below in 7, it is possible that a court would find that a lecturer giving a conference presentation was acting as an individual, as opposed to acting "on behalf of" the university" and that the exception was therefore not applicable.

6.7 The relationship between fair dealing and the statutory licences

There has been very little judicial consideration given to the question of the relationship between the statutory licensing schemes contained in Parts VA and VB of the Act and the fair dealing provisions. The Full Federal Court in *Haines v Copyright Agency Limited* considered the overlap between the fair dealing provisions and the precursor of part VB, which was contained in section 53B and 53D of the Act. This case arose when the Director General of the Education Department sent a memo to school principals suggesting that section 40 allowed virtually the same amount of copying to be done as sections 53B and 53D, without the need to make payment.

The Full Federal Court held that in determining what "fair dealing" means in section 40, regard must be had to the existence of the statutory licensing scheme. In other words, "fairness" is determined having regard to the existence of the statutory licensing scheme.

7. New 'special purposes' exception

7.1 Background

The *Copyright Amendment* Act 2006 introduced a new "special purposes" free exception in s 200AB of the Act.

The new exception resulted from a Government review of the fair dealing exceptions which was prompted by concerns that those exceptions were unduly inflexible. It is NOT a general

purpose flexible exception, but rather applies to certain groups only, including educational institutions.

The new exception attracted considerable controversy for incorporating the language of the so-called *three-step test* (the test which is to be found in various copyright treaties for determining whether exceptions included in domestic copyright law comply with international copyright obligations) into the Act. As Australian courts have not, to date, been required to give any consideration to what the words of the three-step test mean, it is likely to be some time before anything like a clear consensus emerges as to the circumstances in which this new exception applies.

7.2 s 200AB – what do you need to show?

In the discussion which follows we consider the application of s 200AB to educational institutions. The exception can also be relied on by persons with a disability or those assisting them. The conditions which apply to uses of this kind are discussed below in section 14.

In order to rely on this exception it is firstly necessary to show that the use which is intended:

- is to be made by or on behalf of the university;
- is for the purpose of giving educational instruction; and
- is not made partly for the purpose of the university obtaining a commercial advantage or profit.

The purpose criteria

If the above criteria (the purpose criteria) are satisfied, then a university can rely on the exception provided that the use which is intended satisfies the three-step criteria set out below:

- it amounts to a special case;
- it does not conflict with a normal exploitation of the work/subject matter and
- it does not unreasonably prejudice the legitimate interests of the owner of copyright.

The three-step test criteria

Finally:

The exception cannot be relied on in circumstances where another exception in the Act could be relied on in respect of the particular use in question.

The no other exception criteria

We now consider these criteria in more detail.

The purpose criteria

The exception is intended to be relied on by institutions, not individuals. As with the Part VB statutory licence, the use must be made by a staff member or some other person (eg student)

with authority to act *on behalf of* the university. It should be sufficient to satisfy this criteria if a staff member *asks* a student to carry out a particular act *on behalf of* the university. While the exception cannot be relied on by students in respect of uses which are not made "on behalf of" the university, there may (subject to the provisos below) be some scope for academics to direct students to carry out certain activities related to their own research, and for these activities to be subject to the exception. Note, however, that if the activity in question *could* be done pursuant to either of the VA or VB statutory licences, then the special purpose exception in s 200AB will not be available.

A further requirement is that the use for the purpose of "giving educational instruction". A question arises whether this would include research purposes. While there is some uncertainty regarding the proper construction of these words, AVCC's view is that the exception can arguably be relied on by a university in respect of uses relating to the research purposes of the university. This *may* also include the research purposes of students, provided that they are directed to carry out certain research tasks by their supervisor/lecturer.

Finally, the use must not be made "partly for the purpose" of the university obtaining a commercial advantage or profit. Following lobbying from the education sector, the Government agreed to provide a clarification (in s 200AB(6A) to the effect that a university is **not** prevented from relying on the exception *merely because* it charges a fee which is connected with the use, provided that such fee does not exceed the cost of the use to the university.

The three-step criteria

It is anticipated that the three-step criteria will provide the most difficulty in determining when the new exception can be relied on. While international law relating to the application of the three-step test may provide *some* guidance as to proper construction of this test, it is likely that there will remain very real uncertainty as to the application of the test until cases begin to come before the courts.

As a very general guide, however, the following may be found by a court to be relevant:

1. "Special case"

The requirement that a use be a "special case" in order to be eligible for this exception appears to require that the use be clearly defined and narrow in its scope. It will not be enough to point to the fact that the intended use is for educational instruction: while this is a threshold requirement it is not enough.

2. Does not conflict with a normal exploitation of the work/subject matter

Clearly, if a particular use is one which the copyright owner is presently exploiting (ie a use for which the copyright owner receives licence payments), then the use will not amount to an exception pursuant to this provision.

However, if the use in question is one which is *not* presently being exploited by the copyright owner, then a reasonable argument arises that the use is not one which would conflict with the "normal" exploitation of the work. It may be of assistance – in the event that the use is the subject of a legal challenge and the university wishes to rely on s 200AB – to be in a position

to show that the university took reasonable steps to ascertain whether the use it wished to engage in was one which was at that time being exploited by the copyright owner.

In AVCC's view, it would not be enough to defeat the exception merely to show that the copyright owner could – had he or she been approached – have chosen to charge a fee for the use. It is clearly not the legislative intention of the Act that *each and every use* which the copyright owner might choose to control, if given the option, comes within the grant of copyright.

3. **Does not unreasonably prejudice the legitimate interests of the owner of copyright.**

The inclusion of the words "unreasonably" and "legitimate" clearly anticipates some balancing of interests between the owner of copyright and the user. Not every use which prejudices the interests of the copyright owner will be unreasonable, nor will every interest of the copyright owner in seeking to control such a use be legitimate.

In an advice prepared for the Centre for Copyright Studies Ltd on the three-step test, professor Sam Ricketson (who was commenting on the application of the three-step test to determine whether fair dealing and other copyright exceptions complied with international treaty obligations) suggested that "unreasonable prejudice" may be avoided by the imposition of conditions on the usage. Arguably, a university which incorporates certain conditions – such as pass-word protected access, destroying copies after use etc – in relation to any usage made of a work in reliance on s 200AB will stand a better chance of resisting any challenge which is brought by the copyright owner. Proportionality is also likely to be relevant: ie whether the amount taken is more than is reasonably necessary for the proposed use.

The no other exception criteria

The final condition with respect to this exception is that it cannot be relied on where another exception in the Act could be relied on in respect of the particular use in question. This means that a university cannot choose to avoid having to rely on the Part VA or Part VB licence by choosing to rely instead on s 200AB in respect of a use which *could* have been done pursuant to one of the statutory licences.

Q: Can s 200AB be relied on to make *multiple* copies of a work, audio-visual item etc for distribution to students?

A: As noted above, s 200AB cannot be relied on to copy or communicate works etc for distribution to students if this *could* have been done pursuant to either of the educational statutory licences. However, if a particular use is not covered by either the Part VA or Part VB licences, then, subject to the limitations discussed above, s 200AB may apply. Examples of such uses may include:

- copying and communicating, for distribution to students, a podcast (other than a podcast of a broadcast) which has been made freely available (ie no password protection and no requirement to pay for the use) on the world wide web by the copyright owner and without restriction. There is arguably no conflict with the normal exploitation of the work (as it is already being made available to the world without a

request for payment) and there is arguably no unreasonable prejudice to the legitimate interests of the copyright owner; and

- copying or communicating, for distribution to students a sound recording (other than a broadcast) in circumstances where, despite having made all reasonable inquiries, the university is unable to locate the owner of copyright in order to obtain permission for this usage. As above, in the event that the copyright owner cannot be located, it would be arguable that the "normal exploitation" of the work does not include seeking payment for uses of this kind. Further, any prejudice to the legitimate interests of the copyright owner can probably be said to be "reasonable" in circumstances where a potential user cannot, despite having made inquiries, locate the copyright owner in order to seek permission. Of course, if the proposed use is covered by the Music Licence which some universities have entered into with the music collecting societies, then reliance on s 200AB in respect of this use – even if your university is not a party to the Music Licence - would almost certainly "conflict with a normal exploitation of the work" and thus not be permitted.. It may also be advisable – if possible – to distribute the recording to students in a format which cannot be further copied or communicated and to use no more of the recording than is required for the relevant purpose.

Q: Can the university outsource copying which is done pursuant to s 200AB?

A: There is nothing to prevent a university outsourcing s 200AB copying: the requirement is that the copying is done "by or **on behalf of**" the university.

Q: Can a university rely on s 200AB to copy very small segments of films for inclusion in lectures that are to be recorded with a view to being accessible by students via the iLecture/Lectopia system?

A: A university can rely on s 28 of the Act in order to perform a commercially hired or purchased film in class. Since 1 January 2007, s 28 can also be relied on where the film is to be delivered to students in different part of the university via a reticulated delivery system. The use which you propose, however, involves the university making a **reproduction** of segments of a film and communicating these segments to students. Arguably, such a use does fall within s 200AB of the Act. If it were the case that it was a fairly simple matter for the university to contact the copyright owner or the copyright owner's representative in order to obtain a licence in respect of this use, then there *may* be an argument that the use would conflict with the normal exploitation of the work with the result that s 200AB would not apply. In the absence of such a simple means of obtaining permission, it is in the AVCC;s view arguable that the use is permitted pursuant to s 200AB. It would be advisable to ensure that access to the work was pass-word protected and available only to students enrolled in the relevant course. These steps would assist in avoiding unreasonable prejudice to the legitimate interests of the copyright owner.

8. Moral Rights

8.1 What are moral rights?

Moral rights were introduced into Australian copyright law in 2000. The moral rights provisions are contained in Part IX of the Copyright Act.

Moral rights are independent of the author's economic rights and continue to exist even after transfer of the economic rights.

The moral rights now enacted into Australian law are:

- The right of an author or artist to be identified with his or her works – known as the **right of attribution**; and

- The right to object to alteration or other derogatory treatment of the work that would be prejudicial to the author or artist's honour or reputation – known as the **right of integrity**.

Moral rights apply to all works, except films, existing on 21 December 2000 and which are still protected by copyright, and to all works including films created after that date.

Under the right of attribution, the creator's right to recognition as creator of a work consists of four sub-rights:

- to be known as the creator of a work;
- to prevent others from claiming to be the creator of a work;
- to prevent the false attribution of works to the creator;
- to prevent attribution to the creator of unauthorized altered versions of a work.

The right of integrity is the creator's right to object to derogatory treatment of a work, and covers both

- changes made to the work itself (i.e. distortion, mutilation or other modification of the work); and
- the manner in which the work is presented.

8.2 Are there exceptions to moral rights?

It is possible to consent to subsequent uses of copyright material which may offend against the moral rights, but the owner of the work may not have the right to alter a work against the wishes of the creator. This could have implications for the use of material written by academics in 'electronic courseware' and other products where material is used and altered.

The moral rights provisions are also subject to "reasonableness" exceptions. In determining whether it was "reasonable" (and thus not actionable) to infringe an authors' moral rights, the courts will take into account factors which include the nature of the work the purpose for which it was used, industry practice and whether the work was created by an employee or under a contract of service. Generally, industry practice will provide a guide to what is acceptable use that will not infringe the moral rights in copyright material, but there is little guidance available from case law yet and the guidelines developed by universities for use and subsequent use of academic creative endeavours may help determine what is reasonable.

8.3 What are the remedies for breach of moral rights?

The remedies for a breach of an author's moral rights include:

- injunction;
- damages;
- an order that the defendant make a public apology for the infringement; and
- an order that the false attribution or derogatory treatment of the work be reversed.

8.4 How will universities be affected by moral rights legislation?

To date, the moral rights legislation appears *not* to have resulted in any major changes to the way in which universities manage copyright material. Most policies already recognise the right of fair attribution or authorship (or invention), and the need to protect the reputation of an author or creator, and to give the opportunity for the originator to be involved in the final outcome resulting from their creative efforts.

Q. Do I need to mark the name of the author on copies of third party material which I make available to my students?

A. Yes. Apart from this being good academic practice, it is now the case that authors have moral rights which include the right to be identified as the author (or one of the authors) of the work; the right to have the integrity of their work respected; and the right not to have their work falsely attributed.

The name of the author of literary, dramatic, musical and artistic works and cinematographic films should be clearly and reasonably prominently identified on each copy of a work which is made available to students. When the work in question is a film, the "authors" are the director, the producer and the screenwriter.

Q. If I make a sound recording available to my students, do I need to mark the names of the singers on the copy?

A. Performers of live and recorded performances (for example singers, musicians and conductors) have the same moral rights as authors of literary, dramatic, musical and artistic works.

Where a performance is recorded, or a copy is made of a sound recording, there is a requirement to identify the performer (eg the singer).

If the sound recording is being made available pursuant to the *Music Licence* entered into by some universities in June 2005, there is a requirement to attach a notice to any recording which is made available which contains:

- the title of each musical work;
- the name of each composer, lyricist and arranger of the musical work; and
- if the recording contains an ARIA Sound Recording, the artist/group name, and the record company label.

9. Copying and Communicating Music – Other Than in Reliance on Part VA

9.1 Music Licence

On 3 June 2005, some universities entered into a Music Licence agreement with APRA, ARIA, PPCA and AMCOS. Unlike the Part VA and VB statutory licences, which are contained in the Copyright Act, the Music Licence agreement is a commercial contract.

The Music Licence applies to a range of activities including Music-on-Hold, music performances at University Events (as defined in the Music Licence) and certain copying and communication of sound recordings for the educational purposes of the university.

Q: How can a university know whether or not particular works and recordings are included in the repertoire covered by the licence, and what enquiries, etc should they make before assuming the licence allows them to do what they want to do with these works?

A: While the aim of the Music Licence is to ensure very broad coverage, and thus provide universities with a high degree of certainty that they can safely copy and communicate musical works and sound recordings works in the ways provided for in the Licence, the Licence does not provide 100 per cent coverage. Unfortunately, it has not been possible to provide an easy means of checking - in advance of using a particular work - whether it is in fact covered by the Licence. Clearly, if a staff member is aware that a particular work or sound recording is not covered, then this should not be used without obtaining the permission of the copyright owner (unless, of course, a fair dealing exception is available or the proposed use is in respect of less than a substantial part of the work/sound recording.)Otherwise, the intention of the parties was to give the most extensive blanket coverage possible, and that has been achieved. In the unlikely event that a copyright owner threatened legal action in respect of such a use, it would be open to the university to seek to negotiate a licence or delete the content. If this failed to resolve any dispute, then the fact that a university had acted in reliance on the Music Licence would not provide a defence to the action, but it would almost certainly lead to a finding that the university had not acted in flagrant disregard of the copyright owner's rights, thus avoiding a risk of punitive damages being awarded. The practical result of this is that any damages would probably be limited to the amount that the copyright owner could have expected to be paid had it granted a licence in respect of the use.

Q: How do the notice requirements apply to the use of a resource like i-lectures?

A: Clause 2.2 of the Music Licence provides that a university can allow staff and students access via its intranets to recordings made in accordance with clause 2.1 of the Licence, provided that the university displays a notice in the form proscribed in clause 2.2(a) as well as the information set out at clause 2.2 (b). In the case of an i-lecture or similar - where a recording is made of a lecture which includes one or more performances of music - the notice requirements will be complied with if the prescribed notice and information are spoken by the lecturer (either during the course of the lecture or at a later time) and thus included in the recording of the lecture. It is sufficient if the information set out at clause 2.2(b) is displayed (ie, spoken) at the end of the recording of the lecture. It is important to ensure that the i-lecture cannot be downloaded if it includes material copied and communicated pursuant to the Music Licence.

Alternatively, all prescribed information could be added at the start or finish of the digital recording so that it comes up much like the credits at the beginning or end of a movie.

Q: Does the agreement allow for streaming of sound recordings over the university intranet? What about downloading?

A: The agreement allows for streaming of sound recordings over a university's intranet where the activity meets other requirements of the agreement including 'educational purpose'. Note that 'Intranet' is a defined term in the agreement. Download is also a defined term , and downloading is not allowed under the agreement. Staff and students can however make copies of sound recordings under the agreement, for example from servers on university campuses, but this does not extend to copies being made over university intranets.

Q: Paragraph 2.1(h) of the Music Licence allows the university to perform musical works in public at University Events. I assume that this would cover things like Open Days, Graduation Ceremonies, etc. Would it also include such things such as Alumni social events, conferences organised by teaching schools, playing front-of-house music in the foyer of the university's theatre, or at art exhibition openings, etc?

A: University Event is defined in the Music Licence to mean

> *an event at the Participating University (or some other venue) organised or authorised by the Participating University, including live performances by students or staff.*

Subject to what is said below regarding fee-for-entry, Open Days and Graduation Ceremonies clearly fall within the scope of the Music Licence.

However, paragraph 4.2 (l) provides that the rights granted under the Music Licence **do not** include the right to perform in public APRA Works/PPCA Sound Recordings where a fee for entry is charged or where the Participating University's premises have been let for hire or otherwise to a third party (including a student) *other than* for the Educational Purposes of the Participating University. A useful rule of thumb is that if the activity is a "box event", for which an entry fee is charged, then it is almost certainly not covered by the licence.

With respect to the "fee for entry" limitation, the AVCC takes the view that the limitation applies only where the fee is being charged *for* the music (eg a fee for entry to a concert). It follows from this that the AVCC takes the view that the limitation does not apply merely because music is being performed at a University Event (such as an art exhibition) for which a fee is charged. Furthermore, if there is a 'gold coin donation' associated with the event (ie the contribution is voluntary) then the event will most likely covered by the licence.

As to whether an Alumni social event will come within the scope of the Music Licence, the answer will depend on whether the Alumni organisation is a university-run organisation or an ex-student-run organisation. If the latter, then the limitation in paragraph 4.2(l) is likely to apply.

Q: Paragraph 2.1(g) of the Music Licence allows the University to perform musical works in public for the Educational Purposes of the university. Would this cover situations where music is played, for example, in clinics run by the school of Physiotherapy? In these clinics students carry out treatment under supervision using university students and staff as

patients. They gain practical experience as part of their course and are assessed on their work, but clients using the facilities are charged a small fee for the service provided.

A: The situation described above is quite different to the university running, on a for-profit basis, a clinic which is open to members of the public. The AVCC takes the view that the Music Licence (in particular paragraphs 2.1(g) and (i)) would apply in circumstances where students are operating a clinic, under supervision of university staff, as part of their training, provided that the clinic is open only to staff and students of the university. This is subject to the following proviso: it is *possible* that University Event would, in the event of a dispute, be given a narrower meaning – ie confined to an event in the nature of a Graduation Ceremony, Open Day, etc. The AVCC considers this unlikely. We note that at a 2006 briefing session, the Music Societies advised those present that a university with a TAFE component would not breach the Music Licence in circumstances where music was played in a teaching/training restaurant associated with the TAFE, notwithstanding that members of the public may attend.

Q: Would the Music Licence apply where sound recordings are played as background music in science, engineering or computing laboratories for the benefit of staff and students?

A: Subject to the proviso discussed above with respect to the definition of University Event, yes.

Q: Our university has a lounge area where a cable TV is being screened continuously via a TV monitor. The lounge is open to students and the general public. Does the Music Licence cover this?

A: Subject to the proviso discussed above with respect to University Event, and subject to the music coming within the repertoire covered by the Music Licence, the Licence would cover this activity. Of course, the Music Licence would provide protection with respect to the *music* only. The activity described above may well expose the university to an action in respect of infringement of copyright in the underlying film, scripts etc.

Q: Paragraph 2.1(i) of the Music Licence allows the university to perform musical works in public for the sole benefit of employees in the workplace. I assume that this would allow staff to play radios or CDs at their work station. But would it also cover the playing of music at exercise/mediation classes held for staff? Is the answer any different if a fee is charged for staff to attend these classes?

A: With respect to the first question relating to employees in the workplace, the answer is yes. With respect to the question relating to playing of music at exercise etc classes, then subject to the proviso discussed above regarding the definition of University Event, then provided the class is organised by the university and not an outside group, it will qualify as a University Event and thus fall within the scope of the licence. The fact that a fee is charged for the class does not cause the loss of the Licence.

Q: My understanding is that Media students are allowed to include small excerpts of music in their film or video productions under the fair dealing provisions of the Copyright Act, as long as the film/video is produced as part of their course requirements and is submitted as an assignment. I also understand, however, that the fair dealing exception is unlikely to

apply if the student wishes to show the film/video at a festival, enter it into a competition etc. Does the Music Licence cover uses of this kind?

A: The Music Licence is unlikely to be construed as applying to activities of this kind.

Q: Does the Music Licence apply to University Events at offshore campuses?

A: No. Performance of sound recordings etc offshore will be subject to the copyright law of the relevant jurisdiction.

Q: Paragraph 4.2(q) of the Music Licence stipulates that the licence does not grant the right to perform any music and associated words so as to burlesque or parody the work. Does this mean that students of a Participating University are absolutely prohibited from engaging in a burlesque or parody of a musical work, or does it merely mean that they would be required to take out a separate licence if they wish to do so? This might be important - musical revues undertaken by Performing Arts students might well include examples of burlesque or parody.

A: The limitation referred to merely has the effect that the Music Licence does not cover activities of this kind. This does not amount to a blanket prohibition: it simply means that no licence is granted with respect to these activities. A student may be entitled to rely on the parody exception contained in ss 41A and 103AA in respect of a burlesque or parody of a musical work. See the discussion in section 6.4 above.

Q: I'm unclear as to what sound recordings need to be included in the annual survey in October as described in Section 7 and Schedule I of the Music Licence. Would the university be expected to list any copyright music held in online teaching and learning materials or in I-lectures, in situations where the production of these materials is co-ordinated by a Central Unit? Where a Central Unit has been responsible for producing a large amount of online teaching/learning materials in the past it is unlikely that it will know which of these materials contains copyright music without undertaking the huge task of reviewing all the material. Is this really what is intended?

A: The obligation is to report data on sound recordings copied and communicated in reliance on the Music Licence and held on a Central Unit IT system. No data is to be collected on:

- CD's or other sound recordings in original form which have not been uploaded onto an IT system in a Central Unit;
- Music on Hold; or
- public performances.

Central Unit means any area of the university, whether administrative or departmental, which is providing (amongst other things) a central resource or facility for the electronic copying, storage and communication, in reliance on the Music Licence, of sound recordings for all or any part of the university.

If the music in question is not *held* in Central Units, then there is no obligation to report this.

9.2 Can the fair dealing exceptions ever be relied on to copy or communicate sound recordings?

In certain circumstances, students can rely on the fair dealing exceptions to incorporate material from sound recordings into assignments. (This could also be done by the university in reliance on the Music Licence. If the Music Licence is not available with respect to a particular use, the university may also be able to rely on s 200AB which is discussed at section 7 above.

Section 103C of the Copyright Act allows fair dealing copying of an audio-visual item for the purpose of research or study. For the purposes of s.103C, an audio-visual item includes a sound recording.

Copying of a sound recording done by students for their own research or study (including assessment) would usually be fair dealing. However, the amount of the item copied would be a factor taken into account in determining whether the copying was "fair" in the event that infringement action is brought against the copier.

Section 103A allows for fair dealing copying of an audio-visual item for the purpose of parody or satire.

The new "special purposes" exception contained in s 200AB may also be available in certain circumstances.

10. Use of University Premises by Third Parties – 'Authorisation'

The university is, potentially, liable for copyright infringement which occurs when the university allows third parties to use its premises to engage in activities which it knows may result in copyright infringement.

Most copyright officers are familiar with the potential for infringing activity by *students* to expose the university to liability for having **authorised** such infringing activity. But the activities of third parties *other than students* also needs to be considered.

The decision of the Federal Court in Australasian Performing Right Association Limited v Metro on George Pty Limited [2004] FCA 1123 (31 August 2004) provides a useful guide for universities as to what steps they need to take to seek to avoid being held liable for the infringing conduct of third parties using their premises. In this case, the Court held that Metro on George – which allowed its venue to be used for live performances – was liable for infringements which occurred when it hired out its premises to bands who had not paid the appropriate licence fee to APRA. This was notwithstanding that Metro on George had a contractual relationship with the band promoters with whom it dealt which required the promoters, and not Metro on George, to pay the APRA licence fee. APRA was able to show that Metro on George was aware that some promoters had not paid the relevant licence fee. The Court held that it was open to APRA to pursue Metro on George (rather than each individual promoter) in respect of the infringements which occurred when the bands used the venue without an APRA licence.

The lesson from this case is that it is not enough to have a contractual relationship with third parties which requires *them*, and not the university, to be responsible for licence fees etc. If the university becomes aware that the appropriate licenses have not been obtained – or is on notice of any other conduct which suggests that the third party is using university premises to infringe copyright – then the university is exposed to authorisation liability if it turns a blind eye to that.

11. How to Respond if the University is Subject to Anton Piller-Style Orders

11.1 What is an Anton Piller order?

An Anton Piller order is *akin to* a civil search warrant – it is an order of a Court directing the defendant to permit identified people to enter the defendant's premises. A defendant who refuses to obey that order can be found guilty of contempt of court. As discussed below, however, the solicitor serving an Anton Piller order is obliged to advise the party served that he or she is entitled to seek legal advice prior to the order being executed, provided that such advice can be obtained promptly.

In February 2004, three Australian universities were served with Anton Piller orders which had been taken out by music companies who were suing companies associated with the Kazaa peer-to-peer software. The orders had been obtained ex-parte the day before they were served on the three universities. The universities requested that the solicitors who had served the orders refrain from executing those orders until the universities had had an opportunity to seek legal advice. As a result of that advice, obtained from the solicitors for the AVCC, the Court agreed to a request by the universities to vary the orders, and a more limited form of search than had been anticipated by the original orders was in fact carried out.

11.2 What do I do if I am served with an Anton Piller order?

An Anton Piller order should be served on a person with authority to act on behalf of the university, eg the University Solicitor. It is possible, however, that the order will be served on a copyright officer or some other university employee.

Each university will have in place its own procedure for dealing with matters of this kind, but as a general rule, if you are served with an Anton Piller order (or you become aware that some other employee of the university – other than a person who is authorised to act on behalf of the university in such situations – has been served) you should immediately notify the office of the Vice-Chancellor and/or the University Solicitor. DO NOT make any statement to the solicitor serving the order, or provide that solicitor with any access to documents etc, before you have notified the appropriate person at the university that an Anton Piller order has been served. While being served with an order of this kind can be an intimidating experience, there is an obligation on the person who executes the order to advise the defendant of its right to obtain legal advice before the order is executed, provided that the advice is able to be obtained promptly. If you are served with an order, it is most important that you do not compromise the right of the university to seek appropriate legal advice *prior* to the order being executed by simply granting the party serving the order access to documents etc yourself.

12. The US-Australia Free Trade Agreement – How Has it Impacted on Copyright Law?

The Australia-United States Free Trade Agreement (AUSFTA) obliged Australia to make substantial amendments to its Copyright Act. Some of these amendments have already come into effect. Others are still in the pipeline. Of most relevance to universities are:

1. extension of the term of copyright from life of the author plus 50 years to life of the author plus **70 years** (the so-called "Disney amendment");

2. the introduction of **"safe-harbour"** provisions limiting the liability of carriage service providers who comply with certain conditions; and

3. amendments to the sections of the Act dealing with **technological protection measures**, including a prohibition (subject to limited exceptions) on use of a TPM.

12.1 Safe harbour

While the university sector was vocal in lobbying for a safe-harbour scheme, the sector appears to have been overlooked in the drafting of the safe-harbour provisions, which came into effect from 1 January 2005. As these apply to *carriage service providers* within the meaning of the *Telecommunications Act*, they do not apply to most universities. As a result of lobbying by the AVCC and the schools sector, the Government is expected to introduce an amendment to the Act, possibly some time in 2007, addressing this anomaly.

12.2 TPMs

As a result of obligations assumed pursuant to the AUSFTA, the Act has been amended, with effect from 1 January 2007, to bring the Australian anti-circumvention regime with respect to technological protection measures (TPMs) into line with the US Digital Millennium Copyright Act (DMCA).

The new TPM scheme is discussed in detail in the next section.

13. Technological protection measures (TPM's)

A TPM is a device, product, technology etc which is used by copyright owners to prevent their material being copied or accessed. Examples include passwords, encryption software and access codes.

As a result of entering into the AUSFTA, Australia was obliged to bring its anti—circumvention provisions – ie the provisions relating to circumvention of TPM's - more in line with those contained in the US DMCA. Those changes were contained in the Copyright Amendment Act 2006, and came into force on 1 January 2007.

The major changes were as follows:

- the introduction of a new category of technological protection measure (**TPM**) known as an **access control TPM. Access control TPM's** are TPM's which are used to control access to a work. A TPM which prevents a work from being copied but does not prevent the work from being accessed is NOT an access control TPM;
- a new definition of TPM;
- a prohibition on **use** of a circumvention device or service to circumvent an access control TPM. (Prior to 1 January 2007 there was no prohibition on use of circumvention devices and services – the only prohibition related to the commercial supply of such devices/services). There is no prohibition on circumventing a TPM which does not come within the definition of an **access control TPM (**eg a copy control TPM)**;** and
- new exceptions to liability under the TPM scheme.

The TPM scheme is found in Part V Division 2A of the Act. **TPM** and **Access control TPM** are defined in s 10 of the Act.

As a result of strong lobbying by consumer groups, the government has sought to exclude from the TPM scheme devices etc *to the extent that* they are used for region coding in relation to films, computer games etc. The definition of TPM also seeks to exclude from the scheme devices etc *to the extent that* these restrict the use of after-market goods or services.

While the press release issued by the Department of Attorney General suggests that the carve-outs discussed above **will have the effect that** consumers "will be able to circumvent region coding on TPM's on legitimate DVD's purchased overseas" and that "makers of products are not able to restrict the use of generic after market goods and services through the application of TPM's to their product", it remains to be seen if the language will be construed as having this effect.

To come within the definition of **access control TPM**, a TPM must be:

- used by, or with the permission of, the owner or exclusive licences of copyright;
- used on material in which copyright subsists;
- used **in connection with** the exercise of the copyright owner's exclusive rights; and
- used in the normal course of its operation to control access to the work (eg by pay of a password, lock etc).

The carve-outs discussed above with respect to region-coding and after-sales services also apply to limit the definition of an access-control TPM.

What prohibitions apply?

The following prohibitions apply:

1. Circumventing an access control measure: s 116AN

Subject to the exceptions to be discussed below, it is a breach of the TPM provisions to do an act that results in the circumvention of an access control TPM where you know or ought reasonably to know that the act will have that effect. The prohibition does not apply if you have the permission of the copyright owner or exclusive licensee to circumvent the access control measure.

The prohibition is also subject to certain exceptions, some of which are set out in s 116AN and some of which are set out in Schedule 10A to the *Copyright Regulations.* Of most relevance to universities are the following exceptions:

- certain acts for the purpose of achieving interoperability of computer programs (s 116AN(3);
- certain acts for the purpose of encryption research (s 116AN(4);
- circumvention by or on behalf of a university for the purpose of copying or communicating a work pursuant to the Part VB licence (there is no equivalent exception relating to Part VA); and
- circumvention by a library for the purposes of exercising the rights contained in ss 49 to 51 of the Act (the library copying provisions)

2. Manufacturing a circumvention device for a TPM: s 116AO

The following prohibitions apply in relation to manufacture, supply etc of a device which a person knows or ought reasonably to know is a circumvention device for a TPM:

- manufacturing a TPM **with the intention of providing it to another person**;
- importing a TPM into Australia with the intention of providing it to another person; and
- distributing, providing or communicating a TPM to another person.

Importantly, there is no exception for educational institutions. This is the so-called "inexcusable, lamentable flaw" identified by Senate Legal and Constitutional Affairs Committee which reviewed the draft legislation: unless a university is in a position to manufacture a circumvention device itself in order to take advantage of the exception in relation to *use* of such devices, it cannot exercise the benefit of that exception. No one – not even another university – can legally supply a university with a circumvention device.

Similar provisions apply (s 116AP) in relation to the provision of circumvention services

Q: Is pdf format a TPM within the meaning of the Act? Can a university circumvent the copy-control code on a pdf document in order to copy and communicate the work pursuant to Part VB of the Act?

A: There is no prohibition on the use of circumvention devices to circumvent a TPM which is not an access control TPM (ie a TPM which prevents copying of the work, but does not prevent the work from being accessed). However, even if the pdf file is subject to an access control TPM (ie a lock, password etc that prevents the work from being *accessed*) then the university is permitted to circumvent the access control TPM for the purpose of copying/communicating the work pursuant to Part VB. Of course, the university must be in a position to manufacture such a device itself.

14. Copyright Issues Relating to Students with Disabilities

The new special purpose exception contained in s 200AB can be relied upon in respect of uses made by or on behalf of a person with a disability in certain circumstances: s 200AB.

The requirements are:

- that the disability is one that causes difficulty in reading, viewing or hearing a work etc in a particular form;
- that the use in question is made for the purpose of the person obtaining a reproduction of the work etc in another form, or with a feature, that reduces that difficulty;
- that the use is not made partly for the purpose of obtaining a commercial advantage or profit; and
- that the "three-step criteria" and the "no other exception criteria" discussed above in s 7.2 are also complied with.

14.1 Copying and communicating for students with a print disability – how does the Part VB licence apply?

S.135ZP allows a university which has the necessary Part VB remuneration notice in place to make a sound recording of a work in order to assist those with print disabilities or to **copy or communicate** the whole or part of a **literary or dramatic work** by making and/or communicating a Braille version, a large-print version, a photographic version or an electronic version of the work in certain circumstances. If the work has been separately published *in the version the university wishes to create (eg sound recording, Braille, large print or electronic)*, the university cannot do so unless the person making the version is satisfied, after reasonable investigation, that *no new copy* (ie not second-hand) of such a version of the work can be obtained within a reasonable time at an ordinary commercial price.

A photographic version is not the same as a photocopy.

S.135ZQ allows the university to make a "*relevant reproduction*" or "*relevant communication*" of the whole or part of a work for the sole purpose of making a Braille version, a large-print version, a photographic version or an electronic version for the purpose of assisting those with a print disability. Certain marking and notice requirements need to be complied with in order to obtain the benefit of the s 135ZQ licence with respect to these copies.

Q. When is a person considered to have a disability?

A. A person with a print disability includes a person without sight, a person whose sight is severely impaired; a person unable to hold or manipulate books or to focus or move his or her eyes or a person with a perceptual disability.

Q. What formats can the reproductions can be made into for university students or staff with a print disability?

A. Reproductions can be made in Braille, large-print, photographic and in electronic versions.

Q. What type of material can be copied under the print disability provisions?

A. Under the statutory licence for print disabilities, universities may make accessible copies of literary and dramatic works. Music, artistic works (including graphs and diagrams),

unpublished material (such as conference papers) or audiovisual material (such as DVDs or television programs) can not be reproduced or communicated.

Computer programs cannot be copied under this statutory licence.

Q. Can material be faxed, or emailed to a student or staff member with a print disability?

A. Yes, copies which are made under this statutory licence can be communicated by fax, email or by posting the copy on a secure server on the internet or a university intranet.

Q. Do I have to check whether there is a large print or Braille version available before I copy something for a student with a print disability?

A. Yes. You must make reasonable investigations and be satisfied that a new copy of the work can not be obtained within a reasonable time in the format required at an ordinary commercial price. A new copy means a copy that is not second hand.

Q. Can I sell a copy of a course material which was made for a student with a print disability?

A. No. If the copy was made under the print disability provisions, it cannot be sold for a profit or used for any purpose other than the needs of people with a print disability unless consent is given by the producer.

Q. Can a text book be copied into Braille under the print disability statutory licence provisions and artistic works in the text book be reproduced under the educational statutory licence provisions?

A. Yes. Different aspects of the educational and disability statutory licence provisions can be relied upon simultaneously.

Q. Can any material be reproduced for a student or a staff member with a print if the copyright owner gives permission?

A. Yes. It would be advisable to keep a copy of this permission for the university's files.

Q. Is there a fee payable?

A. Under the Copyright Act, Copyright Agency Limited (CAL) is able to charge equitable remuneration.

Currently, CAL does not charge a fee for copying under this licence.

Q. Even though there is no fee payable, do remuneration notices need to be lodged with CAL?

A. Yes. For analogue reproductions there is a sampling or records notice. For electronic reproductions and communications, there are electronic use notices. CAL has pro forma remuneration notices.

Q. Do the copies need to be marked?

A. Currently, CAL does not require hardcopy and analogue copies to be marked if the sample system is being used. However, the name of the author(s) should be marked clearly and reasonably prominent on the copy to ensure that the moral rights of the author(s) are not infringed.

Electronic copies and electronic communications must contain the following statement:

> **COMMONWEALTH OF AUSTRALIA**
>
> **Copyright Regulations 1969**
>
> **WARNING**
>
> This material has been reproduced and communicated to you by or on behalf of [insert name of institution] pursuant to Part VB of the *Copyright Act 1968* (the Act).
>
> The material in this communication may be subject to copyright under the Act. Any further reproduction or communication of this material by you may be the subject of copyright protection under the Act.
>
> Do not remove this notice.

The university must take reasonable steps to ensure that each communication can only be received or accessed by the teachers or students who are entitled to receive or access it.

Q. Can a master copy be made for the purpose of making copies for students with print disabilities?

A. Yes. Master copies can be made without checking for commercial availability.
You must notify CAL within three months of making or communicating the master copy, and specify the name of the university, the work and date on which the reproduction or communication was made.

Q. Do master copies need to destroyed after a certain period?

A. No.

Q. What happens if the master copy is used for a purpose other than assisting a student with a print disability?

A. The copy loses the protection of the print disability provisions. The copy is deemed to have infringed copyright from the time it was made.

14.2 Can we copy for students with a hearing disability?

There are no provisions dealing specifically with this sort of copying. However, provided the copying was being done, by or on behalf of the student, to assist them in their research or study, it may be permissible to copy an audio-visual item into a special format in reliance on s 200AB(4). This copying cannot be done under the Part VA licence.

14.3 Copying and communicating for persons with an intellectual disability – how does the VB licence apply?

Division 4 of Part VB contains provisions that allow for copies and communications to be made, pursuant to Part VB of the Act, by institutions assisting persons with an intellectual disability.

These provisions are not likely to be of any relevance to universities.

15. Student Copyright

It goes without saying that students own copyright in works which are authored by them, including assignments etc. Unless the student has assigned copyright to the university (eg as in the case of a thesis or an article which the student has jointly authored with an academic), or unless that Part VB statutory licence is being relied on by the university, the university must obtain permission before copying or communicating a substantial part of the work. Most universities have a procedure for this.

Q: Can the university use a copy of a student's art work, without permission, for the purpose of including this in promotional material?

A: No. This is not a use which is permitted under Part VB of the Act (as it is for the promotional, as opposed to the educational, purposes of the university). In the absence of an exception, the university will infringe copyright in the student's art work unless it obtains the student's permission for this use. The permission should be obtained in writing, and a record should be retained.

16. Video conferencing, i-lectures and podcasts

Notwithstanding the attempts of the Government to render the Copyright Act "technology neutral", inevitably new technologies give rise to questions about the applicability of existing copyright law.

In what follows, we discuss some of those questions. We also discuss the ways in which various amendments contained in the Copyright Amendment Act 2006 have impacted on how universities can take advantage of digital technology.

A threshold question which often arises in respect of new technology is: how should the particular activity in question be *characterised*.

By way of example, while the so-called "i-lecture" technology can involve live streaming of lectures, the lectures are also generally "captured" in order that they can be accessed by students at some time in the future. The rights of copyright which are exercised by this activity include the communication right as well as the reproduction right.

16.1 *Copyright Amendment Act* 2006 – new ways for universities to take advantage of digital technology

The *Copyright Amendment* Act 2006, which commenced on 1 January 2007, resulted in the Act being amended in various ways which will enable universities to make better use of digital technology. These include:

- The exception contained in **s 28** of the Act (which allows universities to perform commercially purchased and hired audio-visual material in the classroom without payment) has been expanded to include the right to communicate such material. This amendment was sought by the AVCC, and removes the previous impediment to using reticulated delivery systems, audio-conference facilities etc in order to deliver commercially purchased or hired material (which is not covered by the Part VA licence) to students in remote classrooms. s 28 now applies to the communication of literary, dramatic and musical works, film and sound recordings, broadcasts and artistic works provided that the other conditions set out in s 28 are met. The changes render the exception contained in s 28 more technology neutral than they were prior to the amendment; and

The Part VA licence now applies to podcasts and webcasts of broadcasts which have been made available online by the broadcaster. The amendment is contained in s 135C.

Q: ***What are the copyright implications for live-streaming of a lecture to students in another room/building/campus? Assume the lecture contains extracts from literary, audio visual, music, performance, or artistic material.***

A: The copyright implications of streaming material live are the same as those which arise when material is made available online for access or download at a later point in time: in both cases, the university is exercising the right of communication (ie making material available online or electronically transmitting it) in respect of the various works etc which are contained in the lecture.

Prior to 1 January 2007, there was no exception in the Act which allowed a university to communicate to students commercially hired or purchased audio-visual material or other material not covered by one of the educational statutory licences. Provided the lecture contained *only* material which was covered by one of those licences, then a lecture could be be *streamed* (ie communicated to students) in reliance on these licences. From 1 January 2007, a university can rely on the expanded exception contained in s 28 of the Act in order to communicate (via live streaming technology) a lecture containing material not covered by either of the Part VA or VB licences.

Q: Is it likely that a commercial audio-visual product can be included in an i-lecture if there are no specific conditions stating otherwise?

A: The expanded exception contained in s 28 of the Act can be relied on in respect of commercial audio-visual material contained in an i-lecture. Of course, the conditions set out in s 28 must also be complied with. It is important to note that s 28 does not apply to the reproduction right, and thus does not cover the activity of "capturing" the i-lecture for later access by students. There is no exception which expressly applies to the reproduction of

commercially hired or purchased audio-visual material. It is *possible* that a court would find that the new special purpose exception contained in s 200AB (and discussed above at section 7) would apply to this activity.

Q: Can I rely on s28 to include use of commercially purchased / hired DVDs, CDs and videos in an online course or is use of this provision restricted to "videoconferencing" this type of material to students in physical classrooms on different campuses?

A: Section 28 can be relied on by a university to communicate commercially purchased or hired DVDs, CDs in the course of educational instruction.
This includes videoconferencing. However, s 28 **cannot** be relied on in respect of any **reproduction** which is made when a work contained on a DVD, CD etc is incorporated into a podcast or loaded onto a server for access by students.

Q: What are the copyright implications of podcasting?

A: The answer to this question depends on whether a university is **creating its own podcast**, and making these available to students, or **using, for educational purposes, third party podcasts** which have been made available on the internet. In what follows, the copyright implications of each of these activities is discussed.

16.2 University produced podcasts

Universities are increasingly turning to podcasting as a means of making material available to students.

The maker of a podcast exercises the following rights of copyright: the reproduction right, the communication right and the right of public performance/causing any sound recording and film clips to be seen or heard in public. The question arises – how do the Part VA and VB statutory licences apply to these activities as they relate to the creation of a podcast?

- **Material which has been broadcast (eg on radio, television, cable or satellite)**

Broadcasts or parts of broadcasts can be incorporated into a podcast in reliance on the Part VA statutory licence. Of course, care should be taken to ensure that the podcast is made available to staff and students only for the educational purposes of the university.

- **Commercially purchased or hired audio-visual material (such as videos and CD's)**

The Part VA licence does not apply to commercially hired or purchased audio-visual material. Nor is the expanded exception contain in s 28 relevant, as this does not apply to the reproduction right, only the performance and communication rights. It follows from this that (subject to the special purpose exception in s 200AB being available) material of this kind can *only* be safely included in a university-produced podcast if permission is obtained from the copyright owner. It is *possible* that a court would find that the new special purpose exception contained in s 200AB (and discussed above at section 7) would apply to the inclusion of very

small excerpts from commercially hired or purchased audio-visual material in university produced podcasts.

- **Audio-visual material available on the internet**

If the audio-visual material is a broadcast which has been available on the internet by the broadcaster, Part VA can now be relied on to copy and communicate that material to students. If the material you wish to include in the podcast is *not* a broadcast (or a podcast of a broadcast), then Part VA cannot be relied on. It is *possible* that a court would find that the new special purpose exception contained in s 200AB (and discussed above at section 7) would apply to the inclusion of freely accessible web-based audio-visual material in podcasts produced by the university for the purposes of educational instruction.

- **Literary works**

A lecturer may wish to read excerpts from a text and include this in a podcast. As noted above, in doing so, the lecturer would be exercising the reproduction and communication rights as well as the right to perform the work in public.

The Part VB statutory licence can be relied on in respect of the reproduction and communication.

As for the public performance right, s 28 of the Act – while clearly not drafted in anticipation of podcast technology – would appear to apply to podcasts of a literary work performed (ie read) by a teacher, provided that the podcast is produced for the purpose of the teacher giving educational instruction. (See also paragraph 2.14 above.)

How can a university comply with the notice requirements which are a condition of relying on the Part VA and Part VB statutory licences?

Neither the Act nor the Copyright Regulations anticipate the use of podcasts as a means of making third party material available to students, and thus there is no guidance as to the appropriate way of incorporating the notices which are required to be given when the statutory licences are being relied on.

As a guide, the AVCC suggests:

If the podcast is of audio-visual material only, the relevant notice should be incorporated orally (ie read out) at the commencement of the podcast.

If the podcast contains visual as well as audio material, the notice should be incorporated as text at the beginning of the podcast.

16.3 University use of third-party podcasts

Podcasting has become a highly popular means of distributing multi-media files, such as sound recordings and film clips, over the internet. Content which is made available in a podcast format (such as the RSS or Atom format) can be downloaded automatically to a digital media player such as an iPod or mp3 player.

There are two ways in which a university may wish to make use of third party podcasts: firstly, a lecturer may direct students to a particular website and suggest that they personally download a podcast and secondly, a lecturer may wish to copy a podcast and make this available to students. .

Directing students to websites containing podcasts

Directing students to websites containing podcasts gives rise to the same issues as directing students to websites containing material in other file formats: if the site a lecturer is suggesting students visit contains material which has been made available without the permission of the owner of copyright, there is a risk that the university will be held to have authorised any copyright infringement which occurs when students download infringing podcasts. (The temporary copy exception contained in s 43A of the Act would not apply to the reproduction which would occur when a student downloaded a podcast. Such a reproduction would not be "temporary" within the meaning of that exception.) It can *generally* be assumed that major broadcasters will not make a podcast available online unless they have the necessary permissions from copyright owners to do so. It would not, however, be safe to make such an assumption in relation to material made available by individuals etc.

Provided, however, that the podcast appears to have been made available with the permission of the copyright owner, there is nothing to prevent a university from directing students to the podcast and suggesting that they personally download the podcast.

Copying and communicating a podcast for the purpose of making this available to students

In copying and communicating a podcast, a university exercises the following rights of copyright: the reproduction right, the communication right and the rights to cause the sound recordings/film clips to be seen/heard in public.

Subject to what is said below with respect to broadcasts which have been made available by the broadcaster *as a podcast*, the Part VA licence will not apply to the reproduction and communication of podcasts. This is because podcasts are not broadcasts within the meaning of the Act. The exception to this is broadcasts which are made available as a podcast by the broadcaster (eg ABC radio programmes which are available on the ABC website as a podcast.) From 1 January 2007, these are covered by the Part VA licence.

As a matter of practical reality, the Part VB licence will be of little relevance to a university wishing to copy and communicate a podcast. A podcast which includes a performance of a literary work (eg a narrator reading text) cannot be copied or communicated in reliance on Part VB because Part VB applies only to the reproduction and communication rights, and not to the right to perform a literary work in public. While s 28 of the Act provides an exemption in respect of literary works performed *by a teacher* in the course of giving educational instruction, this exception would not apply where the university was seeking to copy/communicate a podcast of *some other person* performing a literary work.

> It follows from what is said above that in almost all cases, it will be necessary to obtain the permission of the copyright owner before copying and communicating a podcast. It should be noted that a copyright owner who has made a podcast available to be downloaded freely by members of the public cannot, for this reason

alone, be taken to have licensed a university to copy and communicate the podcast for the purpose of making this available to its students.