

Educational statutory licences

Introduction

- 3.1 Parts VA and VB of the Copyright Act establish statutory licence schemes for certain institutions to copy, respectively, television and radio broadcasts and print copyright works. These statutory exceptions to copyright are available to institutions subject to a remuneration requirement.
- 3.2 The stated aim of the Bill is to extend the existing statutory licence schemes to allow institutions, such as schools, universities and institutions assisting persons with a print or intellectual disability, to reproduce and communicate copyright material in electronic form.¹ Such use is subject to the institutions paying equitable remuneration to copyright owners. The extended schemes have been drafted to enable them to encompass future technological developments and to promote flexibility, based on agreement between educational institutions and relevant copyright collecting societies. If the parties fail to agree on certain matters, the Bill provides the Copyright Tribunal with new jurisdiction to determine these matters.
- 3.3 There are mixed views on the success of the operation of the statutory licence schemes to date. The Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) Task Force

¹ Hon Daryl Williams AM QC MP, Attorney-General, Second Reading Speech, Copyright Amendment (Digital Agenda) Bill 1999, House of Representatives, *Hansard*, 2 September 1999, p. 7428.

commented that in general terms the statutory licences have worked well.² On the other hand, the Australian Vice-Chancellors' Committee (AVCC) expressed the view that the complexity and cost of the existing system of statutory licences makes it almost unworkable.³

Part VA – Copying of broadcasts

- 3.4 Part VA of the Copyright Act creates a statutory exception to the exclusive right of reproduction attached to copyright. It effectively removes from rights holders the ability to deny authorisation, and requires the grant of access to educational institutions in return for the payment of equitable remuneration.⁴ Screenrights suggests that each of the education sector and the rights holders is more or less satisfied with the arrangements to date.⁵
- 3.5 Items 105 to 123 of Schedule 1 of the Bill propose amendments to Part VA consequent upon Item 1. Item 1 proposes to bring the definition of 'broadcast' in the Copyright Act into line with the wider ambit of 'broadcasting service' in the *Broadcasting Services Act 1992* (BSA). The proposed definition of 'broadcast' is to encompass the current meaning of 'transmission' as defined in s. 135A. Most of the proposed amendments to Part VA are to omit the term 'transmission' and to insert the term 'broadcast'.

Scope of the extension of Part VA statutory licences

- 3.6 Representatives of educational institutions and rights holders alike have observed that the provisions of the Bill do not extend the new right of communication to broadcasts which have been reproduced by an educational institution.⁶
- 3.7 MCEETYA stated there would be an adverse impact on schools if the Bill did not provide for an extension of the right of communication to broadcasts copied by educational institutions.⁷ It was argued that a number of schools in Australia would not be able to continue the practice

2 Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), *Submissions*, p. S20.

3 Australian Vice-Chancellors' Committee (AVCC), *Submissions*, p. S543.

4 Screenrights, *Submissions*, p. S136.

5 Screenrights, *Submissions*, pp. S135–S138.

6 For example: MCEETYA, *Submissions*, p. S23; AVCC, *Submissions*, p. S548; Screenrights, *Submissions*, p. S126; and Educational Media Australia, *Submissions*, p. S14.

7 MCEETYA, *Submissions*, p. S23.

of communicating audio visual works from a centrally placed video recorder to relevant classrooms, including those on other campuses. MCEETYA acknowledged that the exercise of such a right would be limited by the necessity for the communication to be for the 'educational purposes of the institution'.

- 3.8 The AVCC argued that there was no point in enabling a university to record a broadcast under a statutory licence, and to pay equitable remuneration for that recording if it could not also make the recording available to students and staff.⁸ Mr Ross McLean on behalf of the AVCC elaborated on this argument before the Committee:

As things become more and more digital, this will mean that we have a useless statutory licence: we can copy things, but we cannot make them available. Indeed, it is arguable that even now, in order to make broadcasts available, you have to put your video cassette into a machine which then makes it available electronically on a monitor. So, without a statutory licence with the new right to communicate, we are effectively denied access to an important teaching resource.⁹

- 3.9 Screenrights agreed in principle, that the Bill should provide for the new right of communication to be imported into Part VA in a manner consistent with that proposed for Part VB.¹⁰ It argued that inconsistent treatment of statutory licences between the two areas was undesirable. The inconsistency led to the 'peculiar' outcome that while educational institutions may be able to copy broadcasts they will not be able to communicate those copies to students.
- 3.10 Despite foreseeing that a common outcome was desirable and discussing a possible solution to this problem over the course of the inquiry, Screenrights and the AVCC could not agree on a common approach for including the desired right of communication in Part VA. The differences between them are about equitable remuneration in relation to the communication of the copied broadcasts.
- 3.11 Not all the evidence supported such an extension of this statutory licence to the right to communicate broadcasts. Educational Media Australia stated that

[w]e are grateful for the foresight of the government in not extending the statutory licence to communication of that copy.

8 AVCC, *Submissions*, p. S548.

9 Ross McLean, AVCC, *Transcript*, p. 152.

10 Screenrights, *Submissions*, pp. S125–S126.

If educational institutions have to apply to copyright holders for a licence to communicate the digital product they have acquired, then it seems that copyright holders will thus have access to the means for ongoing commercial exploitation of their products.¹¹

- 3.12 The Government did not address the extension of the educational statutory licence with respect to broadcasts in evidence to the Committee, and there is very little by way of explicit government comment on this particular aspect of the right to communicate. No express reference is made in the Explanatory Memorandum or the second reading speech to whether or not the Bill would extend the right to communicate to broadcasts copied under Part VA.
- 3.13 One indication of what might be intended is provided by item 105, the proposed new heading of Part VA. The proposed heading refers simply to 'Copying of broadcasts ...' etc. In comparison, item 124 proposes as the new heading of Part VB, 'Reproducing and communicating works ...' etc.
- 3.14 The only explicit statement on the matter is to be found in the Government's commentary on the Exposure Draft of the Bill:
- Although the proposed new right of communication to the public is intended to replace and extend the existing broadcasting and cable diffusion rights, it is necessary to retain a definition of 'broadcasting' in the Act (albeit a wider definition as discussed in paragraph 25 above). The reason for this is that the Government has decided to retain most of the existing statutory licences and exceptions in the Act in relation to **broadcasting** and not extend these licences to apply in relation to **communication**. These exceptions and licences are provided in:
- ...
- Part VA of the Act ...¹²
- 3.15 This comment indicates the Government's position in February 1999, although the reasons for the decision are not clear.
- 3.16 As the issue of extending the right to communicate to broadcasts copied by educational institutions was not identified as one of the changes to the exposure draft prior to introducing the Bill, the implication is that the Government's decision not to extend licences for broadcasts to apply in relation to communication still applies.

11 Educational Media Australia, *Submissions*, p. S14.

12 *Exposure Draft and Commentary: Copyright Amendment (Digital Agenda) Bill 1999*, Attorney-General's Department, February 1999, p. 19.

Conclusions

- 3.17 The Committee was impressed with the spirit of cooperation demonstrated by Screenrights and the AVCC in entering into negotiations to attempt to reach an agreement on this matter. The Committee recognises that final agreement has not been reached, but that nevertheless there is much common ground. The Committee considers that the case made for including the right, by both the users and the copyright holders, is strong. It agrees with the comments from both sides that in the absence of a statutory right to communicate the broadcasts they have been enabled to copy, the educational institutions are left with a licence that is greatly diminished in value in the digital environment.
- 3.18 The Committee is sympathetic to the concerns of copyright holders, such as Educational Media Australia, that they be appropriately remunerated for their creativity. The Committee supports the need for equitable remuneration to be a feature of the new licence.

Recommendation 8

- 3.19 **The Committee recommends that the Copyright Amendment (Digital Agenda) Bill 1999 be amended to extend the statutory licence scheme under Part VA, to enable educational and other institutions to communicate broadcasts copied under Part VA, as part of the equitable remuneration scheme.**

Part VB – Reproducing and communicating works etc

- 3.20 Part VB of the Copyright Act creates a statutory exception to the exclusive right of reproduction attached to copyright material in hardcopy or analog form. Items 124 to 199 of Schedule 1 propose amendments to Part VB of the Copyright Act, which would extend the current statutory licence scheme. This scheme would be extended to apply to the reproduction and communication of copyright material in electronic or digital form.¹³

Remuneration notices

- 3.21 Under the Copyright Act, remuneration notices are prepared on the basis of use, whether relying on a records system or a sampling system. Much

¹³ Explanatory Memorandum, para. 234.

of the detail in relation to remuneration notices is provided in regulations made under the Act. The Bill provides for remuneration notices with respect to reproductions in electronic form to be prepared on the basis of an electronic use system. Item 125 proposes the definition of a new type of remuneration notice called 'electronic use notice' to be included in s. 135ZB.

- 3.22 The stated aim of the electronic use system is to avoid the technology-specific requirements of the current records and sampling systems, and is intended to be broad enough to encompass electronic copyright management systems, or other systems, including ones based on records or sampling, as agreed between the parties.¹⁴ As with the current systems, if the parties fail to agree on certain issues they will have recourse to the Copyright Tribunal.
- 3.23 The Bill provides for a single remuneration notice to be given for the exercise of both the reproduction and the communication of copyright material in electronic form.¹⁵ Alternatively, each of the rights may be separately remunerated if the parties agree.
- 3.24 MCEETYA stated that educational institutions were opposed to a separate electronic use notice.¹⁶ Their position was founded on the premise that as electronic use is closely associated with reproduction it should be looked on as one transaction. Their aim was to have two types of notice that educational institutions can give, one being a records notice and one being a sampling notice, without the need to give a further electronic use notice.
- 3.25 The AVCC argued similarly that there should be one single licence for educational use that covers copying and making available, in order to make the licensing as simple as possible.¹⁷ The differentiation between what is copied and how it is made available could be addressed by applying different rates of remuneration for different situations rather than having a multiplicity of statutory licences. Mr McLean said the focus should be on the use, not on the variety of rights that are being used.
- 3.26 The Copyright Agency Ltd (CAL) agreed that multiple schemes and multiple notices could lead to complexity and difficulty.¹⁸ CAL did not support MCEETYA's proposal, but did support the concept of one remuneration notice. It hoped that sampling and record keeping could be

14 Explanatory Memorandum, para. 237.

15 Explanatory Memorandum, para. 236.

16 Charles Alexander, MCEETYA, *Transcript*, p. 154.

17 Ross McLean, AVCC, *Transcript*, p. 153.

18 Caroline Morgan, Copyright Agency Ltd (CAL), *Transcript*, p. 157.

removed because in a digital future all of the copying could be recorded automatically, and eventually a full audit or record of all the copyright owners could be maintained so that they could receive payment.¹⁹ CAL holds the view that it is unfair that one party to a licence can elect whether the information the copyright owners receive about what is copied is based on a full record or a sample. It supports the feature in the electronic use system that the nature of recording is to be a matter for the Copyright Tribunal to decide based on arguments from each party.

- 3.27 The joint submissions from the Attorney-General's Department and the Department of Communications, Information Technology and the Arts (AGD and DCITA) stated that the electronic use system proposed in the Bill has been specifically designed to provide greater flexibility than is currently provided under the sampling and records systems.²⁰ They emphasise that the new scheme is a response to the different character of electronic form as compared with print, and note further that not every educational institution would have to adopt the same use system.

Conclusion

- 3.28 The Committee considers that while the Bill does indeed provide for a separate new category of remuneration notice, the stated aim in so doing appears to be to address the very concerns expressed by MCEETYA and the AVCC, that is, a desire for reduced administrative complexity. The Committee notes that the Explanatory Memorandum states that the new electronic use system is capable of permitting one notice for both the reproduction, and the communication of material in electronic form, which approach is favoured by MCEETYA.
- 3.29 The Committee concludes that there is no need to amend the proposed electronic use system. The Committee considers that the nature of systems for assessing use for the purposes of equitable remuneration is rightly a matter for determination to the satisfaction of the negotiating parties. Different parties may have preferences for particular use systems, and the Committee considers it a strength of the scheme if it permits parties flexibility in agreeing a method of assessing use based on what is appropriate in the circumstances.
- 3.30 If there is to be improved administration of the remuneration notices the Committee considers it is largely a matter that rests within the control of negotiating parties. The Committee notes that satisfactory resolution of the

19 Caroline Morgan, CAL, *Transcript*, p. 158.

20 Attorney-General's Department and Department of Communications, Information Technology and the Arts (AGD & DCITA), *Submissions*, p. S745.

matter relies in the first instance on the will to reach a negotiated agreement.

Copyright material in electronic form

- 3.31 Item 151 inserts new provisions into Part VB of the Copyright Act to extend the statutory licence scheme for educational institutions to the reproduction and communication of copyright material in electronic form.²¹

Exceptions for insubstantial parts of works

- 3.32 In item 151, proposed section 135ZMB creates an exception to the infringement of copyright for material in electronic form where an insubstantial part – not more than 1% of the total words – of the work is reproduced or communicated on the premises of an educational institution for the purposes of a course of study provided by it.²² Proposed s. 135ZMB is based on the current exception in the Act in relation to copying insubstantial portions of works, s. 135ZG.
- 3.33 Qualifications apply in the electronic environment to prevent the measure being used to circumvent the statutory licence scheme: a further reproduction or communication of an insubstantial portion of the same work cannot be made until 14 days after the original reproduction or communication; and where such a portion is made available online another such portion may not be made available online simultaneously.

Continuing the exception in the digital environment

- 3.34 CAL argued that the proposed provision be omitted from the Bill because it is a free exception for educational institutions to copy portions without payment.²³ This suggestion follows from CAL's opposition to current section 135ZG of the Act, which section it would like to see repealed.²⁴ These provisions are free exceptions contained within the statutory licences, which means there is no remuneration to copyright owners for such use of their works. The Australian Copyright Council (ACC) makes a similar objection.²⁵

21 Explanatory Memorandum, para. 271.

22 Explanatory memorandum, para. 273.

23 Caroline Morgan, CAL, *Transcript*, p. 157.

24 Marie-Louise Symons, CAL, *Transcript*, p. 267.

25 Australian Copyright Council (ACC), *Submissions*, pp. S364–S367.

- 3.35 The scenario drawn by Ms Marie-Louise Symons, on behalf of CAL, was that educational institutions could select the most important parts of works, which could be continually presented to their students.²⁶ The effect might be that copying which is far greater than what might be regarded as reasonable or a small amount would occur. Ms Symons argued that, historically, this measure was introduced to enable a very small amount of copying at a time when it would have been uneconomic for copyright owners to collect remuneration for the intended copying. With the subsequent establishment of copyright collecting societies, such as CAL, copyright owners are now in a much better position to administer licences and to have payments collected for these kinds of copying, which it was argued, are far greater than insubstantial copying.
- 3.36 In response to CAL's suggestion, Mr Jamie Wodetzki said that this Bill was not intended as a vehicle for reconsideration of the merits of permitting an exception for insubstantial portions.²⁷ Rather, it was drafted to carry the exception forward to the digital environment, which, he argued it had done. He doubted whether it was actually practical to charge for the use, as was suggested. The reporting process was administratively tedious and the benefit to users was likely to be minimal.
- 3.37 The AGD and DCITA emphasised that proposed s. 135ZMB, and s. 135ZG, reflect an underlying principle in copyright law in Australia that an act in relation to copyright material is an infringement of copyright only where it is in relation to a substantial part of the material.²⁸ The exceptions provide guidance to educational institutions as to what should be regarded as an insubstantial part and what is considered desirable for the benefit of education.

Conclusion

- 3.38 The Committee notes the view of AGD and DCITA that the exception for educational institutions to copy insubstantial portions without payment is an underlying principle in Australian copyright law. Nevertheless, the Committee considers that this inquiry is an appropriate opportunity for reconsidering the proposed extension of this exception for insubstantial copying including its extension to communication.
- 3.39 Evidence to the Committee did not demonstrate a strong case for extending this exception into the digital environment. The Committee notes that s. 135ZG was introduced into the Copyright Act at a time prior

26 Marie-Louise Symons, CAL, *Transcript*, pp. 267–268.

27 Jamie Wodetzki, Australian Digital Alliance (ADA), *Transcript*, p. 272.

28 AGD and DCITA, *Submissions*, p. S746.

to the operation of copyright collecting societies. It has some sympathy with the argument advanced by CAL that copyright owners are now in a much better position, through their collecting societies, to administer licences and to be remunerated for the use of their work.

- 3.40 The Committee considers that reproducing and communicating even insubstantial parts is after all a use of copyright material which should be remunerated. It concludes that the exception should not be transferred to the digital environment, and accordingly does not support proposed s. 135ZMB, which provides for an exception to infringement of copyright for material in electronic form where an insubstantial part of the work is reproduced or communicated by an educational institution for the purposes of a course of study provided by it.

Recommendation 9

- 3.41 **The Committee recommends that proposed section 135ZMB be omitted from the Copyright Amendment (Digital Agenda) Bill 1999.**

- 3.42 Furthermore, the Committee suspects that it would also be practical to repeal s. 135ZG, the current exception in the Copyright Act in relation to copying insubstantial portions or works.

Scope of the exception – work reproduced or communicated on the premises

- 3.43 MCEETYA argued that the words ‘carried out on the premises of an educational institution’ in proposed s. 135ZMB, might operate to prevent access to a school database from outside the school premises and could restrict the access of students in remote areas.²⁹ Charles Alexander, for MCEETYA also argued that the words were unclear and inconsistent with other provisions. MCEETYA suggested that those words be replaced with ‘for the educational purposes of the institution or of another educational institution’ as used in s. 135E(1)(b).³⁰
- 3.44 CAL regarded the inclusion of the words ‘on the premises of’ as critical in prescribing the appropriate scope of application of the measure.³¹
- 3.45 The AGD and DCITA did not comment on this issue in evidence to the Committee.

29 MCEETYA, *Submissions*, p. S22.

30 MCEETYA, *Submissions*, p. S23.

31 Caroline Morgan, CAL, *Transcript*, p. 159.

Conclusion

- 3.46 It should be noted that if the Committee's recommendation above is accepted, then this concern about the wording used in proposed s. 135ZMB is dissolved. In the event that the recommendation is not accepted, the following findings should be considered.
- 3.47 The Committee notes that the language used in proposed s. 135ZMB reflects that used in s. 135ZG(1), the similar provision in the Act in relation to copying insubstantial portions of works. While communication has a different application to copying, the Committee does not consider that the proposed form of words would necessarily cause difficulties such as those suggested by MCEETYA. Specifically, the Committee considers that the proposed wording does not prevent an educational institution from communicating the work in a way that would enable students in remote areas access. Accordingly, if proposed s. 135ZMB(1) is to remain part of the Bill, the Committee supports retention of the current wording.

Illustrative artistic works

- 3.48 In item 151, proposed section 135ZME sets out the application of the extension of the statutory licence scheme for educational institutions to the reproduction and communication of illustrative artistic works that accompany articles or works in electronic form.³² Where more than one copyright owner is involved, the remuneration in respect of the uses is to be divided between them. The owners themselves are to agree the amount and division of remuneration. Failing agreement, the copyright owners have recourse to the Copyright Tribunal.
- 3.49 Ms Kate Gilchrist of the Arts Law Centre supported the sentiment of proposed section 135ZME, but expressed concern that the language in the Bill gave "the connotation that artistic works are somehow less valuable than the text".³³
- 3.50 Ms Anna Ward of VISCOPY suggested that proposed section 135ZME be omitted. She said that the value of an artistic work is much greater in the digital environment because the work can be readily divorced from the text with the use of modern technologies and then reused as a stand alone work.³⁴ The language of the Bill should reflect this argument that artistic works should not be regarded as an accompaniment but as works in their own right.

32 Explanatory Memorandum, para. 282

33 Kate Gilchrist, Arts Law Centre, *Transcript*, p. 273.

34 Anna Ward, VISCOPY, *Transcript*, p. 274.

- 3.51 Ms Libby Baulch of the ACC also supported omitting proposed s.135ZME, saying that an educational institution could nevertheless copy and communicate artistic works under proposed section 135ZMD.³⁵ The proposal to omit the provision is based on the view that the legislation should not attempt to govern the distribution of money collected and a commercial availability test should apply.³⁶
- 3.52 On the other hand, Mr Ross McLean of the AVCC supported retaining the proposed provision, arguing that equitable payment for the higher value uses described by Ms Ward was provided for under s. 135ZL. He expressed concern that a need to record the two kinds of copying for two kinds of owners might prove onerous.³⁷
- 3.53 Ms Symons of CAL agreed that it might not be necessary to retain a distribution mechanism in the legislation, and said further that collecting societies should be able to offer some kind of scheme which avoided the necessity of recording two kinds of copying for two kinds of owners.³⁸

Conclusion

- 3.54 The Committee accepts the view that artistic works should be treated as being a separate and valuable classification of works. The Committee notes that proposed s. 135ZME does not prescribe the distribution of remuneration, in the same level of detail as does s. 135ZM of the Act, but rather provides that ‘the amount of remuneration must be divided among the owner or owners of the copyright in the artistic work ... and the owner ... of the copyright in the article or other ... works’. The Committee believes this flexible statement might obviate the concerns of the ACC about the distribution of money collected for copying.
- 3.55 The arguments advanced in favour of omitting proposed s. 135ZME from the Bill based on dissatisfaction with s. 135ZM of the Act, were not strong enough to convince the Committee. The Committee concludes that the proposed provision should remain. The Committee notes the remaining concerns expressed about this proposed section, and suggests that the Government review this matter in the course of its three year review.

35 Libby Baulch, ACC, *Transcript*, p. 275.

36 See also, ACC, *Submissions*, pp. S366–S367.

37 Ross McLean, AVCC, *Transcript*, p. 275.

38 Marie-Louise Symons, CAL, *Transcript*, p. 275.