



Journal of Copyright in Education and Librarianship

ISSN 2473-8336 | jcel-pub.org

Volume 5, Issue 1 (2021)

Copyright in the Time of COVID-19: An Australian Perspective

Amanda Bellenger and Helen Balfour

Bellenger, A. and Balfour, H. (2021). Copyright in the time of COVID-19: An Australian perspective. *Journal of Copyright in Education and Librarianship*, 5(1), 1-20.
<https://doi.org/10.17161/jcel.v5i1.16249>



© 2021 Amanda Bellenger and Helen Balfour. This open access article is distributed under a [Creative Commons Attribution- 4.0 International license](https://creativecommons.org/licenses/by/4.0/).

Copyright in the Time of COVID-19: An Australian Perspective

Amanda Bellenger, Curtin University, Perth, Western Australia

Helen Balfour, Murdoch University, Perth, Western Australia

Author Note: Correspondence regarding this article should be directed to Manager, Research and Copyright, University Library, Curtin University, Perth, Western Australia, a.bellenger@curtin.edu.au.

Abstract

COVID-19 has raised many challenges in terms of applying Australian copyright legislation and related policies to higher education context. This paper describes the experience of Copyright Officers at Curtin University and Murdoch University from the initial stages of border-control measures affecting delivery of learning materials to students in China, to the wider disruption of the pandemic with many countries implementing lockdown measures, to the current environment where remote delivery is the “new normal.” The [Australian Copyright Act 1968](#) (Commonwealth of Australia) provides narrow fair dealing exceptions (sections 40 and 41) and broader but more uncertain flexible dealing exceptions (section 200AB), creating a barrier for educators providing access to the information resources needed for teaching, learning, and research. The uncertainty of applying section 200AB was exacerbated by the conditions caused by the pandemic. The authors describe their experiences in providing copyright support during the pandemic as well as how the copyright services adapted to meet requirements.

Copyright in the Time of COVID-19: An Australian Perspective

Background

Curtin University and Murdoch University are both located in Western Australia, with campuses located worldwide. Curtin delivers a wide range of learning and teaching programs across the faculties of business and law, health sciences, humanities, and science and engineering as well as through the Centre for Aboriginal Studies. Courses are delivered to more than 50,000 students studying remotely or through Curtin's campuses located in Australia, Dubai, Malaysia, Mauritius, and Singapore, with [courses offered at undergraduate and postgraduate levels](#). Murdoch has a broad scope of learning and teaching areas covering business and law, creative arts and communication, engineering, health, science, social and cultural studies, teaching, and technology. Courses are delivered to approximately 23,000 undergraduate and postgraduate students who study remotely or at [Murdoch campuses](#) located in Australia, Dubai, and Singapore.

Typical of Australian university libraries, the library services at Curtin University and Murdoch University are broad in scope. Academic libraries play a key role in supporting their institutions' learning, teaching, and research outcomes. They undertake a range of activities relating to scholarly information, including discoverability, access, and preservation. They provide programs and spaces to develop the skills of staff and students relating to the creation and dissemination of knowledge.¹ Despite the wide range of services offered at Australian institutions, levels of library staffing are quite modest, with 2018 Council of Australian University Librarians (CAUL) statistics reporting 75.7 fulltime equivalent (FTE) staff at Curtin Library and 38 FTE staff at Murdoch Library (CAUL, 2020).

Australian university libraries were quick to adopt an electronic-only approach with their collections for users, partly due to the high proportion of students accessing library services remotely or from global campuses and partly due to the drive to open library spaces housing physical collections to flexible student learning spaces. In 2018, Australian university libraries spent more than

¹ The [Curtin Library](#) and [Murdoch Library](#) websites provide details into their respective service offerings.

\$358 million on collections as a sector, with expenditure on electronic collections representing \$336 million or 94% of total collections expenditure (CAUL, 2020).

Universities Australia is a representative body for the university sector. Part of their role is to negotiate three copyright licences on behalf of the sector—two Statutory Licence agreements governed by licensing schemes for educational providers as defined in the Australian Copyright Act 1968 (section 113P) and a voluntary licence with music-collecting societies including the Australasian Performing Right Association (APRA), the Australasian Mechanical Copyright Owners Society (AMCOS), the Phonographic Performance Company of Australia (PPCA), and the Australian Recording Industry Association (ARIA). The first Statutory Licence agreement is with Copyright Agency, a collecting society representing rightsholders of text and artistic works. This agreement permits universities to copy and communicate text or artistic works for educational purposes, subject to copying limits of one chapter or 10% of the words or pages per book, whichever is greater, and one article per journal issue. The second Statutory Licence agreement is with Screenrights, a collecting society representing rightsholders of broadcast programs. This agreement permits universities to copy and communicate television and radio broadcasts with no copying limits. It excludes video on demand services such as Netflix and Amazon Prime because these services do not meet the traditional definition of broadcasts as set out in Australian legislation. The music licence permits universities to copy and communicate music and sound recordings for a range of purposes, including use at official university events and for educational purposes.

Partly due to the complexity in administering these copyright licences, including requirements to coordinate regular sampling surveys for the purpose of the Copyright Agency Statutory Licence agreement, Australian universities generally have staff acting in a part-time or full-time capacity as a Copyright Officer. Copyright Officers may be staff within the Legal Service or, increasingly, from the University Library. Job responsibilities vary by institution, but most Copyright Officers do the following:

- Monitor the compliance with copyright legislation and policy within the institution;
- Respond to staff and student queries relating to copyright;

- Deliver training sessions on compliance requirements relating to learning, teaching, and research activities;
- Assist the library with interpretation of copyright exceptions that relate to library activities;
- Maintain online self-help materials such as websites and how-to guides;
- Act as the central contact for the university in responding to takedown notices issued by copyright holders; and,
- Liaise with Universities Australia as required in managing the copyright licence agreements.

The Australian University Copyright Officers network has been established as an informal group to discuss copyright issues and regularly interact through annual meetings organised by Universities Australia and online webinars.

Apart from the Statutory Licensing scheme (section 113P) as set out in the Australian Copyright Act 1968, exceptions that might be relied upon by educational providers and staff and students include the following:

- Fair dealing, for the purposes of research and study as well as criticism or review;
- Library exceptions that cover the provision of content to library users or other libraries for research and study purposes, preservation, and other activities to maintain the operations of a library;
- Supply to a person with a disability incorporating requirements from the Marrakesh Treaty;
- s200AB, known as the flexible dealing or special case exception, that may be relied upon when no other exception applies subject to certain criteria based on the Berne three step test. s200AB has four criteria—the use amounts to a special case, the use is for educational instruction and not for obtaining commercial advantage or profit, the use does not conflict with a normal exploitation of the work, and the use does not unreasonably prejudice the legitimate interests of the copyright owner.

Although s200AB is supposed to be a flexible dealing exception for educational institutions and libraries, it has proved to be difficult to apply because of its drafting choices that incorporate the “three-step test” with unclear terms. Also, s200AB(6)(b), which states that “[Subsection](#) (1) does not apply if, because of another provision of this Act,” further complicates an assessment of

use as the use is not permitted if other exceptions apply, including the statutory licensing scheme (Flahvin & Dalton, 2012). These complications result in uncertainty on how to apply s200AB, so many institutions adopt a risk-averse approach and often do not rely on this exception. It's commonly thought that because of its complexity and difficulty to apply, s200AB is generally a failure in terms of it being a fair dealing exception as librarians and educators are so unsure about using it (Flahvin & Dalton, 2012). However, Coates (2019) believes that the years of using s200AB since its drafting have set some common uses that are generally accepted, and considers it "deliberately flexible," although adding, "It is up to the practitioner or institution to decide whether they think it applies in a particular case." Often the decision to use is hampered by uncertainty.

Library Delivery of Unit Readings

Both Curtin and Murdoch libraries have pushed their preference for electronic resources in the last few years (Curtin University Library, 2017; Murdoch University Library, 2012). This aggressive shift from acquiring information resources in a digital format rather than physical format is demonstrated by the proportion of digital holdings and expenditure. For Curtin, more than 68% of the collection holdings are in electronic format, with more than 98% of the library acquisitions budget going toward the purchase or licensing of new electronic format information resources. For Murdoch, more than 56% of holdings are electronic, with almost 94% of the library expenditure covering digital acquisitions (CAUL, 2020).

This emphasis on licensing electronic content meant both libraries were reasonably well-placed to respond to COVID-19 and the challenges associated with remote delivery. Direct licensing through publishers has always been prioritised over reliance on the Statutory Licence license because the direct licensing approach means for some publishing agreements students may access more than the prescribed copying limits of 10% of the words or pages/one chapter per title. Publisher platforms often provide functionality to enhance the experience of accessing the title, for example by providing note-taking facilities and by integrating with third-party services such as the reference management software Endnote.

Both universities mandate that learning and teaching staff use online unit readings systems to copy and communicate content in compliance with the Statutory Licence agreements (Curtin, 2017; Murdoch, 2020). This mandate puts the administrative burden of copyright sampling surveys as required by the Statutory Licence on the library, which operates a centralised service. These services can ensure that copying limits are met and required electronic warning notices are attached to files of content copied in reliance on the Statutory Licence. The libraries offer value-added services to staff via these systems. Library staff can assist learning and teaching staff in sourcing unit readings—by ordering publications if not already held in the library collections, by processing an interlibrary loan or document-delivery request to obtain a copy, or by digitising content if covered by the Statutory Licence. Increasingly these unit reading systems offer advanced and sophisticated learning analytics that tell lecturers about the take-up of unit readings by students. Curtin’s online unit reading system is branded as Reading Lists using the Ex Libris Leganto software and Murdoch’s online system is Talis Aspire. Both systems give learning and teaching staff the ability to create and curate unit readings and are integrated with the relevant learning management system.

Students in China

For Murdoch, the challenge in applying copyright exceptions during COVID-19 came early in the pandemic. In February, the Federal government of Australia closed the borders of the country for anyone except Australian citizens coming home from China (these citizens then needed to go into quarantine).

Many students had returned home for the summer break in December 2019–February 2020 and would have normally returned to Australia in time for the start of first semester in late February 2020. However, students in China could not return to Australia because of the government travel bans in place. Universities outside of China have had the added and long-standing issue of China’s government policies that block many Western internet sites adopted as unit readings for learning and teaching purposes, such as YouTube, TEDTalks and region-blocked Australian platforms including ABC Radio, iView, and other news articles.

To manage the issue of delivering access to course materials to students in China, the Murdoch Copyright Officer sought guidance from other institutions and networks as well as in-house Legal Counsel. Lecturers would put links in their course readings to resources, but as the links were not accessible the library needed to make copies of online-hosted content (e.g., videos and news articles that would ordinarily be publicly available to students outside of China via YouTube and other online platforms) to give students in China access to their course materials. There was also the ongoing issue of how to provide essential readings that were not available in electronic format to students.

In some cases, universities could reasonably rely on s200AB of the Copyright Act—the flexible dealing exception for libraries and educational institutions for use in special circumstances—which might apply when communicating copies of a chapter from textbooks that were required readings for students in China who could not purchase their textbook outside Australia in any format. To manage any potential risk in applying s200AB, Murdoch staff kept records of what was copied and communicated in case there was any future claim from a copyright holder or collecting society that our copyright interpretation was too liberal and that the use was remunerable—that way they could provide evidence of the scope of the use. Staff also restricted access to these copied chapters by providing them only to the students in China—not the entire class. The works were communicated with a s200AB copyright notice attached notifying the students that the copy was made in reliance on s200AB and that no further copying was permitted.

From the Curtin perspective, the issue in delivering content to students in China was at a much smaller level than Murdoch, as there was not a significant number of enrolled students at that location. Similar to Murdoch, direct commercial licensing of electronic format readings and reliance on s200AB were available for consideration. The Curtin issue was more focused around the provision of essential software to the region rather than delivery of unit readings.

Early Closures and Impact on Libraries

A state of emergency was first declared by the state government in Western Australia (WA) in response to the COVID-19 on March 15, 2020, and by

early April the government closed the WA border to the remainder of Australia to control the spread of the disease.

Over this period both universities rapidly transitioned to online delivery of all lectures, with tutorials and labs transitioning to online and nontuition study weeks adjusted to provide learning and teaching staff with preparation time to make the move to remote delivery.

For Curtin, social distancing measures were introduced in campus venues, with events cancelled and face-to-face meetings limited as much as possible . From March 20 on, all lectures were moved to online, with other course components including tutorials, workshops, and laboratories planning toward online delivery. Staff were directed to work from home starting on March 25. The main library building at the Bentley campus was closed from late March until early May, and on reopening in early May initially limited access to individual study spaces only, gradually transitioning to a return to full service in early June 2020. It is important to mention that this is not necessarily the experience of Curtin's international campuses, which have had different levels of restrictions imposed by their local governments, meaning some campuses continued to be closed to students.

For Murdoch, the closure announcement from the Provost was made on March 13, with online-only learning and teaching to run for the duration of the first semester. This meant that all staff had three weeks to be trained using Blackboard Collaborate, which was the preferred platform for remote learning and teaching delivery. With the Murdoch Library building closing in early April, staff and students had no access to the print high-demand collections and the general collections that housed the required and recommended unit readings.

Both Copyright Officers moved quickly to provide guidance for learning, teaching, and library staff, anticipating that the rapid move to remote delivery was likely to result in widespread confusion regarding copyright requirements. With no access to physical library collections during the lockdown period, there was a lot of pressure from academic staff to allow more than the copying limits set out in the Statutory Licence.

The Curtin guideline document for academic staff who had to transition to remote learning was circulated in late March and was based on guidance provided by various networks, including the Australian Libraries Copyright

Committee (ALCC, 2020) and Smartcopying (National Copyright Unit, n.d.). The key messages for the Curtin guidelines were 1) that staff should continue to use Reading Lists to provide access to unit readings (as the service and software can track usage under the Statutory Licence agreements) and 2) for hard copy content that is not easily accessible to students (due to the library building closure) staff should consider alternatives, such as using content in library databases, using openly licensed content such as Creative Commons material, and using links instead of copies. The guidelines emphasised the point that the copyright legislation itself had not changed, only the interpretation of the legislation given the special circumstances of the pandemic. To supplement the guidelines an online webinar was recorded and made available that covered the guidelines, and two live sessions were offered via Blackboard Collaborate Ultra wherein academic staff could drop in without registering and ask questions about their particular circumstance. For library staff, sessions were delivered to particular team groupings, specifically the collections staff who manage Reading Lists and client engagement staff who are responsible for publicly managing the print collections and are the first line for client queries.

The Murdoch guide for library staff was developed following guidance from in-house counsel, with reference to networks, including the Australian Libraries Copyright Committee (ALCC, 2020). This covered the exceptions library staff could possibly rely on and what things needed to be taken into consideration. The main audience for the guide were subject librarians and the enquiry and lending services (ELS) team. This guide was based around the conditions that needed to be met to use s200AB for providing copies. The guide detailed the workflows, and a series of copyright declaration forms had to be created. A frequently asked questions document was developed for teaching staff and students, which explained that some special exceptions could possibly apply during the pandemic and, similar to the Curtin approach, stressing that the copyright laws had not changed, but due to the special circumstances we could be more flexible in how we interpret some exceptions in the Act. The guide stressed that teaching and learning materials go into reading lists via Murdoch's Talis Aspire system, and that unit coordinators should speak with the Copyright Coordinator if they needed guidance on their special case or circumstance. As this was an unprecedented situation, a risk management approach was adopted

with guidance carefully followed and workflows executed. Library staff kept meticulous records of what was copied under s200ab and under what circumstances, including details of commercial availability checks so that if any further issues arose we had the records to explain the context for applying the exception.

Relying on Copyright Exceptions for Delivery of Content

The Curtin and Murdoch Copyright Officers turned to other institutions and networks for guidance on how to manage risk during these special circumstances. Clear guidance was not forthcoming, and the changing nature of the pandemic meant the universities' responses kept adjusting to reflect the government directives to have the campuses open, partially open, or closed. This required universities to continually adjust the way we evaluated our risk and interpretation of copyright exceptions. The situation was very stressful for the Copyright Officer role. As well as accommodating a drastic increase in queries, the Copyright Officers were also transitioning to work from home and the new normal of lockdown. A key challenge was to come up with guidance that makes the exceptions a workflow for staff to manage without constantly consulting the Copyright Officer, while balancing the need for case-by-case analysis when applying copyright exceptions such as s200AB.

There were two main gaps for electronic access—textbooks issued in physical format only and audiovisual content. For textbooks, ordinarily the Statutory Licence would apply with its copying limits. The Statutory Licence as defined in a previous iteration of the Copyright Act (known as Part VB) prescribed the copying limits, including one chapter per book/one article per journal issue. In determining whether it was appropriate to exceed the copying limit with textbooks, the use had to be assessed on a case-by-case basis.

As a starting point, the Curtin Copyright Officer directed staff to speak to the library collections team to determine commercial availability of the electronic format of the requested unit reading. Where content is commercially available for licensing in electronic formats, this was the preference in order to comply with the Act. If more than a chapter was required, or the commercial availability suggested print only was available, there were numerous factors considered before determining that the proposed use fit the Statutory Licence.

For example, a physical book only being available overseas or in a certain physical location such as a bookshop or other library and therefore not arriving in time for when it would be needed for study. Under normal circumstances the students would be expected to purchase their own copy of the textbook or to rely on the library copy due to the criticality of the book to teaching the unit (as some titles were more core than others to the learning design and assessment). Staff were advised to speak with the Curtin Library copyright team to talk through the use case.

Once the libraries determined whether the textbook could be copied in reliance on the Statutory Licence, the other issue that emerged was how we could physically access the item because the campus libraries were closed during the lockdown period. Curtin managed this via an interim measure, whereby the library Reading Lists service accepted scans provided by learning and teaching staff sourced from their personal copies and provided simple scanning instructions in the guidelines. This was not generally permitted in normal processes—library staff have more experience in optimising the scans for student use and ensuring the pages were legible and formatted correctly. Reading Lists staff could retrospectively ensure that the copies were monitored and flush out any potentially risky copies that may exceed copying limits or may come from an infringing source that are stored within the system.

For audiovisual content, both libraries chose to assess the use on a case-by-case basis based on the s200AB criteria. In the Australian Copyright Act, format shifting of physical media to an electronic format is only permitted for domestic and personal uses. However, there is some potential to apply s200AB to format shifting for institutional educational use. Provision of electronic audiovisual content was a particular need for film studies. For video, the second Statutory Licence agreement with Screenrights covers the use of broadcast TV and radio programs for educational purposes. Another option is direct licensing through Kanopy and other video providers. In applying s200AB, the Copyright Officers considered the four criteria and emphasised with academic staff that s200AB copying was a last resort so they should exhaust all other avenues of sourcing content and they should use no more than required for their purpose (i.e., rely on excerpts rather than full videos where possible).

Delivery of Content to Students by Lecturers

The Curtin guidance to academic staff was that the Statutory Licence permitted providing copies of physical material to students subject to the copying limits, and if staff wanted to exceed these limits they should contact the library copyright team. It was advised staff attach a cover letter with the material reminding students that the use was for personal research and study purposes only, and not to make further copies.

For emailing students, the Curtin guidance suggested staff use Reading Lists as the preferred delivery method as usage could be monitored via the centralised service. While not widely encouraged, limited emailing of content is permissible under the Statutory Licence, however, staff were reminded that they were to abide by the copying limits. For content accessible via library databases, staff were encouraged to use URLs rather than make copies because of variations in licensing terms that may or may not permit making and disseminating copies for students.

Curtin campuses located outside Australia were advised to consider their local legislation and reminded that access via the library-licensed databases was acceptable because these information resources were specifically licensed for use by Curtin staff and students regardless of location. There were also particular campus issues: for example, at one point Singapore Library was not permitted to provide access to nursing students on campus as these students were working on the frontline at clinics and other health providers. For those students, a class set of print textbooks was available at the campus library, but they were unable to be present on-site to access the copy. As the electronic copy was not commercially available for licensing, and the copyright holder would have already been remunerated through the prior acquisition of the class set, this strengthened the argument for reliance on s200AB to make a digital copy available to that specific cohort of students for the duration of the restrictions to campus access.

The Curtin Copyright Officer ensured Curtin's in-house legal team was fully briefed on the library's copying activity in reliance on s200AB and referred particularly complex queries to them for a second opinion on the level of risk.

In order to manage risk both Copyright Officers continued to monitor guidance issued by other organisations and networks to ensure their respective

guidelines were up-to-date. Queries from staff and students were monitored, and emerging issues were incorporated into the guidelines where appropriate.

Examinations

At the end of semester one, examinations were replaced with alternative assessments delivered online at both Curtin and Murdoch. Changes to the Copyright Act in 2017 meant that the exception covering use of copyright material for examination purposes had expanded from face-to-face examinations to online examinations (see s200[1A]).

In practice, the main copyright issue in relation to online examinations was not related to teaching staff copying and communicating copyright material but to the use of online contract cheating platforms by students. This was a new issue that arose due to the conditions of the pandemic, with staff moving to remote examinations in place of the regular face-to-face method. Many universities are experiencing widespread instances of students sharing assessments, exam questions, and answers via online platforms. Both Curtin and Murdoch have intellectual property policies whereby the university owns copyright to the examination questions (as these were created by staff in their day-to-day duties as an employee) and students own copyright to their answers. Apart from the infringement of the university's copyright, the sharing of examination questions and answers posed significant concerns regarding cheating and academic integrity. This led to a significant workload for both Copyright Officers in submitting takedown notices, as there was some urgency with these requests, in order to have content removed within examination windows.

How the Pandemic Changed the Copyright Service

The effect of the pandemic on copyright manifested in two areas: 1) training and outreach and 2) increasing the adoption of electronic unit readings. For Curtin, the rapid acceleration to remote learning meant quickly adapting to delivery of training via online platforms such as Blackboard Collaborate. On the whole, library workshops have been delivered to higher numbers of participants from a wider range of global locations. Those students in offshore locations previously may not have had access to these workshops, which were only offered

at the Bentley campus. Copyright training, by necessity, became more targeted. Instead of generic sessions on copyright for teaching staff, the training specifically addressed real-life scenarios that posed problems during the pandemic.

The Curtin Copyright Officer undertook a substantial piece of work in 2017 and 2018 to revise [online self-help resources](#) and flag copyright as a strategic issue with the university's Academic Board and Learning and Teaching Committee. The implementation of Curtin's Reading Lists software had also raised the profile of copyright and instilled in staff the key compliance requirement to use Reading Lists as a means of copying and communicating copyright material, especially Statutory Licenced content. All these activities held Curtin in good stead during the pandemic, as learning and teaching staff were aware of the key copyright compliance messaging and the Curtin community was quick to follow up with the copyright service if they were needing support in providing online resources.

At Murdoch, consults between the Copyright Officer and learning and teaching staff are now done online, and all training is done via Blackboard Collaborate live sessions or via video training. Every semester the library hosts a series of seminars for early career researchers in study week called "Research Reach Out." Previously all sessions were held face to face; now all sessions must be delivered online. The copyright session is on understanding publisher contracts and this session was delivered via an online video with further links to [the copyright website](#). Participants reported that they found this format more convenient, and it can also now be used for workshops with researchers at our overseas campuses in Singapore and Dubai.

Murdoch also hosts a day-in-the-life information session for library students enrolled in the copyright unit as part of their degree. The aim of this session is to give students an idea of what it is like to work in copyright at a university. This too has moved to a Blackboard Collaborate session and some positives have come out of this shift to online. Some students found it much easier to attend the session online rather than to travel to the campus for the session. Some also felt more comfortable asking questions in the online environment. The training was made richer by a livelier discussion.

In terms of adopting electronic textbooks, both Curtin and Murdoch had already begun the move to electronic copies of textbooks over physical textbooks for titles listed on reading lists. Murdoch Library had investigated all electronic textbooks for law and business and had actively encouraged the acquisition of electronic textbooks over print for high-demand titles. This work was done before the pandemic, meaning they were in a good position to deal with library closures. Since the COVID-19 lockdown, teaching staff saw the real-world benefits in having their reading list titles as electronic texts for their students, and now we have widespread adoption of electronic texts and online journals as a primary format for course reading lists.

At Curtin, the two main consequences of the pandemic for learning and teaching staff relating to their unit readings were 1) urgency in sourcing copies when the prescribed reading was only available in print format and 2) a change in sourcing unit readings because print format options were no longer attractive when setting up a Reading List. On the rare occasion s200AB could be relied upon, staff and students experienced a positive change in how remote learning and teaching was delivered. For example, the School of Psychology used a textbook and accompanying CD for a substantial part of a core unit. The CD was an interactive software that was locally hosted in the student computer labs on campus due to a previous permission received by the publisher. The interactive software formed part of the unit's regular assessments. For students who could not access the computer labs on campus, this meant they could not complete the unit. The library staff worked with the academics involved to revisit this issue and do s200AB analysis to determine if a version of the software might be hosted in a cloud environment. The book and CD were long out of print and the publisher was not responsive to permission requests. Therefore a remote copy could be made in reliance on s200AB for this short-term need. Interestingly enough, the copyright side was easier to resolve than the technical side—as the university then had to put in place infrastructure to ensure students could easily access the 'digitised' software in the cloud environment using secured platforms.

Both universities are moving toward using and creating open educational resources (OER) as an alternative to high-cost e-books. Future work in this area will need to balance limited library resources with the workload of learning and teaching staff in sourcing, using, and creating OERs.

Reflections and the Current Situation

As of March 2021, both Curtin and Murdoch are continuing to take a blended approach, with all lectures delivered online only and most tutorials and labs offered face-to-face depending on class size.

Both institutions reported the following similar experiences

- As the pandemic hit there was increased reliance on the copyright service in interpreting legislation and assessing risk in the new environment. The acceleration to remote learning due to the lockdown period meant roughly a two-week turnaround time for institutions to get up and running. Now that the pandemic is the new normal this support has levelled off and reverted to usual demands on the service.
- Guidance was provided by a range of organisations and networks, and sometimes this was unclear or conflicting. This made the practicality of applying guidance to our local setting problematic.
- There were attempts to be proactive with digitising works before physical library buildings had closed, thereby removing access to print collections. However, the nature of the flexible-dealing exception limits the ability of educational providers to make just-in-time copies for specific purposes rather than building a library of content just in case. Therefore, copies could only be made once commercial availability checks were completed and further clarification around the specific use provided.
- Networks of other Copyright Officers were useful in speaking through specific examples and sharing experiences. This was a useful way to inform risk assessment when exceeding copying limits under the Statutory Licence or assessing use against s200AB.
- The pandemic and acceleration toward remote learning highlighted the deficits in adopting a textbook that is only accessible in print format for unit coordinators. It is hoped this can be a useful reference point to have strategic conversations with senior stakeholders to push for policy that mandates accessible unit readings and drive higher adoption of open educational resources as a freely available online alternative.

- The pandemic has significantly affected the delivery of examinations, with a blended approach and new models of assessment. This approach is realising the potential of new technologies in innovating in this area.
- It is critical that institutions retain records on what was copied and under what circumstances in their library systems as a means of managing their risk when pushing the boundaries of what may be accomplished under copyright exceptions such as s200AB.
- Post lockdown, many of the queries transitioned from requests for accessible copies of unit readings to requests for use of copyright in music and film used in events that had transitioned online, such as orientation activities and conferences.
- As a collaborative activity, Murdoch and Curtin have planned two workshop discussion days around the use and creation of OERs. The workshops will focus on discussion groups, collaborative work, and sharing ideas. We are waiting for WA COVID-19 restrictions to be lifted before we can hold an in-person event like this. Tentatively we have this planned for February 2021.

Finally, the increased demand for the Copyright Officers to analyse use cases against s200AB has given both individuals more confidence in applying this copyright exception even though it continues to be complex in its application. As mentioned, both sets of guidance issued by Curtin and Murdoch Copyright Officers emphasised that the pandemic did not change the legislation, that the rules still applied, and that it was only our interpretation that had modified. This change in approach is best demonstrated in how we considered the special case and commercial market effects for copyright exceptions. For s200AB the circumstances of the use must amount to a special case and no other exception can apply—the pandemic easily fit the definition of a special case because it was an unprecedented experience for the universities. s49 of the Act is a library exception that permits libraries to supply material to clients for their own research and study purposes. Similar to the Statutory Licence agreement, this section has copying limits. However, libraries can exceed these limits if a copy is not available at a reasonable time and at an ordinary commercial price. The pandemic altered what we defined as “reasonable” and “ordinary.” As campus

locations were not available to students, our interpretation of copyright exceptions had to reflect the urgent needs of our new normal.

Need for Legal Reform

The experiences of Curtin and Murdoch emphasise the issues for educational providers in providing access to copyright materials for learning, teaching, and research purposes in a remote environment when physical facilities and collections are not available, as well as inadequacies with the current copyright legislation in providing certainty in applying copyright exceptions. This suggests a need for more clarification of s200AB and its application, consideration of expanded fair dealing provisions, or even adoption of a fair use doctrine similar to the United States.

Both Copyright Officers found assessing risks difficult because determining commercial availability can be time consuming and cannot reliably lead to a clear outcome; sometimes content can be unable to be identified, located, or easily written off as commercially unavailable.

The Minister of Culture and the Arts announced progress on proposed copyright reforms in August 2020 that will include the following five measures (Commonwealth of Australia, Department of Infrastructure, Transport, Regional Development and Communications, 2020):

1. Introduce a limited liability scheme for use of orphan works;
2. Introduce a new fair dealing exception for noncommercial quotation;
3. Amend library and archives exceptions;
4. Amend education exceptions;
5. Streamline the government statutory licensing scheme.

No exposure draft has been written at time of publication, but we welcome reforms around the issues highlighted in our paper. Australian Digital Alliance chairperson Derek Whitehead further echoes our anticipation:

Lockdown has forced cultural bodies, schools, universities and government bodies to quickly transition to online delivery and our current Copyright Act couldn't keep up. These changes are crucial to Australia's ongoing response to the global pandemic and will position our cultural

collections and educators well to meet future challenges, whatever they may be. (Bledsoe, 2020, August 13)

Conclusion

The COVID-19 pandemic has forced educational providers to accelerate their provision of learning and teaching via online platforms and tools. It provides a useful lever in strategic conversations about the importance of accessible readings and the benefits of open access. For Australian institutions, it has tested the limits of our copyright exceptions, particularly s200AB, and highlighted the urgent need for legal reform to give libraries more certainty in how to apply the exceptions.

References

- Australian Libraries Copyright Committee. (2020). Copyright and remote supply webinar: Video and slides. Recording of webinar held May 21, 2020.
<https://libcopyright.org.au/copyright-and-remote-supply-webinar-video/>
- Bledsoe, E. (2020, August 13). Government proposes much needed copyright changes for online access. Australian Digital Alliance.
<https://digital.org.au/2020/08/13/access-reforms-announcement-media-release/>
- Coates, Jessica. (2019). "Copyright can dos: Navigating the complex world of copyright to empower learning." *Access*, 33(4), 34–37.
- Copyright Act 1968 (Cth) (Austral.).
- Commonwealth of Australia, Department of Infrastructure, Transport, Regional Development and Communications. (2020, August 13). Copyright access reforms. <https://www.communications.gov.au/departmental-news/copyright-access-reforms>
- Council of Australian University Librarians. (2020, October 7). Statistics services: Data files for 2010–2019. <https://www.caul.edu.au/programs-projects/statistics-services>
- Flahvin, A., & C. Dalton. (2012). *Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?* Policy Australia, Report prepared for the Australian Digital Alliance/Australian Libraries Copyright Committee.
<https://libcopyright.org.au/wp-content/uploads/mp/files/posts/files/appendix-1-ada-s200ab-report-15-nov-2012.pdf>
- National Copyright Unit. (n.d.). Smartcopying: COVID-19 copyright issues.
<https://smartcopying.edu.au/covid-19-copyright-issues/>