

# The flexible dealing provision for Australia's cultural & educational institutions

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**Laura Simes**

Executive Officer | **Australian Digital Alliance**

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- Section 200AB of the Copyright Act
  - ADA's /my take on this provision
  - Some examples & brief case studies of use under s200A
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# Australian Digital Alliance

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“The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate.”

[www.digital.org.au](http://www.digital.org.au)

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# Copyright Amendment Act 2006

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- Implemented obligations under AUSFTA (provisions relating to TPMs and increased criminal and civil liability)
  - Introduced further flexibilities:
    - Consumer exceptions (eg iPod provision)
    - Fair dealing for parody and satire
    - Additional exceptions for libraries, cultural and educational institutions, including...  
section 200AB, aka *flexible dealing provision*
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# Section 200AB

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“a flexible exception to enable copyright material to be used for certain socially beneficial purposes” (Explanatory Memorandum)

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# Section 200AB

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This provision should allow use of copyright material for ‘ “special” purposes that benefit the broader Australian community’

(Fact Sheet, Attorney-General’s Department)

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# Section 200AB

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- Open-ended exception
  - *Like* US “fair use”
  - New (and so scope untested)
  
  - Need for guidance so that institutions take full advantage of the flexibilities introduced under s200AB
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# This is my commentary for previous slide

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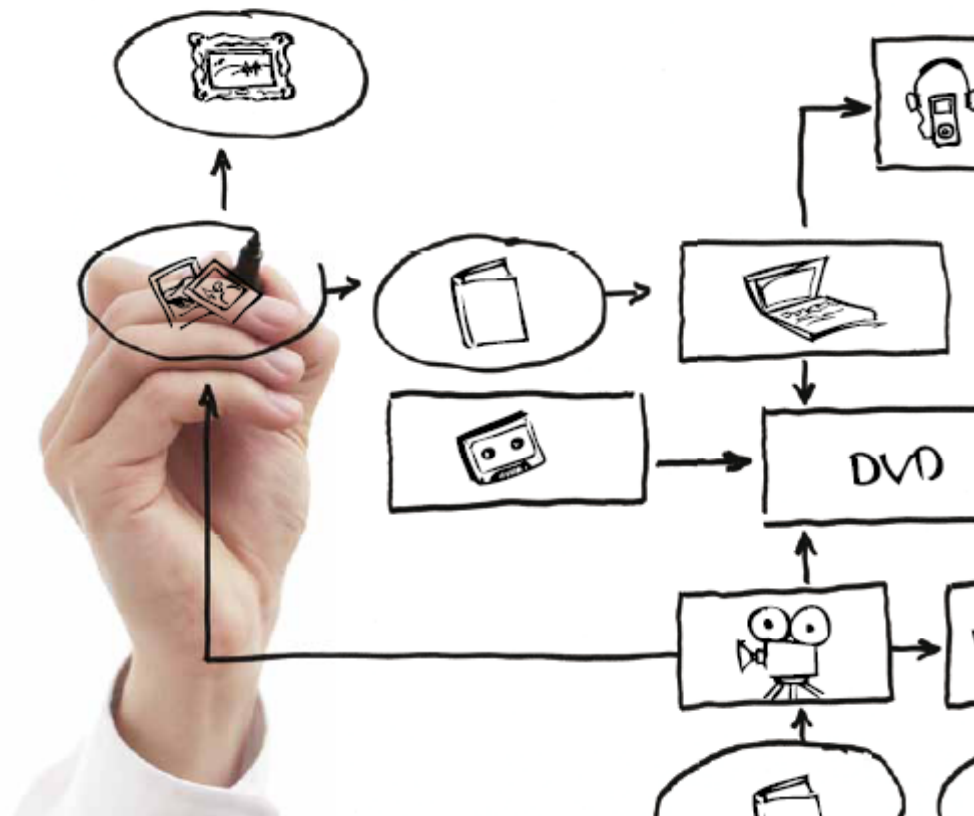
- ADA and Australian Libraries Copyright Committee (ALCC) identified a need for guidance on this new provision
    - Institutions can be risk averse
    - Given the open-ended nature of s200AB we were concerned that institutions might err on the side of caution / read down s200AB as a result of uncertainty and s200AB would not be fully utilised.
    - Some commentary suggested that s200AB would be of little to no use, but...
    - Helen Daniels (Copyright Law Branch AGD) has said “we wouldn’t have put it there if we didn’t want you to use it”
    - The ADA and ALCC jointly undertook to produce a handbook that sought to interpret s200AB in this context and other statements relating to it (eg that “this section is to allow uses for socially beneficial purposes”)
    - ALCC ran copyright training sessions for libraries and archives in 2007 and 2008 to provide information on copyright developments
    - Gathered a number of examples of how s200AB might be of use to institutions
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# A User's Guide

to the Flexible Dealing Provision for  
Libraries, Educational Institutions  
and Cultural Institutions

Section 200AB of the *Copyright Act 1968* (Cth)



# Commentary for FDH (prev slide)

## **Basic structure:**

- Outline of s200AB and our interpretation
- A number of scenarios based on examples collected at copyright training session
- Scenarios work through the steps to illustrate how a possible use can be approached
- This is a USER'S guide (aim of the handbook was to encourage use and hopefully help institutions become comfortable with using the exception).

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(<http://www.digital.org.au/>)

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## **200AB Use of works and other subject-matter for certain purposes**

(1) The copyright in a work or other subject-matter is not infringed by a use of the work or other subject-matter if all the following conditions exist:

- a) the circumstances of the use (including those described in paragraphs (b), (c) and (d)) amount to a special case;
- b) the use is covered by subsection (2), (3) or (4);
- c) the use does not conflict with a normal exploitation of the work or other subject-matter;
- d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.

### ***Use by body administering library or archives***

(2) This subsection covers a use that:

- a) is made by or on behalf of the body administering a library or archives; and
- b) is made for the purpose of maintaining or operating the library or archives (including operating the library or archives to provide services of a kind usually provided by a library or archives); and
- c) is not made partly for the purpose of the body obtaining a commercial advantage or profit.

### ***Use by body administering educational institution***

(3) This subsection covers a use that:

- a) is made by or on behalf of a body administering an educational institution; and
- b) is made for the purpose of giving educational instruction; and
- c) is not made partly for the purpose of the body obtaining a commercial advantage or profit.

### ***Use by or for person with a disability***

(4) This subsection covers a use that meets all the following conditions:

- a) the use is made by:
  - i) a person with a disability that causes difficulty in reading, viewing or hearing the work or other subject-matter in a particular form; or
  - ii) someone else;
- b) the use is made for the purpose of the person obtaining a reproduction or copy of the work or other subject-matter in another form, or with a feature, that reduces the difficulty;
- c) the use is not made partly for the purpose of obtaining a commercial advantage or profit.

***This section does not apply if under another provision the use does not, or might not, infringe copyright***

(6) Subsection (1) does not apply if, because of another provision of this Act:

- a) the use is not an infringement of copyright; or
- b) the use would not be an infringement of copyright assuming the conditions or requirements of that other provision were met.

**Example 1:** Paragraph (a)—Without using an appliance adapted for producing multiple copies or an appliance that can produce copies by reprographic reproduction, a school teacher reproduces a literary work in the course of educational instruction. Under subsection 200(1), the reproduction is not an infringement of copyright in the work, so this section does not apply.

**Example 2:** Paragraph (b)—A body administering an institution assisting persons with a print disability makes a Braille version of a published literary work. Under subsection 135ZP(2), making such a version does not infringe copyright in the work if certain conditions (relating to remuneration etc.) are met, so this section does not apply.

***Cost recovery not commercial advantage or profit***

6A) The use does not fail to meet the condition in paragraph (2)(c), (3)(c) or (4)(c) merely because of the charging of a fee that:

- a) is connected with the use; and
- b) does not exceed the costs of the use to the charger of the fee.

***Definitions***

(7) In this section:

**conflict with a normal exploitation** has the same meaning as in Article 13 of the TRIPS Agreement.

**special case** has the same meaning as in Article 13 of the TRIPS Agreement.

**unreasonably prejudice the legitimate interests** has the same meaning as in Article 13 of the TRIPS Agreement.

There are no other exceptions available to you



You are using the material for a set purpose



The use is non-commercial



The use does not conflict with normal exploitation



The use will not unreasonably prejudice the copyright holder



The use is a special case



Use allowed under the flexible dealing provision

# Notes for prev slide

- This is taken from the handbook
- Distilled section 200AB into these steps
- I'll now briefly go through our interpretation

There are no other exceptions available

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**EXAMPLES:**

- *Fair dealing exceptions*
  - *Libraries and archives* – eg a preservation provision
  - *Educational institution* – eg Part VA or VB license
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Use *by or on behalf of* a body administering  
a library or archives

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The institution can allow another  
person or body to act as agent for them

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# You are using the material for a set purpose – **LIBRARY OR ARCHIVES**

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“For the purpose of maintaining or operating the library or archives.”

Includes:

- Providing a service of a kind usually provided by a library or archives;
  - Activities designed to maintain the current collection and, arguably, activities designed to keep the collection up to date; and
  - Both the internal administration of the library or archives and providing services to users.
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# You are using the material for a set purpose – **LIBRARY OR ARCHIVES**

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- A broad-purpose test
  - Includes the full ambit of usual library and archives activity.
  - Includes 'usual' services, but can also include activities such as a new service offered by the library.
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# Educational Institutions

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For the purpose of providing educational instruction

Includes:

- Preparing to teach
  - Compiling resources for students
  - Something else for the purpose of teaching
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# To assist a person with a disability

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- A disability that causes difficulty reading, viewing or hearing the material
  - Exception open to anyone, and institution (Including the person with a disability)
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# The use is non-commercial

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*“Use not partly for the purpose of obtaining commercial advantage or profit”*

Consider:

- Cost recovery fee is OK
  - Is the use linked to the purpose or is it more closely linked to an activity in which a commercial entity might be engaged?
  - Does the use involve selling something, or using the material in connection with the sale of a good or service, for a price that is greater than cost recovery?
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# The use is non-commercial

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- Step is easy if there is no money involved
- Questions in situations where 'profit making intention' is not

EG: Institution produces exhibition catalogue for sale – purpose is to promote the collection, but intent is also for the catalogue to be commercial success in institution's shop (??)

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# Use does not conflict with normal exploitation

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Consider:

- How does © holder usually make money from their material?
  - Will proposed use enter into competition with © holder's use?
  - Will the proposed use deprive the © holder of significant or tangible commercial gains?
  - How might the © holder want to make money from their copyright material in the near future? Is it likely that the use would deprive the copyright holder of future economic gains?
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# Use does not conflict with normal exploitation

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“normal exploitation” is a difficult term to pin down

- differing opinions on scope
  - Licenses: some suggest that if a license is offered then there is a conflict with normal expn
  - But what if license is custom tailored for use?
  - What if this use does not seem to be something that is a 'normal exn'?
  - Interesting area is thumbnail images...
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# Use will not unreasonably prejudice the copyright holder

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## Consider:

- Is the use appropriate? (eg not making more copies than necessary)
- Has creator been properly attributed (if possible)?
- Has the institution made any changes to the work? If so, are they necessary / is it obvious on the copies that there have been changes?
- Is the institution considering issues such as privacy, cultural sensitivities, issues raised by unpublished works?
- Will the use of the material expose it to possible misuse, for example piracy, or has the institution placed appropriate controls on the use, for example, by restricting access?

**SUMMARY:** consider the purpose, and limit the use to a reasonable amount.

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## Use is a special case

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Is the use narrow, specific, identified?

### **Consider:**

- Have the other steps been passed?
  - Is there an identifiable reason for the use?
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# Examples of uses

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- Format-shifting
  - Use of orphan works
  - Digitisation projects
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# S200AB

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- A broad provision with plenty of scope for use by institutions

Can begin with very expansive possible use

==> feed through the steps

==> make appropriate modifications

==> bring use within s200AB

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# Some examples... (1)

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A university library has a specialist collection of USSR material (eg anonymous political pamphlets and other ephemera) and wishes to make it available electronically. The library plans to limit access to the material to three people at any one time. It will only be available to people for their research and study and those declaring they will not use the material for a commercial purpose. A substantial quantity of the material is orphan works.

## Some examples... (2)

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A state gallery is planning and exhibition of a special collection. It wishes to include promotional thumbnail images and compressed format audio from the collection on its website.

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## Some examples... (3)

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A library wishes to make preservation copies of born digital materials in its collection. The digital material is commercially available online but the library wants to make preservation copies of the material to ensure it continues to be available in the future (for example, even after the material has been removed from original web page

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## Some examples... (4)

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- Institution wants to include an orphan work photo in a new publication
  - A music student contacts their library seeking a copy of an audio recording of a music piece she is studying
  - A library wishes to format-shift VHS documentaries to DVD format to make them more readily accessible to users
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Are institutions using this provision?

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# In a nutshell, yes

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- AWM recently decided to digitise notebooks and diaries of CEW Bean
  - Notebooks contained material with different copyright owners (eg letters, photos, drawings) that were unknown or unlocateable
  - AWM fed these materials through the steps and concluded they could rely on s200AB
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# In a nutshell yes

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- A number of other libraries, educational and cultural institutions are quietly /tentatively using s200AB as scenarios arise
  - Some are beginning to see s200AB as a possible solution to projects like digitisation and online access to collection items which previously could only be undertaken under a risk management approach
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- Limitations to s200AB of course (and SW will probably look at this in more detail next) but s200AB does seem to be having an effect on institutions and their practices / projects
  - Where before an innovative project like open access to digitised works could be fraught with risks, there is now this flexible exception, technologically neutral which can be adapted to a broad range of uses.
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**Laura Simes**

Executive Officer | Australian Digital Alliance |

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[lsimes@nla.gov.au](mailto:lsimes@nla.gov.au)