

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

Laura Simes (Executive Officer, Australian Digital Alliance)

This paper is broadly based on *A User's Guide to the Flexible Dealing Provision for Libraries, Educational Institutions and Cultural Institutions*, available under creative commons license on the ADA website: <http://www.digital.org.au/documents/FlexibleDealingHandbookfinal.pdf>.

### 1. Background

In December 2006 a new copyright exception, section 200AB, was introduced into Australian law through the *Copyright Amendment Act 2006* (Cth) with the aim of providing a ‘flexible exception to enable copyright material to be used for certain socially beneficial purposes, while remaining consistent with Australia’s obligations under international copyright treaties’.<sup>1</sup> This exception draws on the language of international intellectual property treaties, incorporating the “three-step test”, and in addition has also been described as intended to operate like the US “fair use” doctrine, allowing the use of copyright materials for a range of socially beneficial purposes.

Section 200AB offers the possibility of increased flexibility in how libraries, galleries, archives and educational institutions make use of copyright materials. As an -ended exception, s200AB is unlike other existing exceptions for institutions. As a result of this, following the introduction of this section, the Australian Digital Alliance and the Australian Libraries Copyright Committee identified the need for guidance and suggestions for institutions considering using section 200AB.

Following on from copyright training sessions run by the Australian Libraries Copyright Committee (ALCC) in 2007 and 2008, a number of examples of how section 200AB might be of use to libraries, archives, galleries and educational institutions were collected together to form the bulk of the Flexible Dealing Handbook produced by the ALCC and Australian Digital Alliance. (Digital version of the handbook available here:)

This paper draws on the ADA/ALCC flexible dealing handbook and includes a brief outline of the history and context for section 200AB, the ADA/ALCC interpretation of the provision, and discussion of the potential s200AB offers for providing increased access to institutions’ collections.

#### 1.1 Copyright Law

Copyright law in Australia gives copyright holders exclusive rights to do certain things with their material. Depending on the type of material, the copyright holder generally has the right to control:

- Publication;
- Performance;
- Communication to the public;

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<sup>1</sup> Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 108.

- Adaptation of the material (for example, a translation or adaptation from a novel to a play); and
- Reproduction.

If a person or institution wishes to use material under copyright in a way that can be controlled by the copyright holder (for example, making a copy), they will generally need to seek the permission of the copyright holder. Material is protected by copyright for up to 70 years after the death of the creator. Works that have been unpublished can remain in copyright in perpetuity.

One of the justifications for providing these rights is to provide copyright holders with an incentive to produce works, as they are provided with a limited monopoly that allows them to exploit work for their own economic gain.

However, it is recognised that copyright law must strike a balance between providing this incentive to create and providing users (and creators) of copyright material with reasonable access. It is particularly important that copyright law is not so restrictive that it hinders people and institutions from using copyright material for socially beneficial purposes, such as education and research. For this reason, the *Copyright Act 1968* (Cth) contains a number of exceptions to copyright holders' rights. Where an exception applies, the individual or institution does not need to obtain the permission of the copyright holder before they use the material, and in many cases, will not need to pay a fee or royalty.

## **1.2 Copyright Amendment Act 2006**

The *Copyright Amendment Act 2006* came into effect in December 2006, and among other things introduced new criminal provisions, provisions relating to technological protection measures, and a number of exceptions for users of copyright materials.

Prior to this, the Attorney-General's Department released an issues paper on copyright exceptions.<sup>2</sup> Many user groups, including the Australian Digital Alliance and the Australian Libraries Copyright Committee, made submissions to Government in support of a flexible dealing provision, similar to the 'fair use' exception in the United States. The US exception is different from Australia's exceptions in that it does not apply to specific purposes, specific types of uses and certain types of bodies or institutions. It is a general provision available to any individual or body and involves balancing factors such as the way the material is used and the effect the use will have on the market for the copyright material. As it is a general provision, new or innovative uses (including new uses as technology changes), are possible under this doctrine provided the circumstances of the use are 'fair'.

## **1.3 The Flexible Dealing Provision**

The *Copyright Amendment Act 2006* did not include a US-style 'fair use' provision, but did include section 200AB. This provision applies to libraries, archives and

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<sup>2</sup> Attorney-General's Department, *Copyright Fair Use and Other Copyright Exceptions*. Canberra: Attorney-General's Department, 2005, [www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_Copyright-ReviewofFairUseExemption-May2005](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseExemption-May2005).

educational institutions, as well as people and institutions assisting those with a disability, and is intended to operate *like* fair use.

As stated in the Explanatory Memorandum, section 200AB is intended to be a ‘flexible exception’ that allows use of copyright material for ‘certain socially useful purposes’.<sup>3</sup> The Attorney-General’s Department also states in its fact sheet that this provision should allow use of copyright material for ““special” purposes that benefit the broader Australian community’.

This flexible dealing provision will be particularly helpful to institutions in cases where their proposed use of copyright material falls outside other specific exceptions, such as fair dealing or library and archives preservation provisions. Very briefly, the requirements for using the flexible dealing provision are:

- No other exceptions apply;
- The use is for a certain purpose (more information on this is provided below);
- The use is non-commercial;
- The use will not prejudice the copyright holder;
- The use will not compete with, or take profit from, the copyright holder and
- The use is a special case.

The final three requirements are known as the ‘three-step test’. This test has been directly imported from international treaties such as the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). The three-step test is the threshold that domestic governments (who are signatories to TRIPS) need to apply when introducing exceptions to copyright to ensure compliance with international law.

Although there are a number of steps to satisfy before making use of this provision, it is important to remember that the purpose of the provision is to make it possible for institutions to use copyright material for a range of socially beneficial purposes, and it is intended to operate in a flexible way. Other exceptions under the Copyright Act only deal with a narrow range of specific situations and uses, which often prevents the use of the copyright material even though it would not have a detrimental effect on the copyright holder and would be beneficial to society. These kinds of uses are possible under the flexible dealing provision.

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<sup>3</sup> Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 109.

## 2. Section 200AB Steps

Below is a flowchart summarising the steps to take when deciding to use section 200AB. An explanation of each step follows.

**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**

### 2.1 There Are No Other Exceptions Available to You

The Explanatory Memorandum for this part of the flexible dealing provision states:

This condition ensures other specific exceptions and statutory licences continue to apply and are not overtaken by s 200AB. Eg, where an act is permitted under a statutory licence, a user cannot access s 200AB as a way of avoiding the obligation to pay remuneration by failing to meet a condition of the statutory licence.<sup>4</sup>

For this step, institutions need to check if there is another exception that can be relied upon for the proposed use:

- Is a fair dealing exception available, for example, fair dealing for the purpose of research or study, reporting the news, or parody and satire?
- *Libraries or archives*: is a specific exception available, for example, a preservation provision such as section 51A, allowing libraries to make copies of works for preservation purposes? Can the interlibrary loans and document delivery provisions be relied upon?
- *Educational institutions*: does the intended use fall under one of the statutory licences, that is, Part VA or Part VB licences? These licences cover many uses. Educational institutions should also check whether the use is permitted under an exception such as section 28, which allows

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<sup>4</sup> Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 112.

performance and communication of works in the course of educational instruction.

- Some institutions such as libraries in government departments or government archives may be able to rely on the Crown copying provisions under section 183. This is a statutory licence that allows expansive use of materials but is remunerable, as under the Part VA and Part VB licences. If the institution can rely on this provision for the proposed use, then section 200AB will not be available.
- If an educational institution is assisting a person with a disability, it may be that the Part VB licence dealing with assistance for people with a print disability will apply to the use.

## 2.2 The Purpose of the Use

There are three possible purposes of use under the flexible dealing provision. Libraries within educational institutions may be able to rely on either the library purpose or the educational institution purpose. Any institution can also utilise this provision to assist a person with a disability.

### a) Library or Archives

If working at a library or archives the use of the material must be for the purpose of maintaining or operating the library or archives. This 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.

This is a broad-purpose test that includes the full ambit of usual library and archives activity. It includes ‘usual’ services, but can also include activities such as a new service offered by the library (noting of course that the other steps still need to be passed).

The use can also be by or on behalf of the library or archives, so the institution can have another person or organisation act as agent for them. For example, if a library wished to shift material from VHS to DVD format relying on the flexible dealing provision, but did not have the technical capacity to do so, the library could engage another organisation to do the format-shifting on its behalf.

### b) Educational Institutions

An educational institution can use material for the purpose of educational instruction. The Explanatory Memorandum for this part of the provision states that this includes classroom and remote teaching.<sup>5</sup>

The term ‘educational instruction’ is not used restrictively and can include a range of activities such as:

- Preparing to teach;

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<sup>5</sup> Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 110.

- Compiling resources for students;
- Assessing and examining; and
- Anything else that is for the purpose of teaching.

As with libraries and archives, the use can be by or on behalf of the educational institution, so the institution can get another person or organisation to act as agent for it.

### **c) Use by or for a Person with a Disability**

The flexible dealing provision can be used by, or to assist, a person with a disability that results in difficulty in reading, viewing or hearing the material in its current format.

A person with a disability can take advantage of this provision, along with any other person or institution (including educational institutions, libraries and cultural institutions). Those using this provision just need to make sure that the reason for their use of the copyright work (adapting, making large-text copies, adding subtitles, etc.) is to provide a person with a disability with material in a new form, or with a feature that reduces the difficulty caused by the disability. Note, however, that educational institutions have other exceptions for assisting people with a disability that may restrict the ability to rely on section 200AB.

### **d) Definitions**

#### ***Library***

There is no definition of ‘library’ in the Copyright Act. Where terms are not defined, the practice is to look to the ordinary meaning of the word (including dictionary definitions). The term ‘library’ would no doubt include a collection of books, journals and other materials (including audiovisual and electronic materials) that is maintained for research, study and reference by users.

#### ***Archives***

‘Archives’ is defined in the Copyright Act. It specifically refers to the National Archives of Australia and state archives bodies in New South Wales, Victoria and Tasmania. The general definition includes any collection of documents or other materials provided they are of historical significance or public interest. The body needs to be maintaining and preserving the documents, and cannot be doing this for the purpose of making a profit. The Act specifically states that museums and galleries could have collections that fall under this definition.

#### ***Educational Institution***

An ‘educational institution’ is defined in the Copyright Act and includes a wide range of bodies:

- Pre-schools or kindergartens;
- Primary schools;
- Secondary schools;
- Universities;
- Technical and further education (TAFE) institutions; and

- Other organisations offering education. This includes bodies offering external study or correspondence, and schools of nursing.

### **2.3 The Use Is Non-commercial**

The exact phrase used in section 200AB is that the use cannot be ‘partly for the purpose of commercial advantage or profit’. In practice, this means the flexible dealing provision will not be available if the use is partly or wholly for the purpose of commercial advantage or profit. The provision specifically states it is acceptable to charge a cost-recovery fee.

At this point the user needs to consider the reason for using this provision. If it is in order to make a profit or to obtain a commercial advantage over competitors, then at this step they will probably run into difficulties.

This step is easily satisfied if the use of the material is for a non-commercial purpose. Commercial entities such as profit-making colleges may have more difficulty dealing with this requirement. We do not believe that just being a commercial entity excludes the use of section 200AB, however these bodies may need to seek further advice on the extent to which reliance on section 200AB is possible.

If an institution is not sure whether the use of the material is for profit or commercial advantage, it may be useful to ask:

- Is the use linked to the purpose (for example, offering a library service) or is it more closely linked to an activity in which a commercial entity might be engaged?
- Are you 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?

Whether an activity is ‘partly for the purpose of commercial advantage or profit’ is an issue on which different views have been expressed, and one on which the institution may have taken (or may need to take) a position.

### **2.4 The Use Will Not Conflict with Normal Exploitation**

This step is about assessing how your use affects the way copyright holders usually make money from their copyright material. The Explanatory Memorandum states:

The questions to be considered under this condition are whether the use closes off ways that copyright holders normally extract economic value from copyright in the Australian market or enters into economic competition with those ways, thereby depriving copyright holders of significant or tangible commercial gains. Forms of exploitation which, with a certain degree of likelihood, could acquire considerable economic or practical importance may also be considered.<sup>6</sup>

The sorts of questions you can ask here are:

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<sup>6</sup> Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 110.

- How does the copyright holder usually make money from their copyright material?
- Will the proposed use enter into competition with the copyright holder's use?
- Will the proposed use deprive the copyright holder of significant or tangible commercial gains?
- How might the copyright 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?

### **'Normal Exploitation'**

It is necessary to assess whether the intended use of the material is a use that a copyright holder normally charges for. The types of licences that would be considered 'normal exploitation' would be those that copyright holders commonly use to exploit their works, such as those offered for the performance of a play or music, or to copy materials such as hymns for a church or sheet music for an orchestra.

There are differences of opinion on exactly what assessment section 200AB requires an institution to perform in relation to 'normal exploitation'. The Australian Copyright Council, for example, states that an institution needs to consider not just the immediate impact of the particular use, but 'whether your use, if done by every person entitled to rely on section 200AB, would deprive copyright holders [generally] of significant or tangible gains'.<sup>7</sup> It can also be argued that the references in section 200AB to the copyright work require a more specific consideration of the impact of conflict with a particular copyright holder's normal exploitation. In addition, it has been suggested that this step must also include consideration as to whether the intended use is something the copyright owner *should* be able to exploit, in the overall context of copyright law and policy. This final point is raised given that a very broad reading of 'normal exploitation' could result in any potential uses being seen as a use that the copyright holder could exploit, thereby severely limiting the utility of section 200AB.

The Act is unclear. In any event, it is probably best not to assume that 'one little use doesn't hurt anyone', and in the case of a significant amount of use, to seek advice. These issues will also be relevant to analysing the risk of relying on section 200AB.

Some examples of situations where it is likely your use will conflict with the copyright holder include:

- If you are using the material to make an adaptation/ reproduction/ new format that will be available for sale; or
- If there is a common licence that you could obtain for the intended use.

Some situations where it is likely that your use will not conflict with the copyright holder include:

- If you cannot purchase the adaptation/ reproduction/ new format of the material;

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<sup>7</sup> Australian Copyright Council, *Special Case Exception: Education, Libraries, Collection*. Sydney: Australian Copyright Council, 2007, at 9.

- If the material you wish to use has been abandoned by the copyright holder (and so they are clearly not exploiting nor intending to exploit the material);
- If the material is something that the copyright holder never had an intention of exploiting commercially and which they still do not wish to exploit commercially; or
- If there is no common licence for what you want to do. A collecting society might inform you it does not have a standard licence for the use, but it can put together a new or one-off licence. This is not a ‘normal’ licence and so would not be part of the ‘normal exploitation’ of the material, particularly if your use is new or novel, or one for which collecting societies have not normally offered a licence.

## **2.5 The Use Will Not Unreasonably Prejudice the Copyright Holder**

As stated in the Explanatory Memorandum, the use must not:

unreasonably prejudice the legitimate interests of the holder of the copyright or a person licensed by the holder of the copyright. This condition requires an assessment of the legitimate economic and non-economic interests of the copyright holder.<sup>8</sup>

The previous step involved thinking about how the copyright holder usually makes money from their copyright material. This step involves thinking about how it is intended that the copyright material be used, and how the use might affect the economic and non-economic interests of the copyright holder more generally. This is not just about whether the use will interfere with the copyright holder’s profits—it is also about whether it will interfere with their other interests. It is also about making sure that the copyright material is used in a fair and reasonable way that will not unnecessarily interfere with the copyright holder’s rights.

The kinds of questions that can be asked are:

- Is the material being used in an appropriate way, for example, is the institution making only as many copies as necessary?
- Is the institution respecting the moral rights of the creator, for example, has the creator been properly attributed (if possible)?
- Has the institution made any changes to the work? If so, are they necessary and is it obvious on the copies that there have been changes?
- Is the institution considering issues such as privacy, whether the work is published or not, and cultural sensitivities?
- 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?

The issue is whether the institution is *unreasonably* prejudicing the copyright holder. In many cases, your use of the material will prejudice the copyright holder to some

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<sup>8</sup> Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 110.

extent. This step is about making sure that the use is limited to ensure that the prejudice is not unreasonable.

Examples of actions that might be taken to limit the use are:

- attaching conditions to the use
- restricting who has access to the material, for example, password protection
- using compressed-format or low-resolution copies
- making sure, if reasonable and practicable, copies have information about the copyright holder attached
- using only as much of the material that is needed.

## 2.6 The Use Is a Special Case

If you have proceeded through all the other steps, it is very likely that the use is a special case. That is, this hurdle should not be too difficult to satisfy. The Explanatory Memorandum for section 200AB states this step is ‘intended to ensure that the use is narrow in a quantitative as well as qualitative sense’.<sup>9</sup> In order to do this, section 200AB requires a consideration of all the other steps, and in the context of these steps, a decision as to whether the use is special.

At this step the institution will be checking that their intended use is narrow, specific and identified.

After going through all the previous steps and making appropriate adjustments to the use accordingly (for example, using only how much is needed, limiting access online through password protection etc.), it is very likely that upon reaching this final step the institution will already have modified their use in a way that ensures it is appropriately narrow.

At this step:

- Check that the other steps have been passed. At each of the steps, if necessary, the institution should have narrowed or modified the use so that prejudice to the copyright holder is limited, there is no interference with the copyright holder’s economic interest, the use is non-commercial and so on.
- Check that there is an identifiable reason for the use, that is, that the institution is not making copies or using the material speculatively or ‘just in case’. Once again, it is likely that the institution will have identified an appropriate need or reason for the use at the purpose test (that is, when checking the purpose is for maintaining or operating the library, for educational instruction, etc.).

## 3. Potential Uses

Some common areas where it is anticipated that section 200AB will be able to help libraries, archives, galleries and educational institutions are:

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<sup>9</sup> Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 110.

- Format-shifting;
- Use of orphan works (works whose copyright holders cannot be identified or located);
- Digitisation of the collection;
- Adapting works to assist with educational instruction, to assist in the operation of a library or archives, or to produce a more accessible copy of the work.

The flexible dealing provision has a very broad application, and often it will just be necessary to moderate the intended use a little so that it fits within the provision. When starting with a very broad possible use, institutions find that in running through each step the intended use naturally becomes more defined and discrete.

For example, an institution might propose to provide access to the collection online (a very broad use). When checking the use does not conflict with normal exploitation, this will exclude digitisation and open access to publications such as *Harry Potter*, but will most likely allow access to orphan work ephemera. Upon reaching the step where it is necessary to limit prejudice to the copyright holder, and institution may decide that some unpublished and more sensitive materials will be digitised but only made available to people who request access (for example, researchers).

While there are of course limits to section 200AB, there is certainly much potential in the provision for enabling greatly increased access to institutions' collections, particularly in allowing institutions to take advantage of technological developments. Other copyright exceptions are relatively specific or prescriptive, however the open-ended nature of section 200AB means that as new uses and technologies develop, institutions will have the ability to move along with these developments. A current example is the move by institutions to increase access to collection by digitising and making collections available online, and undoubtedly section 200AB is assisting institutions in this.