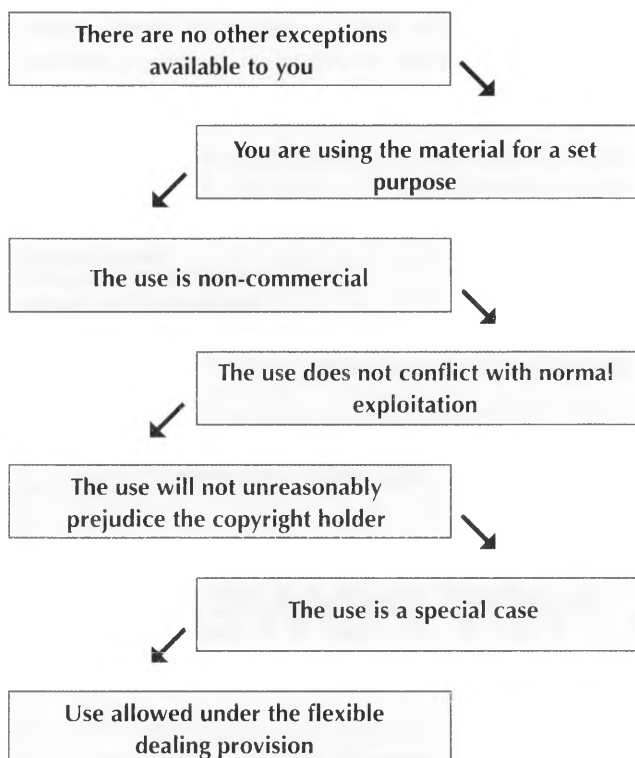


Copyright

Fair deal or no deal: How the copyright flexible dealing exception can help your library

Section 200AB was introduced 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". This provision applies to libraries, archives and educational institutions, as well as people and institutions assisting those with a disability, and is intended to operate like fair use.

Steps to take when deciding to use the flexible dealing provision



Flowchart steps in detail

There are no other exceptions available to you

For this step, you need to check if there is another exception available for your proposed use:

- Can you rely on a fair dealing exception, for example, fair dealing for the purpose of research or study?
- Libraries or archives: can you use one of the specific exceptions, for example, a preservation provision such as section 51A, which allows libraries to make copies of works for preservation purposes?
- Educational institutions: does the intended use fall under one of the statutory licences, that is, Part VA or Part VB licences? Educational institutions should also check whether the use is permitted under an exception such as section 28, which allows performance and communication of works in the course of educational instruction.



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Some institutions such as libraries in government departments 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.

If you are assisting a person with a disability and you are an educational institution, check that the Part VB licence dealing with assistance for people with a print disability does not apply.

You are using the material for a set purpose

There are three possible purposes of use under the flexible dealing provision. If you work at a library in an educational institution, it may be possible to rely on either the library purpose or the educational institution purpose. Any institution can also use this provision to assist a person with a disability.

Library or Archives

If you work at a library or archives you should be using the material 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.

It also includes activities designed to maintain the current collection and, arguably, activities designed to keep the collection up to date.

It encompasses both the internal administration of the library or archives and providing services to users.

The use is non-commercial

This means you cannot use the flexible dealing provision 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.

The use does not conflict with normal exploitation

The sorts of questions you can ask here are:

- How does the copyright holder usually make money from their copyright material?
- Will your proposed use enter into competition with the copyright holder's use?
- Will your 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 your use would deprive the copyright holder of future economic gains?

The use will not unreasonably prejudice the copyright holder

This step involves thinking about the way you intend to use the copyright material, and how your use might affect the economic and non-economic interests of the copyright holder more generally. You can tackle this step by asking these kinds of questions:

- Am I using the material in an appropriate way, for example, am I making sure I only make as many copies as necessary?

- Am I respecting the moral rights of the creator, for example, have I properly attributed them (if possible)?
- Have I made any changes to the work? If so, are they necessary and is it obvious on the copies that there have been changes?
- Am I thinking about other issues such as privacy, whether the work is published or not, and cultural sensitivities?
- Will my use of the material expose it to possible misuse, for example, piracy, or have I placed appropriate controls on the use, for example, by restricting access?

In many cases, your use of the material will prejudice the copyright holder to some extent. This step is about making sure that you limit your use so that your prejudice is not unreasonable.

Examples of actions you might take 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 you need.

The use is a special case

At this step you will be checking that your intended use is narrow, specific and identified. If you have gone through all the previous steps and made appropriate adjustments to your use accordingly (for example, using only how much you need or limiting access online through password protection), once you get to this final step it is very likely that you will already have modified your use in a way that ensures it is appropriately narrow.

Use allowed under the flexible dealing provision

A worked example of deciding if the flexible dealing provision applies

A public library has a room where users can borrow programs, documentaries and films from the library's collection and watch them. It has a documentary on VHS but no longer has video players on the premises. It wishes to shift this from VHS to DVD format.

Yes. The library can use the flexible dealing provision for this use, subject to some issues outlined below. We have also discussed some variations in this use and how this might affect the availability of the flexible dealing provision.

There is no other exception. If the reason for wanting to format-shift the VHS documentary is because it is damaged or deteriorating, then the library could use section 110(2)(b), which allows a replacement copy to be made for preservation purposes. However, here the reason behind wanting to format-shift is technological obsolescence, so there is no other exception the library could use.

For the purpose of maintaining or operating the library. It is quite common for libraries to offer a room where users can view films or documentaries held in its collection.

The use is non-commercial. The library's use of the copyright material is non-commercial as the service would be offered

to users free. If the library decided to charge and this fee exceeded the cost of providing the service, then this step would not be satisfied.

The use does not conflict with normal exploitation. At this step the library would look at the availability of the documentary in DVD format. If the library contacted the distributor and discovered that it currently sells the same documentary in DVD format, then by making its own DVD copy the library would be coming into conflict with how the copyright holder normally makes money from their work. The library may also be aware that the distributor will soon be issuing the documentary on DVD. This might raise problems, but would not necessarily prevent the library from making its own copy. If there is a need for the documentary to be available in DVD format within a certain timeframe, the library could format-shift it itself.

The use will not unreasonably prejudice the copyright holder. At this step the library can think about the way it intends to use the documentary, and how to make sure that the use respects the copyright holder. For example, the library should make sure the format-shifted copy replicates attribution details on the original (for example, the creator, date of publication and distributor). The library should also check it is using the material only to the extent it needs to. For example, if the library holds only one copy in VHS format, it is probably reasonable to make only one copy rather than multiple copies in the DVD format.

The use is a special case. Here, the library thinks about the factors discussed in the previous steps to decide if the use seems special in the circumstances. In its current format, the documentary is useless due to technological obsolescence and there is no other provision to allow the library to format-shift. The library has ensured the use is limited by only format-shifting one equivalent copy.

More information

ADA / ALCC Flexible Dealing Handbook

The Australian Digital Alliance (ADA) and the Australian Libraries Copyright Committee (ALCC) have released a handbook which contains an outline of how they believe each of the steps of the provision should be approached. They then work through a number of possible scenarios to illustrate how s200AB might work in practice. The handbook is now available at <http://www.digital.org.au/alcc/resources/documents/FlexibleDealingHandbookfinal.pdf>

Copyright Act 1968 (Cth) s200AB

http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s200ab.html.

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