

# The new flexible dealings exception – What am I allowed to do?

If you want to use copyright material in a way not permitted by the statutory licences or other, specific, exceptions under the Copyright Act, you may be able to rely on the s 200AB exception, known as “flexible dealing”.

The “flexible dealing” exception permits schools to make limited use of copyright material for free, for educational instruction, if the use satisfies a number of criteria. You must assess your proposed use against those criteria on a case-by-case basis.

This fact sheet is divided into three parts:

1. How to determine if your proposed use is a permitted “flexible dealing”
2. Examples of common activities that are permitted “flexible dealings”
3. Some frequently asked questions about “flexible dealings”

## How to determine if your proposed use is a permitted “flexible dealing”

You may carry out your proposed use of copyright material as a “flexible dealing” under s200AB of the Act if:

### 1. It is not covered by an existing statutory licence or exception

If your proposed use is covered by a statutory licence (Part VA or Part VB), or another statutory exception (eg s 28, regarding classroom performances), you cannot rely on s 200AB.

For further information on the statutory licences, see: Education Licences (Statutory and Voluntary Licences)

For further information on the statutory exceptions, see the various fact sheets on this website. (For example, regarding s28, see: Performance and Communication in Class)

### 2. It is for the purpose of educational instruction and is not for profit

Your proposed use must be for educational instruction. “Educational instruction” includes teaching (in a classroom or remotely), preparing to teach, compiling resources for student homework or research, and doing anything else for the purpose of teaching.

Note that "just in case" copying will generally not be sufficient, (eg "I'll copy this in case I need it sometime in the future"). You should have a particular instructional purpose in mind.

Also, your use must not be for the purpose of the school obtaining a profit or a commercial advantage. Charging on a cost-recovery basis is ok.

### **3. It isn't "unreasonable"**

Your proposed use must not conflict with the normal exploitation of the work nor unreasonably prejudice the interests of the copyright owner. Your use may well be unreasonable in this sense if (for example):

- You can purchase or obtain a licence for the proposed use.

If you can purchase the material in the form you require or obtain a licence for your proposed use on reasonable terms, then you must do so.

- You have used more than you need.

Your use of the copyright material should be narrow and specific. You should only use as much of the material as you require for your specific purpose.

- You expose the material to a risk of piracy.

You should not be making copyright material available for further copying and reuse (eg by posting material on a public website or emailing around to students). This would be unreasonably prejudicial to the interests of the copyright owner in being able to control use of their work in the future.

(By contrast, making the material available on a password protected online space, just for students and teachers involved in the educational instruction, would be OK.)

### **Some common activities that are permitted "flexible dealings"**

Due to the various criteria that have to be complied with before s200AB can be relied upon, many uses of copyright material will not in fact be permitted as "flexible dealing".

Some examples of uses that are permitted "flexible dealings" under s200AB include:

- making a captioned version of a film for hearing impaired students when it is not possible to buy a captioned version of the film and you need to show the film in class \*
- converting 8-track or VHS tapes to DVD where it is not possible to buy a DVD of that film and the DVD is needed for teaching purposes \*

- copying a small extract of audiovisual material from a CD-Rom to disc or PowerPoint for classroom display \*
- compiling short extracts of audio-visual material for use in class (such as making a DVD of short extracts of several films for an English class) when it is not possible to buy a similar teaching resource \*
- copying a French language song that is not available for purchase in digital format to a digital file for inclusion in a podcast for a French language class \*
- including short extracts of music in PowerPoint teaching aids \*
- translating an extract of an Australian novel into Japanese (where you cannot buy a copy in Japanese) for use in a Japanese language class \*
- staging a free practice performance of a play on a drama syllabus for family and friends to allow drama students to practice for a performance assessment \*
- preparing an arrangement of a musical work for students to perform in a music class when you cannot buy the arrangement you need \*
- copying part of a track from an audio CD for use in an aural exam or assignment \*

\* Note: If a work is protected by a copying protection technology, you may not be able to copy material under this exception. You are not allowed to circumvent an access control TPM in the course of making a "flexible dealing".

For example, you are not allowed to circumvent CSS – the anti-copying technology present on most commercial DVDs.

For more information see “**Technological Protection Measures and the Copyright Amendment Act 2006**” Information Sheet.

Note: These examples assume that the source copy of all materials has been legitimately acquired by the school.

### Frequently asked questions

**Q: Who can use section 200AB?**

A: Teachers and staff in schools can use s 200AB provided the proposed use:

1. Is not covered by an existing licence or exception
2. Is for the purpose of educational instruction and is not for profit
3. Is not "unreasonable"

**Q: What types of copyright material does section 200AB cover?**

A: All types of material. This includes the following material in hardcopy and digital format:

- text based works (such as books, plays, poems, articles from journals and newspapers)
- artistic works (such as photographs, diagrams, cartoons and illustrations)
- musical works (such as sheet music and scores)
- sound recordings (CDs, podcasts, MP3 files)
- television and radio broadcasts
- films (online and in VHS/DVD format)

BUT NOTE some types of copyright material will almost always be protected by an access control TPM (such as commercially produced entertainment DVDs). You are never allowed to remove or disable an access control TPM for the purposes of section 200AB. For more information on 'access control TPMs' see the "**Technological Protection Measures and the Copyright Amendment Act 2006**" Information Sheet.

**Q: What does section 200AB allow me to do with copyright material?**

A: Section 200AB applies to all of the rights owned by a copyright owner. This means that section 200AB could let teachers copy and communicate content (eg, email or upload to the intranet), make an adaptation of a work (eg, translate from one language to another), or publish or perform the material in public – but in each case only if the use does not involve circumventing an access control TPM (as described in the previous question).

**Q: How do I know if my use is for the purposes of giving educational instruction?**

A: Your proposed use must be for educational instruction. "Educational instruction" includes teaching (in a classroom or remotely), preparing to teach, compiling resources for student homework or research, and doing anything else for the purpose of teaching.

Note that "just in case" copying will generally not be sufficient, (eg "I'll copy this in case I need it sometime in the future"). You should have a particular instructional purpose in mind.

**Q: Will my use still be for educational instruction if I charge a cost recovery fee?**

A: Yes. Cost recovery is OK. However, if you or your school is making a profit from the use or obtaining some other commercial advantage, flexible dealing will not apply to your use.

For further information see the SmartCopying website at [www.smartcopying.edu.au](http://www.smartcopying.edu.au) or contact your local copyright manager. You can also contact the National Copyright Unit on (02) 9561 1204 or at email [delia.browne@det.nsw.edu.au](mailto:delia.browne@det.nsw.edu.au)