Flexible dealing and cultural institutions

Statement of Principles regarding the use of section 200AB of the Copyright Act (1968): an industry standard and user guide for the cultural sector

September 2010
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Endorsements

This document has been reviewed and formally endorsed by the following cultural institutions:

Australian Digital Alliance
Australian Institute of Aboriginal and Torres Strait Islander Studies
Australian Libraries Copyright Committee
Australian National Maritime Museum
Australian War Memorial
National Gallery of Australia
National Film and Sound Archive
National Museum of Australia
Powerhouse Museum
State Library of NSW
Part 1 - Preamble

Purpose of these Principles

The purpose of these Principles is to provide a guide for the cultural sector in relation to the use of section 200AB (s.200AB) in accordance with the Australian Government’s intent that s.200AB provide a ‘flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia’s obligations under international copyright treaties.”

This guide also facilitates institutions’ effective management of their IP in accordance with the Statement of IP Principles for Australian Government Agencies.

These Principles are a guide only and have been developed to assist institutions to interpret s.200AB in accordance with their institutional risk management, relationship management and other policies. As there have not been any judicial decisions in relation to s.200AB, this guide cannot and does not remove all risks associated with use of the provision. However, institutions will be able to use these Principles in conjunction with their risk management policies and procedures in order to manage and mitigate those risks.

While these Principles have been drafted for the cultural sector and in particular, the members of the Copyright In Cultural Institutions’ (CICI) Group (the Cultural Institutions) s.200AB applies more broadly to all ‘libraries and archives’ (as defined in the Copyright Act 1968 (the Copyright Act). It may therefore also be useful for other libraries, archives, galleries and museums falling within the statutory definition (see Part 3 below).

Background

The provision

The Copyright Amendment Act 2006 introduced an important new exception which allows Cultural Institutions to use copyright materials for free in certain circumstances for the purposes of maintaining or operating the library or archive or providing library or archival services.

Section 200AB is different to other exceptions in the Copyright Act because it does not specify exactly which copyright uses are permitted by the provision. Instead it sets out a number of steps to be followed in order to determine whether a particular use of copyright material will be allowed, and requires a case-by-case assessment of each particular use.

1 Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth)
These Principles provide guidance in relation to how Cultural Institutions can decide whether or not a particular use of copyright material may be permitted by s.200AB, rather than prescribing the particular uses in which the exception will apply.

**Importance for the Sector**

The Cultural Institutions are government agencies charged with statutory functions and powers of preserving, managing and providing access to their collections. The Cultural Institutions face similar copyright issues which directly impact upon their ability to fulfil their statutory functions. Namely, large components of their collections are protected by copyright and, in many instances, the Cultural Institutions do not own copyright in those collection materials or have the necessary rights in relation to their collections required to fulfil their statutory functions. For example, many collection items are ‘orphan works’ where it is impossible to trace or locate the copyright owner, whether due to uncertain provenance; the fact that the works are unpublished or published anonymously; or that ownership of the copyright is uncertain due to multiple transfers in title to the work.

This has resulted in a situation where Cultural Institutions are required to comply with conflicting legal requirements:

- their mandates in accordance with their enabling legislation which require them to preserve and provide public access to their collections for the benefit of the public; and
- copyright laws which often function to inhibit this.

Section 200AB has been introduced, in part, to address these conflicting requirements by giving Cultural Institutions more scope to fulfil their mandates and broadening the ways in which copyright material can be used for purposes that benefit the wider public interest.

**Note on examples**

The examples provided in these Principles are current at the time of writing. As such, the application of s.200AB to these specific examples may change over time as industry practice and expectations change, particularly in relation to what is considered to be a ‘normal exploitation of a work’.

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4 See for example AGD e-news on Copyright, Issue 9, May 2006; the Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth); the Supplementary Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth).
Part 2 - Application of Section 200AB

For a particular use of copyright material to fall under s.200AB, the use must comply with the following requirements:

1. The use must not fall within another specific exception or statutory licence under the Copyright Act;

2. You must not circumvent a technological protection measure (TPM) in order to make the use;

3. You must be making the use on behalf of a library or archive for the purpose of maintaining the library or archive;

4. The use must not be for commercial advantage or profit;

5. The use must not ‘conflict with the normal exploitation of the work’;

6. The use must not ‘unreasonably prejudice the legitimate interests of the owner of copyright’; and

7. The use must be a ‘special case’.

These requirements generally permit a library or archive to use a work where that use does not prejudice the copyright holder’s legitimate economic or moral interests in that work.

This part sets out the nature of these requirements and provides flow charts to help you to apply these requirements to a particular use.

1. The use must not fall within another specific exception or statutory licence under the Copyright Act

Section 200AB will not apply:

- if your use can be made under another exception; or

- if another exception would apply to your use if you met the conditions or requirements of that exception.\(^5\)

Therefore, if the use falls within the scope of the preservation provisions or other library or archive provisions, s.200AB will not apply.

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\(^5\) S.200AB(6), Copyright Act 1968
Additionally, you cannot rely on s.200AB to circumvent the conditions or requirements of other exceptions that are applicable to your use. For example, where your use would fall within the preservation provisions if you adhered to the notice requirements, or the limitations in relation to copying, then s.200AB will not be available. However, if the type of preservation that you wish to make is not covered by these provisions, then s.200AB will not be excluded.

Scenario 1

A Cultural Institution wishes to preserve a published collection item. The use would potentially fall within ss.51B (4)(a) and 51A (1)(b), however the item is commercially available.

The Cultural Institution cannot copy the material under s.200AB in order to avoid the ‘commercial availability’ test, a ‘condition or requirement’ under both section 51B and 51A.

Section 183

If a use is exempted from infringement because it is undertaken under s.183, then s.200AB will not apply.

Section 183 provides that Commonwealth and State bodies do not infringe copyright by making copyright uses ‘for the services of the Crown’. However, the copyright owner is entitled to payment for any uses made under s.183.

Cultural Institutions which are not legally considered to be ‘the Crown’ will not have access to s.183 and will therefore be able to rely on s.200AB. It is a matter for each agency to determine whether they are legally considered to be the Crown for the purposes of the Copyright Act.

Additionally, where uses are not ‘for the services of the Crown’, s.183 will not be available. The words ‘for the services of the Commonwealth or a State’ are not defined. Not every act of using copyright material will necessarily be covered by s.183. For example, the Australian Copyright Council is of the view that only those dealings with copyright material which are ‘governmental’ in nature and where there is some element of public interest involved are likely to be covered by s.183. The High Court has suggested that s.183 provides a comprehensive licence scheme for government use of copyright material.

To work out if another exception applies, please refer to the following flow chart:

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6 This is a complex question of law and will depend on the purpose and constitution of the body in question. Cultural Institutions may need to get independent legal advice on this point.
7 See for example, Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth, 1959, at paragraph 404.
9 For further information on the HCA decision, see Copyright Agency Limited v State of New South Wales [2008] HCA 35 (see, for example, paragraphs 60-63, 67, 68 and 70).
2. The use must not require you to circumvent any TPMs

You cannot make a use under s.200AB if that use requires you to circumvent an access control technological protection measure (TPM). This is in contrast with the ‘old’ library and archive provisions (sections 49, 50, 51A, 110A, 110B)\textsuperscript{10} for which specific TPM exceptions allow you to circumvent TPMs in order for you to use those exceptions.

An access-control TPM is a device, product, technology or component (including a computer program) that is used by, with the permission of, or on behalf of the copyright owner, in connection with the exercise of the copyright; and in the normal course of its operation, controls access to copyright content.\textsuperscript{11}

\textsuperscript{10} These are specified in the Copyright Regulations 1969, Schedule 10A. The ‘old’ library and archive provisions refer to those provisions that were in existence prior to the implementation of the Copyright Amendment Act 2006.

\textsuperscript{11} Copyright Act 1969, s.10
Examples of TPMs are password protection, time access controls and encryption measures applied to formats that only allow access to copyright content by authorised persons. For example, copyright content on commercial DVDs and CDs is commonly protected by TPMs such as the Content Scrambling System (CSS).

Regional coding is not a TPM.

This means that, when you want to make a use of a work in digital form, you need to first consider whether or not that use will require you to circumvent an access TPM. If it does, s.200AB will be excluded.

3. The use must be made by or on behalf of a body administering a library or archive

‘Library’ is not defined for the purposes of s.200AB. ‘Archive’ however is defined in the Copyright Act and includes ‘a collection of documents or other material which:

- are of historical significance or public interest that

- are being maintained by the body for the purpose of conserving and preserving those documents or other material; and

- are not being maintained or operated for profit’.12

The Copyright Act specifically states that museums and galleries are examples of bodies that could have collections covered by the definition of archive. For the purposes of these Principles, the Cultural Institutions fall within this definition.

4. The use must be made for the purpose of maintaining or operating the library or archive

Section 200AB is available for the purpose of maintaining or operating the library or archive.

The Explanatory Memorandum provides that this includes providing a service of a kind usually provided by a library or archive and would encompass the internal administration of the library or archive as well as providing services to users’.13

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12 Sections 10(1) and 10(4), Copyright Act 1968.
13 Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth)
This appears to cover all reasonable activities undertaken by Cultural Institutions in accordance with their functions and powers and could therefore apply to uses in relation to materials other than collection items.

**Scenario 2**

A Cultural Institution seeks to make use of an item that it has borrowed from another external collection for the purposes of including the item in an exhibition.

The Cultural Institution may be able to rely on s.200AB to make the use. The fact that the item is from an external collection does not of itself preclude reliance on s.200AB.

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**5. The use must not be for commercial advantage or profit**

This step requires that the specific use you seek to make under s.200AB not be for a commercial advantage or profit. Whether the institution performs functions that are for profit or commercial advantage is not directly relevant and will not prohibit the application of s.200AB. Section 200AB will only be excluded where there is a direct nexus between the profit or commercial advantage and the use. In other words, the use itself must be for profit or commercial advantage.

The charging of a fee does not necessarily exclude s.200AB. The charging of a fee will not be ‘for commercial advantage or profit’ where it does not exceed the costs of the use.

**Scenario 3**

A Cultural Institution wishes to make a use in relation to a not-for-profit exhibition. The exhibition is expected to attract more patrons, potentially more donations, and to bolster the image of the institution.

The use would not be precluded from the operation of s.200AB at this step because it is not ‘for commercial advantage or profit’.

**Scenario 4**

A Cultural Institution wishes to make a use for the purpose of including a copy of the work as a centrepiece in tender documentation in order to procure ‘best value’ services for the institution.

The use is likely to be seen as being made for the purpose of gaining a commercial advantage and s.200AB is therefore likely to be excluded.

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14 Copyright Act 1968, s.200AB; Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth); Evidence of Ms Helen Daniels to the Senate Standing Committee on Legal and Constitutional Affairs in relation to the Copyright Amendment Bill 2006 (Cth), for example, see: [http://www.aph.gov.au/SENATE/committee/legcon_ctte/completed_inquiries/2004-07/copyright06/submissions/sub69A.pdf](http://www.aph.gov.au/SENATE/committee/legcon_ctte/completed_inquiries/2004-07/copyright06/submissions/sub69A.pdf)

15 Copyright Act 1968; s.200AB(6A)
Scenario 5

A Cultural Institution wishes to use a work for the purpose of displaying a copy of the work in its café.

The use is likely to be seen as a use which is ‘for commercial advantage or profit’ and s.200AB is likely to be excluded.

6. The use must not conflict with a normal exploitation of the work or subject-matter

This step is directed towards:

a) whether there is a market that the law should protect from the particular use;

or

b) whether there is a potential market that ‘with a certain degree of likelihood, could acquire considerable economic or practical importance’.16

It requires a consideration of what constitutes ‘normal exploitation’ and at what point or in what circumstances, there is a definable market that the law should protect. It also requires ‘normative’ considerations or in other words, considerations of the objectives of copyright law.17 The term ‘normal’ may require a consideration of a wide range of factors including:

- market displacement18;
- technological developments19; and
- the social benefits of the use more generally.20

What is required is a weighing up of all of the circumstances surrounding the use, in order to determine whether the particular use is one that the copyright owner should control21.

In order to help Cultural Institutions to balance the competing interests of this test, the following table, weighing factors ‘for’ and ‘against’ the proposed use of a work, will assist:

16 Ibid at 6.180
18 Ibid at 6.183.
19 Ibid at 6.187.
20 Ibid at 6.187. See also, the US Ninth Circuit Court of Appeals interpretation of the three step test embodied in s.107 of the US Copyright Act 1976 in cases such as: Kelly v Arriba Soft Corp (2003) at 9073; Perfect 10, Inc. v Amazon (& Google) (2007) at 5779.
21 Ibid, for example at 6.167; See also Ginsberg, J. Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions at 14 and Cf. Campbell v. Acuff-Rose Music, Inc, 510 U.S. 569 (1994) (“no market” for parodies, even if copyright owner could license them).
7. The use must not unreasonably prejudice the legitimate interests of the owner of copyright

The Explanatory Memorandum states that this step requires ‘an assessment of the legitimate economic and non-economic interests of the copyright owner’22.

The WTO panel in the Homestyle decision23 noted that this requires a 4-step analysis of;

- what are the interests of the right holders;
- which attributes make them ‘legitimate’;
- what the term ‘prejudice’ means; and
- when does the prejudice become ‘unreasonable’.

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22 Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth)
Again, the WTO panel emphasised the importance of ‘normative’ definitions of these words, noting that exceptions will always prejudice the copyright holder. What this test requires is a consideration of the point at which this prejudice becomes unreasonable.24

In order to help Cultural Institutions to balance the competing interests of this test, the following table, weighing factors ‘for’ and ‘against’ the proposed use of a work, will assist:

<table>
<thead>
<tr>
<th>Factors weighing against use</th>
<th>Factors weighing in favour of use</th>
</tr>
</thead>
<tbody>
<tr>
<td>The use is not defined</td>
<td>The use is for a specific and limited purpose</td>
</tr>
<tr>
<td>An excessive or unnecessary amount of material has been taken.</td>
<td>The amount and nature of the material taken is appropriate in light of the nature of the copyrighted work and of the use.</td>
</tr>
<tr>
<td>Cultural sensitivities and restrictions have not been considered (or respected) where it is appropriate to do so.</td>
<td>The use takes into account and respects any cultural sensitivities that may exist in relation to the nature of the material (for example, Indigenous communal intellectual property rights or cultural restrictions).</td>
</tr>
<tr>
<td>The moral rights of the creator have not been considered.</td>
<td>In making the use, you have complied with the moral rights requirements of the Copyright Act 1968 (for example, the use properly attributes the author where it is reasonable to do so).</td>
</tr>
<tr>
<td>The use breaches contractual or other legal restrictions on the material.</td>
<td>The use does not breach any contractual or legal restrictions on the material (for example, donor/depositor restrictions or obligations under relevant privacy laws).</td>
</tr>
<tr>
<td>The use exposes the material to an unreasonable risk of misuse (such as unauthorised use by others).</td>
<td>The use does not give rise to an unreasonable risk of misuse or has been appropriately constrained so that any risks are minimised.</td>
</tr>
</tbody>
</table>

24 Ibid at 6.222-6.229
8. The use must be a special case

The explanatory memorandum to the Copyright Amendment Bill 2006 states that ‘this condition is intended to ensure that the use is narrow in a quantitative as well as qualitative sense’. While this step does not require that a use be unique or extraordinary, it does require that the use be for a defined purpose. That is, the use must be for a specific rather than a general purpose. For example, copying an item for a specific exhibition would likely be considered copying for a defined purpose. But copying to create a repository of material to have available for future exhibitions would not be considered copying for a defined purpose. Similarly, copying an item as part of a mass digitisation project where the copying is undertaken to create multiple back-up copies of a work is unlikely to be considered a specific purpose.

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Summary

In assessing whether s.200AB can be relied on for a particular use, the following flow chart will assist Cultural Institutions to work through the requirements of the provision.

- **Does your use fall within another specific exception or statutory licence in the Copyright Act?**
  - Yes: s.200AB excluded
  - No: Proceed to the next question.

- **Does the use require you to circumvent a TPM?**
  - Yes: Proceed to the next question.
  - No: Proceed to the next question.

- **Is the use for commercial advantage or profit?**
  - Yes: Proceed to the next question.
  - No: Proceed to the next question.

- **Does the use conflict with the normal exploitation of the work?**
  - Yes: Proceed to the next question.
  - No: Proceed to the next question.

- **Does the use unreasonably prejudice the rights holder?**
  - Yes: Proceed to the next question.
  - No: Proceed to the next question.

- **Is the use a special case?**
  - Yes: s.200AB available
  - No: Proceed to the next question.

- **s.200AB available**
Part 3 - Examples

Example 1

A Cultural Institution wishes to copy a collection item for the purpose of including that copy in an educational program and/or exhibition.

Step 1: The use must not fall within another specific exception or statutory licence under the Copyright Act

If there are no other exceptions applicable, s.200AB will not be excluded.

Cultural Institutions should consider, in relation to the particular use, whether the library and archive provisions may apply. This may be the case if the access copy is made for preservation purposes or administrative purposes and meets the other requirements of those provisions.

Cultural Institutions should also consider (if their institution is a ‘Crown body’) whether their use is ‘for the services of the Crown’ under s.183.

Step 2: You must not circumvent a TPM in order to make the use

Where the use is in relation to a digital work, you should consider whether making that use will require you to circumvent a technological protection measure that protects access to the copyright material by limiting it to authorised persons.

Where no such measure exists, s.200AB will not be excluded.

Step 3: You must be making the use on behalf of a library or archive for the purpose of maintaining the library or archive

The making of access copies for exhibitions and educational programs would clearly fall within the reasonable services or activities of the library or archive.

Therefore, s.200AB will not be excluded.
Step 4: The use must not be for commercial advantage or profit

If the use is made for the purpose of an exhibition which is commercial in nature, s.200AB will be excluded.

An entry fee which is for cost-recovery purposes only, or the attraction of unexpected donations, will not exclude the operation of s.200AB.

Step 5: The use must not ‘conflict with the normal exploitation of the work’

An assessment of the following factors will assist Cultural Institutions to determine whether s.200AB may be available or whether s.200AB will be excluded:

- Whether there is a readily available licence for making the use (which indicates the existence of a market for that use)\textsuperscript{26};

- The use (making an access copy for the purposes of a Cultural Institution exhibition) is unlikely to be a way that the copyright owner usually makes money from their work;

- The use (being for the purposes of a limited or one-off exhibition) is unlikely to deprive the copyright owner of significant revenue now or in the foreseeable future;

- The use is likely to be separate and distinct from the way that the copyright owner usually exploits the work;

- The use is likely to enhance the copyright owner’s ability to exploit the work by promoting the work.

In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh against the use, uses for the purposes of non-commercial, not-for-profit public exhibitions are unlikely to be excluded from s.200AB by this step. However, so far as certain uses are covered by statutory or collective licences (such as an APRA collective licence), s.200AB will be excluded.

Step 6: The use must not ‘unreasonably prejudice the legitimate interests of the owner of copyright’

An assessment of the following factors will assist Cultural Institutions to determine whether s.200AB may be available or whether s.200AB will be excluded:

\textsuperscript{26} For example, if the collection item is an audiovisual item, a licence for use of the music and/or sound-recording may be available from Australasian Performing Right Association (APRA) or the Phonographic Performance Company of Australia (PPCA).
• The use is for a specific and limited purpose (an exhibition);

• The amount and nature of the material taken is appropriate in light of the nature of the copyrighted work and of the use (the amount reflects what will be shown at the exhibition);

• The use takes into account and respects any cultural sensitivities that may exist in relation to the nature of the material;

• In making the use, you have complied with the moral rights requirements of the Copyright Act;

• The Cultural Institution has taken any steps which are reasonable in light of the nature of the work to ensure the item is not exposed to unreasonable risk of misuse.

In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh against the use, uses for the purposes of public exhibitions are unlikely to be excluded from s.200AB by this step as long as the Cultural Institution has taken steps to ensure that the use is confined to the purpose and that the moral rights of the author and any cultural sensitivities related to the work have been taken into account.

**Step 7: The use must be a ‘special case’**

If the use has not been excluded by the above steps, it is unlikely to be excluded by this step.

This step requires the use to be for a defined purpose.

**Conclusion**

While each use should be assessed on a case-by-case basis, s.200AB is likely to be available for these kinds of uses.
Example 2

*A Cultural Institution wishes to reproduce a collection item in a low resolution digital format (as a ‘thumbnail’ image) and display it on the Institution’s collection database.*

**Step 1: The use must not fall within another specific exception or statutory licence under the Copyright Act**

If there are no other exceptions applicable, s.200AB will not be excluded.

If the use is made for preservation purposes or administrative purposes, the library and archive provisions may apply.

Cultural Institutions should also consider (if their institution is a ‘Crown body’) whether their use is ‘for the services of the Crown’ under s.183.

**Step 2: You must not circumvent a TPM in order to make the use**

Where the use is in relation to a digital work, you should consider whether making that use will require you to circumvent a technological protection measure that protects access to the copyright material by limiting it to authorised persons.

Where no such measure exists, s.200AB will not be excluded.

**Step 3: You must be making the use on behalf of a library or archive for the purpose of maintaining the library or archive**

The making of copies for inclusion on an institution’s collection database would fall within the reasonable services or activities of the library or archive.

Therefore, s.200AB will not be excluded.

**Step 4: The use must not be for commercial advantage or profit**

Uses for purposes of inclusion on an institution’s collection database are unlikely to be for commercial advantage or profit.
Step 5: The use must not ‘conflict with the normal exploitation of the work’

A weighing-up and assessment of the following factors on a case-by-case basis will assist Cultural Institutions to determine whether s.200AB may be available or whether s.200AB will be excluded:

- Whether there is a readily available licence for making the use (which indicates the existence of a market for that use);
- The use (making a low resolution thumbnail copy for the purposes of a collection database) is unlikely to be a way that the copyright owner usually makes money from their work;
- The use is unlikely to deprive the copyright owner of significant revenue now or in the foreseeable future;
- The use is likely to be separate and distinct from the way that the copyright owner usually exploits the work;
- The use is likely to enhance the copyright owner’s ability to exploit the work by promoting the work.

In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh against the use, uses of low resolution thumbnail images of items for the purposes of inclusion in a collection database are unlikely to be excluded from s.200AB by this step.

Step 6: The use must not ‘unreasonably prejudice the legitimate interests of the owner of copyright’

An assessment of the following factors will assist Cultural Institutions to determine whether s.200AB may be available or whether s.200AB will be excluded:

- The use is for a specific and limited purpose (use on a collection database);
- The amount and nature of the material taken is appropriate in light of the nature of the copyrighted work and of the use (the amount reflects what will be required for the database);
- The use takes into account and respects any cultural sensitivities that may exist in relation to the nature of the material;
- In making the use, you have complied with the moral rights requirements of the Copyright Act;
- The Cultural Institution has taken any reasonable steps to ensure the item is not exposed to unreasonable risk of misuse (for example, the fact that the copy will be in a low resolution format is a step which mitigates any risk of misuse).
In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh against the use, uses for the purposes of inclusion of low resolution images on collection databases are unlikely to be excluded from s.200AB by this step as long as the Cultural Institution has taken steps to ensure that the use is confined to the purpose and that the moral rights of the author and any cultural sensitivities related to the work have been taken into account.

**Step 7: The use must be a ‘special case’**

If the use has not been excluded by the above steps, it is unlikely to be excluded by this step.

This step requires the use to be for a defined purpose.

**Conclusion**

While each use should be assessed on a case-by-case basis, s.200AB is likely to be available for these kinds of uses.
Example 3A

A Cultural Institution wishes to make an orphan work available on its website.

Step 1: The use must not fall within another specific exception or statutory licence under the Copyright Act

If there are no other exceptions applicable, s.200AB will not be excluded.

If the use is made for preservation purposes or administrative purposes the library and archive provisions may apply. However, this will be unlikely if the use is to promote access to the public at large via the institutional website.

Cultural Institutions should also consider (if their institution is a ‘Crown body’) whether their use is ‘for the services of the Crown’ under s.183.

Step 2: You must not circumvent a TPM in order to make the use

Where the use is in relation to a digital work, you should consider whether making that use will require you to circumvent a technological protection measure that protects access to the copyright material by limiting it to authorised persons.

Where no such measure exists, s.200AB will not be excluded.

Step 3: You must be making the use on behalf of a library or archive for the purpose of maintaining the library or archive

Making orphan works (within the institution’s collection) available on the institution’s website would fall within the reasonable services or activities of the library or archive.

Therefore, s.200AB will not be excluded.

Step 4: The use must not be for commercial advantage or profit

Uses for the purposes of making orphan works available to the public via the institution’s website are unlikely to be for commercial advantage or profit.
Step 5: The use must not ‘conflict with the normal exploitation of the work’

A weighing-up and assessment of the following factors on a case-by-case basis will assist Cultural Institutions to determine whether s.200AB may be available or whether s.200AB will be excluded:

- Whether there is a readily available licence for making the use (which indicates the existence of a market for that use);
- The use (making the orphan work available to the public on the internet) would ordinarily be a way that a copyright owner would make money from their work. However, in the case of an orphan or abandoned work, this will not be the case (so long as the work remains orphan or abandoned). However, institutions should note that this may change if the owner subsequently comes forward and indicates that they wish to exploit the work;
- The use is unlikely to deprive the copyright owner of significant revenue now. The use may deprive the copyright owner of revenue in the future if the copyright owner comes forward;
- The use is likely to be separate and distinct from the way that the copyright owner usually exploits the work;
- The use is likely to enhance the copyright owner’s ability to exploit the work by promoting the work.

In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh against the use, uses of orphan works are unlikely to be excluded from s.200AB by this step.

Step 6: The use must not ‘unreasonably prejudice the legitimate interests of the owner of copyright’

An assessment of the following factors will assist Cultural Institutions to determine whether s.200AB may be available or whether s.200AB will be excluded:

- The use is for a specific purpose. Whether the use can be said to be for a ‘limited purpose’ may depend on whether appropriate measures have been taken to ensure that the work is not exposed to an unreasonable risk of misuse (see below);
- The amount and nature of the material taken is appropriate in light of the nature of the copyrighted work and of the use (the amount reflects what will be required for the purpose of the use);
- The use takes into account and respects any cultural sensitivities that may exist in relation to the nature of the material (so far as is possible in the context of the work being orphan);
• In making the use, you have complied with the moral rights requirements of the Copyright Act (so far as you are able to do in the context of the work being orphan);

• The Institution has taken reasonable steps to ensure the item is not exposed to unreasonable risk of misuse. This will be a key factor under this step where institutions are seeking to make works available on the internet. While the risk in relation to ‘unreasonably prejudicing the legitimate interests of the copyright owner’ are less in relation to orphan work than other works, Cultural Institutions should still consider any steps appropriate to minimise risk of misuse. The nature of those steps will depend on the nature of the work that is being made available. Examples of ways that may minimise misuse may include: making the item available in a low resolution format; making only a part of the item available; making the item available with legal or technological restrictions; or making the item available with an accompanying notice to potential copyright owners in relation to the institution’s take-down procedures.27

In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh against the use, uses for the purposes of making orphan works available to the public are unlikely to be excluded from s.200AB by this step.

**Step 7: The use must be a ‘special case’**

If the use has not been excluded by the above steps, it is unlikely to be excluded by this step.

This step requires the use to be for a defined purpose.

**Conclusion**

While each use should be assessed on a case-by-case basis, s.200AB is likely to be available for these kinds of uses28.

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27 It is important to note that while there are a range of measures available to protect online material from an unreasonable risk of misuse, the appropriateness of the measures adopted depends on the nature of the material being used. While it may be possible to protect artworks, designs and photos via a low-resolution reproduction, other works (including audiovisual works and written material such as correspondence, graphs, maps, and musical scores) cannot be easily reproduced in low-resolution format without distorting the meaning and value of the work. For these types of materials reproducing the material in full accompanied by an accompanying notice and take-down procedure would be likely to be considered an effective and reasonable means of minimising the risk of misuse of the material by downstream users.

28 However, Cultural Institutions should note that, the nature of the uses made by the Institution may be relevant to negotiating payment in relation to those uses should a copyright owner come forward in the future and seek payment. Therefore, containing the nature of the uses and taking reasonable steps not to expose the material to unreasonable risk of misuse will be an important part of an Institution’s general risk mitigation strategy.
Example 3B

*A Cultural Institution wishes to make a work (other than an orphan work) available on its website (for example, as part of an online exhibition).*

Step 1: The use must not fall within another specific exception or statutory licence under the Copyright Act

Analysis same as Example 3A above.

Step 2: You must not circumvent a TPM in order to make the use

Analysis same as Example 3A above.

Step 3: You must be making the use on behalf of a library or archive for the purpose of maintaining the library or archive

Making copies for the purposes of an exhibition would fall within the reasonable services or activities of the library or archive.

Therefore, s.200AB will not be excluded.

Step 4: The use must not be for commercial advantage or profit

If the use is made for commercial purposes (for example, as part of an online exhibition operated on a pay-per-view basis or for the purposes of promoting sales of products sold within an institution’s shop), s.200AB will be excluded.

Where collection material is made available on an institution’s website for non-commercial purposes (including for the purposes of personal viewing and non-commercial educational use, such as showcasing aspects of an institution’s collection) then s.200AB is unlikely to be excluded.

Step 5: The use must not ‘conflict with the normal exploitation of the work’

A weighing-up and assessment of the following factors on a case-by-case basis will assist Cultural Institutions to determine whether s.200AB may be available or whether s.200AB will be excluded:
• Whether there is a readily available licence for making the use (which indicates the existence of a market for that use);

• Depending on the nature of the work, the use (making the work available to the public on the internet) may be a way that the copyright owner makes money from their work. For example, if the work is a letter from a digger held by the Australian War Memorial (AWM), the use is unlikely to be a way the copyright owner makes money from their work. On the other hand, if the work is an Australian feature film, the use is likely to be a way the copyright owner usually makes money from their work;

• The use may deprive the copyright owner of significant revenue if there is a readily available licence for the use or if the copyright owner ordinarily licences such uses;

• The use is likely to be separate and distinct from the way that the copyright owner usually exploits the work;

• The use is likely to enhance the copyright owner’s ability to exploit the work by promoting the work.

In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh in favour of the use, uses of works are likely to be excluded from s.200AB by this step if a licence from the copyright owner is readily available. In some circumstances this may be outweighed by the nature and circumstances of the use. However, Cultural Institutions should bear in mind that use of s.200AB in these circumstances would involve a higher degree of risk than use of s.200AB in the circumstances outlined in Example 3A above. The exact level of that risk will depend on the nature of the work.

Step 6: The use must not ‘unreasonably prejudice the legitimate interests of the owner of copyright’

An assessment of the following factors will assist Cultural Institutions to determine whether s.200AB may be available or whether s.200AB will be excluded:

• The use is for a specific purpose. Whether the use can be said to be for a ‘limited purpose’ may depend on whether appropriate measures have been taken to ensure that the work is not exposed to an unreasonable risk of misuse (see below);

• The amount and nature of the material taken is appropriate in light of the nature of the copyrighted work and of the use (the amount reflects what will be required for the purpose of the use);

• The use takes into account and respects any cultural sensitivities that may exist in relation to the nature of the material;

• In making the use, you have complied with the moral rights requirements of the Copyright Act;
The Cultural Institution has taken reasonable steps to ensure the item is not exposed to unreasonable risk of misuse. This will be a key factor under this step where institutions are seeking to make works available on the internet. The nature of those steps will depend on the nature of the work that is being made available (see footnote 27 for a discussion about this point in relation to example 3A). Examples of ways that may minimise misuse may include: making the item available in a low resolution format; making only a part of the item available; making the item available with legal or technological restrictions; or making the item available with an accompanying notice to potential copyright owners in relation to the institution’s take-down procedures.

Whether such a use would be available under s.200AB would need to be assessed on a case-by-case basis and would depend heavily on the nature of the work, whether a licence is available for the use and whether appropriate steps have been taken to minimise risk of misuse of the work.

**Step 7: The use must be a ‘special case’**

If the use has not been excluded by the above steps, it is unlikely to be excluded by this step.

This step requires the use to be for a defined purpose.

**Conclusion**

Section 200AB may be available for these kinds of uses, depending on the factors outlined above.
Example 4

A Cultural Institution from the film and sound industries wishes to preserve a collection of posters selected from the Institution’s archives. In addition to making high resolution digital preservation copies, the Institution also seeks to make low resolution digital browsing copies for access purposes and to reduce the risk of corruption of the high resolution digital preservation.

Step 1: The use must not fall within another specific exception or statutory licence under the Copyright Act

If there are no other exceptions applicable, s.200AB will not be excluded.

In relation to the high resolution digital preservation copies, these will be able to be made under the preservation provisions as long as the relevant works are not able to be obtained ‘within a reasonable time at an ordinary commercial price’ (s.51B). The copies may also be able to be made under s.51A(2) for administrative purposes. On this basis, there would be other provisions which would allow the preservation of the collection and s.200AB would be excluded.

However, in relation to the low resolution digital browsing copies for access purposes, s.200AB will not be excluded.

Cultural Institutions should also consider (if their institution is a ‘Crown body’) whether their use is ‘for the services of the Crown’ under s.183.

Step 2: You must not circumvent a TPM in order to make the use

TPMs do not apply to hard copy posters so s.200AB will not be excluded.

Step 3: You must be making the use on behalf of a library or archive for the purpose of maintaining the library or archive

The uses (making access copies) would fall within the reasonable services or activities of the library or archive. Therefore, s.200AB will not be excluded.

Step 4: The use must not be for commercial advantage or profit;

Uses for the purposes of making low resolution access copies are unlikely to be for commercial advantage or profit.
Step 5: The use must not ‘conflict with the normal exploitation of the work’

A weighing-up and assessment of the following factors in relation to each use will assist Cultural Institutions to determine whether s.200AB may be available or whether s.200AB will be excluded:

- Whether there is a readily available licence for making each use (which indicates the existence of a market for that use);
- In relation to each use, (making a work available to the public on the internet) whether that use would ordinarily be a way that the copyright owner would make money from their work. This may depend on the nature of the work in each instance;
- The use may deprive the copyright owner of significant revenue if there is a readily available licence for the use or if the copyright owner ordinarily licences such uses;
- The use is likely to be separate and distinct from the way that the copyright owner usually exploits the work;
- The use is likely to enhance the copyright owner’s ability to exploit the work by promoting the work.

Whether s.200AB will be excluded or not under this step will depend upon a balancing of the above factors in relation to each use. If a licence is readily available from the copyright owner, a use may be excluded from s.200AB by this step. On the other hand, if there is no readily available licence, it is unlikely that s.200AB will be excluded. The risk of using s.200AB in relation to these uses may differ depending on the nature of the particular works in question.

Step 6: The use must not ‘unreasonably prejudice the legitimate interests of the owner of copyright’

An assessment of the following factors will assist Cultural Institutions to determine whether s.200AB may be available in relation to each use or whether s.200AB will be excluded:

- Each use is for a specific purpose. Whether a use can be said to be for a ‘limited purpose’ may depend on whether appropriate measures have been taken to ensure that the work in question is not exposed to an unreasonable risk of misuse (see below);
- The amount and nature of the material taken in relation to each use is appropriate in light of the nature of the copyright work and of the use (the amount reflects what will be required for the purpose of the use);
- Each use takes into account and respects any cultural sensitivities that may exist in relation to the nature of the material;
• In making each use, you have complied with the moral rights requirements of the Copyright Act;

• The Cultural Institution has taken reasonable steps to ensure each item is not exposed to unreasonable risk of misuse. This will be a key factor under this step where institutions are seeking to make works available on the internet. The nature of those steps will depend on the nature of each work that is being made available (see footnote 27 for a discussion about this point in relation to example 3A). Examples of ways that may minimise misuse may include; making items available in a low resolution format; making only a part of an item available; making an item available with legal or technological restrictions; or making an item (or the collection) available with an accompanying notice to potential copyright owners in relation to the institution’s take-down procedures.

Whether such uses would be available under s.200AB would need to be assessed on a case-by-case basis and would depend on the nature of the work, whether a licence is available for the use and whether appropriate steps have been taken to minimise risk of misuse of the work.

**Step 7: The use must be a ‘special case’**

If the uses in relation to the collection have not been excluded by the above steps, they are unlikely to be excluded by this step.

This step requires the use to be for a defined purpose.

**Conclusion**

Cultural Institutions may wish to make a number of uses under s.200AB (for example, because they are making access copies of several works, or because they would like to make several copyright uses in relation to those works). While each use should be assessed on a case-by-case basis (having regard to relevant risk management strategies) s.200AB is likely to be available for these kinds of uses.
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