



## **Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?**

Report prepared for the Australian Digital Alliance/  
Australian Libraries Copyright Committee

### **1. Introduction**

Section 200AB was introduced in 2006 to provide a flexible exception to enable copyright material to be used for certain socially useful purposes. It was designed to operate like a US style fair use exception to provide more flexibility than is available under existing exceptions and statutory licences in the *Copyright Act (the Act)*<sup>1</sup>. Six years after it was introduced, there is a widespread view in the education, library and cultural sectors that s 200AB has not lived up the expressed legislative intention of bringing these sectors more in line with their counterparts in the US.

Consultations with stakeholders conducted as part of this study, combined with our own engagement with those responsible for copyright in schools, universities, libraries and cultural institutions suggests that most institutions in each of these sectors view s 200AB as a failure.

This report considers the factors that have led to s 200AB being considered a failure by those it was intended to benefit. Part of this assessment includes considering to what extent the failure of Australian cultural and educational institutions to make significant use of s 200AB can be considered to be directly linked to the legislative provision itself, and to what extent this can be related to cultural factors in the institutions themselves.

The report concludes that while some degree of risk aversion and cultural reticence to use a flexible exception can be attributed to the sectors' approach to s 200AB, the primary reason for institutional reticence to use s 200AB is directly related to the particular form of implementation of the 'three step test' from international treaties into the Australian Act.

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<sup>1</sup> Regulatory Impact Statement in the Explanatory Memorandum to *Copyright Amendment Bill 2006* (Cth) [6.53], 11

The current review of copyright and the digital economy being undertaken by the Australian Law Reform Commission (ALRC) provides an opportunity to revisit the question that was last considered in the Government's Fair Use review in 2005: does Australia need a flexible, open-ended exception to copyright<sup>2</sup>? A further question addressed in this report is whether fair use would deliver the flexibility that s 200AB has failed to deliver? In other words, would the library, education and cultural sectors fare better under fair use than they have under s 200AB?

The report considers both the drafting differences between s 200AB and fair use, and also the cultural differences between the relevant sectors in Australia and their US counterparts in approaching a flexible exception. The report concludes that fair use would deliver a significant degree more flexibility and utility than s 200AB.

## **2. Why has s 200AB failed to deliver?**

There appear to be four main reasons why s 200AB is perceived largely as a failure by so many of the institutions that were intended to benefit from it:

Firstly and most significantly, the particular drafting choices made in the incorporation of the three step test into s 200AB have created a high degree of uncertainty as to the practical application and potential scope of the exception. This has led to the need for extremely technical legal analysis of the provision, making it extremely difficult for individual teachers, librarians and curators to understand the requirements and application of s 200AB. It has also made it extremely difficult for those advising them to create useful, general guidelines to assist day-to-day decision making.

Secondly, s 200AB(6)(b), which provides that the exception does not apply to any use that "because of another provision of this Act...would not be an infringement of copyright assuming the conditions or requirement of that other use were met", appears to narrow the scope of the exception to a significant extent.

Thirdly, the absence of an exception permitting institutions to circumvent access control technological protection measures (TPMs) for the purposes of s 200AB, combined with the increasing use of TPMs on audio-visual works, has resulted in an ever-growing pool of content that effectively falls outside of the scope of the exception.

Finally, educational institutions, libraries and cultural institutions are for the most part inherently risk averse, and the uncertainty caused by Australia's particular implementation of the three step test in s 200AB has led to many of them to refrain from using the exception at all for fear of facing a legal challenge. As mentioned, it has also made it extremely difficult to create sensible and clear guidelines to clarify the section's application.

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<sup>2</sup> Australian Law Reform Commission, *Copyright and the Digital Economy Issues Paper* (IP 42) (ALRC, August 2012), 79 (see question 52)

## **A. *Uncertainty arising from incorporation of the three step test***

Six years after s 200AB was introduced there remains a very large degree of uncertainty as to the scope of the exception and the circumstances in which it can be relied on.

Some might say that the degree of uncertainty is no greater than would be the case had s 200AB been subject to a list of fairness factors; such as those that apply to the US fair use exception or to the research and study fair dealing exception in s 40 of the Act. In other words, no matter what factors were adopted by Parliament to determine whether the exception could be relied on, a degree of certainty would come only after a number of years as agreed practices emerged and case law provided further guidance.

To a certain extent this may be true – there would probably have been an initial period of uncertainty if Parliament had decided to introduce a fair use style provision in 2006 instead of s 200AB. However after careful consideration we have formed the view that s 200AB is much more uncertain in practice than a “fairness” exception such as fair use or a fair dealing provision.

The particular way in which the three step test has been implemented in s 200AB as the touchstone for this exception has led to a much greater degree of confusion and uncertainty than could have been expected had the legislature opted for a fair use exception. From our examination of the experience of similar institutions in the United States and Canada, it could be argued that the level of certainty involved in an open-ended exception accretes over time. In contrast, our stakeholder consultations in developing this report have indicated that s 200AB may in fact be more uncertain today as it was in 2006, given the lack of clarity about the application of s 200AB to digital materials.

It became clear during our stakeholder consultations about s 200AB that it is not just the teachers, librarians and archivists “on the ground” who are confused about how to apply s 200AB. Those charged with advising them (including legal advisers and copyright officers) are in no better position, expressing almost the same level of confusion and frustration about the legal interpretation to s 200AB as those they advise.

One theme that was repeated in discussions with stakeholders was that the language of the three step test is not as familiar or instinctive as the language of fairness. Participants expressed the view that the language of “fairness” is a language that the intended users of this exception are more familiar with. For example, Australians are used to assessing whether uses for research or study, or criticism or review are fair. In terms of determining the practical application of an exception based on fairness, there would also have been jurisprudence for would-be-users to draw upon. Each of

the US and Australian “fairness factors” reflect common law principles that were developed over more than a century.<sup>3</sup>

Instead, advisers on s 200AB need to address at least 8 questions that make its operation complex and uncertain:

1. What approach should be taken to interpreting the three step test in a domestic context?
2. Are the requirements of s 200AB to be considered cumulatively or holistically?
3. What does a ‘certain special case’ mean in an individual context?
4. What is a “normal” exploitation of a work?
5. What is “unreasonable” prejudice?
6. What are a rights holder’s “legitimate” interests?
7. Should the scope of compliant uses be construed narrowly or broadly?
8. Are these matters to be determined by applying a purely economic logic, or are they intended to be understood through a more normative lens?

These questions do not consider the further consideration required as to whether a use is for the permitted purposes set out in the section, such as giving educational instruction<sup>4</sup> or maintaining or operating a library or archives<sup>5</sup>.

#### *Interpreting the three step test in domestic law*

The three-step test is included in both the Berne Convention and the WIPO Copyright Treaty and in Article 13 of the World Trade Organisation (WTO) Agreement on the Trade Related Aspects of International Property (TRIPS Agreement).

International scholars have widely divergent views on the interpretation that should be given to the three step test in international treaties. This divergence is summarised by Jonathan Griffiths:

*Despite the entrenched position of the “three-step test” within international and national copyright law, its detailed requirements thus remain fundamentally uncertain. In such circumstances, it is hardly surprising that attempts to apply the “test” in concrete situations can, at best, be described as guesswork and, at worst, characterised as reverse reasoning disguising pre-determined policy preferences.<sup>6</sup>*

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<sup>3</sup> Ricketson, Sam and Creswell, Christopher, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Law Book Company, 2002), para 11.15

<sup>4</sup> *Copyright Act 1968*, s200AB (3)(b)

<sup>5</sup> *Copyright Act 1968*, s200AB (2)(b)

<sup>6</sup> Ginsburg, Jane C., *Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions* (Revue Internationale du Droit d’Auteur, January 2001)

Parliament purported to provide some guidance as to what it had in mind when adopting the language of the three step test in s 200AB(1). Section 200AB(7) provides that the words “special case”, “conflict with a normal exploitation”, and “unreasonably prejudice the legitimate interests” have the same meaning as in Article 13 of the TRIPS Agreement. The explanatory memorandum for the *Copyright Amendment Bill 2006* states that the intention was that “these phrases should not be interpreted more narrowly in s 200AB than Article 13 of the TRIPS Agreement requires.”

Perhaps a court construing s 200AB would take some guidance from the preamble to the WIPO Copyright Treaty, which recognises “*the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention*”. That does suggest that the three step test is intended, at least in the WIPO Copyright Treaty, to be construed in such a way as to “maintain” a balance between the rights of authors and the larger public interest. But those words don’t appear in TRIPS, and s 200AB (7) specifically states that the three step test, as implemented in Australian law, should be interpreted by express reference to TRIPS.

Section 200AB(7) therefore may suggest that the starting point for any analysis of s 200AB is to seek out authoritative interpretations of the language of the three step test as it appears in Article 13 of TRIPS. To date, however, the only international adjudicative decision interpreting Article 13 of TRIPS is a decision of the World Trade Organization dispute resolution panel (WTO Panel report) finding the United States contravened with three step test with an exception that permitted commercial bars and restaurants etc to play music without having to pay a royalty.<sup>7</sup>

The WTO Panel report defined the three-step test in a narrow and restrictive fashion. It is unclear, however, how directly applicable the WTO Panel report is to anyone trying to determine how the three step test language would apply to traditionally privileged uses such as education, and access to information through libraries and archives.

On one view, the result of the WTO Panel report may lead to an extremely narrow construction of s 200AB. Professor Jane Ginsburg has commented that the WTO Panel interpretation of the “normal exploitation” limb of the test may result in “*even traditionally privileged uses such as scholarship...[being] deemed ‘normal exploitations, assuming copyright owners could develop a low transactions cost method of charging for them’*”<sup>8</sup>.

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<sup>7</sup> World Trade Organisation, *Report of the Panel on United States - Section 110(5) of the US Copyright Act* (WT/ DS160/R, 15 June 2000)

<sup>8</sup> Ginsburg, Jane C., *Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions* (Revue Internationale du Droit d’Auteur, January 2001)

Another scholar, Dr Martin Senftleben, notes that the drafters of the three step test intentionally used an abstract formula with a view to reconciling the many different types of exceptions that already existed when it was introduced:

*"A comparison of the various observations made by the member countries elicits the specific quality of the abstract formula...: due to its openness, it gains the capacity to encompass a wide range of exceptions and forms a proper basis for the reconciliation of contrary opinions."<sup>9</sup>*

Dr Senftleben's interpretation of the three step test is clearly at odds with the narrow interpretation of the WTO Panel in the *Homestyle* case. However, an Australian court may consider that s 200AB(7) requires it to apply the approach of the WTO Panel report given that the *Homestyle* case is the only international adjudicative statement on the proper application of the three step test as it appears in TRIPS.

*Should s 200AB be considered cumulatively or holistically?*

A traditional view of the three step test is that each of its limbs should be assessed individually, to reach a 'cumulative' application of the three step test<sup>10</sup>. There is also, however, a considerable body of scholarship that suggests that there is no requirement on the face of the three step test to consider each of the steps in a narrow, cumulative fashion, and that a more balanced interpretation, whereby the steps are considered together as a whole in a comprehensive overall assessment, is both permissible and preferred.<sup>11</sup>

It is unclear whether an Australian court would adopt a cumulative or holistic approach when construing s 200AB. The explanatory memorandum to the *Copyright Amendment Bill 2006* (EM) says that Parliament intended that the three step language "*should not be interpreted more narrowly in s 200AB than Article 13 of the TRIPS Agreement requires*". This may lead a court to feel bound to approach the construction of the three step test in the same way as the WTO Panel in the *Homestyle* case; ie considering each step individually in a cumulative fashion.

*A certain special case*

This limb of the three step test is particularly difficult to apply in practice. Given that s.200AB already specifies that copying must be limited to particular types of uses (for example, maintaining and operating a library or archives) it is unclear what further circumstances or limitations this 'special case' requirement requires. The reference in s200AB(1) to both a special case (subsection (1)(a) ) and to the purposes specified in subsections (2), (3) and (4) suggest that the special case requirement

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<sup>9</sup> Senftleben, Martin, *Copyright, Limitations, and the Three-Step Test: Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International, 2004)

<sup>10</sup> See commentary on this issue in Patry, William, *The Declaration of the Three Step Test* <<http://williampatry.blogspot.com.au/2008/07/declaration-on-three-step-test.html>>

<sup>11</sup> *Declaration: A Balanced Interpretation Of The "Three-Step Test" In Copyright Law* (Jipitec, 2010)

must be met in addition to meeting the more general library, archive and educational purpose requirements.

In practice, this has led to teachers, librarians and gallery employees considering what further limitations to the general library, archive or educational purposes specified in ss 200AB(2) and (3) that may be required by the reference to the requirement in s 200AB(1)(a) that the circumstances of the use amount to a special case.

*Not conflict with the normal exploitation of the work*

The WTO Panel report states that the “*normal exploitation*” of a work encompasses not just forms of exploitation that currently generate an income for the rights holder, but also those which in all probability are likely to be of importance in the future. These words are echoed in the EM, which states that users of s 200AB should consider “forms of exploitation which, with a certain degree of likelihood, could acquire significant economic or practical importance”<sup>12</sup>. This statement has led to significant concern that any potential conflict with a licence that is, or may be offered by a copyright owner, may mean that s 200AB cannot apply to the use. This is becoming problematic for people who wish to use digital materials, as an increasing range of digital materials are now available for licence and/or purchase online.

Does the statement in the EM mean that there is no normative element to the “normal exploitation” limb of the test? Can Parliament really have intended that the “normal exploitation” limb of the test be considered in a purely economic way, without any regard to normative considerations such as the privileged status traditionally accorded to universities, schools, libraries and archives? As noted above, in her analysis of the WTO Panel report, Professor Jane Ginsburg says that it is simply unclear whether “normal exploitation” limb of the three step test allows for exclusion of traditionally privileged uses, such as scholarship, education etc.<sup>13</sup> However commentators such as Christophe Geiger have said that if a purely empirical approach is adopted, rights holders could effectively write the exceptions out of existence in the digital environment as technical evolution enabled them to control previously uncontrollable uses.<sup>14</sup>

*Not unreasonably prejudice the legitimate interest of the rights holder*

The Explanatory Memorandum states that this factor requires an assessment of the “legitimate economic and non-economic interests of the copyright owner”<sup>15</sup>. However

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<sup>12</sup> Explanatory Memorandum to *Copyright Amendment Bill 2006* [6.54]

<sup>13</sup> Ginsburg, above n8

<sup>14</sup> Geiger, Christophe, ‘The Role of the Three Step Test in the Adaptation of Copyright Law into the Information Society’ (January - March 2007) *e-Copyright Bulletin*  
<[http://portal.unesco.org/pv\\_obj\\_cache/pv\\_obj\\_id\\_90C667EE4BA972CD65857381E8A8A3CCFE5B0200/filename/test\\_trois\\_etapes\\_en.pdf](http://portal.unesco.org/pv_obj_cache/pv_obj_id_90C667EE4BA972CD65857381E8A8A3CCFE5B0200/filename/test_trois_etapes_en.pdf)>

<sup>15</sup> Ibid.

it is unclear what additional interests are required to be taken into account in addition to the market considerations described above.

This inquiry into the rights holder's "legitimate interests" may allow for consideration of whether certain uses "ought" to be paid for, regardless of whether a rights holder is prepared to grant a licence for previously unexploited uses. But would a court look to the WTO Panel report for guidance, and on that basis determine that this third limb had no work to do whenever a rights holder would, if asked, have granted a licence? Or may choose to do so in the near future? Or would a court instead construe the three steps in a more balanced fashion, as many expert commentators have considered is both permissible and appropriate?<sup>16</sup>

### **B. *The limitation contained in s 200AB(6)(b)***

Section 200AB does not apply to any use that "because of another provision of this Act ... would not be an infringement of copyright assuming the conditions or requirement of that other use were met". The EM says that the intention was to ensure that other specific exceptions and statutory licences continued to apply and were not "overtaken" by s 200AB.

It is clear from this that s 200AB cannot be relied on to avoid having to pay for a use that would be permissible under one of the educational statutory licences in Parts VA and VB of the Act. What is less clear is whether s 200AB can be relied on for a use that goes beyond or slightly differs from a use that would otherwise be permitted by one of the free exceptions?

For example:

*A library receives a request from a user to be provided with a copy of a journal article. The library copying exception in s 49 of the Act allows libraries to copy on behalf of users, but only for the purpose of the user's own research or study. In this case, the user is a journalist, and is requesting the article for the purpose of reporting news.*

There are two possibilities as to how s 200AB(6)(b) should be interpreted. The first is that s49 operates as a "safe harbour" for uses that fall strictly within its limits, but that s 200AB may still operate as a catch-all for uses that exceed these limits (provided, of course, that the conditions of s 200AB are otherwise satisfied). There is some support for this interpretation in the Regulatory Impact Statement to the *Copyright Amendment Bill 2006*:

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<sup>16</sup> *Declaration: A Balanced Interpretation Of The "Three-Step Test" In Copyright Law* (Jipitec, 2010)

*[Section 200AB] benefits users by providing a flexible exception to supplement the present range of specific exceptions and statutory licences<sup>17</sup>.*

The second possibility is that reliance on s 200AB is foreclosed if the use could have been done under s49 but for the fact that the user did not have the relevant purpose; ie research or study. There is support for this interpretation in that s 200AAA(3) (an exception allowing proxy caching by educational institutions introduced in the same Bill as s 200AB) contains the specific provision:

*This section does not limit section 28, 43A, 43B, 111A or 111B.*

As we discuss below in section 4, there is no such uncertainty in the United States. It is clear that the express education and library copying exceptions in the US Copyright Act operate as safe harbors only, and do not foreclose reliance on the fair exception if a use that exceeds the limits of one of these exceptions is otherwise fair.

### **C. No scope to circumvent TPMs**

TPMs are increasingly applied to works and other subject matter that schools, universities, libraries and archives seek to use under s200AB. Examples include commercial DVDs and Blu-ray discs as well as eBooks. Stakeholders mentioned in consultations that as increasingly more digital content is subject to TPMs, in practice it is rights holders - not courts – that are determining the scope of s200AB.

At the time of writing this paper, the Government is undertaking a review of TPM exceptions with a view to considering whether further exceptions are warranted. Groups representing the education, library and cultural sectors have each made submissions to this review seeking a TPM exception that would permit relevant users to circumvent a TPM for the purpose of using works in ways otherwise permitted by s 200AB. In the absence of an exception to the TPM provisions, it seems that s 200AB may have an increasingly limited application over time with regard to digital technologies as more digital content is made available online and protected by a TPM.

### **D. Cultural issues – risk aversion in institutions**

From our meeting with stakeholders, it was clear that at least some institutions are choosing to take an expansive interpretation of s 200AB, but these institutions are in the minority. Most institutions we met with considered that s 200AB was too uncertain for the organisation to feel comfortable using it for anything more than relatively limited purposes, if the organisation was comfortable enough to use it at all.

A representative range of comments included:

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<sup>17</sup> Regulatory Impact Statement in the Explanatory Memorandum to the *Copyright Amendment Bill 2006*, 10

*“We don’t use it in any circumstances. We just don’t understand how it works”.*

*“All the different bits overlap. In an organisation that is used to rules, that poses a problem” .*

*200AB is so complex. It’s really difficult to apply a local analysis. We mostly just use it for format shifting because we know we can do that.*

*Most of the complexity comes from the three step test. Just figuring out if my use is fair would be so much easier.*

*Section 200AB seems to be all about the copyright owner. Fair use seems to be about balancing their rights with what I want to use.*

*Fair use is about whether the use is fair. Section 200AB seems to be all about who is doing it and why.*

*We can’t decide if we have to do a step by step analysis or if we’re allowed just to decide if what we want to do is fair.*

*We fear it, not use it.*

*We use it a lot. It’s absolute gold.*

It became clear to us that the reluctance to use s 200AB could not be explained merely by a *general* cultural aversion to risk in educational institutions, libraries and cultural institutions. It is, of course, true that these institutions do tend to take a more risk averse approach to copyright than many in the private sector. But the story is more complicated than that. The feedback from stakeholders suggests that the *particular* complexities of s 200AB mean that it is not amenable to ordinary risk management assessment in institutions of this kind.

By way of example, most of the institutions we spoke to had in place well developed “fairness” assessments that they applied when determining what uses they could make of copyright works. As is clear from the stakeholder comments set out above, the language of fairness is one that these institutions are already very familiar with. It is central to their every-day risk assessment framework, and despite their risk-averse nature, they feel able to apply a fairness framework in a way that allows them to engage in the public purposes for which they were set up.

In contrast, s 200AB does not lend itself to that kind of analysis. As we’ve discussed above, the way in which the three step test has been incorporated into s 200AB is extremely complex and uncertain. Most of the institutions that are intended to benefit from the exception do not have in-house legal counsel, nor a budget that extends to consulting external lawyers on a regular basis. While some groups have prepared

guidelines to assist in interpreting s 200AB, the complexity of the drafting is such that many are reluctant to use it in any but the most straightforward cases.

Policy Australia asked participants directly whether they felt that their institution would be more likely to use an open-ended exception based on fairness than s 200AB. The majority of respondents answered 'yes' to this question. One of the participants expressed their issue as follows:

*It is specifically the three step test and all the steps that is the problem. It is just too unclear. I would feel more comfortable if I just had to decide if the use was fair.*

We wanted to test this a little. To put the question bluntly, given the risk averse nature of these institutions, we wanted to know whether they would actually be more likely to use a fair use style exception than they have been to use s 200AB?

The most commonly expressed reasons for not using s 200AB were:

- Concern that s 200AB means in practice 'if I can buy it or get a licence I can never use it', caused by the specific language in the EM in relation to s 200AB(1)(c) ('normal exploitation of the work')
- Concern that uses that would be fair when assessed against the fairness factors in s.40(2) and/or the US fair use provision would not be permitted by s 200AB due to the highly technical nature of the provision
- The lack of clarity in the interaction between s 200AB and other exceptions in the Act due to the particular drafting in s 200AB(6)
- Concern that the 'step by step' nature of s 200AB is so complex it is almost impossible to apply in practice.

What these responses suggest is that a general culture of risk aversion does not fully explain the lack of take-up of s 200AB. While it is clearly part of the story, the most common reasons expressed for the sectors' lack of use of s 200AB related to the section itself, and specifically the particular complexities created by the drafting choices in implementing the three step test in s 200AB.

This conclusion does not mean that simply replacing s 200AB with an open-ended flexible provision such as fair use would, without more, provide greater clarity for these sectors as to what is and is not permissible. What it does suggest, however, is that any exception that is intended to be relied on by public institutions will not be fit for purpose unless it has regard to the institutional and cultural realities of public institutions, including the fact that many operate on limited budgets and do not have regular recourse to legal advice.

It does appear from the evidence provided in consultations that despite their generally risk averse nature, educational institutions, libraries and cultural bodies would be more likely to use an exception that required them to engage in a fairness risk assessment. This, in our view, is significant. There would be little point seeking

to replace s 200AB with a provision such as fair use if the institutions intended to benefit from such an exception were no more likely to use it than they have been to use s 200AB. Our consultations suggest that this would not be the case.

### **3. Would these institutions fare better under fair use?**

The comments from stakeholders show that many organisations would find it easier to apply a fairness analysis than the assessments required by s 200AB, and would be more likely to use a fairness style exception. But would Australian libraries, archives, museums, galleries and educational institutions really be any better off with a fair use provision instead of s 200AB?

In what follows in this section, we set out the main differences between fair use and s 200AB. We then compare how a fair use analysis and a s 200AB analysis may differ in relation to some particular fact scenarios.

The fair use exception in s 107 of the US Copyright Act provides as follows:

*....the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—*

- 1 the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- 2 the nature of the copyrighted work;*
- 3 the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- 4 the effect of the use upon the potential market for or value of the copyrighted work.*

Some differences between fair use and s 200AB are immediately apparent:

- unlike s 200AB, fair use is not limited by class or user or type of use;
- unlike s 200AB, the factors that a court is required to consider are non-exclusive, meaning that the court has scope to consider any other matter that may be relevant to determining the “fairness” of a particular use;
- unlike s 200AB, there is no requirement for the court in a fair use case to directly apply the three step test.

Other differences arise from the case law. Fair use has been interpreted by US courts in ways that suggest much greater flexibility than s 200AB appears to be capable of.

For example:

- The inclusion of the three step test in s 200AB, and the reference to Article 13 of TRIPS, raises a real prospect that a court would construe each of the three steps in a narrow, cumulative fashion. As we've discussed in section 2 above, that may lead to s 200AB never being available for uses, however socially beneficial, that a rights holder was prepared to licence. The US Supreme Court, on the other hand, has adopted a balanced approach to construing the fairness factors. In determining whether a use is fair, the court first considers all four factors (and any other matters relevant to fairness) before reaching a view.<sup>18</sup> A defendant need not prevail with respect to each of the four enumerated fairness factors for a use to be fair.<sup>19</sup> Rather, the factors are "explored and weighed together, in light of copyright's purpose."<sup>20</sup> In a recent case involving e-reserve copying by a university, a US court found the copying to be fair notwithstanding that the rights holders were willing to licence the copying.<sup>21</sup>
- When determining whether s 200AB applies, a court is limited to applying the factors set out in the section. There is no scope to consider, for example, whether a particular use would promote the goals of copyright. A US court, on the other hand, is not confined by the non-exclusive list of factors set out in s 107 when determining if a particular use is fair. For example, US courts have in many cases considered the extent to which a particular use is "transformative" in determining whether it is fair.<sup>22</sup> If a particular use can be said to have "transformed" the material copied by using it in a way or for a purpose different to the original, it is highly likely to be fair.<sup>23</sup>
- The effect of s 200AB(6)(b) is that s 200AB cannot be relied on if the use in question could have been done in reliance on another provision in the Act. As discussed, it is possible that this would be construed by a court as meaning that s 200AB cannot be relied on to overcome limitations imposed by a more specific exception. US courts have confirmed that fair use can (subject to fairness) be relied on for uses that exceed the limitations of more specific

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<sup>18</sup> *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994)

<sup>19</sup> *NXIVM Corp. v. Ross Inst.* 364 F.3d 471, 477 (2d Cir. 2004)

<sup>20</sup> *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994)

<sup>21</sup> *Cambridge University Press et al v Georgia State University et al*, US District Court for the Northern District of Georgia May 11 2012. In this case, the court found that while factors 1 to 3 favoured the university, factor 4 favoured the rights holders. This led the court to have regard to two other matters when determining whether the use in question was fair: firstly, whether permitting limited amounts of unpaid copying would deter academic authors from creating new works, and secondly, whether the loss of income from permissions licences would lead to a reduction in the publication of scholarly works. Section 200AB does not appear to permit this kind of analysis.

<sup>22</sup> See, for example, *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994)

<sup>23</sup> *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994)

exceptions.<sup>24</sup> In other words, the specific exceptions operate as “safe harbours”, but a use that exceeds the limits set by these exceptions might still be permitted if it is found to be “fair”.

- Currently, the permitted exceptions to the anti-circumvention regime in the Act do not include an exception to circumvent a TPM for the any purpose that would otherwise be permitted under s 200AB. This is in contrast with the US, where certain users (including universities) are permitted to circumvent TPMs for the purposes of engaging in some uses in reliance on fair use.

How do these differences play out in practice?

Activity	Australia - s 200AB	US - fair use
University library copying parts of works for inclusion on an e-reserve that is available to be accessed by students	No scope to rely on s 200AB as another exception or limitation applies. Can only be done in reliance on the educational statutory licence in Part VB of the Act and must therefore be paid for.	May come within fair use. Fair use is not automatically ruled out just because a licence is available. <sup>25</sup>
Library or archive copying published works, films etc for the purpose of preservation before the works are damaged	<p>Exceptions in ss 51A and 110B of the Act allow libraries and archives to copy published works for preservation purposes, but they can only be relied on (a) if a work is already damaged or deteriorating and (b) if a copy of the work is not available commercially for a reasonable price.</p> <p>Even if a copy is not available commercially for a reasonable price, the likely effect of s 200AB(6)(b) is that s 200AB cannot be relied on. Alternatively, even if s 200AB(6)(b) was thought not to prevent reliance on s 200AB, there is a real prospect that the “special case” requirement would rule</p>	Libraries and archives can rely on fair use to undertake pre-emptive preservation copying. This is notwithstanding that the US Copyright Act contains an express exception, in similar terms to s 51 of our Act, that does not permit preemptive preservation of works that have not yet begun to deteriorate. <sup>26</sup>

<sup>24</sup> For a recent example of this see an order by US District Judge Harold Baer in *The Authors Guild Inc et al v Hathi Trust et al United States District Court Southern District of New York* 11 CV 6351 (HB). In this case, rights holders submitted that the systematic digital scanning of books by the Hathi Trust is incapable of coming within the fair use exception. This was based partly on an argument that fair use could not be relied on to exceed the limits that are set out in s 108 of the *Copyright Act*, which permits libraries to make limited copies of works in certain circumstances. The judge rejected this, holding that there was nothing preventing a user from relying on fair use for uses that exceeded the limits set by more specific exceptions.

<sup>25</sup> See *Cambridge University Press et al v Georgia State University et al*, US District Court for the Northern District of Georgia (May 11 2012). See also *Fair Use for Academic and Research Libraries* (January 2012) <<http://www.arl.org/bm-doc/code-of-best-practices-fair-use.pdf>>

<sup>26</sup> Ibid

	out ongoing or systematic preservation projects.	
Library making copy of a work for a user who requests for the copy for the purpose of reporting news	An exception in s 49 of the Act allows libraries to copy on behalf of users, but only for the purpose of the user's own research or study. Section 49 does not permit a library to make a copy for a user who requests this for another fair dealing purpose such reporting news.  It is possible that the effect of s 200AB(6)(b) is that s 200AB cannot be relied on to meet the user's request.	Libraries can rely on fair use to provide users with copies to be used for the user's own fair use purposes.
Library or university creating a database of works to enable academics and other users to perform computerised analysis etc (ie text mining)	Educational institutions can only rely on s 200AB for the purpose of "giving educational instruction": s 200AB is unlikely to apply.  Libraries can rely on s 200AB for the purpose of "maintaining or operating the library": s 200AB is unlikely to apply.	US courts have applied fair use to non-consumptive, transformative uses, such as operating a search engine. Libraries and universities rely on this fair use case law when digitise works for the purpose of enabling text mining, computerised analysis etc. <sup>27</sup>

#### 4. Would a fair use exception comply with the three step test?

The decision to incorporate the language of the three step test into s 200AB appears to have been borne out of concern by the Government in 2006 that a flexible, open-ended exception risked being in breach of the three step test.

These concerns may not be well founded in 2012. Since the introduction of s 200AB, there has been growing international acceptance of the need for flexible exceptions in a rapidly evolving technological environment. Along with the US, Israel, Singapore, South Korea and The Philippines now have a flexible, open ended fair use exception, and other countries, including The Netherlands and Ireland, are considering the same.

While it is beyond the scope of this paper to undertake a thorough analysis of the three step test, there is strong support for the view that a fair use exception is three step compliant. In particular, the work undertaken by Dr Martin Senftleben, which included a detailed study of the negotiations that led to the three step test, supports the view that the three step test can accommodate an open ended exception.<sup>28</sup> Dr

<sup>27</sup> See *Ibid*. See also *The Authors Guild Inc et al v HathiTrust et al*. 11 CV 6351 (HB)

<sup>28</sup> See Senftleben, above n9

Senftleben has shown that the test was intended to reconcile the many different types of exceptions that already existed when it was introduced, and to be an abstract, open formula that could accommodate a "wide range of exceptions". He says:

*"A comparison of the various observations made by the member countries elicits the specific quality of the abstract formula...: due to its openness, it gains the capacity to encompass a wide range of exceptions and forms a proper basis for the reconciliation of contrary opinions."*

It is also significant that in the many hearings leading up to United States becoming a signatory to the Berne Treaty, no concerns regarding fair use were raised by any of the WIPO and European copyright experts who took part. The then WIPO Director-General Arpad Bogsch said that the only aspect of the United States copyright law that made it incompatible with the Berne Convention was the notice and registration requirements that existed at that time.<sup>29</sup> Fair use was not raised as a concern in this regard.

Finally, on the question of whether fair use is three step complaint, it is interesting to note that Dr Emily Hudson has suggested that an exception such as 200AB that merely incorporates the language of the three step test might *itself* be non-compliant on the basis that it might be thought to be insufficient interpretative guidance to courts and users regarding the scope of the exception.<sup>30</sup>

## **Conclusion**

Six years after its introduction, Australian libraries, archives, schools, universities and cultural institutions still struggle to use s 200AB. While this can to some extent be explained by the risk averse nature of these organisations, this does not tell the full story.

The incorporation of the three step test in s 200AB has led to great confusion and uncertainty. Our analysis, based on information obtained in consultations with stakeholders, suggests that this is a greater factor in the lack of adoption of s 200AB than cultural factors alone.

Stakeholders expressed a natural affinity and comfort with the type of fairness analysis required by provisions such as fair use and fair dealing. It was generally considered by participants that a fair use provision would be significantly easier and more certain to apply in practice than s 200AB.

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<sup>29</sup> Patry, Fair Use, the Three-Step Test, and the Counter-Reformation, above n10

<sup>30</sup> Hudson, E. J. *Copyright Exceptions: The Experiences of Cultural Institutions in the United States, Canada and Australia*, Law PhD thesis (The University of Melbourne, 2011), 29

Our analysis suggests that a fair use exception would provide greater flexibility for these users.

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