

New disability provisions in the Copyright Act

In 2017 the Australian government introduced major changes to the disability access provisions of the Australian Copyright Act, as part of implementation of Australia's obligations under the [Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled](#) (also known as the Marrakesh Treaty). Australia was a founding member of the Marrakesh Treaty, and has always been one of its strong champions. As such, the changes aim to be international best practice to allow Australians with a disability to have equitable access to copyright material.

The changes, which were introduced by the [Copyright Amendment \(Disability Access and Other Measures\) Act 2017](#), replace Australia's previous accessibility provisions with two new provisions that are simpler, broader and more efficient. These new provisions are an exception for institutions assisting those with a disability (s 113F) and a new fair dealing for assisting someone with a disability (s 113E).

Exception for institutions providing access to those with a disability

The institutions exception replaces the previous print and intellectual disability statutory licences (ss 135ZN–ZT), which were complex, bureaucratic, didn't apply to all copyright materials or all activities, and were difficult to apply. The new provision improves on the existing by:

- extending the rights to people with any disability, as defined by the [Disability Discrimination Act 1992](#). This is perhaps the biggest change of the Act, and includes not only the print and vision impaired, but also those who are deaf, have learning or intellectual disabilities, physical disabilities that stop them from being able to make use of works, or even temporary disabilities, such as temporary paralysis or broken limbs;
- expanding accessibility rights to cover any activity and any material, with the same rules applying no matter what you want access to and what you need to do it;



- removing reporting and administrative requirements that had, for example, lead to inefficiencies such as universities destroying accessible copies made for one student and remaking them for the next;
- clarifying confusion around the previous provisions' application eg making it clear that even if material is available in one accessible format (eg as an ebook) it can still be converted to another accessible format (eg DAISY) if that is what the person in question needs;
- clearly allowing the import and export of accessible works. This means that if an institution wants to provide an accessible copy to a client, and a copy in the required format is available in a repository in, say, Spain, they can import the work from Spain rather than having to convert it themselves. This will be a significant cost saving, and has the potential to vastly increase the number of accessible works available to Australians, which is currently estimated to be [5–7% of published works](#).

The two important limits on this otherwise very broad exception are:

- the material can only be reproduced etc if it isn't available in a reasonable time at an ordinary commercial price in the required form – however, note that it must be available in the specific form required by the client, not just any accessible form; and
- it only applies to educational institutions and non-profits with a “principal function” of assisting those with a disability – however, the [Explanatory Memorandum](#) that accompanies the Act makes it clear that it doesn't have to be the only “principal function” of the organisation. It provides libraries and archives [check others] as examples of institutions that are likely to satisfy this test.

The good news: if your use isn't covered by this exception - either because you aren't a qualifying institution, or because of the commercial availability limitation - it might still be permitted by the second provision.

Fair dealing for the purpose of access by someone with a disability

The second of the two new exceptions is a new fair dealing for the purpose of access by someone with a disability (s 113E). It replaces the flexible dealing exception in the previous s 200AB(d) and is the groundbreaking part of the new Australian provisions – as far as we're aware, short of those countries that have a fair use exception, no other country has such a potentially broad and flexible provision to provide equitable access for all citizens.

The fair dealing provision basically says that you can do anything with copyright material as long as it is for the purpose of providing access to a person with a disability and it is fair. The advantages of this are:

- Like the institutional provision, it can apply to any use, any material, and any disability; but

- Unlike the above provision, anyone can use it – libraries and archives, private individuals, even commercial companies;
- There is no commercial availability limitation, no limit on commercial activities, no requirement to limit access to specific people – although all of these might be factors that are considered in deciding whether the use is fair.

To help you determine whether your use is "fair", the legislation lists the following factors for consideration:

- The nature of the dealing eg what are you doing? Is your use commercial or non-commercial? Is it large scale or small?
- The nature of the material eg is it old or new? Published or unpublished?
- The effect of the dealing on the market for or value of the work eg are you replacing a sale for the publisher of the work?
- The amount being copied eg are you copying all or part of the work? Are you copying more than you need? Importantly, the explanatory memorandum makes it clear that for disability access, it will often be fair to copy the entire work.

The fair dealing exception is likely to be extremely useful to fill gaps in the current market, where materials just aren't available for your purposes, either because they aren't in the right format, or because there are restrictions on them in that format that make them unsuitable. But it's important to remember that if there's a commercially available copy that provides the functionality you need, it's usually going to be cheaper, quicker and easier to just purchase it than to make your own. So sales of accessible books should continue.

The great thing about the fair dealing provision is that it provides the room you need when the market doesn't provide a solution, to deal with whatever circumstances arise. The government has also made it clear that you should not be too conservative in your interpretation of the provisions, especially of the new fair dealing provision. As the Explanatory Memorandum says:

Section 113E is intended to ... enable a person with a disability to enjoy equitable access to copyright material in the same way as a person without a disability. This provision is deliberately flexible and is intended to encourage creativity, innovation and responsiveness to relevant technological advances within the disability sector. (p.14)

So when it comes to applying the fair dealing in practice, do consider fairness, and do check if you can buy an accessible copy more easily. But other than that, a good place to start could be to ask "how can clients without a disability access and use the work?" If a

client with a disability can't do the same things and needs to, you should be able to do what's necessary to replicate the experience for them.

The [Australian Libraries Copyright Committee](http://libcopyright.org.au) is the primary policy body for the discussion of copyright issues affecting libraries and archives in Australia. For more information and resources on copyright for libraries, including regular training opportunities throughout Australia, see <http://libcopyright.org.au>.