



## Fair Dealing: What Can I Use Without Permission?

The *Copyright Act 1968* (Cth) allows people to use copyright material without the copyright owner's permission in certain situations, including fair dealing for specific purposes.

**The purpose of this information sheet is to give general introductory information about copyright. If you need to know how the law applies in a particular situation, please get advice from a lawyer.**

We have a range of information sheets on a number of topics and publish books that analyse specific areas of the law. We can provide this information sheet in an accessible format on request. Check our website for information about our publications [here](#) and details of our seminar program [here](#).

### Key points

- The *Copyright Act* contains certain exceptions to copyright infringement for fair dealing with copyright material for specified purposes.
- Unlike United States copyright law, Australian law does not have a general fair use defence to a claim of copyright infringement.

### When are the fair dealing exceptions relevant?

The fair dealing exceptions are relevant when you are using copyright material in one of the exclusive ways reserved to the copyright owner (e.g. reproduction) and:

- a) copyright has not expired (see our information sheet [Duration of Copyright](#));
- b) you do not have permission from the copyright owner (see our information sheet [Permission: Do I Need It?](#)); and
- c) you are using the whole or a substantial part of the copyright material (see our information sheet [Quotes and Extracts](#)).

For your use not to be considered an infringement of copyright, it must fall within an exception to copyright infringement. A list of the exceptions to copyright infringement in the *Copyright Act* may be found in our information sheet [Exceptions to Copyright Infringement](#).

### The fair dealing exceptions to copyright infringement

There is no general exception for using copyright material simply because you think it is fair or because you are not making a profit. The *Copyright Act* allows copyright material to be used without permission only if your use is a fair dealing for one of the following purposes:

- research or study
- criticism or review
- parody or satire

- reporting news
- enabling a person with a disability to access the material
- professional advice by a lawyer, patent attorney or trade mark attorney

### What does “fair dealing” mean?

In this context, a dealing with copyright material is use of the material in any of the ways reserved to the copyright owner. Whether a dealing is “fair” depends on the circumstances of the case. In *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (‘The Panel Case’), the primary judge stated some principles in relation to fair dealing:

- fair dealing involves questions of degree and impression;
- fair dealing is to be judged by the criterion of a fair minded and honest person; and
- fair dealing is an abstract concept.

Fairness is to be judged objectively in relation to the relevant purpose. Factors that may be taken into account to determine whether a use is fair include whether the person using the material is doing so for commercial purposes and whether the copyright owner is out of pocket from the use (e.g. where a person copies the whole of a work that is available for sale). The mere fact that the person using the material is not making a profit does not make it fair.

In general, a person or organisation can rely on a fair dealing exception only for their own use of copyright material. For example, it would not be regarded as a fair dealing for criticism or review to reproduce a photograph and invite other people to critique it because the criticism or review should be by the person making the reproduction.

### Fair dealing for research or study

Use of copyright material for the purpose of research or study will not infringe copyright, provided the use is “fair”. The *Copyright Act* states that if you use less than a certain amount of a copyright item for research or study, the use is deemed to be fair (e.g. 10% of the number of pages in an edition or a single chapter). If the amount used exceeds these limits, the Act sets out factors to be taken into account to work out whether the use of the material is “fair”, if you are reproducing the material.

This provision is discussed in our information sheet [Research or Study](#).

### Fair dealing for criticism or review

A person can use copyright material for the purpose of criticism or review without infringing copyright, provided that they acknowledge the author and title of the work and the dealing is “fair”. In assessing whether a defence of fair dealing exists, it is necessary to have regard to the true purpose of the critical work.

In *Time Warner Entertainment Co Ltd v Channel 4 Television Corporation plc* (1993) it was said that the question to be answered is whether the program incorporating the infringing material is a genuine piece of criticism or review or an attempt to dress up the infringement of another's copyright in the guise of criticism and so profit unfairly from another's work.

In *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (‘The Panel Case’), the primary judge stated some principles in relation to fair dealing for criticism or review:

- criticism and review are words of wide and indefinite scope which should be interpreted liberally;
- criticism and review involve the passing of judgment and may be strongly expressed;
- criticism and review must be genuine and not a pretence for some other form of purpose (but if genuine need not necessarily be balanced);

- an oblique or hidden motive may disqualify reliance upon criticism and review, particularly where the copyright infringer is a trade rival who uses the copyright subject matter for its own benefit or in a dissembling way (the path of criticism is a public way); and
- criticism and review extends to thoughts underlying the expression of the copyright works or subject matter.

The criticism or review may relate to the work being used or to other material. For example, television film reviewers may show clips from other films as well as the one they are reviewing, in making their criticism or review. The exception can apply where the criticism or review takes place in a commercial context, such as in published books or newspapers or on commercial television.

The purpose of criticism or review must be genuine. If the person has other motives – especially if the motives involve using the material to make a profit or using a competitor’s material to divert customers from the competitor – the fact that they have also engaged in a form of criticism or review is not enough to prevent the use from infringing copyright.

### **Fair dealing for parody or satire**

The terms parody and satire are not defined in the *Copyright Act*. The courts have said that:

- a parody is, at its essence, where a work is imitated or evoked in a humorous way yet with such revision and alteration as to produce an original work; and
- a satire is a form of ironic, sarcastic, scornful, derisive or ridiculing criticism of vice, folly or abuse, but not by way of an imitation or take-off.

The difference between parody and satire may be of importance. Parody alone seems to require humour, while satire may require criticism. When the satire defence was created, it was distinguished from parody by its ability to make a greater social commentary. (In contrast, the United States parody fair use defence seems to require a comment on the original work or the original work’s creator in some capacity, see *Campbell v. Acuff-Rose Music, Inc.* (aka the ‘Pretty Woman Case’).

Regardless of whether a purpose is parody or satire, this exception can only be relied on if parody or satire is the legitimate purpose of the author; the author cannot simply profit from the original work’s popularity. While a work might be seen as humorous, satirical or parodic, it is not enough to have elements of parody or satire when the purpose is purely commercial. For example, in the *Pokemon v Redbubble* [2017] case clothing with the likeness of one of the characters, with a slight parodic difference, was considered to be created for commercial purposes despite its parodic elements.

The use of copyright material for parody or satire must also be fair. Relevant factors that could be considered by courts might include:

- how much of the copyright material is used;
- the context in which the parody or satire is used;
- the necessity of the copyright material’s use in the work;
- whether there is a significant adverse effect on the original work (financial or otherwise); and
- whether there is a significant adverse effect on the original artist (financial or otherwise).

The relationship between fair dealing for parody or satire and moral rights is yet to be fully determined, however in other jurisdictions it appears that moral rights would be taken into account in considering whether the parody or satire is fair. In a French case, the metaphorical use of copyrighted material in parody or satire was found, because of the

humorous purpose of the cartoon, not to infringe moral rights. While there is no alteration of the moral rights of creators in this situation, the exception's creation recognises the social function of parody and satire to comment on and criticise both creators and society. The exception does not directly affect a creator's right to take legal action if his or her work is treated in a derogatory way, infringing the creator's moral right of integrity. However, in many cases, the use of a copyright work for parodic purposes may be defensible as reasonable under the moral rights provisions.

It may not always be so clear that use of a copyright work for satiric purposes is reasonable because, unlike parody, the object of satire is generally not the copyright material itself or its creators. The copyright material used may enhance a work that has a satirical purpose but is unlikely to be necessary for the satirical purpose.

### Fair dealing for reporting news

Copyright material may be used in reporting news in a newspaper, magazine (or similar periodical) or film, or by means of a broadcast, provided that the use is "fair". The author and title of the work must be acknowledged.

In *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* ('The Panel Case'), the primary judge stated some principles in relation to fair dealing for purpose of reporting news:

- news is not restricted to current events; and
- news may involve the use of humour, though the distinction between news and entertainment may be difficult to determine in particular situations.

Music in news reports is not covered by the provision, unless the playing of the music is part of the news being reported. The use of music and sound recordings in this context is usually covered by broadcasters' licences from the Australasian Performing Right Association and the Phonographic Performance Company of Australia. For further information on these licences, see our information sheet [Copyright Collecting Societies](#).

News is not restricted to current events, for example old material or footage may be relevant to current news events. Investigative journalists may be able to use copyright material they have discovered that relates to past events under this provision.

In looking at whether a person's use of copyright material comes within the exception of fair dealing for reporting news, courts are likely to require more than simply a connection with a newsworthy topic. The crucial element in determining whether the exception applies seems to be whether the **primary purpose** is to report or comment on news. Although courts have held that reporting news may involve the use of humour, it seems that where a court considers the purpose of using the material is primarily to entertain, the presence of newsworthy issues is not sufficient to make the use a fair dealing.

### Fair dealing for access by persons with a disability

The *Copyright Amendment (Disability Access and Other Measures) Act 2017* introduced two exceptions regarding access for people with a disability, in line with Australia's obligations under the Marrakesh Treaty. They are:

- a fair dealing exception for the purpose of giving one or more people with a disability access to the material (section 113E); and
- an exception allowing certain organisations to use material for the purpose of assisting people with a disability to access material in their required format (section 113F).

For the purpose of these exceptions, a person with a disability means a disability that causes difficulty in reading, viewing, hearing or comprehending copyright material in a particular

form. This means that, for example, a person with a hearing disability who is unable to watch a movie without closed captions, or a person with an intellectual disability who cannot easily read text, can use copyright material under this exception, however a person who is mobility disabled but has no difficulty reading or listening will not.

In order for the section 113E exception to apply, the use of copyright material must be for the purpose of access by people with a disability. In addition, section 113E requires that the following fairness factors be considered:

- a) the nature of the copyright material (e.g. is it published or unpublished);
- b) the effect on the potential market or value of the material (e.g. is the use likely to harm the market for the material); and
- c) the amount and substantiality of the dealing (e.g. how many copies will be made).

In order for the section 113F exception to apply, the user must be an organisation that assists people with a disability. This includes educational institutions and not-for-profit organisations with a primary function of providing assistance to persons with a disability. Such organisations can provide copyright material in an accessible format to people with disabilities, however unlike section 113E, they must first check whether an accessible version can be obtained on the commercial market. If an accessible version is not commercially available (i.e. cannot be obtained in the appropriate format within a reasonable time at an ordinary commercial price), then the organisation may itself make an accessible format copy and supply it to the person with a disability under section 113F.

Finally, the exceptions also extend to the importation or exportation of copyright material in an accessible format, provided that the copy is not infringing under Australian law and is not imported/exported for commercial purposes.

### **Fair dealing for professional advice**

It is not an infringement of copyright to use copyright material for the purpose of giving professional advice by a lawyer, patent attorney or trade mark attorney. Again, the use of the material must genuinely be for the purpose of giving such advice and must be "fair". For example, if an item is available for sale, it is unlikely that this provision would allow a person to copy the entire item for the purposes of legal advice. There are also special exceptions allowing use of copyright material for the purpose of legal proceedings (e.g. for use in court).

### **Frequently asked questions (FAQs)**

#### ***Someone has reproduced my work without my permission and is claiming that their use is a fair dealing. What can I do?***

In this case, you should try to find out the exact circumstances of the person's use of your work and the basis on which he or she considers the use was a fair dealing. Before taking legal action, you should seek legal advice. For further guidance on infringement, see our information sheet [Infringement: What Can I Do?](#)

#### ***Can we reproduce material in an educational textbook for users of the textbook to critique?***

The reproduction may be a fair dealing if the textbook criticises or reviews the material. If, however, there is no criticism or review in the textbook, and the criticism or review is to be done by people using the textbook, then the reproduction would not be fair dealing for criticism or review and permission from the copyright owner would be needed.

#### ***Can our photocopying business copy for students for their research or study?***

A photocopying business is not entitled to photocopy material requested by students for their research or study. Even if the person requesting the copy genuinely needs it for their research or study, the purpose of the photocopying business in making the copy would be to make a profit and it could not rely on a fair dealing defence. However, it might be able to obtain a licence from Copyright Agency allowing it to make some copies in these circumstances (for example, 10% or one chapter of a book).

***Is it fair dealing for research or study if I copy 10 per cent of a literary work or 30 seconds of a sound recording?***

The *Copyright Act* deems copying for research or study of 10 per cent of the number of pages or a single chapter to be a “reasonable portion” and a fair dealing. The *Copyright Act* does not have a similar deemed amount for sound recordings. Our information sheet [Research or Study](#) provides further guidance on this issue.

***Can our school make an audio version of a book for students who are blind?***

The fair dealing exception for the purpose of providing access to people with a disability allows educational institutions to make accessible copies of copyright material for print-disabled users, under some conditions. If you can easily purchase an audio version of the book, either in Australia or from overseas on the Internet, you should purchase that audio copy. If no audio version exists, then you may make your own audio version of the book for those students.

***What is fair use and how is it different to fair dealing?***

Fair use is an exception in United States copyright law and applies only in that jurisdiction. Fair use applies more broadly than fair dealing but is less certain.

In March 2018, the Department of Communications and the Arts issued a Copyright Modernisation Consultation Paper, beginning the Department’s consultation on reform options following the Australian Government’s response to the Final Report of the Productivity Commission Inquiry into Australia’s Intellectual Property Arrangements. It asked for views on areas of the *Copyright Act* that may benefit from modernisation including flexible exceptions to copyright infringement. For further guidance see our information sheet [Fair Use and Copyright Modernisation](#).

***Is it fair dealing if I copy material from the internet?***

You should first check the website for any statements about copyright which apply to the material you want to copy – the copyright owner may expressly allow you to print and/or download material, possibly under stated conditions. Otherwise, you may print and/or save material if:

- it is for one of the fair dealing purposes; and
- the copying is fair, having regard to the five fairness factors.

It is unlikely to be either for research or study, or fair, to provide copies of the material you have downloaded to other people (e.g. as an email attachment or by posting it on Facebook).

***I want to make a list of my favourite quotes by my favourite authors and put it on my website and if it goes well, publish a book – is this fair dealing?***

There are some preliminary questions you will need to ask:

- am I taking a substantial part of another person's copyright material – see our information sheet [Quotes and Extracts](#)
- if I am taking a substantial part, is the proposed use a fair dealing?

If you aren't commenting on the quotes, making parodies or satire, or reporting the news, it is unlikely that putting the quotes on the website would be a fair dealing. Furthermore, publishing a book of quotes is unlikely to be a fair dealing. For further guidance on parody and satire, see our information sheet [Parodies, Satire and Jokes](#).

### Further information and advice

An Australian Copyright Council lawyer may be able to give you free preliminary legal advice about an issue not addressed in an information sheet. This service is primarily for professional creators and arts organisations but is also available to staff of educational institutions and libraries. For further information about the service, see the Legal Advice section of our website [copyright.org.au](http://copyright.org.au).

### Reproducing this information sheet

Our information sheets are regularly updated. Please check our website to ensure you are accessing the most current version. Should you wish to use this information sheet for any purpose other than your reference, please contact us for assistance.

### About us

The Australian Copyright Council is an independent, non-profit organisation. Founded in 1968, we represent the peak bodies for professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies.

We are advocates for the contribution of creators to Australia's culture and economy; the importance of copyright for the common good. We work to promote understanding of copyright law and its application, lobby for appropriate law reform and foster collaboration between content creators and consumers.

We provide easily accessible and affordable practical, user-friendly information, legal advice education and forums on Australian copyright law for content creators and consumers.

Australian Copyright Council respectfully acknowledges the Gadigal people, the owners and custodians of the land on which our office is located. We pay our respects to the elders and to all First Nations elders: past, present and emerging. This always was and always will be Aboriginal land.



Australian Government



*The Australian Copyright Council has been assisted by the Australian Government through the Australia Council, its arts funding and advisory body.*

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