

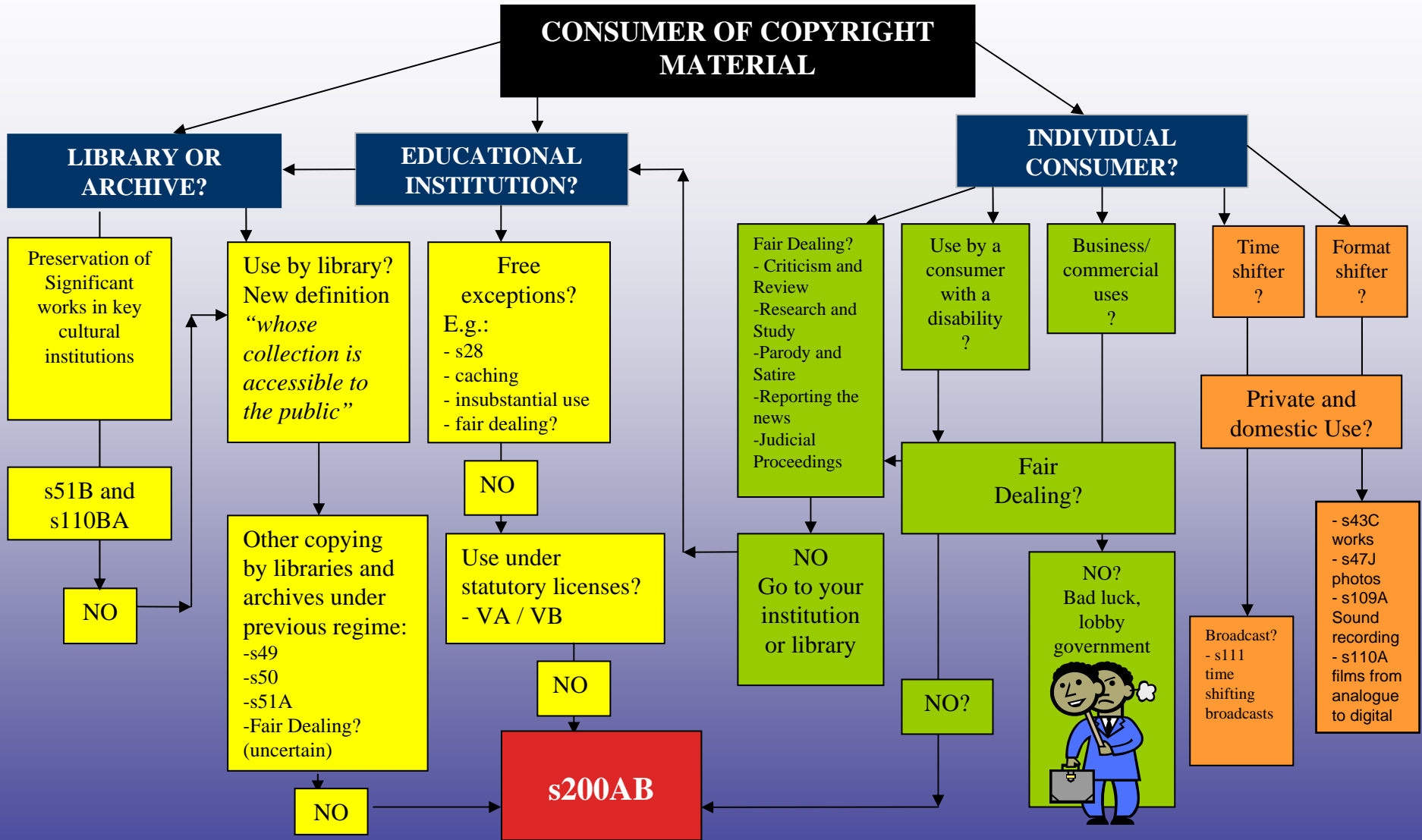
A NEW ERA OF COPYRIGHT:

Fair dealing,
Flexible dealing,
and other new
exceptions

Introduction

- Part I: Overview of the Exceptions Legislation
- Part II: Interpreting 200 AB

WHICH EXCEPTION APPLIES?



s200AB

- *Explanatory Memorandum:*

“The intention is that s 200 AB 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”.

S. 40(2) Flexibility based on fairness

- (a) the purpose and character of the dealing;
- (b) the nature of the work or adaptation;
- (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation;
and
- (e) in a case where part only of the work or adaptation is reproduced--the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

S. 200AB: Flexible Dealing

Subsection 1:

Use of works and other subject-matter for certain purposes

- (1) The copyright in a work or other subject-matter is not infringed by **a use** of the work or other subject-matter if **all** the following conditions exist:
 - (a) the circumstances of the use (including those described in paragraphs (b), (c) and (d)) amount to a special case;
 - (b) the use is covered by subsection (2), (3) or (4);
 - (c) the use does not conflict with a normal exploitation of the work other subject-matter; OR
 - (d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.

s. 200AB = 3 Steps + Additional Modifications & Restrictions

The 3 steps are limited by:

- ▣ who can use the provision
 - Library or Archive
 - Educational Institution
 - Disabled / those assisting

- ▣ for what purposes &
 - Maintenance
 - Educational Instruction
 - Reduce difficulty in reading / viewing / hearing

- ▣ the kinds of uses
 - Not 'For Profit'
 - Not 'Commercial Advantage'?

S. 200AB: Flexible Dealing

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 - (b) the use is covered by subsection (2), (3) or (4);
 - (c) the use does not **conflict with a normal exploitation** of the work other subject-matter; OR
 - (d) the use does not **unreasonably prejudice the legitimate interests** of the owner of the copyright.

Step 1: 'Certain Special Cases'

Explanatory memorandum to Copyright Amendment Bill 2006:

“This condition is intended to ensure that the use is narrow in a quantitative as well as qualitative sense”

WTO Panel:

“clearly defined and narrow in its scope and reach”

Step 2: 'the use does not conflict with a normal exploitation of the work or other subject-matter'

Explanatory memorandum to Copyright Amendment Bill 2006:

“whether the use **closes off** ways that copyright holders *normally* extract economic value from copyright in the Australian market or enters into economic competition with those ways, thereby ‘depriving copyright holders of significant or tangible commercial gains. Forms of exploitation which, **with a certain degree of likelihood**, could acquire **Considerable economic or practical importance** may also be considered”.

What is “Normal” Exploitation:

1. **Empirical definition:** Does the exception displace a current market?
2. **Normative definition:** ‘conforming to a type of standard’ – Considerations of the objectives of copyright and the protection of exclusive rights

Is the particular use one that the copyright owner *should* control, or is there some conflicting interest justifying this not being so?

Step 3: 'the use does not unreasonably prejudice the legitimate interests of the copyright holder'

Explanatory memorandum to Copyright Amendment Bill 2006:

“this condition requires an assessment of the *legitimate* economic and non economic interests of the copyright owner”.

WTO Panel, Homestyle case:

“First, one has to define what are the ‘interests’ of right holders at stake and which attributes make them ‘legitimate’. Then, it is necessary to develop an interpretation of the term ‘prejudice’ and what amount of it reaches a level that should be considered ‘unreasonable’.”

- Does the exception or limitation cause or have the potential to cause an *unreasonable* loss of income to the copyright holder? *Para 6.229*
- ‘**reasonableness**’ requires weighing of conflicting user & owner interests

Conclusion

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