Disability Access Measures

The Copyright Act contains two non-remunerable disability copying exceptions:

- Use of copyright material by organisations assisting persons with a disability; and
- Fair dealing for the purpose of assisting persons with a disability.

Both of these exceptions can be used by TAFEs and schools to assist students with a disability, but the circumstances in which they apply differ.

Disability is defined as “a disability that causes the person difficulty in reading, viewing, hearing or comprehending copyright material in a particular form”. This would include students with vision impairment, students who are unable to hold or manipulate books, students with an intellectual disability and students with general learning difficulties such as dyslexia.

These guidelines explain how each of these exceptions works (and the difference between them), as well as the interaction between the disability copying exceptions and the statutory licence.

TAFEs and schools do not need to rely on the statutory text and artistic works or broadcast licences for any copying that could be done in reliance on either of the disability exceptions.

Use of copyright material by organisations assisting persons with a disability: s 113F (The organisational disability exception)

The organisational disability exception in s 113F allows TAFEs and schools to make accessible format copies for students with a disability if the copyright material is not commercially available in the format required by the student and with the appropriate features they require. There is no restriction on the kind of format that can be created under this exception. It could include, for example, converting a book into Easy English, providing captions, providing audio-descriptions, scanning for use with other assistive technology and making necessary adjustments to enable a student to adjust font size or colour.

The commercial availability test can be applied to the format that the student requires; i.e. copies can be made in a format that is most suitable for the particular student, even if a copy of the work can be purchased in a different but unsuitable format.

Before relying on the organisational disability exception, a TAFE or school must be “satisfied that the material (or a relevant part of the material) cannot be obtained in [the required] format within a reasonable time at an ordinary commercial price”. This condition means that you should
take steps to determine whether the work is available for purchase. The question of what amounts to a "reasonable time" will depend on the particular circumstances in each case. If, for example, material in an accessible format is required for a particular course at very short notice, it would be permissible to rely on the exception if no commercially available copy could be sourced at such short notice.

The organisational disability exception applies to all copyright material: i.e. text and artistic works as well as audio-visual content such as films and sound recordings.

There is no obligation to mark copies, but NCU suggests that it would be good practice to include the following notice where reasonably practicable:

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This material has been copied/made available to you under s 113F of the Copyright Act. Any further reproduction or communication of this material by you may be the subject of copyright protection under the Act. Do not remove this notice
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It is permissible to circumvent a technological protection measure (TPM) in order to rely on the organisational disability exception.

**Fair dealing for the purpose of access by persons with a disability: s 113E (the fair dealing for disability exception)**

The fair dealing for disability exception in s 113F permits TAFEs and schools to make “fair dealings” of copyright material for the purpose of providing students with a disability to have access to the content.

For the fair dealing for disability exception to apply, you will need to be show:

a. that the purpose of the dealing is for one or more persons with a disability having access to the copyright material; and
b. that the dealing was fair.

There is a list of four “fairness factors” that must be taken into account when determining if the use was “fair”:

- the purpose and character of the dealing
- the nature of the copyright material
- the effect of the dealing upon the potential market for, or value of, the material;
- if only part of the material is dealt with - the amount and substantiality of the part dealt with, taken in relation to the whole material.
In applying these factors, you should have regard to the following:

- Each factor should be considered.

- The **first** factor: the purpose and character of the dealing. If the use is made to assist a person with a disability to enjoy copyright material, this factor is likely to be satisfied.

- The **second** factor: the nature of the copyright material. Whether material is in print and available, as well as if it is published or unpublished, are relevant issues for consideration.

- The **third** factor: the effect of the dealing upon the potential market for, or value of the material. This factor requires an analysis of whether the proposed use of copyright material is reasonably fair with regard to the interests of the copyright holder. If material is commercially available, factors one, two and four become more important, noting that a use may still be considered fair even if the material is commercially available. *Only substantial market harm from the individual use should be considered unfair.*

- The **fourth** factor: if only part of the material is dealt with, the amount and substantiality of the part dealt with, taken in relation to the whole material. This factor requires consideration of the portion of the material to be used or quantity of copies to be made. A copy of the whole copyright material may be required by persons with a disability where the material is not available in the format required or with necessary accessibility features.

**Interaction between the two disability copying exceptions**

When considering which - if any - of the two disability exceptions applies to what you want to do, you need to ask: is my intended use likely to satisfy the fairness factors in the fair dealing for disability exception? If so, you can rely on that exception regardless of whether the material that your student requires can be purchased in the required format.

If your intended use would not come within the fair dealing for disability exception, then you need to consider whether the organisation disability exception would apply. If the copyright material your student requires can be obtained in the required format within a reasonable time at an ordinary commercial price, you cannot rely on this exception. In this case, your only option will be to purchase a copy of the content you require.