

# **Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled**

## **Introduction**

- 2.1 The *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (the proposed Treaty) is intended to make books and other printed materials available in formats accessible to a person with a print disability, while balancing the commercial interests of the copyright holders.<sup>1</sup>
- 2.2 The Attorney General's Department claims that there are 357,000 blind or visually impaired people in Australia. Only five per cent of print material is available in a format these people can access.<sup>2</sup>
- 2.3 According to the Department:
- The object of the Marrakesh treaty is simple: improving the availability of books in an accessible format so that they may be enjoyed by as many people as possible. It does so by removing unnecessary barriers to the supply of accessible format material.<sup>3</sup>

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1 National Interest Analysis [2015] ATNIA 9, *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* [2014] ATNIF 15 (hereafter referred to as the NIA), paras 6 and 7.

2 Mr Andrew Walter, Assistant Secretary, Civil Law Division, Commercial and Administrative Law Branch, Attorney-General's Department, *Committee Hansard*, Canberra, 10 August 2015, p. 1.

3 Mr Walter, *Committee Hansard*, Canberra, 10 August 2015, p. 1.

- 2.4 The NIA states that the *Copyright Act 1968* in its present form is sufficient for Australia to already comply with the provisions of the proposed Treaty.<sup>4</sup>

## Current Copyright Act provisions

- 2.5 The Copyright Act allows certain organisations to reproduce copyrighted works in a format accessible to a person with a print disability without the permission of the copyright owner. Organisations reproducing such works pay for their use. The mechanism by which this works is as follows.
- 2.6 Only organisations declared by the Attorney-General under section 10A of the Copyright Act can reproduce copyrighted works in a format accessible to a person with a print disability.
- 2.7 A print disability is defined in the Copyright Act as blindness, severely impaired eyesight, perceptual disability, or an inability to manipulate books or move eyes for reading.<sup>5</sup>
- 2.8 Declared organisations have a statutory licence that allows the reproduction and communication of literary and dramatic works in certain formats (including sound recording, braille, large print, photographic or electronic formats).<sup>6</sup>
- 2.9 Organisations undertaking this work are required to provide a remuneration notice to the relevant Australian copyright collecting society.<sup>7</sup>
- 2.10 A copyright collecting society functions as a clearing house for the collection and payment of royalties to the owners of copyrighted works.<sup>8</sup> A remuneration notice is a notice provided by an organisation making use of copyrighted material. It includes advice on what the organisation will pay for the use of the copyrighted material, and also acts as a mechanism for advising copyright holders that their work has been used.<sup>9</sup>

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4 NIA, para 24.

5 Section 10 of the *Copyright Act 1968*.

6 NIA, para 26.

7 NIA, para 26.

8 Arts Law Centre of Australia, *Copyright Collecting Societies*, <<http://www.artslaw.com.au/info-sheets/info-sheet/copyright-collecting-societies/>>, accessed 3 August 2015.

9 Section 135G of the *Copyright Act 1968*.

- 2.11 The organisations making use of copyrighted material are required to attribute the licenced copy of the work, and ensure the copy is used by a person with a print disability.<sup>10</sup>
- 2.12 Organisations may also make a copy of a work using a format not specified in their statutory licence using an exemption contained in section 200AB of the Copyright Act. Section 200AB permits an accessible format to be created for a person with a visual disability where no other provisions apply.<sup>11</sup>
- 2.13 The export and import of accessible format works is permitted under the Copyright Act if the activity does not unreasonably prejudice the legitimate interests of the rights holders.<sup>12</sup>

## The Treaty

- 2.14 The proposed Treaty will create an international framework similar to the national framework that exists in Australia. That is, it will allow exemptions to international copyright law so that organisations can reproduce and distribute copyrighted material in formats that are accessible to people with a print disability.<sup>13</sup>
- 2.15 Under the proposed Treaty, a copyrighted work is defined as a literary or artistic work within the meaning of the *Berne Convention of Literary and Artistic Works* that takes the form of text, notation, and related illustrations, whether published or made publically available.<sup>14</sup>
- 2.16 A format accessible to people with a print disability is defined as:  
... a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability...<sup>15</sup>
- 2.17 The proposed Treaty defines a person with a print disability as a person who is:

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10 NIA, para 26.

11 NIA, para 27.

12 NIA, para 27.

13 NIA, para 6.

14 NIA, para 13.

15 *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* [2014] ATNIF 15 (hereafter referred to as the proposed Agreement), Article 2(b).

- blind;
  - has a visual impairment or a perceptual or reading disability which means they are unable to read printed works and which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment; or
  - otherwise unable, through physical disability to hold a book or to focus or move the eyes to the extent that would normally be needed for reading.<sup>16</sup>
- 2.18 The proposed Treaty will require parties to include exemptions in their copyright laws to permit the reproduction of defined works by identified organisations for the use of people with a print disability. The works are to be produced in such a way that they are not changed, except in such a way as to permit their intended use. The works can only be produced on a not-for-profit basis and can only be used by people with a print disability.<sup>17</sup>
- 2.19 Parties to the proposed Treaty can declare an exemption so that reproduction can only occur if the material in the desired format cannot be purchased on commercially reasonable terms. The National Interest Analysis (NIA) indicates that the Australian Government intends to lodge such an exemption.<sup>18</sup>
- 2.20 According to the Attorney General's Department:
- ...What we are trying to avoid is closing off the commercial arrangements where this can occur.<sup>19</sup>
- 2.21 A similar commercially available test already exists under section 135ZP of the Copyright Act. Vision Australia, and the Australian Libraries Copyright Committee and the Australian Digital Alliance, note in their submissions that the commercially available test in the Copyright Act may be too prescriptive to comply with the proposed Treaty.<sup>20</sup>
- 2.22 In particular, the submitters note that the Copyright Act test appears to prevent reproduction of a work in DAISY (structured audio) format if the work is available in spoken word form.<sup>21</sup> The DAISY format includes

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16 The proposed Agreement, Article 3.

17 NIA, para 14.

18 NIA, para 15.

19 Mr Walter, *Committee Hansard*, Canberra, 10 August 2015, p. 2.

20 Vision Australia, *Submission 10*, p 3 and the Australian Libraries Copyright Committee and the Australian Digital Alliance, *Submission 13*, p 3.

21 DAISY, or Digital Access Information System, is a digital talking book format that includes the ability to navigate a book using a table of contents, 'bookmark' the point at which you stop listening, and can store up to 50 hours of material.

helpful tools such as tables of content, section headings, and indexes. These are particularly useful for non-fiction works, where a lack of access to these tools would impair a person's ability to access the work with the same feasibility and comfort as people without a print disability.<sup>22</sup>

2.23 In response, the Attorney General's Department advised:

...what a number of the submissions have highlighted is that those provisions are difficult and they are hard to work with. We think they are compliant with the treaty, but they are difficult for us to interpret, and we work with the act every day. The government has signalled its intention to actually spend a bit of time simplifying those arrangements. The point is that we think we are compliant, but we still think there is room for improvement.<sup>23</sup>

2.24 The proposed Treaty permits organisations reproducing the copyrighted materials to provide them to people with a print disability in another country that is party to the Treaty.<sup>24</sup>

2.25 Mr William Jolly provides an example of how this might be beneficial to Australians with a print disability:

In some fields of study audio books are very complex and therefore expensive to produce. My particular interest is modern physics and cosmology, a proper understanding of which needs knowledge of the underlying mathematical theory and analytic techniques. Many of the superior text and reference books are available to citizens of the United States, read by skilled narrators who can articulate the equations correctly and describe the diagrams clearly. But I am not an American citizen, so I cannot listen to these audio books...<sup>25</sup>

2.26 The Australian Society of Authors expresses concern about how cross border exchange of copyrighted materials is implemented in each party. In particular, the Society is concerned that the definition of 'identified organisation' in the proposed Treaty is not sufficiently precise to prevent differing interpretations between parties.<sup>26</sup>

2.27 In other words, organisations that would not be permitted to reproduce copyrighted works in Australia may be able to do so in other parties to the

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22 Vision Australia, *Submission 10*, p 3 and the Australian Libraries Copyright Committee and the Australian Digital Alliance, *Submission 13*, p 3.

23 Mr Walter, *Committee Hansard*, Canberra, 10 August 2015, p. 3.

24 NIA, para 16.

25 Mr William Jolly, *Submission 14*, p 2.

26 Australian Society of Authors, *Submission 21*, p 2.

- Treaty. The organisations will then be able to supply the works to Australians with a print disability. The Society is concerned that this would effectively circumvent Australian copyright law.<sup>27</sup>
- 2.28 The Australian Society of Authors is also concerned about another aspect of cross border exchange. It states that copyright holders are not required to be notified or to authorise the production and export of copyright material where that production takes place in another party to the proposed Treaty.<sup>28</sup>
- 2.29 In relation to this concern, the Attorney General's Department stated:
- ...the treaty allows us to use the current licensing system that we have in the act, which is set up to provide exactly that mechanism: to link rights holders through a licensing provision to the use of those provisions. I think that is a fairly broad interpretation of the act. I do not think how we give effect to it and how we will continue to give effect to it will lead to that disconnect.<sup>29</sup>
- 2.30 A number of copyrighted works are protected by software, called technological protection measures, that prevents duplication. The proposed Treaty will permit organisations producing works for people with a print disability to circumvent technological protection measures.<sup>30</sup>
- 2.31 The Australian Libraries Copyright Committee, and the Australian Digital Alliance and the Copyright Advisory Group of COAG, argue that the Copyright Act is not compliant with the technological protection measures obligations in the proposed Treaty.
- 2.32 The Copyright Advisory Group argues that the technological protection measures circumvention is not available to organisations making use of the section 200AB copyright exemption to produce material for people with a print disability.<sup>31</sup>
- 2.33 As an example, the Copyright Advisory Council notes that section 200AB is generally used by schools to content shift material for students with a print disability. School materials are increasingly being supplied with technological protection measures, preventing schools from content shifting those materials for students with a print disability.<sup>32</sup>

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27 Australian Society of Authors, *Submission 21*, p 2.

28 Australian Society of Authors, *Submission 21*, p 2.

29 Mr Walter, *Committee Hansard*, Canberra, 10 August 2015, p. 3.

30 The proposed Agreement, Article 7.

31 The Australian Libraries Copyright Committee and the Australian Digital Alliance, *Submission 13*, p 6, and the Copyright Advisory Group of COAG, *Submission 12*, pp 2-3.

32 The Australian Libraries Copyright Committee and the Australian Digital Alliance, *Submission 13*, p 6, and the Copyright Advisory Group of COAG, *Submission 12*, pp 2-3.

2.34 Further, organisations making use of their statutory licence to circumvent technological protection measures are constrained by a prohibition on supplying another person with a circumvention device. In other words, they cannot provide material to a person with a print disability if that material contains a mechanism to overcome technological protection measures.<sup>33</sup>

2.35 In response to concerns about technological protection measures, the Attorney General's Department advised:

We have heard this concern and it is a matter that is being actively considered by the government at this time.<sup>34</sup>

2.36 Further, the Attorney General's Department stated that all that would be needed to allow those who rely on section 200AB to overcome the prohibition on circumventing technological protection measures would be a regulation to that effect. The Department confirmed that the Australian Government was considering making such a regulation.<sup>35</sup>

## Legislative amendment

2.37 The Attorney General's Department pointed out that the Copyright Act will not need to be amended to implement the proposed Treaty, but that consultation with stakeholders following the signing of the proposed Treaty highlighted that there was room to streamline and simplify the existing disability framework in the Copyright Act.<sup>36</sup>

2.38 There are two amendments foreshadowed in the NIA:

- the existing print disability statutory licence mechanism will be replaced by a print disability exemption; and
- the existing print disability mechanism for declaring organisations will be replaced by a fair dealing exemption for disability access. This is expected to provide faster access for individuals.<sup>37</sup>

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33 The Australian Libraries Copyright Committee and the Australian Digital Alliance, *Submission 13*, p 6, and the Copyright Advisory Group of COAG, *Submission 12*, p 3.

34 Mr Walter, *Committee Hansard*, Canberra, 10 August 2015, p. 2.

35 Mr Walter, *Committee Hansard*, Canberra, 10 August 2015, p. 3.

36 Mr Walter, *Committee Hansard*, Canberra, 10 August 2015, p. 1.

37 NIA, paras 31-33.

## Conclusion

- 2.39 The Committee supports Australia's ratification of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* and recommends that binding treaty action be taken.

### Recommendation 1

- 2.40 **The Committee supports the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* and recommends that binding treaty action be taken.**