

## Executive Summary

The Australian Libraries Copyright Committee (ALCC) and the Australian Digital Alliance (ADA) strongly support the speedy ratification of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* (the Treaty). The Treaty is a landmark agreement that, when implemented, will do much to address the book famine, a global shortage of accessible format books for the blind and vision impaired. We acknowledge the leadership role played by Australia in the development of the Treaty and look forward to Australia being amongst the leading nations in ratification.

In implementation, the ADA and ALCC support an approach that fulfils our obligations to provide equality of opportunity and accessibility to all Australians.<sup>1</sup> An ideal implementation would:

- Deliver equality of access for the blind, vision impaired and perceptually disabled:
- Enable those with a disability to access works as easily as those persons without a disability;
- Enable print disabled persons to make their own copies, as well as facilitating actions from people and organisations assisting the print disabled;
- Be streamlined with low administrative and recording keeping burdens;
- Be cohesive – no need to switch/mix licences and exceptions when making and supplying accessible copies;
- Have a low cost burden;
- Encourage market solutions and protect rightsholder interests (by applying only when there is no acceptable commercially available product at a reasonable price); and
- Be flexible enough to take advantage of new technologies.

With this in mind, we urge speedy legislative and regulatory change to properly implement the Treaty. While Australia is largely compliant with the Treaty obligations, changes are required in order to be properly compliant. In particular, we raise concerns with

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<sup>1</sup> For example Australia's obligations under UN *Convention on the Rights of Persons with Disabilities*, 13 December 2006

- Article 4 (National Law Limitations and Exceptions Regarding Accessible Format Copies)

The current licence for disabilities restricts the making of accessible copies if a copy exists in a certain format, even if the available format is not accessible to the person who is blind or vision impaired. For example an available synthetic text to speech version precludes a DAISY<sup>2</sup> version being made, leaving blind people unable to access a work in the format easiest to understand.

- Article 7 (Technological Protection Measures)

The Treaty provides that people and organisations using the exceptions and limitations to make accessible format copies should not be prevented by Technological Protection Measures (TPMs). Our current schedule of permissible uses which allow bypass of TPMs<sup>3</sup> doesn't cover all the existing exceptions. This means, for example, blind people aren't allowed to make an accessible copy of a work for themselves if the original is protected by a TPM, forcing them to rely on declared institutions to do the work on their behalf.

These issues could be addressed with the proposed new exceptions for disabilities and fair dealing for disability access recommended in the National Interest Analysis and regulatory change to the TPM exemptions. Without these changes we will not be fully compliant with our Treaty obligations, so we urge swift action. We have also outlined a simple amendment to s49 of the Copyright Act 1968 (the Act) for libraries supplying material for the purposes of research and study which would remove inefficiencies.

Looking forward to the future, broader reform agendas, such as the introductions of fair use or flexible fair dealing as recently recommended by the Australian Law Reform Commission,<sup>4</sup> would enable larger scale beneficial projects.

The ALCC and ADA members include schools, universities, libraries, cultural institutions and disability organisations. These institutions have legal and moral obligations, and a strong desire, to serve people with disabilities to the same standard as all other Australians. Proper implementation of the Marrakesh Treaty would remove some of the barriers imposed by the current formulation of the disability provisions in the *Copyright Act* to the benefit of all.

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<sup>2</sup>

<sup>3</sup> See Schedule 10A Copyright Regulations 1969

<sup>4</sup> Australian Law Reform Commission Report 122 [Copyright and the Digital Economy](#) (2014)

## Part 1: Exceptions for disabilities

The National Interest Analysis suggests replacing the current statutory licence for disabilities and the disabilities portion of s200AB with a disability exception and a fair dealing exception for disability access. Without these changes we will not be fully compliant with our Treaty obligations and we will continue to have a system that places unnecessary barriers in front of people with disabilities.

### Non-compliance with Article 4

Article 4(1)(a) of the Marrakesh Treaty provides (emphasis added)

Contracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works **in accessible format copies** for beneficiary persons. The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.

Accessible format copy is defined in Article 2(b):

"accessible format copy" means 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. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;

This has the practical effect that the exceptions and limitations in law must allow for a work to be created and provided in a format that is accessible to the person requiring it.

Currently the Division VB Part 3 statutory licence does not allow for a work to be converted if there is already a version available in one of the prescribed formats, even if that version is not accessible to the person requiring it. For example, if a large print commercial version of a book is available, but the person requesting it requires even larger print, a version with larger print

cannot be made under the licence. Similarly, synthetic text to speech conversions is considered an adequate substitution for DAISY format, a key concern for the blind and vision impaired.<sup>5</sup>

At bare minimum, the references to the five formats in s135ZQ of the Act must be removed and replaced with a reference to the Marrakesh definition of 'accessible format copy'.<sup>6</sup> Preferable would be the repeal of the statutory licence with the exception outlined in the NIA, for the reasons below.

## Further issues with the current system

The ADA and ALCC strongly support legislative reform in order to properly implement the Treaty. The current system places unnecessary administrative burdens and barriers on people with a disability and those that assist them, such as:

- **Commercial availability**

Currently organisations are required to check if there is a commercially available copy before each use, and must wait for a period to check if a commercially available accessible format will become available after the 'regular' format edition is released. The practical implication of these requirements is that people with a disability wait longer to access content than those who can access standard format works. This exacerbates the delay that comes from the processes of conversion and communication done by the institutions. It also makes efficient systems, such as online distribution platforms, a practical impossibility.<sup>7</sup> If rightsholders are concerned about copies being available after they have created an accessible version, a notification system could be established where rightsholders can lodge information about which titles have been made

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<sup>5</sup> See submissions to Blind Citizens Australia Australian Law Reform Commission Report 122 [Copyright and the Digital Economy](#) (2014) *Submission 157*; Vision Australia, *Submission 181*

<sup>6</sup> The Marrakesh Treaty defines "accessible format copy" as:

"accessible format copy" means 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.** The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons" (emphasis added)

<sup>7</sup> S135ZQ *Copyright Act 1968*

accessible in which formats, at which point the commercial copy would have to be purchased for the institution to use. This would encourage rightsholders to provide market-solutions and accessible copies as part of their standard delivery.

- **Unnecessary administrative burdens.**

Currently the statutory licence has obligations to provide remuneration notices, mark copies, record notices, sample notices and agree to surveys. As no money is paid out on this licence (or under the proposed exception) there is no real need for this administration, and it makes a group of mainly charitable organisation face higher administrative burdens than other groups who simply rely on the exceptions. We support the recommendation in the NIA that these requirements are removed.

- **Licence extended to cover other works and subject matter other than works.**

Currently declared organisations may find themselves creating an accessible copy under two different sections of the Act. For example a text book may have the words converted under the statutory licence and the graphs converted under s200AB. This adds extra layers of administration and confusion as organisations try to comply with the requirements (including record keeping) of different sections. In considering the disability exceptions it would be best have flexible exceptions focussed on substance rather than administration. We look forward to working further with the department on this matter.

- **Declared organisations**

Currently organisations who fit into the category of “authorised entities”<sup>8</sup> under the Treaty are only be able to take advantage of the statutory licence if they are ‘declared.’ This requires an organisation to write the Attorney-General, have their business details tabled in parliament and be announced in the Government Gazette, a time-consuming process. The NIA suggests removing this burdensome red tape measure, a recommendation we endorse.

- **Other disabilities**

The statutory licence is currently restricted to people with a print disability. However other disabilities, for example the hearing impaired, also face barriers to accessing content. Australia’s

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<sup>8</sup> Marrakesh Treaty Article 1(c) “authorized entity” means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations

obligations under the UN *Convention on the Rights of Persons with Disabilities*<sup>9</sup> and other instruments require us to ensure that IP laws do not provide unreasonable barriers to access for this wider definition of disabilities, and it would be efficient to ensure that they are included at this time.

## Part 2: Technological Protection Measures

For works that are protected by a technological protection measure (TPM) breaking the digital lock in order to convert the work to accessible format will be an offence unless it is for a prescribed act. Currently only institutions assisting persons with a disability, educational institutions (in limited circumstances) and libraries (in limited circumstances) are permitted to break a TPM in order to make accessible copies.<sup>10</sup> This severely limits the ability of people to make their own copies and the assistance that can be provided by non-prescribed organisations, rendering many uses of technologies such as screen readers or braille conversions useless.<sup>11</sup>

We note that the AGD is currently conducting a review of TPMs (submissions closed in 2012). It seems that new reforms may have already overtaken the outcomes of that review. In order to be compliant with Marrakesh Article 7<sup>12</sup> any provisions/licences that are used to implement our commitments in Marrakesh should have a corresponding exception in Schedule 10A of the regulations.

## Part 3: Full implementation- Fair use or flexible fair dealing

The introduction of fair use or flexible fair dealing, as was the recommendation of the Australian Law Reform Commission (ALRC) in their recent review into exceptions and limitations<sup>13</sup> would be

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<sup>9</sup> *Convention on the Rights of Persons with Disabilities*, 13 December 2006, ATS 12 (entered into force on 3 May 2008) provides that Australia must 'ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials'

<sup>10</sup> [Schedule 10A Copyright Regulations 1969](#)

<sup>11</sup> See for example N Suzor et al, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13(1)*Media & Arts Law Review* 1

<sup>12</sup> Article 7 "Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty

<sup>13</sup> Australian Law Reform Commission Report 122 [Copyright and the Digital Economy](#) (2014) at 16

the best opportunity to provide an exception able to take advantage of new technologies and distribution methods as they arise.

By concentrating on whether a use is fair, as judged against the four fairness factors (familiar to Australians from the fairness factors applied under the current fair dealing exceptions) fair use allows new and innovative uses to be considered. Importantly, by concentrating on the fairness of the use rather than the person doing the act, fair use has the ability to facilitate third party uses even those done for commercial profit, for example a library contracting a commercial provider to do the conversion on their behalf.<sup>14</sup> As the ALRC noted with regards to third party uses:

Using copyright material might sometimes be considered more likely to be fair when a third party merely facilitates a permitted use. However, other factors, such as whether the use is transformative or harms the rights holder's market, will usually be more important. ...if a use is for a different expressive purpose than the original and does not harm a rights holder's market, then the use should often be fair, even if it is commercial. Such an approach to copyright exceptions better serves an innovative digital economy."<sup>15</sup>

Fair use in the USA has supported significant projects to benefit disability access. The HathiTrust project is probably the most significant project. In the HathiTrust project books held by a consortium of academic libraries were digitised and indexed. The full text of those works can be accessed by students with a certified print disability who are enrolled at the University of Michigan, and the hope is that further students will be able to take advantage of the program in the future. The decision that the disability access was fair use was recently upheld by the US Court of Appeal (second circuit).<sup>16</sup> In responding to the judgment Dr Mark Maurer, President of the US National Federation for the Blind, stated:

"This ruling will dramatically improve the lives of blind and print-disabled Americans, allowing us access to the millions of books held by the HathiTrust Digital Library and any similar collections created in the future. The decision is a victory for the blind and print disabled, the significance of which cannot be overstated. The court's historic action

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<sup>14</sup> Section 200AB of the Copyright Act 1968 allows anybody to make an accessible copy on behalf of a person with a disability, but not if that copy is made on a commercial basis, which would seem to remove the possibility of libraries commissioning third parties to do external conversion work. Following the reasoning in *National Rugby League v Singtel Optus* [2012] FCAFC 59 it seems likely that if library employees used a third party platform to convert works then copies made in the process would be made by the third party (or possibly by the library and the third party platform). That third party platform if based in Australia would need to seek a licence or operate on no more than cost recovery basis to avoid infringing copyright.

<sup>15</sup> Australian Law Reform Commission Report 122 [Copyright and the Digital Economy](#) (2014) 7.3-7.4

<sup>16</sup> [Authors Guild v. HathiTrust](#) (2d Cir. June 10, 2014)

hastens the day when the blind and others with print disabilities will have full access to all of the world's written knowledge"<sup>17</sup>

The American Library Association reports that fair use has provided the flexibility to allow libraries to 'maintain their missions when a purpose-specific exception may not cover unforeseen or unaccounted-for changes in technology or access'.<sup>18</sup> We would expect a similar outcome in Australia.

## Part 4: Sections 49 and 50 – destruction of electronic copies

One further change to make providing access to disabled patrons more efficient would be a minor change to remove s49(7A)(d) and s50(7C)(b) of the Act (document delivery and inter-library loan provisions). These sections require libraries to destroy electronic copies made in the process of supplying a document delivery or inter-library loan request electronically.

As we have previously written, the practical effect of these provisions is that:

Every time an item is requested, it must be retrieved by a staff member, scanned, OCR'd and prepared for communication to the user, and then destroyed. This has become a particular problem for university libraries fulfilling requests for a homogenous pool of students and staff pursuing the same course of study.<sup>19</sup>

As a practical example for the period 2011-2012, the Australian National University reports that of 10,693 bibliographic titles requested from offsite Hume repository alone, 3,077 titles were requested 2 or more times. Of these, 2 titles were requested more than 100 times.<sup>20</sup> Further:

- 5 titles were requested between 50 - 99 times
- 23 titles were requested between 25 - 49 times
- 132 titles were requested between 10 - 24 times

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<sup>17</sup> Mark Maurer, President of the US National Federation for the Blind quoted in National Federation for the Blind Press Release *National Federation of the Blind Applauds Ruling in Authors Guild v. HathiTrust* (June 10 2014)

<sup>18</sup> American Library Association and Association of Research Libraries, *Submission 703* to the Australian Law Reform Commission *Copyright and the Digital Economy Discussion Paper* (2013)

<sup>19</sup> Australian Digital Alliance and Australian Libraries Copyright Committee [Submission 213](#) to the Australian Law Reform Commission's *Copyright and the Digital Economy Discussion Paper* (2012)

<sup>20</sup> Although ANU notes that the 'title' refers to serial title, not individual article.



- 477 titles were requested between 5 - 10 times.<sup>21</sup>

The mandatory destruction of electronic content supplied (and copyright issues associated with digitisation), contribute to inefficiencies and high costs in fulfilling document supply requests for students.

While universities are permitted to scan whole books and other materials for individuals with a disability, any items supplied must be re-scanned for the next student (ie each term, there may be a certain number of students requiring the same content in an alternative accessible format). Again using the ANU as an example, they estimate the cost of scanning each book at over \$100, and note there are often significant delays for students with disabilities to receive whole scanned works given the diversion of staff resources required to undertake the extensive scanning.<sup>22</sup> The mandatory destruction of scanned copies inhibits services for those with disabilities.

As the ADA and ALCC have previously written:

The Explanatory Memorandum to Copyright Amendment (Digital Agenda) Bill 1999 indicates that subsection 49(7) was intended to “prevent libraries and archives from building up electronic collections of parts or the whole of articles or works as a result of communicating such works to users.”<sup>23</sup> This seems to have arisen out of concerns libraries would use section 49 to develop electronic collections of article excerpts rather than purchasing them in electronic format. This is not the case. Documents reproduced in electronic format under section 49 are to fulfil document supply requests - there has not been any expectation on the part of libraries that these copies would be made available for wider public access, or to reduce purchasing of digital content licences. Libraries have proven themselves to be eager and extensive purchasers of digital content licences. Additionally, the commercial availability of a work is already one of the considerations a library takes into account in deciding whether to supply a work. Internal storage of documents supplied in electronic format merely increases efficiency and effective provision of services for students with disabilities.”<sup>24</sup>

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<sup>21</sup> ANU have also noted the top five repeat requested serials: *Archaeology in Oceania* (138 times), *Linguistics* (121 times), *Australian Historical Studies* (78 times), *Medical Journal of Australia* (61), and *Nature* (60)

<sup>22</sup> Australian National University adds that occasionally, delays can be more than a month

<sup>23</sup> Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999, p 36

<sup>24</sup> Australian Digital Alliance and Australian Libraries Copyright Committee [Submission 213](#) to the Australian Law Reform Commission’s *Copyright and the Digital Economy Discussion Paper* (2012)



### **About the Australian Libraries Copyright Committee**

The Australian Libraries Copyright Committee (ALCC) is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with members representing the following organisations:

- Council of Australian University Librarians
- Australian Library and Information Association
- National and State Libraries Australasia
- National Library of Australia
- National Archives of Australia
- Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Australian Government Libraries Information Network

### **About the Australian Digital Alliance**

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumers, galleries, museums, IT companies, libraries, archives and charitable organisations.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that appropriately balances the interests of rights holders with the interests of users of copyright material.