

**National Interest Analysis [2015] ATNIA 9
with attachment on consultation**

**Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind,
Visually Impaired, or Otherwise Print Disabled**

(Marrakesh, 27 June 2013)

[2014] ATNIF 15

Attachments:

Consultation

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled

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Nature and timing of proposed treaty action

1. The proposed treaty action is to ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled ('Treaty'), which Australia signed at the Headquarters of the World Intellectual Property Organization ('WIPO') in Geneva on 23 June 2014. The treaty action is being submitted to the Joint Standing Committee on Treaties ('JSCOT') for consideration at the earliest available opportunity following investigation of necessary changes to Australia's Copyright laws.
2. At the time of its ratification of the Treaty, Australia intends to declare in a Notification, in accordance with **Article 4** (4) of the Treaty, that the exceptions and limitations to copyright infringement contained in **Article 4** (National Law Limitations and Exceptions Regarding Accessible Format Copies) of the Treaty will remain subject to commercial availability testing in Australia. Such a notification by Australia will mean that authorised entities under the Treaty must first take steps to commercially obtain the required accessible material prior to relying on the copyright exceptions and limitations under **Article 4** of the Treaty. This is consistent with the terms of **Article 4** (4) of the Treaty and an existing requirement in Australian law.
3. Under **Article 18** of the Treaty, the Treaty enters into force three (3) months after twenty (20) eligible Parties deposit their instruments of ratification or accession. The Treaty will bind Australia from this date if Australia is one of the first 20 countries to ratify or accede¹, or otherwise from the expiration of three months from the date of Australia's ratification after general entry into force.
4. It is proposed that Australia lodge its Instrument of Ratification with the Director General of WIPO as soon as practically possible after completion of Australia's domestic legal requirements for entry into the Treaty.

Overview and national interest summary

5. On 27 June 2013 the Treaty was adopted in Marrakesh by the WIPO Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities. Australia was an active participant in the Treaty negotiations.
6. The Treaty will allow exceptions to international copyright law to enable organisations to reproduce and distribute published books and other material in formats that are accessible to people with a print disability. The Treaty will therefore give people who are print disabled greater access to works published in accessible formats, such as print, Braille and audio.

¹ As at May 2015, 8 WIPO Member States have signed or acceded to the Treaty: India, El Salvador, United Arab Emirates, Uruguay, Mali, Paraguay, Singapore and Argentina.

7. Ratification and implementation of the Treaty is in Australia's national interest. It provides equitable access to information for people who are print disabled, while balancing the commercial interests of rights holders. Ratification of the Treaty by Australia will mark an important advance to help overcome the significant barriers that limit the availability of print accessible literature to people who are blind and vision impaired and that preclude these Australians from full participation in society.

Reasons for Australia to take the Proposed Treaty Action

8. Once in force, the Treaty will establish an authorised network of accessible print format distributors for Australia. This will increase the range of material available in accessible print formats available to people with a print disability in Australia. Importantly, the Treaty will also assist people in countries with less developed systems for making works available in an accessible print format.
9. The Treaty was concluded following consultation with a broad range of stakeholders, including publishers and organisations representing the print disability sector. The consultation undertaken in Australia by the Attorney General's Department ('AGD') shows support from these groups.
10. Ratification and implementation of the Treaty will help to fulfil Australia's international legal obligations under the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD). The CRPD requires Australia to 'take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials'. Once the Treaty is in force, it will help to fulfil Australia's obligations to ensure persons with disability have access to information and communications on an equal basis with others and can exercise the right to freedom of expression and opinion.
11. Ratification of the Treaty is also consistent with Australia's foreign aid policy *Australian aid: promoting prosperity, reducing poverty, enhancing stability* (2014), and the disability-inclusive development Strategy Development for All 2015-2020: Strategy for strengthening disability-inclusive development in Australia's aid program. Through these policies, the Australian Government is committed to playing a leadership role internationally in disability-inclusive development to enable people with disabilities in developing countries to find pathways out of poverty and realise their full potential.
12. Early ratification of the Treaty provides an opportunity for Australia to be a global leader in facilitating access to accessible format works. According to the World Health Organization, there are an estimated 285 million people worldwide who have a visual impairment. Ratification by Australia of the Treaty will promote Australia's support for the work of WIPO as the global forum for intellectual property services, policy, information and cooperation.

Obligations

Treaty definitions

13. **Article 2** (a) of the Treaty defines 'works' to be literary and artistic works within the meaning of the *Berne Convention of Literary and Artistic Works [1978] ATS 5* ('Berne Convention'), in the form of text, notation and/or related illustrations whether published or made publically available. **Article 2** (b) of the Treaty defines an 'accessible format copy' as a work published in an alternative manner which gives a print disabled person access to that work. These copies must be used solely for the use by a person with a print disability and maintain the integrity of

the original material. **Article 2** (c) of the Treaty defines which organisation would undertake the work of the Treaty; they are 'authorised entities'. An authorised entity could be a body established by government or a recognised non-profit organisation that assists people with a print disability. **Article 3** of the Treaty states that a beneficiary person is someone who is blind, has a visual impairment, perceptual disability and/or is otherwise unable through physical disability to hold or manipulate a book or to focus or move their eyes to an extent that would be acceptable for reading.

Reproduction of published works into accessible formats

14. **Article 4** (1) of the Treaty requires the Contracting Parties to include exceptions and limitations in national copyright law to the right of reproduction, the right of distribution, and the right of making available to the public (provided by the WIPO *Copyright Treaty [2007] ATS 26*) in order to increase the availability of books and other material in accessible formats for beneficiary persons. Contracting Parties to the proposed Treaty must also allow for any reasonable changes to be made to works in order to make them fully accessible to the individual. Contracting Parties can also provide an exception or limitation to the right of public performance.
15. **Article 4** (2) (National Law Limitations and Exceptions Regarding Accessible Format Copies) of the Treaty provides that a Contracting Party may fulfil the obligation in **Article 4** (1) of the Treaty, through an exception or limitation in its national copyright law, to allow authorised entities to make, obtain and supply accessible format works locally or abroad. Supply of the works can be by any means necessary, including by non-commercial lending or electronic communication by wire or wireless means. Further conditions apply under **Article 4** (2), including the condition that no changes can be introduced to the work, other than those for accessibility purposes and supply of the works is for the exclusive use of beneficiary persons and on a non-profit basis only. Under **Article 4** (4) of the Treaty, a Contracting Party may declare that these exceptions and limitations will only apply to material which, in the particular format required, cannot be obtained commercially on reasonable terms for a beneficiary person in that market. Australia proposes to make such a declaration at the time of its ratification of the Treaty.

Exportation and importation of accessible format works

16. **Article 5** (Cross-Border Exchange of Accessible Format Copies) requires the Contracting Parties to the Treaty to ensure that accessible format copies made under an exception or limitation may be distributed or made available by an authorised entity to a beneficiary person domestically or an authorised entity or beneficiary person in another Contracting Party. Beneficiary persons would not be authorized to exchange works with other beneficiary persons across borders.
17. **Article 6** (Importation of Accessible Format Copies) of the Treaty obliges the Contracting Parties to ensure that, to the extent that their national laws permit eligible people, including print disabled individuals or their representatives, to make an accessible format copy of a work, the national law of the Contracting Party also allows those people to import accessible format works without the authorisation of the rights holder.

Technological protection measures

18. **Article 7** (Obligations Concerning Technological Measures) requires the Contracting Parties to ensure that when they provide legal protection and legal remedies against the circumvention of technological protection measures, such protection and remedies do not impact on the use of the limitations and exceptions provided for in the Treaty by a beneficiary person.

Privacy

19. In implementing the Treaty, contracting Parties are required by **Article 8** (Respect for Privacy) to endeavour to protect the privacy of beneficiary persons on an equal basis with others. No amendment of the *Privacy Act 1988* (Cth) is required to implement this treaty obligation in Australia's domestic law.

Cross border cooperation

20. **Article 9** (Cooperation to Facilitate Cross-Border Exchange) of the Treaty encourages the Contracting Parties to participate in the voluntary sharing of information through an international access point, which is to be established by the International Bureau of WIPO.

Implementation obligations

21. **Article 10** (General Principles on Implementation) obliges Contracting Parties to the Treaty to adopt measures necessary to ensure the application of the Treaty. It provides that Contracting Parties may determine the appropriate method of implementing the Treaty subject to existing international obligations, such as those outlined in **Article 11** (General Obligations on Limitations and Exceptions) of the Treaty, including: the Berne Convention, the *Agreement on Trade-Related Aspects of Intellectual Property Rights [1995] ATS 38* ('TRIPS') and the WIPO Copyright Treaty.
22. **Article 16** (Rights and Obligations under the Treaty) provides that each Contracting Party to the Treaty must take responsibility for [implementing] all of the obligations under the Treaty, as well as the use of all the rights that it provides.

Assembly of Contracting Parties

23. **Article 13** (Assembly) of the Treaty establishes an Assembly of Contracting Parties to manage matters concerning the maintenance and development of the Treaty. Contracting Parties are obliged to bear all costs of their attendance at Assembly meetings (**Article 13** (1) (c)).

Implementation

24. The *Copyright Act 1968*(Cth) ('Copyright Act') includes a statutory licence scheme and exceptions for the disability sector that currently comply with the terms of the Treaty and therefore, no legislative amendment to the Copyright Act is necessary in order to implement the Treaty obligations that Australia will assume upon ratification of the Treaty.
25. The Government intends, however, to make some technical amendments to the disability provisions in the Copyright Act to ensure that they respond flexibly to the needs of the sector. The nature of and rationale for these proposed amendments is outlined at **Paragraphs 30-32** below.

Current Copyright Act provisions

26. Currently under the Copyright Act, organisations assisting people with a print disability have access to a statutory licence regime (**Part VB, Division 3**). This licence allows organisations to reproduce and communicate literary and dramatic works in certain formats, including sound recording, Braille, large print, photographic or electronic versions without infringing copyright. Organisations undertaking this work are required to provide a remuneration notice to the relevant Australian collecting society, attribute the licensed copy of the work and ensure the copy is for use by a person with a print disability.

27. If an organisation needs to create a different format or type of work not specified in the statutory licence, it can rely on **Section 200AB** of the Copyright Act. Subsection 200AB (4) provides for accessible format works to be created by and for people with a print disability where no other provisions apply. The statutory licence is subject to commercial availability testing and **Subsection 200AB** (1) and (4) permit a use which amounts to a 'special case', is for the purposes of print disability access, does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the rights holder.
28. Implementation of the Treaty is not expected to impact on the current provisions of the Copyright Act that allow importation and exportation of accessible format works. Importation and exportation of accessible format works will not infringe copyright, provided that this activity does not harm the legitimate interests of a rights holders, for example, selling, hiring, offering for trade, exposing for sale or hire, distributing for trade or any other similar purpose (see **Part III, Division 2** of the Copyright Act). Exportation of these accessible format works is not prohibited by the Copyright Act.
29. Importation and exportation of accessible format works for the purposes of **Article 6** (Importation of Accessible Format Copies) the Treaty would need to comply with the Copyright Act, namely, any importation must be on a non-commercial and non-profit basis (see **Sections 37 and 38** of the Copyright Act), including for the purposes of non-profit library lending. For example, if an Australian print disability organisation is unable to purchase a required work in a reasonable timeframe, then a non-infringing copy could be requested from an international authorised entity and vice-versa.
30. Currently, consistent with Australia's obligations under the Treaty, the statutory licence regime under the Copyright Act allows exportation in an accessible format of a literary or dramatic work, provided the purpose of the exportation is to assist a person with a print disability. Australian declared institutions are permitted to make an initial copy of a published literary or dramatic work to keep as a master copy. An Australian declared institution can share this master copy of the work domestically with other declared institutions, but is not permitted to share it with authorised entities abroad. To export a master copy of the work, an Australian declared institution must rely on **Subsection 200AB** (4) of the Copyright Act to create a new file for exportation. This means that the use of the work can only be made subject to its compliance with the test outlined in **Paragraph 26** above.

Proposed amendments to Copyright legislation

31. Some practical issues with the existing copyright provisions were raised during recent AGD consultations with stakeholders on Treaty implementation and in the Australian Law Reform Commission ('ALRC') Report on *Copyright and the Digital Economy* (ALRC Report 122 of February 2014) as detailed below. The Government intends to address these issues for the print disability sector. As legislative amendment to Australia's copyright legislation is not necessary in order for Australia to meet its international obligations under the proposed Treaty, amendments to the legislation to address the ALRC concerns and the concerns of stakeholders consulted by AGD will be addressed separately to this proposed treaty action.
32. The first concern raised relates to the use of copyright material by declared institutions. In order to address this concern, the existing print disability statutory licence under the Copyright Act will be replaced with a print disability exception. This amendment is intended to remove outdated, prescriptive requirements and ensure it is technology neutral and can respond flexibly to the needs of the disability sector. The remuneration notice requirement under the existing Copyright legislation will no longer apply. The process for organisations to become 'declared organisations' will also be simplified.

33. The second concern raised relates to the use of copyright material by and for individuals with a print disability and undeclared institutions. In order to address these concerns, the existing print disability provisions in the Copyright Act will be repealed and replaced with a fair dealing exception for disability access. This proposed amendment to the legislation is intended to reduce the complexity of the law and promote faster access to accessible information for individuals. The existing definitions of 'fair dealing', 'fairness factors' and 'print disability' may apply to these proposed legislative changes.

Costs

34. Australia's ratification of the Treaty will not impose any direct financial costs on the Australian Government other than those associated with Australia's participation in the Treaty Assembly under **Article 13** (Assembly) of the Treaty. Under **Article 13** (4), the Assembly will meet during the same period and at the same place as the General Assembly of WIPO. The General Assembly of WIPO meets annually in September, but it is not expected that the Treaty Assembly will be meet on an annual basis. Australia will be responsible for any expenses of its delegation attending the Assembly. If the Australian Government is required to attend such an Assembly in the future, the expected costs would be the travel costs required to send one AGD officer. In this regard, it should be noted that similar Assemblies mandated by other WIPO Agreements, such as the WIPO Copyright Treaty Assembly, generally meet biennially and to date, a representative of the Australian Government has not been required to attend.

Future Treaty Action

35. Under **Article 4** (4) of the Treaty, the Contracting Parties may declare in a notification deposited with the Director General of WIPO at the time of ratification, accession or anytime thereafter, that the exceptions and limitations within **Article 4** of the Treaty are limited to works in a particular accessible format that cannot be obtained commercially under reasonable terms for beneficiary persons (as defined in **Article 3**) in that market (the so-called 'commercial availability test') , as described in **Paragraphs 3** and **14** of this NIA. The proposed deposit of such a notification by Australia at the time of its ratification of the Treaty will only have the effect of amending the operation of **Article 4** of the Treaty.
36. **Article 10** (2) of the Treaty foreshadows that the Contracting Parties may determine the appropriate method of implementing the Treaty within its own legal system and practice. This provision appears to be sufficiently wide to enable Australia to enter into either bilateral or multilateral instruments of less-than-treaty status which contain implementing provisions. Any such future instruments entered into by Australia with any of the Contracting Parties to the Treaty would not invoke Australia's domestic treaty-making requirements.
37. Apart from the limited amendment capacity of **Article 4** (4) and the oblique reference to implementing instruments of less-than-treaty status, the Treaty contains no specific provision for its future amendment. Accordingly, any future treaty action to amend the Treaty will be governed by **Article 39** (General rule regarding the amendment of treaties) of the *Vienna Convention on the Law of Treaties* ('Vienna Convention').
38. **Article 13** (2) (c) of the Treaty indirectly provides for the negotiation of future amendments to the Treaty by empowering the Assembly of Contracting Parties to decide on convening a diplomatic conference to review the Treaty. There is no provision in the Treaty binding the Contracting Parties to any revision adopted at such a meeting. Any review of the provisions of the Treaty under **Article 13**(2)(c) which results in changes to the terms of the Treaty will invoke **Article 39** of the Vienna Convention and Australia's domestic treaty making requirements.

Withdrawal or Denunciation

39. The Treaty does not contain any withdrawal or termination provisions. **Article 20** (Denunciation of the Treaty) provides for a Contracting Party to denounce the Treaty by notification to the Director General of WIPO. Any future decision by Australia to denounce the Treaty (following its ratification and entry into force of the Treaty) would take effect one year after the Director General's receipt of Australia's notification. Any future denunciation of the Treaty by Australia would also be subject to Australia's domestic legal requirements for a proposed treaty action, including the requirement for Executive Council approval.

Contact details

Copyright Law Section
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ATTACHMENT ON CONSULTATION

Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled

Marrakesh 27 June 2013

[2014] ATNIF 15

CONSULTATION

1. The States and Territories were notified of Australia's intention to ratify and implement the *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled* ('Treaty') at the Commonwealth-States Standing Committee on Treaties ('SCOT') Meeting in November 2014. Representatives from the Attorney-General's Department ('AGD') who attended SCOT meetings as requested, presented inter alia written updates on the Treaty in the SCOT Schedule of Treaties and circulated information via email to SCOT participants as appropriate.
2. Given that jurisdiction over copyright falls within the legislative power of the Commonwealth, Australia's proposed ratification to the Treaty will have negligible impact on the legislative and administrative functions of the States and Territories.
3. AGD conducted a public consultation process in 2014 on the Treaty's implementation. It received twenty two (22) submissions from a range of individuals and organisations, seventeen (17) of which are publically available at www.ag.gov.au.

Submissions Received

1. Arts Law Centre of Australia
2. Australian Blindness Forum
3. Australian Copyright Council
4. Australian Digital Alliance
5. Australian Libraries Copyright Committee
6. Australian Publishers Association
7. Commonwealth Braille and Talking Book Cooperative
8. Copyright Advisory Group to the Council of Australian Government's Education Council
9. Copyright Agency Limited
10. National Disability Services
11. Pirate Party of Australia
12. Queensland University of Technology, Intellectual Property and Innovation Law Research Program
13. Screenrights
14. Universities Australia
15. University of Technology Sydney Library
16. Vision 2020
17. Vision Australia
18. Confidential Submission 1
19. Confidential Submission 2
20. Confidential Submission 3
21. Confidential Submission 4
22. Confidential Submission 5