

Marrakesh Treaty implementation options paper

Table of contents

Contents

Marrakesh Treaty implementation options paper	1
Table of contents	1
Summary	1
Introduction	2
Have your say.....	2
Marrakesh Treaty terms	3
Reproduction and domestic distribution of works.....	3
International distribution of works	3
Existing provisions in the Copyright Act	4
Statutory licence scheme and exceptions	4
Importation and exportation.....	5
Identified issues in existing legislation	5
Marrakesh Treaty implementation options	5
Option one: Minor amendment	6
Option two: Moderate amendment.....	6
Option three: Flexible amendment	7
Technological protection measures	8
Guiding questions for submissions	8
Attachment A: Table of provisions and definitions	9

Summary

The Australian Government is working toward ratification of the Marrakesh Treaty to help overcome the legal barriers that affect the availability of accessible format books and other material for people with a print disability worldwide. The Attorney-General's Department (the department) is seeking views on implementation options for the treaty, and is putting forward three possible options including relying on existing legislation, making moderate legislative amendments or creating a new flexible exception.

Introduction

On 24 June 2014 the Australian Government announced its intention to bring the Marrakesh Treaty (the treaty) forward through the Federal Parliament for ratification. The treaty requires exceptions to copyright law to enable authorised organisations and individuals to produce books and other materials in accessible formats and for authorised organisations to distribute accessible formats to people who are blind, visually impaired or have a print disability domestically and internationally.

Binding treaty action remains subject to the usual domestic treaty approval process, including tabling in Parliament, consideration by the Joint Standing Committee on Treaties (JSCOT) and approval by the Executive Council. The treaty will come into effect following its ratification by 20 countries. India, the Republic of El Salvador and the United Arab Emirates have ratified or acceded to the treaty. The treaty has approximately 80 signatories.

The *Copyright Act 1968* (the Act) includes statutory licences and exceptions that allow creation and dissemination of accessible copies, and as such, Australia already complies with a majority of the treaty terms. Some consideration will need to be given to the cross-border transfer of works, and stakeholders have indicated that the existing scheme causes some regulatory burden and can be complicated to use.

The department is putting forward a range of options to implement the treaty, from relying on the existing scheme through to updating it. This paper is intended to prompt debate, not to reflect an established policy decision or duplicate the Australian Law Reform Commission chapter *Access for People with Disability* in the '[Copyright in the Digital Economy](#)' Report.

Have your say

We encourage those who have views on these options to submit responses by Sunday 30 November 2014 via email (in the provided document template) to copyright@ag.gov.au. All responses received throughout this process will be considered, and submissions may be published online if received in the correct template.

People with a disability can contact the Copyright Section by Sunday 30 November 2014 to arrange an alternative method of providing feedback, if preparing a written response is not suitable. Please email copyright@ag.gov.au or phone 02 6141 3796.

Marrakesh Treaty terms

Reproduction and domestic distribution of works

The treaty allows authorised organisations to reproduce, distribute or make available accessible format works without seeking permission from right holders. Supply can include non-commercial lending and electronic sharing of files.

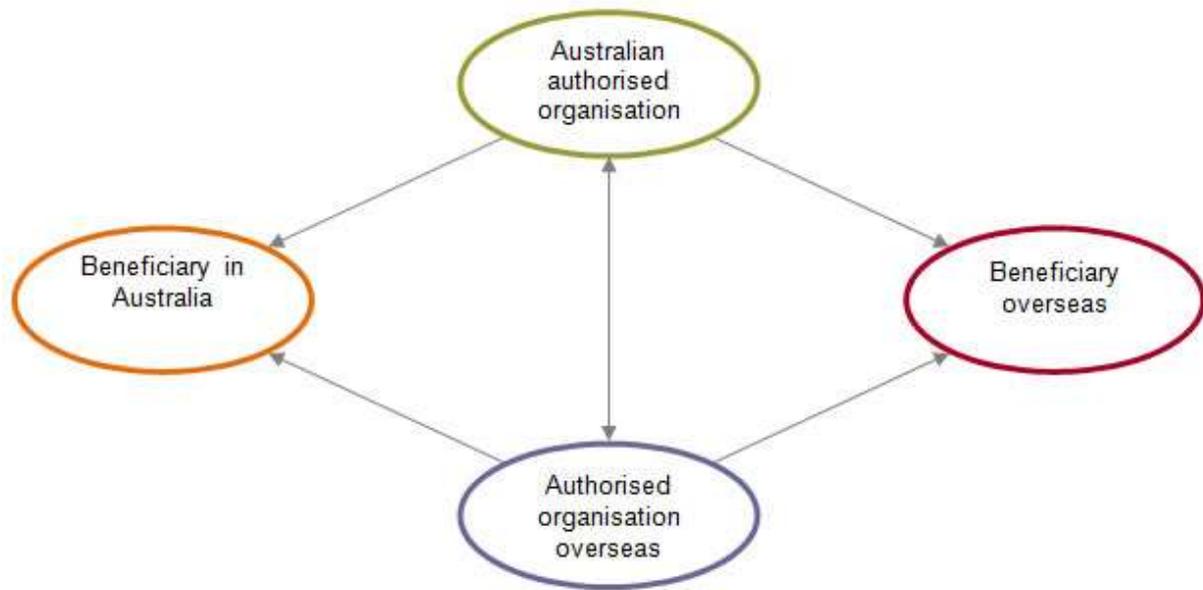
The conditions to do so include that the organisation has lawful access to the work, they do not introduce changes to the accessible copy other than those necessary to make it accessible, and the copies are only for people with a print disability. The treaty provides flexibility on whether use of exceptions and limitations will be subject to remuneration and commercial availability.

Individuals with a print disability may also make an accessible copy for themselves if they have lawful access to that work or a copy of that work, although they cannot supply copies to others.

International distribution of works

The treaty allows authorised organisations to exchange accessible-format works with other authorised organisations and individuals in other countries who have also ratified the treaty. This could include the exchange of works in digital form and hardcopy. Imported works must only be used by people with a print disability. The treaty provides flexibility on whether it may be appropriate for originating authorised organisations to apply measures to confirm that an individual recipient in another country is legitimately entitled to receive accessible works.

The following diagram explains the exchange patterns that would be possible after the treaty comes into effect.



Existing provisions in the Copyright Act

Statutory licence scheme and exceptions

The Copyright Act currently permits the making of accessible copies under a number of different provisions. Part VB, Div 3 of the Act includes a statutory licence to reproduce and communicate literary and dramatic works by institutions assisting people with a print disability. Formats include sound recordings, braille, large print, electronic and photographic versions. Organisations that are declared under s10A of the Act are authorised to undertake these uses.

The uses made under the statutory licence must be made solely for the purpose of assistance to persons with a print disability, under certain conditions, provided they have given a "remuneration notice" to the Copyright Agency. These institutions can also make intermediate copies or "master copies" from which they can make copies for individuals. Currently, the Copyright Agency does not charge fees for copying under this statutory licence. Individuals can make accessible copies under the research and study provisions (s40), format shifting provisions (s43C) or under the flexible dealing provisions of the Act (s200AB(4)).

Section 200AB(4) permits use of works by and for people with a print disability where no other exception applies and where the use of the copyright material is not for the purpose of obtaining a commercial advantage or profit (but it is acceptable to make a charge for cost recovery). In addition, the circumstances of the use must "...amount to a special case, not

conflict with a normal exploitation of the material and not unreasonably prejudice the legitimate interests of the copyright owner”.

Importation and exportation

Generally where a book has been published in Australia copies cannot be imported for commercial purposes. The Act currently does not prevent importation of copies for non-trade use unless they are intended to be distributed in a way that would prejudicially impact on the interests of the copyright owner. The Act does not currently prevent exportation of non-infringing copyright material.

Identified issues in existing legislation

Throughout the negotiation phase of the treaty, the department received feedback from stakeholders that current provisions in the Act do work to allow accessible copies to be made. However, the legislative framework does not operate efficiently to allow timely accessible copies to be made by organisations. Stakeholders considered that both Part VB, Div 3 and s200AB could be simplified and clarified to improve their use. In addition, the existing provisions impose a substantial regulatory burden on authorised organisations.

The administrative burden associated with the s10A declaration process has also been raised. At present, organisations are required to write to the Commonwealth Attorney-General seeking permission to be declared and have their business details tabled in Parliament and announced in the Gazette. This can be a lengthy and time-consuming process. The department welcomes input on ways to simplify this process.

Similar issues were identified in the ALRC report, which the department is currently considering. The report confirmed that stakeholders remain concerned about the narrow scope of Part VB, Div 3 licence, the practicalities of the commercial availability test, legal circumvention of technological protection measures and the lack of a comprehensive exception for individual users (other than s200AB). The ALRC recommended that to help overcome these issues, fair use provision should be introduced with an illustrative purpose for people with disability or a fair dealing exception should be available for people with a print disability.

Marrakesh Treaty implementation options

Through the combined operation of Part VB, Div 3 and s200AB, the department considers that it already complies with the requirements of the treaty. However, in light of the

regulatory burden and practical difficulties identified by stakeholders, the department is seeking views about alternative options for implementing the treaty obligations. Below are three options to facilitate discussion on possible implementation methods. Views are sought on these options and other alternatives that stakeholders may consider appropriate. All options would require a minor amendment of the Copyright Act to ensure accessible copies can only be exchanged with other Marrakesh Treaty parties.

Option one: Minor amendment

This table sets out which provisions of the Copyright Act implement the main obligations of the treaty.

Option one: Minor amendment (cross-border exchange of works)

Category	Type of Use	Literary work	Artistic work
Individual	Reproduction	s200AB [^]	s200AB [^]
Print disability organisation	Reproduction and communication	Part VB, Div 3 ^{*0}	s200AB [^]

Note

* denotes use subject to domestic commercial availability considerations

[^] denotes use subject to three-step test

⁰ denotes amendment required here to limit the cross border exchange of works to Marrakesh parties

Under the current scheme organisations make and distribute accessible copies of literary and dramatic works under Part VB, Div 3. Where an organisation makes and distributes accessible copies of artistic works (whether standalone or accompanying a literary or dramatic work), the use is made under s200AB. An individual would make accessible copies under s200AB.

If the current scheme is maintained, organisations assisting people with a print disability will be required to rely on two separate parts of the Act to fulfil the treaty obligations. This option also includes a minor amendment to ensure accessible copies can only be exchanged with other Marrakesh Treaty parties.

Option two: Moderate amendment

This table sets out which provisions of the Copyright Act would implement the main obligations of the treaty following a moderate amendment to the Act.

Option two: Moderate amendment

Category	Type of Use	Literary work	Artistic work
Individual	Reproduction	s200AB [^]	s200AB [^]
Print disability organisation	Reproduction and communication	Part VB, Div 3 ^{*0}	Part VB, Div 3 ^{*0}

Note

* denotes use subject to domestic commercial availability considerations

[^] denotes use subject to three-step test

⁰ denotes amendment required here to limit the cross border exchange of works to Marrakesh parties

Under option two, the Act would be amended so that Part VB, Div 3 covers not only reproduction and communication of literary, dramatic but also artistic works.

The Part VB, Div 3 statutory licence would be simplified to remove obligations relating to the provision of remuneration notices by organisations, obligations to mark copies, record notices and sampling notices.

Organisations would still be required to ensure that uses are only made for the purpose of assisting people with a print disability, and that copies not be sold for a profit.

The Part VB, Div 3 statutory licence would also be amended to ensure that the commercial availability test is applied in relation to the format required by a print-disabled person, instead of the five current formats (audio, braille, large print, photographic and electronic).

The s10A declaration process would be simplified to remove the requirement for consideration by the Attorney-General, tabling and Gazettal. Applications for declaration would be considered by the department and published on the department's website.

As with option one, this option also includes a minor amendment to ensure accessible copies can only be exchanged with other Marrakesh Treaty parties.

Option three: Flexible amendment

This option would retain the Part VB, Div 3 statutory licence, with the proposed amendments in option two above, and add a standalone, fair dealing provision in line with the recommendations put forward in the ALRC report. The new provision would allow fair dealings for and by people with a print disability. It would be subject to the fairness factors to ensure

use of copyright balances the interests of rights-holders. The fairness factors identified by the ALRC were:

- the purpose and character of use
- nature of the copyright material
- amount and substantiality of the part used
- effect of the use upon the potential market for, or value of, the copyright material.

Such a provision could then be incorporated into a consolidated fair dealing or fair use provision in the future, should the department decide to undertake broader ALRC related reform.

As with options one and two, this option also includes a minor amendment to ensure accessible copies can only be exchanged with other Marrakesh Treaty parties.

Technological protection measures

The department has noted stakeholder concerns that technological protection measures impact on organisations' and individuals' ability to make accessible copies of works. Currently the *Copyright Regulations 1969* provide an exception to liability for the act of circumvention in relation to the "...reproduction or communication by an institution assisting persons with a print disability for provision of assistance to those persons of copyright material of a kind, and in the circumstances, mentioned in Division 3 of Part VB of the Act". The department is currently considering whether to make an exception to liability for the act of circumvention in relation to activities undertaken under s200AB(4). If a fair dealing provision was to be implemented, an equivalent technological protection measure exception would also be considered.

Guiding questions for submissions

In your response you may wish to consider the following questions:

Which option would work best for you or your organisation? Can you recommend an alternative approach?

- Does the statutory licence at Part VA of the Act need consideration for the Marrakesh Treaty to be properly implemented?
- What is an appropriate way to reduce the regulatory burden associated with s10A declaration process?

- Would it be helpful for the department to issue guidelines for the use of s200AB? If so, what information would be most useful for you?
- Would it be helpful for the department to issue guidelines on the application of the commercial availability test under Part VB, Div 3 and if so, what information would be most useful for you?
- Would any of the proposed options remove the practical obstacles to the creation of an online repository of accessible works?

Attachment A: Table of provisions and definitions

Section	Application
Reproduce	To copy a work to make a similar work (such as photocopied). This would include any conversion from or into a digital or electronic machine-readable format.
Communicate	To make available online or electronically transmit (such as email).
s10A	Declarations and notices relating to certain bodies and institutions. Details the administrative process organisations undergo to be declared as organisations assisting the print and intellectually disabled, who may then rely on statutory licences detailed above.
Part VB, Div 3	Reproduction and communicating works etc. by institutions assisting persons with a print disability. <i>Statutory licence scheme for use of certain copyright material by educational institutions and organisations that assist the print and intellectually disabled.</i>
s200AB (4)	Use of works and other subject matter for certain purposes – Use by or for a person with a disability. <i>Exceptions for use of works by or for a person with a disability in certain circumstances.</i>