

Submission to Marrakesh Treaty Implementation

Options Paper

Respondents details

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Response to options paper

Please provide your response to the Marrakesh Treaty Implementation Options Paper below. You can respond to some or all of the options outlined in the paper, and/or you can discuss other options not covered in the paper.

Executive Summary

"People with disability want to be independent, in charge and in control of their lives—this treaty will help people reach that goal"¹

The Marrakesh Treaty (the Treaty) is a key step to ending the book famine which deprives people with a disability of access to the majority of published works. When implemented the Treaty will do much to enable equality of access for people who are blind, vision impaired or perceptually disabled.

An optimal system that delivers equality of access for the blind, vision impaired and perceptually disabled would:

- Enable those with a disability to access works as easily as those without;
- 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;

¹ Senator Fifield, Assistant Minister for Social Services quoted in Joint Press Release *Australian Signs the Marrakesh Treaty* 24 June 2014 accessed at <http://www.attorneygeneral.gov.au/MediaReleases/Pages/2014/SecondQuarter/24June2014-AustraliaSignsTheMarrakeshTreaty.aspx>

- 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.

The introduction of fair use, as recommended by the Australian Law Reform Commission (ALRC)² and the removal of the statutory licence would be the most efficient and streamlined way to implement the treaty and update the *Copyright Act 1968* (the Act) for the digital age. It is the preferred approach of the Australian Digital Alliance (ADA).

With regard to Options 2 and 3 we have made some comments in regards their compatibility with the Treaty and fitness for purpose.

The ADA is strongly supportive of the implementation of the Marrakesh Treaty, which will be of benefit to blind, vision impaired and perceptually disabled people (beneficiaries) here and overseas. In approaching equality of access we also enrich and support Australia’s social, cultural and economic interests. We congratulate the Australian Government on taking these essential steps towards ratification.

Marrakesh Implementation – Fair Use

“To enable persons with disabilities to live independently and participate fully in all aspects of life, State Parties shall take appropriate measures to ensure persons with disabilities access, on an equal basis with others ... to information and communications... These measures ... shall include the identification and elimination of obstacles and barriers to accessibility”³

While the Treaty itself is confined to works and to those with a print disability,⁴ Australia is subject to a wider obligations under the UN *Convention on the Rights of Persons with Disabilities*. This provides an

² Australian Law Reform Commission Report 122 [Copyright and the Digital Economy](#) (2014)

³ *Convention on the Rights of Persons with Disabilities*, 13 December 2006, ATS 12 (entered into force on 3 May 2008)

⁴ [Article 3 Marrakesh Treaty](#)

“ A beneficiary person is a person who:

- (a) is blind;
- (b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or ^[3]
- (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading;

obligation 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.'⁵

In line with these commitments, in implementing the Treaty Australia should ensure the notions of fair access are extended to those with other disabilities (for example those with hearing impairments) or to subject matter other than works (such as films) as long as they comply with our existing international commitments.

The simplest way to achieve this would be the introduction of a fair use exception, as the ALRC concluded:

"The ALRC recommends that access for people with disability should be an illustrative purpose listed in the fair use exception. Many uses for this purpose will be fair, as they are transformative and do not have an impact on the copyright owner's existing market. Including this purpose as an illustrative purpose will increase certainty and confidence for users, and encourage people to undertake these socially desirable uses. Fair use would not usually permit a use that competed with a commercially available product, and would ensure that commercial publishers retain an incentive to produce accessible material."

The flexible, technological neutral approach of relying on the fairness factors means the exception would keep pace with new technologies, allowing organisations and individuals to utilise screen access, technology, portable scanners that convert text to audio, and other technologies as they arise. Fair use is not limited to specific disabilities or formats.

Under a hybrid system organisations assisting the blind and vision impaired face higher administrative burdens to providing accessible copies than anyone else. They are required to apply for status, keep records, mark copies and end up operating under a mix of licence and exceptions depending on the work they are converting. Fair use should cover the uses permitted under the Marrakesh Treaty without need to retain the statutory licence. However we understand that some organisations may wish to retain the licence for added security and certainty.

When recommending the retention of the statutory licences (in streamlined form) the ALRC noted that:

"Like all other users of copyright material, educational institutions, institutions assisting people with disability, and governments should not need to obtain a licence for a use of copyright material that is permitted under an unremunerated exception."⁶

regardless of any other disabilities."

⁵ *Convention on the Rights of Persons with Disabilities*, 13 December 2006, ATS 12 (entered into force on 3 May 2008).

Should fair use or fair dealing be implemented organisations and individuals should not have to rely on the licences for uses that would be fair uses. For educational institutions it should be clear that making works available in ways that would be fair uses can be done under the fair use exception (or the disability licence if retained) even if they are of quantities that could fall under the educational statutory licence.

Comments regarding the licences

Currently no revenue is collected under the statutory licence, but certain administrative demands are made of those organisations who wish to undertake actions under the licence. As there is no remuneration and the uses are already considered 'fair' the ADA again notes that the system would be most efficient if all uses were made under a free exception.

Should the licence be retained it should be streamlined and made as efficient as possible, to avoid burdening organisations who wish to use the licence with pointless red-tape. Again we would emphasise that if an exception applies (fair use, fair dealing or even s200AB) then organisations should be able to choose to rely on the exception if they choose. There is no financial detriment to the rightsholders from this approach as the uses are unremunerated in either case.

For organisations that choose to rely on the licence, the following are suggestions for a more efficient and effective licence scheme.

- No requirement to check commercial availability before each use or to wait to see if a commercially available copy will become available before converting it to an accessible file. 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.⁷ 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 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.
- Works are only considered available in accessible format if the work is accessible to the person requesting it, not simply if there was a version in one of the five prescribed formats. For example, if a large print commercial version is available, but the person requesting it requires even larger print, the commercial 'large print' version would not be considered acceptable. Similarly, synthetic text to speech conversions would be an adequate substitution for DAISY format, a key concern for the blind

⁶ Australian Law Reform Commission Report 122 *Copyright and the Digital Economy* (2014) at 8.54

⁷ S135ZQ *Copyright Act 1968*

and vision impaired.⁸ To achieve this the references to the five formats in s135ZQ of the Act should be removed and replaced with a reference to the Marrakesh definition of ‘accessible format copy’.⁹ This will also allow the inclusion of new formats as they are developed, without need of further legislative change.

- If a person relies on a technology to make non-accessible text accessible (for example a screen reader) the licence covers the provision of a format that is appropriate to be used in conjunction with that technology. The file itself may not be accessible without going through the conversion process that the beneficiary would do under fair use/fair dealing/s200AB.
- Extended to people with any form of disability that means they cannot access the work in its current format, including the hearing impaired. While not a requirement of the Treaty, as noted above Australia has obligations to provide access to all citizens with a disability that makes it difficult or impossible for them to access works.
- Remove obligations to provide remuneration notices, mark copies, record notices, sample notices and agree to surveys. As no money is paid out on this licence, 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.
- Licence extended to cover other works and subject matter other than works. Currently declared organisation may find themselves creating an accessible copy under two different section of the Act. For example a text book may have the words converted under the statutory licence and the graphs converted under s200AB. We believe that fair use should cover both of these types of works. But if the licence is retained and organisations choose to operate under it in preference to the exceptions then it would be most useful if it was comprehensive in nature.
- Organisations who fit into the category of “authorised entities”¹⁰ may use the licence without needing to be ‘declared.’¹¹ This would put organisations assisting disabled persons on the same footing as educational institutions (which do not need to be declared), reducing administrative overheads and the delay which declaration is subject to.

⁸ See submissions to Blind Citizens Australia Australian Law Reform Commission Report 122 *Copyright and the Digital Economy* (2014) *Submission 157*; Vision Australia, *Submission 181*

⁹ 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)

¹⁰ 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

¹¹ 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.

We support the current requirement that copies not be sold for profit, but cost-recovery is acceptable. This is a key protection for rightsholders and ensures that the licence would be used for proper purpose.

Option 3 - Fair Dealing

If fair use is not implemented at this time, a fair dealing provision for the purposes of access for people with a disability would be most appropriate. Fair dealing was considered by the ALRC as the appropriate response if fair use was not enacted. They noted:

“it would allow people with disability, other people assisting them, and institutions not covered by the statutory licence, to copy and format shift, as long as these activities were for the purpose of access. The fairness factors would apply, and uses that compete with a commercially available product would be unlikely to be fair.”¹²

The same comments made above regarding the interaction of the licence and fair use would apply to the licence and a fair dealing exception.

Finally the ADA does not recommend continuing to deal with the accessibility exceptions under s200AB. The requirement that s200AB only applies if a licence or exception does not apply is confusing and ensures fragmentation of approaches for organisations assisting users with disabilities. It can be particularly complex for educational institutions that are working under the disability licence, educational licences and s200AB. If s200AB is adopted consideration should be given to removing this requirement. The complex language in s200AB is difficult to comprehend and can lead to hesitation in application.

Digital Repositories

“All governments have agreed that our vision is for an inclusive Australian society that enables people with disability to fulfil their potential as equal citizens. To achieve this vision, all Australian governments, non-government organisations, business and the wide community have a role to play.”¹³

The access to works is greatly assisted in countries where there are online repositories. Looking to the future, the creation and maintenance of such a repository of accessible-format works would be of great benefit. Similarly, the creation of digital repositories when combined with the growing sophistication of conversion tools can also increase exponentially the accessible works available. The Hathi-Trust project

¹² 16.36

¹³ Council of Australian Governments [Principles to Determine the Responsibilities of the NDIS and other service Systems](#) (April 2013)

in the USA, conducted under the fair use exception, means that students with a perceptual impairment now have access to more works in a more timely fashion than ever before. The introduction of fair use would have the ability to support similar projects in Australia in ways that fair dealing or s200AB would not.

Guidelines

The ADA thinks that explanations in clear language and accessible formats would do much to bolster confidence and use of the system. International experience has shown that the best guidelines tend to be codes of best practice, created by the sector.

TPMs

For works that are protected by a technological protection measure (TPMs) 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.¹⁴ This severely limits the ability of people to make their own copies and assistance from non-prescribed organisations, rendering many uses of technologies such as screen readers or braille conversions useless.¹⁵

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 7¹⁶ any provisions/licences that are used to implement our commitments in Marrakesh should have a corresponding exception in Schedule 10A of the regulations.

Cross-border

In implementing the cross-border provisions it is important that we do not inadvertently curtail existing cross border exchanges, for example document delivery, inter-library loans or personal importation. The simplest way to do this would be to frame it as a positive right. For example 'it is not an infringement of copyright for a legally made accessible format copy to be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party' (with appropriate definitions from the Trea

¹⁴ [Schedule 10A Copyright Regulations 1969](#)

¹⁵ 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

¹⁶ 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