

**COPYRIGHT ADVISORY GROUP  
COAG EDUCATION COUNCIL**

15 December 2014

Marrakesh Treaty Consultation  
Commercial and Administrative Law Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Submission in response to Marrakesh Treaty Implementation Options Paper

This submission is made on behalf of the Copyright Advisory Group to the Council of Australian Governments Education Council (CAG). CAG represents schools and TAFEs in Australia on copyright issues, and is assisted by the National Copyright Unit, a small secretariat based in Sydney, of which I am the Director. CAG members include Commonwealth, State and Territory Departments of Education, all Catholic Education Offices and the Independent Schools, as well as the majority of TAFE colleges.

#### Introduction

Currently, schools, TAFEs, and other bodies assisting students with a print disability are required to rely on a patchwork of legislative provisions that do not cover all uses that are necessary to enable print disabled students to have access to the same resources as their non print disabled colleagues. A further problem with the existing regime is that even where uses are permitted, schools and other groups assisting people with a print disability are saddled with costly and burdensome administrative obligations that have no corresponding benefit to copyright owners. This has led to Australia lagging behind comparable regimes such as the US, the UK and Canada when it comes to the establishment of online repositories for people with a print disability. The widespread use of technological protection measures (*TPMs*) is also standing in the way of schools and other groups meeting the needs of their print disabled students. Each of these roadblocks are contributing to Australian schools finding it difficult - or impossible - to meet their obligations under the *Disability Discrimination Act 1992*.

For these reasons, CAG welcomes the Government's decision to simplify and clarify the print disability copying provisions. CAG submits that there is a strong case for replacing the existing statutory licence with a streamlined licence that would enable schools, and other institutions assisting persons with a print disability, to make accessible copies of works and other subject matter that are not commercially available in a timely and efficient manner. This would enable schools to assist students appropriately, without the need to comply with the burdensome administrative requirements that currently apply, which serve no legitimate purpose.

As contemplated in the options paper, CAG also submits that it would also be appropriate to enact a new exception that would permit people with a print disability, as well as schools and other

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bodies assisting them, to use works in limited ways that are “fair”, regardless of whether or not the work was commercially available in the required format.

## 1. Problems with the existing legislative regime

The existing legislative regime for making content available to print disabled students in accessible formats comprises a complex patchwork of provisions which do not enable schools to fully meet their obligations to ensure that print disabled students are placed on an equal footing with their non print disabled colleagues. The existing regime also imposes unnecessary costs and administrative burdens on schools with no corresponding benefit to rights holders.

### Inability to fully meet the needs of print disabled students

The disability statutory licence, which permits schools to create versions of literary or dramatic works in one of five specified formats<sup>1</sup>, is not sufficiently nuanced or flexible to ensure that schools can provide content to print disabled students in a format that is suitable to *them*. Schools can often not make an accessible copy for a student in a form that is suitable to *them*.

### *Example*

*A student requires content to be provided in a very large font size in order to be able to read it. Her teacher makes inquiries and discovers that the work can be purchased in large print format, but that the font size is not large enough for this particular student's requirements. The fact that the work has been made commercially available in large print format means that the teacher is prevented from relying on the disability statutory licence to assist her student, despite the fact that the version that is commercially available is completely unsuitable for this particular student. Nor can the teacher rely on s 200AB to make an accessible copy in this case: s 200AB(6)<sup>2</sup> prevents this. The only option for the school in this case would be to seek the permission of the copyright owner, who may or may not agree to the school's request. Even if permission is granted, this is a cumbersome process for a statutory licence designed to facilitate such a public interest purpose.*

The Australian Copyright Council has highlighted the perverse outcomes, and wasted resources, that flow from this requirement:

*Print disability organisations sometimes spend considerable time and resources making an accessible master copy of a book, but are then unable to use it for their print-disabled clients without permission because a copy in the same format becomes commercially available. However, the commercially available version may be inferior from the point of view of a person with a print disability (for example, because it lacks navigation information such as chapter and page information).<sup>3</sup>*

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<sup>1</sup> Sound recording, Braille, large-print, photographic, or electronic.

<sup>2</sup> s 200AB(6) provides that s 200AB cannot be relied on if another provision of the Act would apply to use “assuming that the conditions or requirements of that provision have been met”. We discuss this further below in section 4.

<sup>3</sup> [http://www.copyright.org.au/admin/cms-acc1/\\_images/7984422564cd76dde1f006.pdf](http://www.copyright.org.au/admin/cms-acc1/_images/7984422564cd76dde1f006.pdf) p 24

The way in which teachers are required to apply the commercial availability test also operates as a roadblock to schools providing print disabled students with the content that they require in a timely fashion. Each and every time a teacher wants to make an accessible copy in reliance on the licence, the teacher is required to undertake a “reasonable investigation” to satisfy themselves that the work cannot be obtained in a reasonable time at an ordinary commercial price in the relevant format. This requirement is also preventing schools from using the most efficient digital technologies to create an online repository of accessible copies that can be made continuously available to print disabled students. This is because it is effectively impossible to make accessible material available online and comply with this requirement. In its *Copyright and the Digital Economy* Report, the Australian Law Reform Commission (ALRC) noted that this had put Australia out of step with comparable jurisdictions such as the UK, the US and Canada, when it came to creation of online repositories for people with a print disability.<sup>4</sup>

The disability statutory licence is also limited in scope: it currently applies only to literary and dramatic works. If schools are to meet their obligations to print and disabled students, they need to be able to create accessible formats of all kinds of works and subject matter, including musical and artistic works, as well as audio-visual works such as broadcasts (for example, to create a captioned version of a program where this is not available as part of the broadcast). Under the current regime, schools must rely on the Part VA statutory licence - which is remunerable - when making accessible copies of broadcasts, despite the fact that there is no market for such content.

The widespread use of TPMs is another major factor preventing schools from fully meeting the needs of disabled students. The question of whether or not a school is permitted to circumvent a TPM in order to create an accessible copy will depend on whether it is relying on the disability statutory licence (for which a TPM exception does apply), or s 200AB (for which there is no TPM exception).

A further practical roadblock also applies: while schools are in *theory* permitted to circumvent a TPM to create an accessible copy in reliance on the disability statutory licence, the prohibition on supplying another person with a circumvention device, or providing a circumvention service, means that as a matter of practical reality schools are often prevented from taking full advantage of the exceptions that are intended to facilitate access for print disabled students. Along with the absence of a TPM exception for s 200AB, this is creating a significant barrier to access for students with a print disability.

#### Unnecessary costs and administrative burden

The disability statutory licence also imposes a number of administrative requirements that impose cost and burden on schools and other institutions relying on the licence without any corresponding protection or benefit to rights holders.

We have already referred to the requirement to check commercial availability each and every time a copy is made. As the ALRC noted, this requirement is “pointlessly onerous”, particularly in cases where a work is frequently requested and is never likely to be available in the relevant format (such

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<sup>4</sup> ALRC, *Copyright and the Digital Economy*, para 16.18

as Braille or very large print formats).<sup>5</sup> The same view has been expressed by the Australian Copyright Council in its Print Disability Copyright Guidelines.<sup>6</sup>

Other aspects of the disability licence that in CAG's view are pointlessly onerous are the obligations to issue a remuneration notice (undertaking to pay equitable remuneration), and to comply with record-keeping or sampling obligations.<sup>7</sup> This is because the disability licence operates in practice as a free exception. At no time since the licence was enacted has Copyright Agency - the declared collecting society - sought equitable remuneration for copying or communication done in reliance on the licence. In fact, Copyright Agency provides the following information to institutions relying on the disability statutory licence:

*The Remuneration Notice is a document that must be sent to Copyright Agency in order for the institution to copy under the statutory licence. **It's purpose** is to specify that the institution agrees to pay fair remuneration for copying and the system of records to be kept under the licence. **Although there is this obligation to provide a Remuneration Notice, Copyright Agency currently does not charge a fee for copying under the licence.***<sup>8</sup>

We note also that Copyright Agency has stated publicly that

*Though participation in a sample survey is a requirement of statutory licence for the print disabled, [we have] not enforced this component of the licence.*<sup>9</sup>

CAG submits that in circumstances where no remuneration is required (or has ever been required) to be paid, the requirement to issue a remuneration notice, and to undertake to keep records or take part in surveys (which could only ever be relevant to determining which rights holders should receive payment in the event that copying was subject to remuneration) imposes a pointless layer of administrative burden that benefits no one.

In the course of preparing this submission, CAG received feedback from some teachers that notwithstanding that no remuneration was payable, the additional administrative requirements of the disability statutory licence had led to teachers avoiding relying on this licence, and opting to rely on the Part VB licence instead - despite that licence itself being extremely complex and burdensome (see CAG's submissions to the ALRC *Copyright and the Digital Economy* review for further information on this point). This is clear evidence that the policy objectives of the disability statutory licence are being undermined as a result of a needless administrative overlay.

## 2. What would an ideal legislative regime look like?

CAG submits that an ideal legislative regime for making accessible copies for and by people with a print disability would look something like this:

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<sup>5</sup> ALRC report, para 16.13

<sup>6</sup> [http://www.copyright.org.au/admin/cms-acc1/\\_images/7984422564cd76dde1f006.pdf](http://www.copyright.org.au/admin/cms-acc1/_images/7984422564cd76dde1f006.pdf) p 23

<sup>7</sup> s 135ZP

<sup>8</sup> <http://www.copyright.com.au/licences/people-with-disabilities/people-with-a-print-disability>

<sup>9</sup> <http://www.copyright.com.au/licences/people-with-disabilities/people-with-a-print-disability>

- There would be a simple, streamlined, non-remunerable statutory licence (not necessarily contained in Part VB of the Act) that permitted schools and other bodies assisting people with a print disability to copy or communicate any work or subject matter in any format provided *only* that the work etc was not commercially available in a format that was suitable for that person. There would be no requirement to issue a remuneration notice in order to rely on this licence. Nor would there be any requirement to keep records or take part in surveys.
- There would be a simple and efficient means for a body relying on the licence to check whether or not a work was commercially available. One approach would be for a central body - perhaps Copyright Agency - to administer a database which contained information as to whether or not particular content was commercially available in a particular format. Rights holders could notify such a body as to what works they have made available in accessible formats. As well as making it easier for users of the statutory licence to comply with their obligations, this would also encourage rights holders to provide a market solution to the accessibility problem.
- It would be made expressly clear that there was no obligation to make a commercial availability check each and every time a work was copied in reliance on the licence. Removing this requirement would enable the creation of online repositories for people with a print disability, bringing Australia in line with comparable regimes.
- It may be appropriate to create guidelines to assist teachers and other users of the licence when determining what kinds of commercial availability inquiries were appropriate. For example, guidelines could state that users of the licence could satisfy themselves that a work was not commercially available by checking a central database of the kind described above. Such guidelines could also deal with the question of what ongoing checks may be appropriate for determining whether content has become commercially available in the required format since being made available online in reliance on the licence.
- There would also be an exception that permitted uses of works etc for and by people with a print disability, regardless of whether or not the work was commercially available in the required format, provided only that the use was fair. An exception of this kind is appropriate to ensure that persons with a print disability, or schools and other bodies that are assisting them, are not required to purchase an entire work simply in order to undertake uses that would satisfy a fairness analysis. Examples may include sing a small amount of a work in a conference presentation.
- There would be a TPM exception permitting circumvention of TPMs by anyone entitled to rely on either of these provisions. The Australian school sector has been advocating since 2007 for a limited exception to the TPM regime to assist students with disabilities.

### 3. Comment on the 3 options in the options paper

CAG has considered each of the three options set out in the options paper.

We consider that option 1 should be rejected. It would not address any of the concerns that we have outlined above.

Option 2 would address some, but not all, of the concerns that we have outlined. While the disability statutory licence would be simplified and streamlined under this option, it would apply only to literary, dramatic and artistic works. If schools are to fully meet their obligations to ensure that print disabled students are on an equal footing with their non print disabled colleagues, they must be in a position to make accessible copies of not just literary, dramatic and artistic works, but also of other subject matter such as audio-visual works. Another shortcoming of option 2 is that it would leave print disabled people, and bodies such as schools that are assisting them, in the position of having to purchase an entire work even if they wanted to use only a small part of the work in a way that would not prejudice the rights holder, and which would otherwise be considered “fair”. CAG submits that there is real doubt about whether a similar objective could be achieved under s200AB due to the operation of s200AB(6), and particularly Example 2 in the legislative note to that provision (see below).

CAG submits that a modified version of option 3 - that includes the features that we have set out in section 2 above – is the preferred option for ensuring that Australia meets its obligations under the Marrakesh Treaty.

#### 4. What kind of stand alone provision?

The options paper suggests a stand alone fair dealing provision that would be subject to the fairness factors identified by the ALRC in its *Copyright and the Digital Economy* report; ie

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

CAG submits that enacting a fair use exception of the kind recommended by the ALRC would be the most appropriate way of achieving this. As the ALRC noted, fair use has been relied on in the US for initiatives such as the HathiTrust Mass Digitisation project that made digital books available in accessible formats, and on a secure system, to students with certified disabilities.<sup>10</sup>

In the event that the Government decides not to enact fair use at this time, CAG submits that the next best option would be to enact a new fair dealing exception that could be relied on by print disabled people, as well as by schools and other bodies assisting them, regardless of whether the work etc was commercially available in the required format. It would be important to ensure that the drafting was sufficiently clear so as to ensure that schools and other institutions were not prevented from relying on the exception.

CAG submits that a 200AB-style exception is the least appropriate option. There are two main reasons for this:

- Firstly, the incorporation of the three step test in this exception has led to a much greater degree of confusion and uncertainty as to the potential scope of the exception than could have been expected had the legislature opted for a fair use or fair dealing exception. The language of “fairness” is a language that teachers and other intended users of this exception are more familiar with. The incorporation of the three step test has also made it

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<sup>10</sup> ALRC report, para 16.26

difficult to create useful, general guidelines to assist day-to-day decision making.

- Secondly, s 200AB(6)(b), which provides that the exception does not apply to any use that “because of another provision of this Act...would not be an infringement of copyright assuming the conditions or requirement of that other use were met”, appears to narrow the scope of the exception to a significant extent. If s 200AB were used as the model for the proposed stand alone exception, it would potentially be open to a rights holder to argue that this provision had the effect of preventing s 200AB from ever being relied - regardless of how limited the use was - if the use could have been done in reliance on the disability statutory licence but for the fact that the work was commercially available in the required format. The effect would be to completely undermine the policy intention supporting the reforms; ie, to enable people with a print disability, and organisations such as schools that are assisting them, to make fair uses of content regardless of whether or not the content is commercially available in the required format.

## 5. Addressing rights holder concerns

CAG is aware that some rights holders groups have expressed concern that a regime of the kind we have outlined above - and in particular the ability to legally circumvent TPMs - may result in accessible copies being widely distributed, thus potentially undermining markets for such content in circumstances where rights holders make the content commercially available. In our submission, such concerns are without foundation. The institutions that would be relying on these provisions - including schools - have a long track record of taking all reasonable steps to protect the interests of rights holders. They have systems in place for ensuring that copies that made in reliance on exceptions and limitations in the Act are accessible *only* to those users who are entitled to access them.

The practical reality is that in a digital environment, content is increasingly subject to TPM exceptions. This means that exceptions and limitations that are intended to assist people with a print disability to access content in accessible formats are of little practical use unless they are also subject to an exception that permits user to circumvent TPMs in order to exercise their rights to make accessible copies.

Please contact me if you would like to discuss any aspect of this submission

Yours sincerely

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