

Submission to Marrakesh Treaty Implementation

Options Paper

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Response to options paper

Introduction

Universities Australia welcomes this opportunity to provide input into the Government's consideration of what amendments to the *Copyright Act* (the Act) are necessary in order to ensure that Australia meets its obligations under the Marrakesh Treaty, as well as to ensure that the print disability copying regime operates effectively and efficiently.

The current legislative regime for making accessible copies for print disabled students comprises a confusing patchwork of legal provisions that impose unnecessary costs and burden on universities, with no corresponding benefit to rights holders. It also prevents universities from providing access to content in a format that is suitable to individual students learning needs, again, with no benefit to rights holders. Technology has delivered countless opportunities to put print disabled students in the same position as their peers, but those opportunities are not being fully realised under the existing disability copying regime.

There is a strong case to reform the Act to ensure compliance with the Marrakesh Treaty.

1. Shortcomings of the existing print disability copying regime

The existing print disability copying regime imposes unnecessary costs and administrative burden on universities, and prevents them from fully meeting their obligations to ensure that print disabled students have the same access to content as their fellow students.

The current provisions prevent universities from making accessible copies in a format that is suitable for individual students

The print disability statutory licence in Part VB, Div 3 of the Act (*the print disability licence*) permits universities and other authorised bodies to create versions of literary or dramatic works in one of five specified formats - sound recording, Braille, large-print, photographic, or electronic - provided that the work cannot be obtained within a reasonable time, at an ordinary price, in the relevant format.¹

That sounds reasonable in principle. It is clearly intended to ensure that the print disability licence does not operate as a substitute for having to purchase an accessible copy if one is available.

In practice, however, this limitation is preventing universities from making copies in a format that is actually accessible to their students.

Example 1

Student A requires a particular book in an accessible electronic format. It so happens that the book is available commercially in an electronic format, but it is protected by an access control technological protection measure (TPM) that prevents screen reading software known as JAWs from accessing the text. There is an exception that would permit the university to circumvent the TPM in order to render the work accessible to its student, but

¹ s 135ZP

the university has no way of acquiring the necessary anti-circumvention device, as there is a prohibition on the supply of such devices.²

In this scenario the university cannot rely on the print disability statutory licence to make its own electronic copy of the work for its print disabled student: the work can be purchased in electronic format, and that is enough to rule out reliance on the print disability licence, regardless of the fact that the available format is of absolutely no use to the student.

Example 2

Student B requires a particular book in a very large text format. The book is available to be purchased in a large print format, but the font size is not large enough for Student B to be able to read it.

Again, in this scenario the university cannot rely on the print disability licence to make a copy of the work in a format this is accessible to its student. The mere fact that a large format version of the work can be purchased commercially rules out reliance on the licence to create any other large print version of the work.

In each of these cases, the publisher is effectively in a position to control not only the right to copy, but also the right for a print disabled student to be able to *read* the work.

This limitation can only be overcome by modifying the commercial availability test so as to enable universities (and other bodies entitled to rely on the licence) to make accessible copies in any format required by their print disabled students provided only that there is no commercially available equivalent that suits the student's particular needs.

The current provisions are standing in the way of universities creating an online database of accessible works for print disabled students

Under the current print disability copying regime it is effectively impossible to create an online database of works that could be made continuously available to print disabled students. This is because of the requirement that a university undertake a “reasonable investigation” - each and every time that a work is copied or communicated in reliance on the licence - to satisfy itself that

² This is the so-called “lamentable and inexcusable flaw...that verges on absurdity” and converts the exceptions to “empty promises”, that was highlighted by the House Standing Committee on Legal and Constitutional Affairs in its 2006 report into the anti-circumvention regime.

the work cannot be obtained in a reasonable time at an ordinary commercial price in the relevant format. The Copyright Council says that this requirement means that an organisation relying on the licence would need to check for commercial availability before each download by an individual.³ In its *Copyright and the Digital Economy* Report, the Australian Law Reform Commission described the requirement as “pointlessly onerous”, and noted that it had put Australia out of step with comparable jurisdictions when it came to creation of online repositories for people with a print disability.⁴

The print disability regime in the USA has facilitated the creation of online digital databases that have vastly improved access to work for print disabled students (see section 2 below).

The current provisions do not operate efficiently to allow timely accessible copies to be made by organisations

As it currently operates, the commercial availability test is making it difficult for universities to provide timely access to works for their print disabled students. The obligation to enquire - each and every time - as to whether a work can be obtained commercially in the relevant format inevitably means that there is often a significant time delay in making content available to print disabled students. When it comes to the prescribed course material, this time delay can be taken into account by lecturers ensuring that requests are made well in advance of a course beginning. This is not always possible if a student has not identified until the beginning of the course or on an ad-hoc basis.

The current provisions impose unnecessary administrative burdens

The requirement to check commercial availability - see above - imposes a costly and unnecessary administrative burden on universities relying on the print disability licence. There is also an obligation to issue a remuneration notice to Copyright Agency, as well as marking and notice requirements. If these obligations are not complied with, the benefit of the licence is lost, and the copy will amount to an infringement.

That these obligations serve no useful purpose is highlighted by the following statement from Copyright Agency, contained in guidelines for institutions relying on the print disability licence:

³ http://www.copyright.org.au/admin/cms-acc1/_images/7984422564cd76dde1f006.pdf p 16

⁴ ALRC, *Copyright and the Digital Economy*, paras 16.13 and 16.18

The Remuneration Notice is a document that must be sent to Copyright Agency in order for the institution to copy under the statutory licence. Its 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.⁵ (emphasis added)

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.⁶

In circumstances where no remuneration is required to be paid under the print disability licence, the obligation 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 red tape that benefits no one.

Inadequate coverage

The limitation to literary and dramatic works is another shortcoming of the licence. Universities need to be in a position 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 print disabled students.

s 200AB

There are three major shortcomings with s 200AB.

Firstly, the incorporation of the language of the three-step test into this exception has greatly limited its usefulness to the institutions and individuals who were intended to benefit from it. The drafting - which requires users to engage in an eight-step analysis - has led to a high degree of uncertainty as to the practical application and potential scope of the exception.⁷

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

⁵ <http://www.copyright.com.au/licences/people-with-disabilities/people-with-a-print-disability>

⁶ <http://www.copyright.com.au/licences/people-with-disabilities/people-with-a-print-disability>

⁷ See Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?, Report prepared for the Australian Digital Alliance/ Australian Libraries Copyright Committee, 2012

exception to a significant extent. This has quite serious practical implications for universities. In example 1 above, the fact that this use would have been covered by the print disability licence had the work not been commercially available in the relevant format means that the university cannot rely on s 200AB to assist the student, even though the print disability licence is of no practical use.

Thirdly, the absence of an exception permitting institutions to circumvent TPMs for the purposes of s 200AB, combined with the increasing use of TPMs, has resulted in an ever-growing pool of content that effectively falls outside of the scope of the exception.

2. The US position

It is instructive to consider the US position, given that the Marrakesh Treaty was based largely on US copyright law.

Two provisions in the US Copyright Act enable university libraries and disability services offices to provide accessible format copies to students with a print disability: the so-called “Chafee Amendment”, in s 17 of the US Act, and the fair use exception in s 107 of the US Act. If the intended use is covered by the Chafee Amendment, there is no need for a university to undertake a fairness analysis in order to determine whether it can make an accessible copy.

This regime - which does not require universities to check commercial availability each and every time an accessible copy is made available to a student - has facilitated resources that are not available to print disabled students in Australia due to our more restrictive copyright regime. Two examples are the HathiTrust and Bookshare digital libraries.

HathiTrust

In 2008, a consortium of US libraries known as the HathiTrust created a database of millions of volumes of text partly for the purpose of providing works in accessible formats to people with a print disability. The US Court of Appeals for the Second Circuit found earlier this year⁸ that the HathiTrust could rely on the Chafee Amendment, as well as the fair use exception, for this purpose. The Court said that the HathiTrust database had benefited students with a wide range of print disabilities, including students who were legally blind but nevertheless capable of viewing images if these were sufficiently magnified or if the colour contrast was increased, and students whose physical impairments prevented them from turning pages or holding books, who were now able to use assistive devices such as screen readers to access the scanned books.

⁸ Authors Guild Inc v HathiTrust 755 F.3d 87 (2d Cir. 2014)

The court also made clear that once a university library or disability services office makes an accessible format copy for one student, it can rely on these exceptions to retain a digital file of the work for the purpose of making accessible copies of the work available to other print disabled students, whether at that university or another institution.

Bookshare

Bookshare is a database containing more than 300,000 works, in accessible formats, which can be accessed by people with a print disability. While Bookshare has worked cooperatively with publishers, the creation of this incredibly valuable resource would not have been possible without the Chafee Amendment. This exception allows Bookshare to create a database of accessible works, without the need to obtain rights holder permission or check for commercial availability, provided that the copies are made available only to people with bona fide print disabilities. As with HathiTrust, Bookshare does not provide access to copyrighted works for the general public.

Australian print disabled users are able to access some Bookshare content, but only if the publisher has authorised this. This is because the Chafee Amendment cannot be relied on when providing access to users outside of the US. US users, on the other hand, are able to access the entire database, whether or not the content has been included with the permission of the publisher.

3. How the Australian print disability copyright regime can be improved

Universities Australia urges the Government to take this opportunity to address the shortcomings we have set out above, and to enact a streamlined disability copying regime that will better serve the needs of people with a print disability and those organisations, including universities, that assist them.

In our submission, there should be two elements to such a regime:

1. a statutory licence that enables print disabled people, and those assisting, them to make accessible copies of works and subject matter provided only that the content is not available commercially in the required format and in a form that suited the needs of the particular individual; and
2. a provision that enables print disabled people, and those assisting them, to make limited uses of works and subject matter, whether or not the content is available commercially, subject only to a fairness test.

Statutory licence

The existing statutory licence should be expanded to include all works and subject matter. This would enable universities to better meet the needs of print disabled students, whose requirements are not limited to literary and dramatic works.

The obligations to issue a remuneration notice, to mark copies, and to keep records or take part in sample surveys should be abolished. They serve no useful purpose, and simply amount to unnecessary red tape.

It should be made clear that a work and subject matter is only to be regarded as commercially available for the purposes of the licence if it is available in a form that suits the needs of the particular student. This could be achieved by adopting the definition of “accessible copy format” in the Marrakesh Treaty:

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.

It should be made clear that there is no obligation to check commercial availability each and every time a work etc is copied or communicated in reliance in 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.

Consideration should be given as to how best to create a simple means to check whether a work etc is commercially available in the required format. It may be appropriate for a central body to administer a database that contains information as to whether or not particular content is commercially available in a particular format. Rights holders could notify such a body as and when they make content available in particular 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.

There should be a TPM exception permitting circumvention of TPMs by anyone entitled to rely on the statutory licence.

New exception

Universities Australia strongly supports the enactment of an exception that could be relied on by people with a print disability, and those assisting them, to make limited uses of works etc, subject

only to the use being “fair” according to the four fairness factors identified by the ALRC in its *Copyright and the Digital Economy* report. While it is likely that the existing fair dealing exceptions - particularly those relating to research or study and criticism or review - would apply to many of the kinds of ways in which print disabled students may wish to use copyright content, these exceptions will not cover all uses.

Universities Australia recommends that the most appropriate way to implement an exception of this kind would be to enact a fair use exception as recommended by the ALRC.

In the event that the Government decides not to enact fair use at this time, Universities Australia 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 universities and other bodies assisting them. It would be important to ensure that the drafting was sufficiently clear to ensure that a university could rely on this exception when engaging in fair dealings for the purpose of assisting its print disabled students.

Universities Australia strongly submits that a s 200AB-style exception would be inappropriate. For the reasons outlined above in section 2, an exception of this kind is likely to be far less effective in assisting people with a print disability than would fair use or a stand alone fair dealing exception.

4. International distribution of works

In giving effect to the cross-border provisions of the Marrakesh Treaty - which permit authorised organisations to exchange accessible format works with other authorised organisations and individuals in countries who have also ratified the treaty - it will be crucial to ensure that any amendment does not have the unintended consequence of limiting legitimate cross-border exchanges, such as document delivery and interlibrary loan, to countries that have ratified the Marrakesh Treaty.

We trust that this submission has been of assistance. We would be pleased to provide any further information that you may require.