

16. Access for People with Disability

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Summary

16.1 The digital era creates the potential for vastly improved access to copyright material for people with disability. However current legislative arrangements mean that this potential is not fully realised. The *Copyright Act* provides for a statutory licence for institutions assisting people with disability. The licence allows these institutions to make accessible versions of copyright works, but its scope of the licence is limited, the administrative requirements are onerous, and it has not facilitated the establishment of an online repository for people with print disability. The exceptions available for individuals—fair dealing, format shifting and the s 200AB ‘special case’ exception—are also limited in their scope. The widespread use of technological protection measures (TPMs) is creating significant barriers to access for people with disability.

16.2 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.

Introduction

16.3 Until recently, the predominant way for people with print disability to access text was via Braille and sound recordings. However, access remains poor, with only 5% of all books produced in Australia being published in accessible formats such as large print, audio or Braille, a situation that the Disability Discrimination Commissioner, Graeme Innes, describes as a ‘book famine’.¹ The digital era creates the potential for vastly improved access to copyright material for people with disability, using digital technology including:

- online databases of digital versions of books, such as Bookshare or the HathiTrust Digital Library;
- portable mp3 players to listen to an audio description of a movie;
- portable scanners to format shift a purchased copy of a work;
- computers, tablets or smartphones with built-in screen reading software;
- electronic texts read via a digital Braille display, copied to a portable Braille note taking device or sent to an embosser to produce hardcopy Braille; and
- screen access technology that provides tables of contents and allows the user to adjust the font size or colour.

16.4 While the older technology—that is, Braille and sound recordings—was resource intensive and relied upon institutions to create accessible formats, some of the newer technology empowers individuals to convert material to a suitable format for their own use.

16.5 However, the full benefits of digitisation are not yet available for people with disability, partly because of the current legislative arrangements, and partly because of the widespread use of TPMs on digital material, particularly ebooks. TPMs are intended to discourage the making of infringing copies, but they also inhibit the use of screen readers and the creation of Braille versions.²

Current legislative arrangements

16.6 Part VA of the *Copyright Act* provides for a statutory licence for copying and communicating broadcasts that is available to an institution assisting persons with an intellectual disability.³ Part VB contains a statutory licence for reproducing and communicating works, available for institutions assisting persons with print disability

1 Australian Human Rights Commission, *Australia Can Help End World Book Famine* <www.humanrights.gov.au> at 24 October 2013.

2 See generally J Fruchterman, *Technological Protection Measures and the Blind* (2013) <<http://www.benetech.blogspot.com.au/2013/06/technological-protection-measures-and.html>> at 7 November 2013; N Suzor et al, ‘Digital Copyright and Disability Discrimination: From Braille Books to Bookshare’ (2008) 13(1) *Media & Arts Law Review* 1.

3 *Copyright Act 1968* (Cth) pt VA. A broadcast, for the purpose of pt VA, extends to the content of a free-to-air broadcast made available online by a broadcaster: s 135C(1). See also Ch 19.

(literary or dramatic works only) or intellectual disability (literary, dramatic, artistic and musical works). The Part VB licence allows reproduction of the work in one of five versions: sound recording, Braille, large print, photographic or electronic.

16.7 The licence does not extend to making a reproduction of a work in a particular format if there is already a commercially available version in that format.⁴ The statutory licences require equitable remuneration to be paid, but Copyright Agency has indicated that it does not collect payment for these uses.⁵

16.8 There is no comprehensive exception for individual users. Copyright Agency notes that individuals can create accessible materials by relying on exceptions for format shifting, fair dealing for research and study, and ‘special cases’ (s 200AB).⁶

16.9 AMCOS has provided a licence for music to the National Information Library Service. It does not cover all repertoire and is only available for copying for students.⁷

International obligations

16.10 Until recently, international copyright law has permitted, but not required, countries to include exceptions for access for persons with disability.⁸ The *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled* (the Marrakesh Treaty) was adopted on 27 June 2013. The Marrakesh Treaty requires parties to provide exceptions to copyright to facilitate the availability of works in accessible formats.⁹ The exceptions should allow certain uses of copyright material by institutions (‘authorised entities’) and by individuals (for personal use).¹⁰ Australia is not yet a signatory to the Marrakesh Treaty.

16.11 Australia is a party to the UN *Convention on the Rights of Persons with Disabilities*, which requires parties 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’.¹¹

4 Ibid s 135ZQ.

5 Copyright Agency, *Submission 727*.

6 Copyright Agency, *Submission 866*, see also Australian Copyright Council, *Print Disability Copyright Guidelines* (2007).

7 RBS.RVIB.VAF Ltd, Blind Citizens Australia, Royal Institute for Deaf and Blind Children, *Submission to the Copyright Law Branch, Attorney-General’s Department on Fair Use and Other Copyright Exceptions* (2005).

8 J Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired* (2007), 9.

9 *Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled*, (adopted by the Diplomatic Conference, Marrakesh, 27 June 2013), art 4(1).

10 Ibid art 4(2).

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

Problems with existing arrangements

The statutory licence for institutions

16.12 Stakeholders pointed out that the pt VB statutory licence does not extend to artistic works (such as drawings, diagrams, maps and plans) or to musical works.¹² It extends to educational institutions and institutions assisting persons with print disability, but not other institutions such as libraries outside educational institutions.

16.13 Some difficulties with the statutory licence have been identified by the Australian Copyright Council.

- Publishers are not legally obliged to supply digital files for people with print disability, and can provide them on restrictive terms and conditions.
- Organisations must check for commercial availability before making each copy,¹³ which is ‘pointlessly onerous’ when the work is frequently requested and is never likely to be available in the relevant format. This requirement means that it is ‘effectively impossible to make accessible material available online’.
- The Act does not allow reproduction into a format that is commercially available, even where the commercially available version has TPMs that inhibit the use of screen readers, or does not have the navigation information that is useful for a person with a print disability.¹⁴

16.14 There are penalties for the removal of TPMs, and for manufacturing, importing or distributing a circumvention device.¹⁵ Institutions assisting persons with print disability are allowed to remove a TPM,¹⁶ but it is not clear how the institution would obtain a circumvention device.¹⁷

16.15 Some publishers are making audio books available using synthetic voice rather than human narration. Many people find synthetic speech unpleasant to listen to and prefer to listen to a version with human narration. However, if there is a synthetic voice version commercially available, it may not be possible to rely on the statutory licence to make a human narration version.¹⁸

16.16 In 2005, the Queensland Narrating Service, an institution assisting people with a print disability, reported that its efforts to provide narrations of books in a timely

12 ADA and ALCC, *Submission 586*; Copyright Advisory Group—Schools, *Submission 707*.

13 *Copyright Act 1968* (Cth) s 135ZQ.

14 Australian Copyright Council, *Print Disability Copyright Guidelines* (2007). The statutory licence does not permit an ‘electronic version’ to be made if there is an electronic version available within a reasonable time at an ordinary commercial price: *Copyright Act 1968* (Cth) s 135ZP(6A). See also Vision Australia, *Submission 181*.

15 *Copyright Act 1968* (Cth) pt V div 2A.

16 *Copyright Regulations 1969* (Cth) sch 10A.

17 The ALRC has been asked not to duplicate work being done by the review of exceptions relating to technological protection measures. See also Australian Government Attorney-General’s Department *Review of Technological Protection Measure Exceptions* www.ag.gov.au at 24 October 2013.

18 Blind Citizens Australia, *Submission 157*; Vision Australia, *Submission 181*.

manner were hindered by long waits for publishers' permissions, refusal of permission for digital copies and the administration costs associated with the statutory licence.¹⁹

16.17 Also in 2005, a joint submission from three Australian organisations representing people with print disability reported that efforts to digitise 500 analogue items that were 'the core collection of library materials for the print disabled' were jeopardised by 'outmoded and restrictive legislation'.²⁰

16.18 In 2008, Nicholas Suzor pointed out that while the United States had an online repository of books for the blind, and Canada was developing one, Australia had no such repository. He noted that Australian copyright law appears to provide for the development of a repository, but none had been developed for reasons that may include 'the complexity of the legislative scheme'.²¹ He also reported that the statutory licence 'is rarely used to provide electronic text versions (which) suggests some difficulties in interpretation or implementation of the licence in the digital environment'.²²

Exceptions for individuals and libraries

16.19 The exceptions in the *Copyright Act* that are available to individuals are highly qualified—fair dealing is only available for research and study, and not, for example, for reading for leisure. The format shifting and s 200AB 'special case' exceptions have significant limitations, discussed in Ch 10 and 12.²³ The ALRC recommends that all of these exceptions should be repealed and replaced with fair use.²⁴

16.20 The usefulness of these exceptions for people with disability is diminished by the existence of TPMs on many copyright works. Individuals are not permitted to remove TPMs on copyright material they have purchased, even if that TPM is preventing the operation of a screen reader.²⁵

16.21 The *Copyright Act* allows libraries to scan books for the benefit of persons with print disability, but ss 49(7A) and 50(7C) require those scans to be destroyed after a single use, resulting in significant expense for the library and delay for the student.²⁶

Market-based solutions

16.22 Some of these problems may be resolved without changes to the law. The Australian Publishers Association (APA) reported that audio, large print, Braille and

19 Queensland Narrating Service, *Submission to the Copyright Law Branch, Attorney-General's Department on Fair Use and Other Copyright Exceptions* (2005).

20 RBS.RVIB.VAF Ltd, Blind Citizens Australia, Royal Institute for Deaf and Blind Children, *Submission to the Copyright Law Branch, Attorney-General's Department on Fair Use and Other Copyright Exceptions* (2005).

21 N Suzor et al, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13(1) *Media & Arts Law Review* 1, 4.

22 Ibid 6.

23 See also Ibid 8 on the limitations of s 200AB.

24 See Ch 5, 10, 12.

25 *Copyright Act 1968* (Cth) s 116AN, see also N Suzor et al, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13(1) *Media & Arts Law Review* 1, 9–11.

26 ADA and ALCC, *Submission 213*.

DAISY²⁷ versions of books are becoming more available through commercial channels.²⁸ The APA also pointed to changes in technology that allow customers to choose their own font size when accessing an ebook, and to a World Intellectual Property Organization project that facilitates the cross border exchange of books in accessible formats between national libraries and charitable institutions serving people with print disabilities.²⁹

16.23 Similarly, the Australian Copyright Council has attempted to address these problems by encouraging publishers to offer the Individuals Print Disability Licence and by drafting a sample agreement for print disability organisations and publishers.³⁰ In 2005, five publishers had granted the licence to individuals with print disability.

Other approaches

16.24 Canada and the United Kingdom allow a wide range of bodies, as well as individuals, to use the exceptions for access for people with disability.³¹ New Zealand's approach is similar to Australia, in that it allows prescribed bodies to make modified copies of published literary or dramatic works, if the work is not commercially available.³²

16.25 The United States has a print disability scheme under s 31 of the US *Copyright Act 1976* (the Chafee Amendment). It allows authorised entities to copy published, non-dramatic literary works in formats for use by persons with disability.³³ This scheme has facilitated the establishment of Bookshare, an online library for individuals with print disability. Bookshare is available in Australia but not all the books in the collection are available to Australians.³⁴ Blind Citizens Australia noted that

The creation of secure online text repositories for the exclusive use of people who are blind has allowed these countries [US and Canada] to provide a highly beneficial service with little impact on copyright owners.³⁵

16.26 In *The Authors Guild v HathiTrust*, the court held that the existence of the Chafee Amendment did not preclude reliance on fair use for access for people with disability.³⁶ The HathiTrust Mass Digitisation Project made digital books available to students on a secure system for students with certified disabilities. Justice Baer said

27 'DAISY' stands for Digital Accessible Information System and is a technical standard designed for use by people with print disability.

28 Australian Publishers Association, *Submission 225*.

29 Australian Publishers Association, *Submission 629*. Referring to the WIPO project, known as TIGAR (Trusted Intermediary Global Accessible Resources), Disability Discrimination Commissioner Graeme Innes has urged the Australian government not to fund TIGAR, on the basis that it has only produced 300 books in three years: Australian Human Rights Commission, *Australia can help end world book famine* <www.humanrights.gov.au> at 24 October 2013.

30 Australian Copyright Council, *Print Disability Copyright Guidelines* (2007).

31 *Copyright Act 1985* (Can) s 32; *Copyright, Designs and Patents Act 1988* (UK) ss 31A–321F.

32 *Copyright Act 1994* (NZ) s 69.

33 *Copyright Act 1976* (US) 17 U.S.C. 121.

34 Bookshare has 102,000 titles available in most countries, and 71,000 books for readers in Australia: Bookshare, *Books Without Barriers* <www.bookshare.org> at 22 October 2013.

35 Blind Citizens Australia, *Submission 157*.

36 *The Authors Guild Inc v HathiTrust*, WL 4808939 (SDNY, 2012), 23.

that digitisation has enabled ‘the unprecedented ability of print-disabled individuals to have an equal opportunity to compete with their sighted peers’.³⁷ He found that the use of copyright material was transformative in that it provided access for print-disabled individuals, a purpose that was not served by the original work.³⁸ He also noted that the provision of access for print-disabled individuals does not have a significant impact on a market.³⁹

16.27 The American Library Association reports that fair use has provided the flexibility to allow libraries to ‘maintain their missions when a purpose-specific exception may not cover unforeseen or unaccounted-for changes in technology or access’.⁴⁰

An illustrative purpose of access for people with disability

16.28 The ALRC has been asked not to duplicate work being undertaken on increased access to copyright works for people with print disability. However, having determined that Australia would be best served by a fair use exception accompanied by a list of illustrative purposes, it is difficult to ignore the question as to whether facilitating access for people with disability should be an illustrative purpose. Some stakeholders, including schools, libraries, and organisations representing people with disability agreed that there should be such an illustrative purpose.⁴¹

It is our view that a fair usage provision which recognises the need for individuals with a print disability to format shift from an inaccessible to accessible copy would dramatically enhance access for a significant proportion of the population and also advantage copyright owners through increased sales of their works.⁴²

16.29 Representatives of content creators considered that the statutory licence was adequate.⁴³ For example, Australian Copyright Council noted that ‘the print disability statutory licence in Part VB provides greater certainty and access than either fair use or a voluntary licence’.⁴⁴

16.30 The ALRC agrees that the statutory licence has the potential to provide access and certainty, although there is some evidence that it is not meeting this potential. The

37 Ibid, 21.

38 Ibid, 16.

39 Ibid, 21.

40 American Library Association and Association of Research Libraries, *Submission 703*.

41 Copyright Advisory Group—Schools, *Submission 707*; American Library Association and Association of Research Libraries, *Submission 703*; Google, *Submission 600*; ADA and ALCC, *Submission 586*; M Rimmer, *Submission 581*; R Xavier, *Submission 146*. See also the joint submission from three of Australia’s blindness organisations to the 2005 *Fair Use Review*, that supported fair use: RBS.RVIB.VAF Ltd, Blind Citizens Australia, Royal Institute for Deaf and Blind Children, *Submission to the Copyright Law Branch, Attorney-General’s Department on Fair Use and Other Copyright Exceptions* (2005).

42 Blind Citizens Australia, *Submission 157*.

43 Copyright Agency, *Submission 727*; Flemish Book Publishers Association, *Submission 683*; International Publishers Association, *Submission 670*; Australian Copyright Council, *Submission 654*; Australian Publishers Association, *Submission 225*. The International Association of Scientific, Technical and Medical Publishers proposed an exception for ‘libraries for non-commercial research or educational institutions’ to make digital copies for people with print disability: IASTMP, *Submission 200*.

44 Australian Copyright Council, *Submission 654*.

ALRC has not conducted a detailed consideration of the statutory licence, because of its Terms of Reference. However, some tentative conclusions have been reached. First, the statutory licence should be retained and streamlined. Secondly, the obligation to undertake an investigation into commercial availability before making each accessible copy should be reconsidered. In particular, the statutory licence should be reformed so that an Australian online repository for people with print disability can be established. Finally, the statutory licence should permit reproduction in an electronic version as long as there is no commercially available electronic version with the particular access features required.

16.31 There are many ways that copyright material could be used to improve access for people with disability that are not covered by the statutory licence. The fair use exception would be valuable for people with disability doing their own format shifting, and for individuals and institutions not covered by the statutory licence who are assisting people with disability. People with disability are entitled to access copyright material at the same time and the same price as everyone else.⁴⁵ When commercial providers are not able to provide this access, individuals and institutions should be able to use material, as necessary, to make it accessible. The fair use exception, in combination with the statutory licence, would ensure that such uses could occur.

16.32 Many uses that facilitate access for people with disability will be considered to be fair use even if there is no specific illustrative purpose, for the reasons identified by the Court in *HathiTrust*—such uses are transformative and do not affect the market for the original work. On the other hand, including this specific illustrative purpose would give a strong signal to the courts and the public, particularly people with disability, that such uses may be fair. It would increase certainty and confidence for users, and encourage people to undertake these socially desirable and valuable uses.

16.33 It is hoped that the market will become more responsive to consumers with disability. The best result for these consumers is ‘built-in accessibility’, where commercial providers make material available to people with disability at the same time and the same price as for others.⁴⁶ Fair use would not usually permit a use that competed with a commercially available product. The fair use approach, with its emphasis on avoiding market harm, would ensure that commercial publishers retain an incentive to produce accessible material.⁴⁷

16.34 Fair use, with an illustrative purpose of facilitating accessibility for people with disability would also be an effective way of ensuring compliance with the Marrakesh Treaty, should Australia become a signatory.

45 J Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired* (2007), 129. See also the objects of the *Disability Discrimination Act 1992* (Cth): ‘to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of ... the provision of goods, facilities, services and land ...’ (s 3).

46 *Ibid* 129.

47 Copyright Advisory Group—Schools, *Submission 707*.

Fair dealing for the purpose of access for people with disability

16.35 The ALRC recommends that, if fair use is not enacted, the *Copyright Act* should be amended to introduce a new fair dealing exception. This would combine existing fair dealing exceptions and introduce new prescribed purposes which may be held to be fair dealing. The fair dealing exception would also require the fairness factors to be considered in determining whether a particular use was fair.

16.36 If there is a new fair dealing exception, access for people with disability should be a prescribed purpose. This would have the same advantages as fair use—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.

Recommendation 16–1 The fair use or new fair dealing exception should be applied when determining whether a use for access for people with disability infringes copyright.

