



Australian Libraries Copyright Committee



Australian Digital Alliance

**Submission regarding proposed international instrument
on limitations and exceptions for persons with print
disabilities**

By the Australian Digital Alliance and Australian Libraries Copyright Committee

8 November 2011

Executive Summary

The Australian Digital Alliance and Australian Libraries Copyright Committee welcome the opportunity to comment on working document *Proposal on an international instrument on limitations and exceptions for persons with print disabilities* (SCCR/22/15 REV. 1), to be negotiated by the World Intellectual Property Organisation Standing Committee on Copyright and Related Rights (SCCR) in November.

Australia's engagement with this instrument is a step closer to achieving the vision of the government's *National Disability Strategy 2010-2020*:

An inclusive Australian society that enables people with disability to fulfil their potential as equal citizens¹.

The proposed instrument has the potential to greatly improve equality of opportunity to access copyright works for Australians with print disabilities.

1. Access to copyright works is a human right

Access to copyright works for the print disabled is a human right, reflected in Article 30 of the UN Convention on the Rights of Persons with Disabilities². Signatories are bound, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials³.

The *Disability Discrimination Act 1992* (Cth) ensures that existing laws in Australia provide equality of opportunity to persons with disabilities⁴. It acknowledges that laws, despite upholding formal equality, may in effect pose significant barriers to the full participation of persons with disabilities in the Australian community.

2. Persons with print disabilities and the Copyright Act

The *Copyright Act 1968* (Cth) recognises the obstacles copyright laws may pose for persons with print disabilities and provides for limited exceptions and a statutory licence to assist them in gaining access to copyright works. These provisions do not enable the broad and full access by all persons with a print disability in the Australian community to copyright works envisaged by the *Disability Discrimination Act* and UN Convention on the Rights of Persons with Disabilities.

Only institutions assisting persons with a print disability may reproduce copyright works under the Part VB statutory licence. A copyright work may only be reproduced in an accessible format by or on behalf of a person with a disability for certain special purposes under section 200AB. Reproduction cannot conflict with the normal exploitation of the work, which can include entry into the market for accessible-format works by the copyright owner. The circumstances in which technological protection measures can be circumvented under section 116AN do not extend to persons with a print disability.

¹ Council of Australian Governments, *National Disability Strategy: 2010 – 2020* 2011 p 19

² *United Nations Convention on the Rights of Persons with Disabilities*, <http://www.un.org/disabilities/convention/conventionfull.shtml> Australia ratified the UN Convention on 17 July 2008.

³ Article 30(3) *UN Convention on the Rights of Persons with Disabilities*

⁴ Broadly reflected in Section 3, *Disability Discrimination Act 1992*(Cth)

The proposed WIPO instrument would significantly enhance the ability of persons with a print disability to gain access to copyright works, by mandating exceptions in domestic laws to allow for the reproduction of works in accessible formats, and facilitating the cross-border transfer of accessible format copies between countries.

The Australian Digital Alliance and Australian Libraries Copyright Committee attach a number of recommendations to ensure the effectiveness of the proposed instrument for persons with print disabilities in Australia and responses to the questions posed by the Attorney-General's Department.

About the Australian Digital Alliance (ADA)

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

The Association for the Blind (WA) are a member of the ADA, and Vision Australia and the Human Rights Commission were also consulted in preparing this submission.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that balances the interests of rights holders with the interests of users of copyright material.

About the Australian Libraries Copyright Committee (ALCC)

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee which represents the following organisations:

- Australian Library and Information Association
- Australian Government Libraries Information Network
- Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia

1. What are your general views on the proposal?

We support a **binding** international instrument on limitations and exceptions for persons with print disabilities.

The internet enables a broader and more equitable dissemination of knowledge and information resources across communities than has ever been possible. Digital technology has also evolved to provide an efficient means for people with print disabilities to access works. Nonetheless, copyright laws across jurisdictions restrict the ability of persons with print disabilities to take full advantage of the wealth of information available in an accessible format. Technological protection measures (TPMs) further increase the practical difficulties in accessing digital materials.

The proposed WIPO instrument has the potential to “end the book famine⁵” for persons with a print disability, and we are encouraged by the progress made by Member States in bringing discussions to this point. We stress that to ensure the “full and equal access to information, culture and communication for the visually impaired/persons with a print disability” espoused in the instrument’s preamble, sufficient balance must be maintained between the rights of content providers and interests of persons with a print disability.

2. Would it benefit Australian people with a print disability?

A. Article B definition of “beneficiary persons”

The definition of “beneficiary persons” under Article B of the proposed instrument should encompass the broad range of beneficiaries considered under the *Disability Discrimination Act 1992*⁶. The proposed instrument does include “perceptual or reading disabilities or any other print disabilities” in its definition of “beneficiary person”. To ensure broadest access possible for persons with print disabilities in Australia, “perceptual or reading disability” could be redrafted incorporating language from the *Disability Discrimination Act* to consider **any**:

- Disorder or malfunction that results in the person learning differently [and requiring alternate format print works] from a person without the disorder or malfunction⁷.

Alternatively, the definition could be redrafted to include “other special needs” as per Article 3-1(a)(vii) of the draft WIPO *Treaty on Access to Knowledge*. In addition, the definition of “beneficiary persons” should allow for print disabilities that previously existed but no longer exist, or which may exist in the future (including because of a genetic predisposition to that disability) in line definition of “disability” under the *Disability Discrimination Act*.

Recommendation Two: The definition of “beneficiary persons” be expanded in line with the scope of beneficiaries envisaged under the *Disability Discrimination Act 1992* (Cth) and draft *WIPO Treaty on Access to Knowledge*.

⁵ Press release, World Blind Union, ‘On Track for a “Books Without Borders” Treaty’ 30 June 2011

⁶ Section 4(1) “disability”, *Disability Discrimination Act 1992* (Cth)

⁷ Section 4(1) subsection (f) under “disability” *Disability Discrimination Act 1992* (Cth)

B. Cross-border exchange of accessible format copies

A binding instrument ensuring the cross-border exchange of accessible format copies and the importation of accessible format copies would have great benefits for Australians with a print disability. In the past, voluntary commitments made by international publishers to make accessible format copies available for global digital libraries have had poor follow up. Instead, countries have used exceptions available to them under domestic copyright law to build repositories of copyright works for people with print disabilities.

The cross-border exchange of accessible format copies enabled by Article D of the proposed instrument would allow Australians with a print disability to access to the large databases of accessible format works held by member States like the United States and Canada.

The largest American database for the blind, Bookshare, contains over 27,600 books on its site which at present, can only be accessed by an American citizen⁸. Canada has implemented a broad exception to copy, translate, adapt, reproduce, or perform a work ‘in a format specifically designed for persons with a perceptual disability’⁹ which enables the storage of works for visually impaired users¹⁰. Digital repositories available to citizens of Canada include the Canadian National Institute for the Blind (CNIB) Digital Library¹¹, and the Government of Alberta Learning Resources Centre¹², which provides audio resources to Canadian students with perceptual disabilities. Conversely, no similar comprehensive repositories exist in Australia.

The benefits for Australians with print disabilities are tempered by the status of the proposed instrument, the definition of “authorized entities” and the ways in which Member States are able to limit the exception on accessible format copies. The status of the proposed instrument and definition of “authorized entities” are considered under questions **4 and 6**.

Limiting the exception on accessible format copies

A. Avoid direct implementation of the Berne Convention three-step test

Article C(3) and D(3) of the proposed instrument reflects the existing exception on accessible format copies for beneficiary persons available under section 200AB of the Australian *Copyright Act 1968*. The proposed instrument allows that Member States can fulfil the exception on accessible format copies by providing an exception limited to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the copyright holder.

The Australian provision incorporating the three step test has been criticised for failing to provide guidance as to what circumstances would constitute a “special case”, the extent of the “legitimate” interests of the copyright holder and meaning of “unreasonable prejudice”. The operation of a free use exception for persons with a print disability may be construed as unreasonably prejudicing the legitimate interests of copyright owners, who may otherwise seek to

⁸ At <http://www.bookshare.org> in N Suzor, P Harpur, D Thampapilla, *Digital copyright and disability discrimination: from Braille books to bookshare*, (2008) 13 Media and Arts Law Review, 3

⁹ Section 32, *Copyright Act (Canada)*

¹⁰ Above n 4, p 3

¹¹ At <http://webcluster.cnib.ca/Public/home.aspx>

¹² At http://www.lrc.education.gov.ab.ca/pro/audio/audio_index.htm

commercially exploit their work in the market for accessible format copies¹³. Those wishing to rely on section 200AB in Australia to provide an accessible format copy for a beneficiary person operate without any degree of legal certainty. As a result, section 200AB has only been used by beneficiary persons and institutions in limited circumstances, and has not effectively allowed for greater access to alternate format copies by persons with a print disability.

Recommendation Three A – that the provision for the implementation of the Berne Convention three-step test under Articles C(3) and D(3) make clear that implementation should not be by way of express incorporation of the three-step test into national law; or

Recommendation Three B – provide guidance in Article A Definitions regarding “special case”, “legitimate” interests and “unreasonable prejudice” in the context of reproduction of accessible format copies for beneficiary persons.

3. Are there sufficient safeguards for rights holders?

The current proposed instrument maintains sufficient safeguards for rights holders, although we caution that balance must be maintained between the interests of rights holders and the ability of persons with a print disability to access copyright works efficiently and fairly. Fears of a “leak” of accessible format copies made for persons with a print disability into the broader community cannot be used to justify restrictions on the rights of persons with print disabilities to access copyright works.

Persons with print disabilities cannot access copyright works already available to the broader community *at all* without the benefit of broad copyright exceptions or provision of accessible format copies by the copyright owner. A binding international instrument on limitations and exceptions for persons with print disabilities affirms the equal opportunity for persons with print disabilities to access copyright works that are available to the rest of the community.

4. What are your views on the status of the proposed instrument (binding/nonbinding), and what would be the practical effect of either outcome?

We support a **binding** international instrument on limitations and exceptions for persons with print disabilities.

The ADA and ALCC support the views of Vision Australia and the Human Rights Commission regarding the practical effect of a non-binding instrument. Vision Australia maintains that a nonbinding instrument would merely preserve the status quo for those with a print disability in Australia.

A two-step process (non-binding joint recommendation leading to binding treaty) could delay or stop work entirely on a binding instrument. It is a great shame that the legally binding status of treaties for stronger copyright enforcement like the Anti-Counterfeiting Trade Agreement is

¹³ Above n 4, p 9

accepted before an international exception in copyright to assist one of the most disadvantaged groups in the world.

Further, a nonbinding instrument ignores the need to bring national laws of Member States up to a minimum standard regarding the exceptions that are available for persons with a print disability.

The key aspect of the proposed instrument for persons with a print disability in Australia is the access it unlocks to copyright works in accessible formats held by other Member States. The current voluntary code that institutions in Australia rely on to gain accessible format copies from other jurisdictions has been diminished by apathy from publishers and time and expense in negotiating on a per-accessible format copy basis.

A binding instrument would have immediate practical benefits for persons with a print disability in Australia, facilitating the cross-border exchange of accessible format copies.

5. What Australian organisations could become ‘authorised entities’?

The widest class of ‘authorised entities’ should be agreed to, to ensure broad distribution of accessible format copies to persons with print disabilities throughout the community.

Educational institutions and any other institution declared by the Attorney-General to provide assistance to persons with a print disability as a principle function¹⁴ would be considered ‘authorised entities’ for the purposes of the WIPO instrument. ‘Authorised entities’ should include also print disability libraries as well as libraries generally, state government accessible format production centres and any community organisations assisting persons with print disabilities, whether they be educational, recreational or other organisations.

We urge the Government to consider extending “authorised entities” to families and other carers of persons with print disabilities. The *National Disability Strategy: 2010 – 2020* acknowledges the significant role families and carers play in supporting people with disabilities¹⁵. In 2003 an estimated 2.5 million people reported providing informal care to a person because of the care recipient’s disability or old age¹⁶.

Recommendation Four: That “authorised entities” include families and carers of persons with print disabilities.

The Government’s National Disability Strategy recognises that family members and carers, as well as businesses and community groups, play a vital role in creating an inclusive, flexible and accessible environment for people with a print disability.

For-profit companies, and the benefits they may provide to persons with a print disability in the absence of interest from publishers should be considered. Commercial firms will play a significant role in the digitization of books and other copyrighted works in the future, as well as orphaned material. If for-profit companies are left out entirely, persons with disabilities must rely on government centres and charities to make works available.

¹⁴ Section 10(1) *Copyright Act 1968* (Cth)

¹⁵ Council of Australian Governments, *National Disability Strategy: 2010 – 2020* 2011 p 23

¹⁶ Australian Bureau of Statistics (ABS), *4430.0 Survey of Disability, Ageing and Carers 2003, Australia: Summary of Findings*, Commonwealth of Australia, 2004

Recommendation Five: That for-profit companies be considered within the scope of “authorised entities”.

6. Should Australia support the proposal?

Australia should support a binding instrument on limitations and exceptions for persons with print disabilities. Australia should ensure that the proposed instrument maintains sufficient balance between the interests of content providers and the fundamental right of persons with print disabilities to be provided with equal opportunities to access information and education as are available to the rest of the community.

The instrument must facilitate effective and timely access to works for persons with a print disability in Australia. With this in mind, we urge the Attorney-General’s Department to consider the other recommendations made in this submission regarding:

- Guidance regarding circumstances amounting to “special case”, “legitimate” interests and “unreasonable prejudice” reflected in the Berne Convention three-step test. This would alleviate the legal uncertainty and unintentionally restrictive scope of such a provision imported into national law, and facilitate wide use of the exception for the benefit of persons with a print disability.
- Expansion of the scope of “beneficiary persons” under the instrument in line with the *Disability Discrimination Act 1992* (Cth); and
- Consideration of for-profit companies and carers and families as ‘authorized entities’ for the benefit of persons with a print disability.

We stress that the focus of the proposed instrument needs to be **on the individual with the disability with the aim of optimising their quality of life**, as reflected in the Government’s National Disability Strategy¹⁷. The effect of the instrument should not create barriers and structures between levels of government, artificial eligibility criteria or attempt to categorize people based on a ‘one-size-fits-all’ model¹⁸.

We also note the need for amendments to the *Copyright Act 1968* (Cth) to allow for circumvention of technological protection measures for the benefit of a person with a print disability. There must also be reform to section 200AB to clarify non-interference “with commercial exploitation of the work” in the context of accessible format reproduction. Importantly, the ability to access alternate format works through section 200AB should not be negated by the need to circumvent TPMs to reproduce the work.

The Australian Digital Alliance and Australian Libraries Copyright Committee are happy to discuss this submission further with the Attorney-General’s Department at their convenience.

¹⁷ Council of Australian Governments, *National Disability Strategy: 2010 – 2020* 2011 p 45

¹⁸ National People with Disabilities and Carer Council, *Shut Out: The experience of people with disabilities and their families in Australia – National Disability Strategy Consultation Report*, Commonwealth of Australia, 2009 p 19