

10th July 2015

Committee Secretary
Joint Standing Committee on Treaties
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Canberra ACT 2600

By email: jsct@aph.gov.au

Submission in response to the National Interest Analysis on the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled

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.

CAG strongly supports the speedy ratification of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled* (the Treaty). We agree with the National Interest Analysis (NIA) that early ratification of the Treaty provides an opportunity for Australia to be a global leader in facilitating access to accessible work formats. For the reasons set out below, however, we do not agree that Australia is currently in a position to comply with the Treaty.

The current disability copying regime is not compliant with the Treaty

As the NIA sets out, the *Copyright Act (the Act)* currently contains a statutory licence (Part VB, Division 3 of the Act) and an exception (s 200AB(4) of the Act) that can be relied on by organisations assisting persons with a print disability to create works in accessible formats. The NIA states that these limitations and exceptions mean that no *legislative* amendment to the Act is necessary in order to implement the Treaty obligations that Australia will assume upon ratification of the Treaty.

However, Article 7 of the Treaty requires Contracting Parties to ensure that when they provide legal protection and remedies against the circumvention of technological protection measures (TPMs), such protections and remedies do not impact on the use of the limitations and exceptions provided for in the Treaty. What is not acknowledged in the NIA is that Australia's TPM regime *does* currently impact on the use of such limitations and exceptions.

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Firstly, s 200AB(4) cannot be relied on at all if the content that is required in an accessible format has been protected by an access control TPM. The current schedule of permissible uses which permit circumvention of access control TPMs¹ does not include circumvention for the purpose of relying on s 200AB. When s 200AB was enacted, it was anticipated that a typical use would be schools format shifting content to assist students with a disability, but in an age where more and more content is protected by TPMs, this is becoming increasingly impossible.

Secondly, while institutions assisting persons with a print disability are in *theory* permitted to circumvent a TPM to create an accessible copy in reliance on the disability statutory licence in Part VB of the Act, there is a prohibition on supplying another person with a circumvention device, or providing a circumvention service, which means that as a matter of practical reality institutions are often prevented from taking full advantage of the exceptions that are intended to facilitate access for print disabled users.

Urgent need for TPM exception for disability uses

The Australian school sector has been advocating since 2007 for a new, limited-scope exception to the TPM regime to assist students with disabilities.

The problem that CAG seeks to address is not confined to students with a print disability: hearing impaired students are also affected by the lack of a disability exception to the TPM regime. While schools can in theory rely on s 200AB to create a captioned version of a DVD for a hearing impaired student, they are prevented from doing this if the content in question is protected by a TPM. Given that most commercially available content is protected by a TPM, there is limited scope for schools to provide the assistance that their students require. This means that schools are in some cases unable to fully meet their obligations under the *Disability Discrimination Act 1992*, and a subsequent direction from the Australian Human Rights Commission, to ensure that all videos shown in a mainstream class that includes deaf and hearing impaired students are captioned.

Fixing this problem does not require the Government to enact any new legislation. It can be done by regulation.

CAG submits that there is an urgent need to enact a disability TPM exception. This is an essential reform to enable Australian schools and other institutions to actually use existing and future disability copyright exceptions, and to ensure that Australia is in a position to comply with its Treaty obligations.

Other comments on the NIA

CAG is pleased to see that the Government intends to enact more widespread reform of the disability copying provisions by replacing the existing provisions with a streamlined disability exception. This reform is long overdue. As submitted in our December 2014 submission to the Marrakesh Treaty consultation, we consider that the existing disability copying provisions are outdated and in urgent need of reform. They impose unnecessary and costly administrative burdens on schools and other institutions that have no corresponding benefit to rights holders. CAG looks forward to being part of the consultation on the form that a streamlined disability exception should take.

¹ Schedule 10A Copyright Regulations 1969.

Finally, the rationale for reform of the disability copying regime set out in the NIA applies equally to the educational copying regime. The educational statutory licences in Part VA and Part VB (Divisions 2 and 2A) of the Act are - as with the disability statutory licence - outdated and ill-suited to a digital environment. In its November 2013 Copyright and the Digital Economy Report, the Australian Law Reform Commission acknowledged this and recommended that the statutory licences be simplified and streamlined. CAG submits that this would be a consistent and valuable reform to implement at the same time as the broader implementation of the Treaty.

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

Yours sincerely

Delia Browne
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