

ABF response to Productivity Commission Draft Report into Intellectual Property Arrangements

June 2016

About the Australian Blindness Forum

The Australian Blindness Forum is the peak body representing blindness, low vision and rehabilitation in the blindness sector. ABF was formed in 1992 and is funded only by its members. ABF is an Australian public company limited by guarantee and governed by a Board of Directors.

Membership of ABF is open to any organisation that has as its primary objects the provision of services to people who are blind or vision impaired, or whose activities are substantially connected with the welfare of people who are blind or vision impaired, and those whose activities are substantially related to the prevention of blindness.

As Australia's representative to the World Blind Union, the ABF has strong connections with the international blind and vision impaired community.

ABF comprises 15 blindness sector organisations whose expertise and knowledge are reflected in the following comments.

Background

ABF appreciates the opportunity to provide a response to the Productivity Commission Draft Report on Intellectual Property Arrangements (the Draft Report).

ABF and its member organisations believe that, in accordance with the United Nations Convention on the Rights of Persons with Disabilities, the *Disability Services Act 1986*, the *Disability Discrimination Act 1992* and basic human rights, people who are blind or vision impaired are entitled to the same access to information and published materials as all Australians.

Equitable access to information and published materials is vital to the acquisition of literacy and numeracy and to the ability to participate in recreation, community activities, education and training, employment and daily living.

Changing technology has made equitable access to information and published materials attainable in a timely manner. To optimise the benefits of this, there is a need for legislative, technological and financial barriers to information access to be overcome.

ABF Response

Overall, ABF supports the approach in the recommendations of the Draft Report to ensure copyright exceptions and limitations balance the incentive to create with the benefits to users of dissemination and consumption, with exceptions that allow

limited use of copyright material. Any measures proposed in the Draft Report that amend the current intellectual property arrangements in Australia to allow access to an increased range of quality and value goods and services for people who are blind or vision impaired and that will provide greater certainty to individuals and businesses as to whether they are likely to infringe the intellectual property rights of others, as set out in the terms of reference, are welcomed.

However, ABF was disappointed that the Draft Report made only one specific reference to people with disability in the 600 page document. This is surprising given the Australian Government celebrated its ratification of the *Marrakesh Treaty to Facilitate Access to Published Works for People who are Blind, Visually Impaired or otherwise Print Disabled* in December 2015. Australia's ratification of the treaty heightened awareness of the urgent need to amend Australia's copyright legislation to ensure Australia can meet its obligations under the Marrakesh Treaty once it comes into effect.

Despite this significant event, there was also only one minor mention of the Marrakesh Treaty at the back of the Draft Report (in a table of Australia's Membership of WIPO treaties¹) when the Productivity Commission should be giving much greater consideration to this issue in anticipation of the treaty coming into effect very soon.

The Marrakesh Treaty provides exceptions to copyright protections to permit the printing and sending of accessible material in Australia and across borders. The Marrakesh Treaty will come into effect once 20 countries have ratified or acceded to it. According to the World Intellectual Property Organization, at the time of writing, 17 countries had ratified the Marrakesh Treaty² with only three more to ratify the treaty before it will come into effect and before those countries will be required to meet their obligations under the treaty.

ABF and other disability organisations have worked closely with the Australian Government's copyright areas both within the Attorney-General's Department and the Department of Communications and the Arts, providing input and advice on the needs of people who are blind or vision impaired. In particular, in relation to the appropriate copyright amendments that are required in order to achieve equitable access to accessible formats of published material for people who are blind or vision impaired.

This extensive work culminated in the release of the exposure draft of the Copyright Amendment (Disability Access and Other Measures) Bill 2016 (CADAOM Bill exposure draft) in December 2015 that proposes much greater access to copyright material specifically for people with disability and proposes to provide much more flexibility to individuals and organisations to access copyright material in alternative formats. In principle, ABF supported the proposed amendments in the CADAOM Bill exposure draft to the extent that they will allow individuals who are blind or vision

¹ Productivity Commission, Draft Report – Intellectual Property Arrangements, April 2016, Table B1, p.514

² World Intellectual Property Organization,
http://www.wipo.int/treaties/en/ShowResults.jsp?search_what=N&treaty_id=843

impaired and the organisations that support them to have greater access to copyright material.

Given the Draft Report does not discuss the needs of people with disability, the Marrakesh Treaty or the proposed amendments in the CADAOM Bill exposure draft, ABF is concerned to ensure that any Final Report by the Productivity Commission on Intellectual Property Arrangements gives much more consideration to the needs of people with disability and, in particular, gives serious consideration to the urgent need for amendments to the *Copyright Act 1968* to ensure the effective implementation of the Marrakesh Treaty and that its original spirit of human rights and equality for all is maintained.

ABF looks forward to the day that all mediums – print, digital and multimedia – are produced in an accessible format so that all members of the community can, simultaneously and at the same price, access information. We would encourage government legislation to achieve this.

Please find below ABF's response to specific recommendations of the Draft Report as well as other relevant copyright issues.

Fair use (draft recommendation 5.3)

ABF supports the removal of the current fair dealing provisions as set out in S200AB of the *Copyright Act 1968* because ABF members have reported that ambiguities and difficulties in the interpretation of the section have caused significant practical problems for libraries and educational institutions.

In addition, ABF is concerned to ensure that any proposed amendments to the fair dealing provisions give an *individual* who is blind or vision impaired certainty. That is, an individual who is blind or vision impaired needs certainty that they will not be infringing copyright by copying whole books they have legally bought or borrowed and converting them into another form that they can read with assistive technology or software such as braille displays or synthetic speech.

As an example, ABF supports the disability provisions in the United Kingdom's *Copyright (Visually Impaired Persons) Act 2002* that make it very clear it is lawful for a person with a disability to copy the whole (or part) of a work. That is, that Act provides an exception to allow a person who is blind or has low vision to produce a 'one-for-one' accessible copy of anything to which they have legitimate access.

ABF agrees with the proposal in the Draft Report that the Australian Law Reform Commission (ALRC) recommendation to replace the current fair dealing exceptions with fair use should be the minimum level of change the Australian Government should pursue. In particular, ABF is fully supportive of the ALRC recommendation to include illustrative examples of the uses that might be considered fair, reducing any uncertainty in this area. ABF notes the ALRC non-exhaustive list of illustrative purposes included access for people with disability.

It is also important that access for people with disability allows a person who is blind or vision impaired or an organisation that assists people who are blind or vision

impaired to copy the whole or part of a work in order to convert it into an accessible format. This may require further guidance in the Explanatory Memorandum.

ABF supports Draft recommendation 5.3 to replace the current fair dealing exceptions with a broad exception for fair use provided that:

- **the ALRC non-exhaustive list is included with specific reference to “access for people with disability”**
- **further guidance is included in the Explanatory Memorandum to ensure “access for people with disability” allows a person with a disability to copy the whole or part of a work for the purposes of converting it into an accessible format.**

Commercial Availability

Draft recommendation 5.3 proposes a list of factors to be taken into account when assessing whether the use of the copyright material is fair. This includes:

- “the commercial availability of the work at the time of the infringement”.

ABF could not find further discussion in the Draft Report about this factor and how it might relate to organisations assisting people with disability in producing copyright materials in alternative formats. However, the current “commercial availability” test in the *Copyright Act 1968* is a significant issue for the blindness sector.

ABF has members that provide library materials in accessible formats to people who are blind or vision impaired. In fact, currently there are three organisations in Australia that provide accessible library information with over 20 000 borrowers.

ABF members report that the most significant barrier they currently experience in producing and distributing books in alternative formats is the obligation to comply with the Part VB Div. 3 of the *Copyright Act 1968* – the “commercial availability test”. This test requires that if a book is already available in one of the five formats specified, then organisations that assist people with a print disability, cannot produce that title in a similar alternative format. A consequence of this is that the organisations must undertake time-consuming and extensive research to ascertain if a work is already commercially available.

The current requirement in the *Copyright Act 1968* to apply the commercial availability test is a significant barrier to the efficient production of materials in accessible formats, resulting in production delays, wasted resources, and restrictions in the range of published materials that they are able to make available to borrowers in accessible formats.

As an example, if a title is not commercially available in hardcopy braille, a provider of library materials will not be able to produce that title in hardcopy braille if the title is already commercially available in audio format. This is clearly discriminatory and unnecessarily restrictive. Indeed, the Marrakesh Treaty stipulates that an individual with a print disability must have access to material **in their preferred format**, but the current commercial availability test as legislated in Australia will not allow this requirement to be met.

Therefore, ABF supports the proposed amendment to this provision as set out in the CADAOM Bill exposure draft. That proposed amendment changed the commercial availability test so that it only applies to the **specific accessible format** required by a person with a disability and not to accessible formats in general. That is, if the specific format is not available, then an organisation can legally produce that title in another (accessible) format.

ABF urges the Productivity Commission to consider recommending further guidance on this aspect of the fair use provision for organisations assisting people with a disability to ensure the positive developments as provided in the CADAOM Bill exposure draft are not lost.

ABF supports further explicit guidance on Draft recommendation 5.3 to include specific reference to changing the current “commercial availability test” for organisations assisting people with disability so that the test only applies to the specific accessible format required by a person with a disability and not to accessible formats in general.

International organisations

ABF notes the current commercial availability test in the *Copyright Act 1968* also makes it very difficult for institutions in Australia to assist people with disability in accessing the hundreds of thousands of books and other material available overseas.

For example, Bookshare is the world’s largest online library for people with print disabilities and is based in the United States. Bookshare says more than 360,000 people in nearly 50 countries have access to its collection of over 350,000 titles³. Bookshare is only able to make titles available to other countries where publishers have given specific permission.

Bookshare has advised ABF Members that it is impossible for them to satisfy the current test in relation to commercial availability in Australia and, as such, Australians with print disabilities only have access to half the titles available from Bookshare, the lowest number of any country.

ABF is seeking further certainty that the any amendments to the *Copyright Act 1968* will ensure Australians will be able to access all titles offered by entities based overseas such as Bookshare. That is, that entities like Bookshare are not required to comply with the commercial availability test.

Safe Harbours (draft recommendation 18.1)

The development of new technology provides many new opportunities for organisations that assist people with disability to develop innovative online services and to distribute existing materials in more ways.

ABF understands the current “safe harbour” provisions in the *Copyright Act 1968* provide some protections for carriage service providers. However, ABF supported

³<http://www.bookshare.org/cms/about>

the proposed amendments in the CADAOM Bill exposure draft that expands the current safe harbour provisions to cover a broader range of entities, including educational institutions and other online services.

In particular, those amendments removed the word “carriage” in the definition of a carriage service provider. ABF members believe the broadened definition will provide greater protection for organisations that assist people with disability through online services.

ABF supports recommendation 18.1 to expand the safe harbour scheme to cover a broader set of online service providers.

Geoblocking (Draft recommendation 5.1)

ABF supports an amendment to the *Copyright Act 1968* to make clear that it is not an infringement for consumers to circumvent geoblocking technology and supports the Australian Government seeking to avoid international agreements that sanction geoblocking technology. This would ensure that people who are blind or vision impaired can access legitimate copyright-protected material, regardless of their location. This would provide people who are blind or vision impaired with much greater access to digital products, such as movies, television programs and online games. This may also allow people who are blind or vision impaired to access digital products with accessible features, such as movies with audio description or enhanced e-books, and to access these products at a reasonable price.

For example, Australians who are blind or vision impaired are significantly disadvantaged and have their access to entertainment severely restricted because there is no audio-described content on Australian television.

Audio description is delivered as narration on a separate audio track, to describe visual elements happening in a television program during the natural pauses in the dialogue. Without it, people who are blind miss out on important content and social interaction opportunities, because they are unable to watch and discuss television like the rest of the community. Unfortunately, Australia is behind many other developed and developing countries in providing this service.

A number of television programs produced in Australia without audio description are broadcast in other countries with audio description (in some cases the audio description is actually produced in Australia and then exported). Programs such as *Neighbours* are available with audio description in the UK for example. In any case, there is a significant amount of audio-described content available to people who are blind or vision impaired living in countries such as the UK, US and Canada. Some of this content is accessible via internet-based media players but is usually subject to geoblocking technology.

ABF is aware that some people who are blind or vision impaired have resorted to circumventing this technology because it is the only way they can effectively watch popular television programs. It is disappointing that successive Australian Governments have not legislated to mandate minimum levels of audio description on Australian television. In addition, Australians who are blind or vision impaired have

the uncertainty of being charged with a copyright infringement if they try to participate in an activity (watching television) that is taken for granted by the rest of the community.

ABF supports an amendment to the *Copyright Act 1968* to make clear that it is not an infringement for consumers to circumvent geoblocking technology.

Parallel Imports (Draft recommendation 5.2)

ABF supports an amendment to repeal parallel import restrictions for books. This may allow people who are blind or vision impaired to have greater access to books in large print or Braille format, at a reasonable price.

Other areas of importance for the blindness sector

The following issues are further concerns ABF has raised in previous consultations regarding copyright concerns for people who are blind or vision impaired.

Broadcasting

ABF is seeking further clarity relating to use of copyright material by institutions assisting people with a disability in relation to broadcasting and transmission via the internet of digital information.

The CADAOM Bill exposure draft has a proposed amendment to the definition of copyright material to “anything in which copyright subsists”. ABF understands such a definition would allow broadcasters such as Radio for the Print Handicapped to extend its services.

ABF would appreciate the Productivity Commission giving further consideration to whether any broadening of the definition of copyright material would provide greater flexibility in the definition of “broadcast” and if this would include services such as “on demand” listening (which allows people to listen to programs again for a certain period of time after the original broadcast and which would make more material available to people with disability) and “audio description” (where organisations can take a copy of broadcasted material and add audio description so that people with disability can access that broadcast).

ABF is seeking further clarity in the Explanatory Memorandum on whether any proposed amendments will include a broadening of the definition of “broadcast” and if would include services such as “on demand” listening and “audio description”.

National Database

While ABF supports any amendments to the *Copyright Act 1968* that ensure new fair use provisions will allow organisations assisting persons with a disability to reproduce material in accessible formats, any amendment will probably require organisations to be satisfied that the material cannot be obtained in the format that the person with a disability requires and within a reasonable time at an ordinary commercial price.

ABF is concerned that if any proposed amendments result in voluntary rather than mandatory reporting, it will be very difficult for organisations, such as educational institutions, to determine whether or not material already exists in the appropriate format. A national database of all published materials in alternative formats would be useful for this purpose. An entity such as the National Library of Australia or the Copyright Agency Ltd would be ideal entities to maintain such a database.

ABF would support further detail in the Explanatory Memorandum to strongly encourage voluntary reporting.

Future consultation

ABF would like to be involved in any future consultation on Guidelines or the Explanatory Memorandum to identify best practice approaches to dealing with accessible copies and other relevant matters relating to the practical application of the proposed recommendations for individuals who are blind or vision impaired or organisations that assist people who are blind or vision impaired.