

Access to Copyright Material by People with a Print Disability

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Copyright raises fundamental problems for people with print disabilities because they are unable to read or access standard printed material without having it reproduced in some way, whether in hard copy Braille or large print format, as a sound recording, or in a digital format. Generally, any reproduction requires a copyright clearance (unless an exception to infringement applies).

Copyright law in Australia and other countries has recognised this problem and taken some steps towards assisting people with print disabilities by providing special exceptions to copyright infringement allowing people with a print disability, or organisations assisting them, to copy print material into a form that such people can access. This need for access is balanced by a concern to ensure that the rights of copyright owners are not unduly prejudiced and, in particular, by a concern to ensure that copies made for people with print disabilities do not “leak” into the general community, undermining the market for the copyright owners’ work.

Digital technology has provided great opportunities for increasing access for people with print disabilities. Paradoxically, it has also, in some respects, increased the practical and legal complexity of accessing material, especially with the development and use of technological protection measures (TPMs).

In the past twenty years, most English-speaking countries have introduced or expanded legislation allowing accessible copies to be made for people with print disabilities. This article compares the position in a number of these countries, and outlines some options for Australian law.

Further action on accessibility of information is continuing. The World Intellectual Property Organization (WIPO), which administers some of the most important international treaties dealing with copyright, held a meeting on digital content for the visually impaired in November 2003.¹ Following this meeting, WIPO has agreed to work towards achieving consensus on minimum international standards on exceptions to infringement for people with disabilities and certain other groups.²

Balancing interests of copyright owners and users

Concerns about the possible market impact of copying material under special exceptions to infringement have always informed the development of exceptions to infringement, including print disability provisions. Indeed, the Berne Convention requires signatories to address such concerns.

The “three-step test” set out in the major international treaties on copyright, including the Berne Convention, requires that any exception to copyright owners’ exclusive rights must:

- apply only to “certain special cases”;
- not conflict with a normal exploitation of the work; and
- not unreasonably prejudice the legitimate interests of the author or copyright owner.³

Generic approaches to meeting these criteria that have been adopted in various countries implementing print disability provisions include:

- requiring people to check for commercial availability of accessible copies before making accessible copies;
- allowing people to make an accessible copy for personal use of items they own or can legitimately access; and
- preventing “leakage” of copies into the general market by:
 - o restricting formats of copies to those which are inaccessible or unappealing to sighted people;
 - o only allowing specified individuals to access copies made under the provisions;
 - o only allowing specified organisations to make copies under the provisions; and
 - o restricting the permitted uses of copies made under the provisions.

Practical issues in making print material accessible in Australia

As for sighted readers, there is a wide range of types of material that readers with print disabilities want to access, and a number of reasons for which they need to access it. Education is an obvious example, but people with print disabilities also need access to product information and instructions, community and government information, access to general information and reading material for pleasure and interest.

Major practical issues for institutions assisting people with print disabilities vary according to the types of material, formats, and clientele they work with. However, constants for all such institutions include: scarcity of resources to make and supply accessible copies; dealing with publishers in order to get permissions and/or digital files; and the time all of this requires. Timeliness is particularly an issue for institutions assisting students, since the period between finalisation of texts and reading lists and the requirement for students to start using them is often very short.

The process of reading for people with a print disability

The term “print disability” can cover a wide range of issues beyond visual disabilities.⁴ However, the large majority of people regarded as having a print disability in Australian terms are in this category because of a greater or lesser degree of visual impairment.

Braille

A relatively small proportion of people (most of whom have been blind since birth or early childhood) use Braille as their primary literacy medium. Braille texts can be read from embossed hard copies or, for people with the necessary equipment, from “refreshable” Braille readers.

Refreshable Braille readers use software to translate digital text into a form which can be read by touching a keypad on which dots forming the Braille characters are raised, one line at a time. Braille readers are very expensive, costing up to \$10,000, and are largely unaffordable except for people in full-time employment.

This software is only really effective with text or XML files. “Image” files such as PDFs need to be translated into text by other software before they can be accessed.

Voice synthesis software

One of the most widely used means of reading for people with print disabilities is voice synthesis software, such as JAWS. This software “reads” out text from digital files and allows navigation of computer desktops and the internet. The reading out can be sped up so that an experienced user can navigate and use computer equipment very efficiently. However, using the navigation tools effectively requires considerable practice and sophistication, and requires excellent computer skills.

Again, this kind of software is only really effective with text or XML files. “Image” files such as PDF need to be translated into text by other software before they can be accessed using voice synthesis software.

DAISY standard

A new development is the DAISY (Digital Accessible Information SYstem) standard,⁵ which allows text and audio files to be easily navigated by use of “tags” to identify chapter headings, page numbers and so on. This standard is increasingly being adopted overseas. Files formatted to the DAISY standard can be read on an ordinary desktop computer, but can be more readily used and navigated on specialised portable equipment. Use of this standard would make it possible for students with print disabilities to find and use citations far more easily than is now the case, and would allow them to locate particular chapters or page numbers in textbooks almost as easily as a sighted student.

As yet, the DAISY standard is not widespread in Australia, but producer organisations are working towards its introduction.

Spoken word

Another very widely used means of making material accessible is through spoken word recordings and broadcasts. This format can be used by people with any form of print disability, and is the only accessible format for many people who lose vision late in life.

Recordings of entire texts are made, often by volunteers, and copies are sent out to library users. Such recordings are still usually made and sent on analogue audio tape. Traditionally, the usual tape format was four-track and, as the tapes could not be played on standard commercially

available equipment, required the client to have access to special equipment. This served two purposes: the four-track tapes had greater storage space; and the risk of “leakage” to the general community was minimised.

Currently, print disability organisations are planning the phasing out of analogue recordings, largely because the recording and playing equipment is being superseded by digital equipment. The increasing difficulty of getting spare parts and replacements makes it impossible to continue to rely on analogue equipment.

Spoken word broadcasts

Radio is one of the most important ways for people with print disabilities to get access to ephemeral print material such as newspapers, magazines, television guides and government and community information. Radio for the Print Handicapped (RPH) is an umbrella organisation for a number of radio stations that operate throughout Australia, in capital cities and some non-metropolitan areas.⁶ Currently, there is no right under the special licence to stream broadcasts over the internet or provide on-demand programs.

Large print

Large print text is useful for some people with limited vision. Although large print books are sometimes commercially available, the formats used may not suit particular individuals. Organisations preparing large print books for individuals with print disabilities often need to customise the item by altering the font face, font size, the colour of the font and paper, and the layout.

Individuals with computer skills can customise digital material for themselves by manipulating the screen and print appearance of documents.

E-books and other electronic material

It might be thought that the increasing availability of e-books and online information would benefit people with print disabilities. Sadly, this is not necessarily the case.

Most e-books incorporate TPMs such as copy-protection, which prevent the protected material from being read by reader-software. However, the fact that an e-book is commercially available—even in an unreadable form—means it cannot be copied into a useable format under the print disability provisions: permission is needed from the copyright owner.

Many books in which copyright has expired are available online through services such as Project Gutenberg, and the US Bookshare service.⁷ Generally, these are available in a text format that can be read using reader software. Access to more recent material is much more problematic.

Many electronic documents, even if not protected by TPMS, are made available in non-text formats (such as PDF) that cannot be easily read by adaptive software and equipment. In some cases, there may be an implied or express licence to make copies in order to access the material, but doing this is not always a straightforward process.

The process of making accessible copies

Processes in making accessible copies vary according to the format used, the source material, and the particular producer. However, in broad terms, the process of making “master” print or digital copies follows the steps set out in this section.

For audio material, processes are much more varied, depending on the type of equipment used. Audio files may require formatting (for example using the DAISY standard) to allow navigation of the file.

Getting a digital file

Most production of accessible material is now done electronically. Producers generally ask publishers to supply digital files of books, as this reduces the time and resources needed to produce an accessible copy.

If a digital file is unobtainable, the producer may have to scan the originals or even, in some cases, key the text into a new file.

Converting the digital file

Where a digital file has been provided in “image” formats such as PDF or Quark, the producer must convert it into text, using specialised software. This process introduces errors that are time-consuming to correct—such as incorporation of page numbers into text, and substitution of words.

Having obtained a digital text file, the producer puts it into the required large print specifications, or reformats and checks the text before converting it into Braille using specialised software.

For texts that rely on illustrations, diagrams or symbols, the producer may need to create new material to describe or explain the visual material.

Checking, editing and proofreading

The converted version is then edited and proofread, to ensure that it is as close as possible to the original. The process includes adding page reference notes and tailoring the formatting if necessary.

This task is sometimes outsourced to specialist contractors, especially for subjects such as maths, philosophy and science, where symbols are used, as the editor needs detailed knowledge of the subject.

Making individual copies

Copies for individual users are printed, embossed or otherwise copied and posted, or digital copies can be made and emailed or made available online through a secure server.

The right to make accessible copies in Australia

In Australia, there is no specific legal right for individuals with a print disability to make accessible copies for their own use. The legal mechanism by which accessible copies can be made is a provision allowing organisations that meet certain criteria to make and distribute accessible copies of literary and dramatic works, unless copies in that format are commercially available.

Other areas of the Copyright Act allow accessible copies to be made in particular circumstances:

- individuals can use copyright material if it is a fair dealing for research or study;
- libraries can copy and communicate⁸ articles or parts of other published material if requested by individuals for research or study;
- educational institutions can copy and communicate for their students (and in some circumstances staff or parents), within certain limits; and
- governments can use copyright material for the services of government (which may include making accessible copies for staff, clients or the general public).

In some circumstances, organisations may be able to get blanket licences from copyright collecting societies that will allow them to make accessible copies for staff or clients.

Print disability provisions

The legal mechanism by which accessible copies can be made is a provision allowing “institutions assisting people with a print disability” to make and distribute copies of published literary and dramatic works, in Braille, large print, “photographic” or electronic form; or to make sound recordings of published or unpublished literary and dramatic works.⁹ In this article, we refer to such institutions as “producers”.

Definitions and eligibility

Under the Copyright Act, a person with a print disability is someone:

- without sight;
- whose sight is severely impaired;
- who is unable to hold or manipulate books or to focus or move his or her eyes; or
- with a perceptual disability.¹⁰

It is likely that a person with dyslexia falls within this definition, but in our view the definition would not cover slow learners or people learning English as a foreign language.¹¹

An “institution assisting persons with a print disability” is:

- an educational institution; or

- any other institution which provides assistance to persons with a print disability as a principal function, and which has been declared by the Attorney-General to be such an institution.¹²

In order to rely on the print disability provisions, an institution must lodge a remuneration notice with Copyright Agency Limited (CAL), which administers the scheme.¹³

Material that can and can't be copied

Under the statutory scheme, copies can be made of published literary and dramatic works.

The scheme does **not** apply to:

- music;
- artistic works (including graphs and diagrams);
- unpublished material (which may include documents such as conference papers) or
- audiovisual material such as DVDs or television programs.

Producers have commented that the absence of any right to copy music under the print disability provisions causes particular hardship, since a large proportion of people with visual disabilities play and study music. Organisations wishing to make accessible copies must get permission from each copyright owner. Music books set for students often include a number of musical works, each with different copyright owners, making it difficult and time-consuming to get permission to copy the whole book.

“Master copies”

Producers can make “master copies” in any of the relevant forms, for the purpose of making a copy for a person with a print disability or another producer, without checking for commercial availability. Master copies can also be communicated (for example by email or uploading to a secure server) for these purposes.¹⁴ There is no limit under the Copyright Act on the length of time the intermediate reproduction or communication may be kept.

Producers are required to notify CAL within three months of the making or communication of a master copy.¹⁵ CAL maintains a register of master copies, which can be searched by producers, who can then request a copy from the relevant institution rather than duplicating the effort and resources to create a new accessible master copy.

Master copies must be marked with certain messages, which are set out in the Regulations.¹⁶ These state that the copy must be destroyed within three months. It appears that these requirements are still present owing to an oversight: there used to be a requirement in the Copyright Act to destroy master copies within three months, but this was repealed in 1998.¹⁷ There is now no legislative requirement to destroy master copies, although the legislation and regulations still require a statement to this effect to be put on the copies.

If a master copy is used for any purpose other than assisting someone with a print disability, that copy loses the protection of these provisions and is deemed to have infringed copyright from the time it was made.¹⁸

Copying for individuals and for other producers

Producers can make accessible copies of literary or dramatic works¹⁹ for individuals with a print disability, in any of the following formats:²⁰

- a “record embodying a sound recording” (for example, a “talking book” version);²¹
- a Braille version;
- a large-print version;
- a photographic version;²² or
- an electronic version (for example, by scanning into digital format, to allow the work to be viewed onscreen, with or without image magnification software, or used with screen reading software with speech synthesis).²³

Copies made under the scheme can also be communicated (for example, by faxing textual material to the person with a disability, or by emailing a digital file or posting the material to a secure server on the internet or on an intranet).

The provisions appear to allow producers to authorise organisations such as libraries, and other individuals, to make copies on their behalf, and to supply copies to such individuals and organisations as well as to other producers, where the requirements of the print disability provisions are met.²⁴

These rights are subject to a number of requirements, set out in the following paragraphs.

Administrative requirements

Producers are required to mark each copy made for an individual or another organisation with certain information.²⁵ In practice, the only requirements are attribution of the creator(s) of the material (unless an institution has elected to give a “full records” notice). If the copy is communicated, the institution is required to provide a notice together with the communicated copy.²⁶

Commercial availability

Before making a copy for an individual, a producer is required to be “satisfied, after reasonable investigation” that the work is not commercially available in the format required: that is, as a sound recording; a Braille version; a large print version; a photographic version; or an electronic version.²⁷ This is similar to requirements elsewhere in the Copyright Act that preclude users from relying on exceptions to infringement if the material they wish to copy is commercially available.²⁸ However, there are distinct problems with the way this requirement operates in the context of the print disability provisions.

Checking before making each copy for an individual

It is unclear exactly what “reasonable investigation” means in the context of copying for people with a print disability. In practice, as a matter of risk assessment, producers may decide not to make specific enquiries in each case. For some formats, such as Braille, producers may decide

no enquiry is necessary, on the basis that there is no commercial production of Braille material in Australia. For works that are frequently requested, or which are made available online, producers may decide to check at intervals rather than before making each copy.

However, producers could run the risk of legal action by copyright owners if their checking procedures are regarded as inadequate. Technically, the provisions require that some form of investigation be made before each copy is made or communicated.

Checking for format rather than accessibility

A further issue is that if a work is available in the specific format which a producer plans to use (a sound recording, or a Braille, large print, photographic or electronic version),²⁹ the producer cannot rely on the print disability provisions to make an accessible copy.

However, in some cases a work **is available** in the relevant format but is **not accessible to a particular person**. For example, a large print book may not have large enough print for a particular person; an electronic version may have copy-protection that makes it impossible to access using adaptive software; and a sound recording of a book may lack the formatting needed to be useful for people with print disabilities.³⁰ In these situations, although there is no accessible version commercially available, permission must be obtained from the copyright owners before copies can be made.

Restrictions on subsequent use

Copies made under the print disability provisions become infringing copies if they are sold for a profit, or used for any purpose other than the needs of people with print disabilities, with the approval of the producer.³¹ This restriction applies in the same way to copies made under the educational provisions, and under the intellectual disability provisions.

A similar restriction is often included in licences granted by publishers to producers of accessible material for sale to libraries.³²

Copying by individuals

There is no specific right under Australian law for individuals with a print disability to make accessible copies for their own use purely on the basis that they have a disability. However, individuals can use any copyright material (including music and audiovisual material) without permission, if to do so is a “fair dealing” for research or study.³³

“Research or study” is not defined in the Copyright Act. Its meaning is understood to be fairly broad: the exception is not restricted to students enrolled in a course, but can apply to individuals doing private research or study for their own interest. However, reading simply for pleasure or entertainment would not come within the purpose of research or study.

Whether or not they have any form of disability, individuals who need to use copyright material for their research or study can:

- use any copyright material without permission if the dealing is “fair”;³⁴ and
- request a library to make copies of a “reasonable portion” of published literary, dramatic, musical or artistic works for them.³⁵

It is always deemed to be “fair” to copy the whole of a journal article, or up to 10% or one chapter of a published book for the purpose of research or study (or more, in some circumstances).³⁶ Where more than the deemed amounts are reproduced, a number of factors are set out in the Act to help work out whether the dealing is “fair” in the circumstances.³⁷

Generally, if a person with a print disability needs an accessible copy for the purpose of research or study, and the item is not commercially available in a form accessible to that person, he or she can make an accessible copy in reliance on the exception.

It is not clear whether someone else can make a copy on behalf of someone who needs it for his or her research or study. However, a New Zealand court has suggested that this may be the case.³⁸

No general access right

Individuals who simply wish to read books or other material for pleasure, or for purposes other than research or study, cannot rely on the fair dealing provisions. For example, someone with a print disability wishing to read a novel or magazine for pleasure may need to scan it to make a digital copy that can be read either using a refreshable Braille reader or an audio reader. As the law stands currently, doing this requires the copyright owner’s permission.

Even if a person with a print disability acquires a copy in an accessible format from a producer, for practical purposes s/he may need to download (copy) it to a portable reader rather than using the copy on the PC. Again, technically, the law may not currently allow such a copy to be made without permission.

The library provisions are of limited benefit to people with print disabilities, since the whole of a work cannot be copied if the work is commercially available (even if it is not available in an accessible format).

It is possible that the current Government review of the possibility of a “fair use” exception to infringement could address some of these problems.³⁹

Other relevant provisions in the Copyright Act

Material protected by technological protection measures

The Copyright Act provides a degree of protection for TPMs, used by copyright owners to control access to, and use of, digital material. Such measures include digital access codes, encryption and copy-protection. These provisions are in addition to the legal protection given by copyright.

Currently, there is no prohibition against buying or using a circumvention device: the sanctions apply to people who make, sell, distribute or install circumvention devices.

It is, in general, an offence to make, sell, advertise, distribute or import into Australia devices (including software) that circumvent TPMs. However, there is no offence if the device is for use by a producer of accessible material (and certain other types of organisation), and the producer gives the supplier a signed declaration that, among other things, the material to be accessed is not readily available in a form that is not protected by a TPM.

Rules from 2007

In the Free Trade Agreement with the US (AUSFTA), the Government has agreed to amend the Copyright Act to increase legal protection for TPMs. The new provisions are due to come into effect by 1 January 2007. In summary, the effect of the changes will be:

- using a circumvention device will be prohibited;
- circumventing access control will be expressly prohibited;
- the “permitted purposes” for which a circumvention device or service may be supplied will be replaced by more limited exceptions; and
- a procedure will be introduced to allow circumvention of a TPM in order to make non-infringing uses of copyright material, (such as making copies under the fair dealing or print disability provisions) only where the “actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative proceeding” (to be reviewed at least every four years).⁴⁰

Status of “PDF” and other formatting software

Basic PDF software does not constitute a TPM under the Copyright Act, since it does not restrict access to the document or prevent copies of the document (digital or hard copy) from being made. Therefore, generally, undoing PDF formatting using adaptive software will not be a circumvention of a TPM (although reproducing the document may require permission).

However, PDF software allows creators of documents to add further levels of protection to PDF documents, such as encryption that restricts access, and copy-protection. These forms of protection may constitute TPMs. Currently, such protection can legally be circumvented in the narrow circumstances outlined above. As noted earlier, from 2007 this will no longer automatically be the case for most organisations or individuals. However, exceptions may be legislated for people with print disabilities and producers of accessible material.

It should be remembered that access problems are not solved by permitting circumvention of TPMs: circumvention is far from a straightforward procedure, and does not necessarily result in an accessible version of the material.

The print disability radio licence

A radio station which holds a print disability radio licence may broadcast published literary or dramatic works (for example, newspaper articles, or readings from plays).⁴¹ A print disability radio licence is a licence which is granted under the *Broadcasting Services Act 1992* or the *Radiocommunications Act 1992*:

for the purpose of authorising the making of sound broadcasts to persons who by reason of old age, disability or literary problems are unable to handle books or newspapers or to read or comprehend written material.⁴²

There are a number of community radio stations throughout Australia providing this service.⁴³

Use of copyright material by educational institutions⁴⁴

In addition to the print disability provisions, educational institutions are entitled to copy material for their students under a statutory licence. The amount that can be copied under this licence is generally restricted;⁴⁵ however, larger amounts can be copied if the material is not commercially available.⁴⁶

Educational institutions may rely on the educational statutory licence to reproduce limited amounts of material in whatever format they choose—including large print, Braille or electronic copies of material. Arguably, making audio copies is also permitted.⁴⁷ However, the licence does not generally allow copying of entire textbooks. The educational licence can be relied on to make “reading bricks” of articles, extracts from books and similar material, as well as for class handouts.

In some cases, institutions may rely on different aspects of the educational and print disability provisions simultaneously. For example, a textbook may be copied into Braille under the print disability provisions. Technically, artistic works such as graphs and diagrams cannot be reproduced under the print disability provisions. However, institutions could rely on the educational provisions to reproduce such material in accessible form (assuming the relevant artworks are not separately published).

Educational institutions also have broad rights to copy and communicate audiovisual material off broadcasts for their students under a statutory licence.⁴⁸ They would also, generally, be able to make adjustments needed by students with disabilities (such as adding a description of visual features to a copy of a TV program).

Use of copyright material by governments

State, Territory and Commonwealth governments are entitled to use copyright material “for the services of government” without permission, under a statutory licence.⁴⁹ To the extent that the licence covers copying of text, images and print music, it is administered by CAL.⁵⁰ Copying of TV and radio broadcasts is administered by Screenrights.⁵¹ For areas not administered by these organisations, governments must notify the copyright owners that their material has been used, and must pay a licence fee if required.

These provisions allow government departments and similar agencies to make accessible copies as required to enable government employees to do their work. The provisions also allow governments to make information available in an accessible form to people needing to know about government services, or about obligations (such as paying tax) or regulatory requirements. In addition, generally, the *Disability Discrimination Act* (DDA) would require such information to be made available in accessible forms.⁵²

Note, however, that a government could not rely on these provisions to make accessible copies for students within government educational institutions. In such circumstances, the educational provisions apply.⁵³

Voluntary licences

Blanket licences for copying

Companies, local councils and non-profit organisations can take out voluntary licences with CAL that give them broad rights to copy text and images in which copyright is owned by CAL's members, within certain limits.⁵⁴ Such organisations would be able to rely on the licences to make large-print photocopies for employees or customers with print disabilities, within the stated limits, where required for business purposes.⁵⁵ Copies made under these licences can be faxed but not communicated in any other way (such as email). The benefit for people with print disabilities may not be great as a result of the limitations.

Licences between copyright owners and producer organisations

In situations not covered by the statutory licence, producers seek permission directly from copyright owners. Such agreements most often concern:

- material that cannot be covered under the statutory licence, such as music or artistic works;
- material that cannot be copied under the statutory licence because it is commercially available in the relevant format (although it is not available in a format accessible to the individual requesting a copy); or
- requests for digital files to minimise the resources required to make accessible copies.

Obligations and other issues for producers

Copyright in adaptations and accessible versions

In some cases, new copyright material is created in making an accessible version. For example:

- a “talking book” is protected as a sound recording;
- text descriptions of illustrations and diagrams may be new literary works;
- an accessible version for which an existing work is altered and augmented may be a new literary work; and
- a Braille version could arguably be a new literary work in its own right.⁵⁶

However, it is not clear whether producers of accessible versions own copyright in their adaptations or new works. This is because of section 135ZZG, which provides:

Despite any other provision of this Act, copyright does not vest in the maker of a copy or communication of the whole or part of a work for a person with a print disability ... merely because of the making of that copy or communication.

In our view, this means that a producer would not own copyright in, for example, a large print photocopy, or the published edition of a large print copy, made under the print disability provisions.⁵⁷

It has been argued that this section has a wider impact, and would prevent a producer from owning copyright even where it has made something which is not merely a “copy” or “communication”, such as a Braille translation.⁵⁸ However, the wording of the section does not appear to support such a broad interpretation.

In our view, where a producer creates new copyright material in making an accessible version under the print disability provisions, general copyright law applies (except as discussed in the previous paragraph). On this view, the creator of the new material (or his or her employer) generally owns copyright in the new material.⁵⁹

Interaction between anti-discrimination laws and copyright

The *Disability Discrimination Act 1992* (Cth) (DDA) prohibits discrimination in (among other things) the provision of goods or services on the basis of disability, unless non-discriminatory action would impose unjustifiable hardship on the provider of the goods or services.⁶⁰ In some circumstances, the Act may require organisations to make publications available in a form accessible to people with a print disability. For example, educational institutions may be required to provide course material in accessible form.⁶¹

In one case, the Human Rights and Equal Opportunity Commission decided that the Sydney Organising Committee for the Olympic Games (SOCOG) had breached the DDA by failing to provide Braille versions of the ticket book for the 2000 Olympic Games.⁶² In effect, this made it impossible for a man reliant on Braille to purchase tickets for the Games. Because of the complexity of the ticket book and system, it was not practicable for him to get a sighted person to read the book to him.

The Tribunal devoted considerable attention to the question whether providing the materials in Braille would have caused unjustifiable hardship to SOCOG. Ultimately, it decided that there was not unjustifiable hardship in the circumstances, given that producing Braille copies of the ticketing materials would cost approximately \$17,500, a tiny proportion of the budget of \$7.18 million for printing and distributing the ticket book, and an even smaller proportion of SOCOG's surplus for the year ended 30 June 1998 of \$30 million.

The DDA does **not** override copyright owners' rights to control certain uses of their material, and does **not** generally require publishers to make books or other materials available in accessible form.⁶³ Generally, organisations wanting to make accessible copies must rely on specific exceptions to infringement or get permission from copyright owners.

Comparisons with other countries

UK law and practice

In some respects, the UK provisions are broader and more flexible than the equivalent Australian provisions. The aspects that are particularly favourable to people with print disabilities are:

- provision for individuals with print disabilities to make a single accessible copy on their own behalf, or to get others to make accessible copies for them (provided conditions are met);
- inclusion of music and artworks in the types of material that can be copied; and
- focus on accessibility to a particular person when checking for commercial availability (rather than availability of a particular format).

Aspects that are less favourable to people with a print disability include:

- absence of a provision allowing communication of material copied under the print disability provisions;
- more onerous requirements for record-keeping and notification; and
- a requirement to place equivalent copy-protection on any material that was originally copy-protected.

Print disability provisions

The UK provisions for people with print disabilities are contained in the *Copyright (Visually Impaired Persons) Act 2002*, which amends the *Copyright, Designs and Patents Act 1988 (c. 48)* (CDPA).⁶⁴ The amendments came into force on 31 October 2003.

Definitions and eligibility

A “visually impaired person” is defined as a person who:

- is blind;
- has an impairment of visual function which cannot be improved, by the use of corrective lenses, to a level that would normally be acceptable for reading without a special level or kind of light;
- is unable, through physical disability, to hold or manipulate a book; or
- is unable, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading.⁶⁵

An “accessible copy” is a version of a copyright work which provides a visually impaired person with improved access to the work.⁶⁶ An accessible copy may include facilities which enable navigation around it, provided there are no changes to the copyright work apart from those necessary to overcome problems caused by visual impairment, and no changes that may infringe the creator’s right of integrity.⁶⁷

Material that can and can't be copied

A wider range of material can be copied under these provisions than under the Australian provisions. In addition to published literary and dramatic works, individuals or approved bodies can copy published artistic works and print music.⁶⁸

Individuals and approved bodies cannot, however, copy databases or audiovisual material, or record performances of musical works, under these provisions.⁶⁹

Copying by individuals

Under the CDPA (UK), a “visually impaired person” can make a single accessible copy on his or her own behalf, provided he or she has “lawful possession or use of” an original (known in these provisions as a “master”).⁷⁰ This formula does not appear necessarily to require recipients of copies to purchase an original: they might be able to rely on the provisions if they are entitled to borrow the book from a library, for example.

Individuals can also make a single accessible copy for a visually impaired individual under these provisions, provided the person receiving the copy has lawful possession or use of an original, and the person making the copy does not charge more than a cost recovery fee.⁷¹

Copies made under these provisions must be accompanied by a statement of that fact, and must be marked with a sufficient acknowledgement of the author and title.⁷²

Copying by approved bodies

An “approved body” is an educational establishment or a body that is not conducted for profit.⁷³ An approved body can make multiple accessible copies for individuals with a visual impairment, provided the body itself “has lawful possession of” a copy of the work.⁷⁴

If an intermediate copy of the original must be made during the process of making an accessible copy, an approved body can hold it in order to make further accessible copies, for as long as it remains an approved body.⁷⁵

An approved body may lend or transfer an intermediate copy to another approved body that is entitled to make accessible copies under the provision.⁷⁶

Approved bodies copying under these provisions must:

- mark each copy with a statement which includes the section it was made under, and a sufficient acknowledgement of the author and title of the work;⁷⁷
- keep records of all the accessible or intermediate copies made and to whom they were supplied, and any intermediate copies lent or transferred and to whom they were transferred;⁷⁸
- allow the copyright owner or their agent to inspect these records at any time after giving reasonable notice;⁷⁹
- within a reasonable time, notify the copyright owner or each relevant representative body (such as a collecting society) that it has made an accessible copy or has lent or transferred an intermediate copy under the provision;⁸⁰ and

- if the original is in electronic form and is copy-protected, as far as reasonably practical, incorporate the same or equivalent form of copy-protection into the accessible copy.⁸¹

These requirements appear to be more onerous than the Australian provisions. The Australian provisions require institutions to notify CAL when they make master (intermediate) copies, but do not require records to be kept and allow for a sampling system in relation to copies made for individuals with a print disability. In practice, as a result of the licence administered by Copyright Licensing Agency (CLA) (discussed below), the UK reporting requirements have been modified to make them less onerous. However, the record-keeping requirements are unmodified.

Checking for commercial availability

Before copies can be made, the individual or approved body must check whether a copy of the work is commercially available in a form that is accessible to that person: if so, the work cannot be copied in reliance on the provisions.⁸² This requirement is more flexible than the commercial availability test under Australian law, although it still requires case by case checking.

Restrictions on later use of copies

Copies under these provisions are subject to restrictions, as under Australian law. Copies made by individuals or approved bodies under these provisions can only be used for the purposes of these provisions.⁸³

If copies are made by an educational institution, they can only be used for educational purposes.⁸⁴

Interaction between print disability scheme and voluntary licences

The CDPA (UK) includes a provision for a voluntary licence scheme to replace the legislative requirements if approved by the Secretary of State.⁸⁵ Such a licence is in place and is administered by CLA.⁸⁶ The licence simplifies the notification requirements: approved bodies relying on the scheme must notify a centralised agency, Revealweb.⁸⁷ Revealweb maintains a catalogue of resources available in accessible formats and of suppliers and producers of accessible resources. The catalogue is also intended to facilitate checking of commercial availability.⁸⁸

Other UK provisions relevant to people with print disabilities

The CDPA (UK) contains provisions for fair dealing for research and study, and copying by librarians for a client's research and study, that are broadly similar to the Australian provisions.⁸⁹

Educational provisions

Educational provisions in the CDPA (UK) are very limited by comparison with the Australian provisions. More extensive copying is permitted under a voluntary licence offered by Copyright Licensing Agency (CLA). However, the CLA licence is still more limited than the Australian statutory licence for educational institutions, since the amounts are generally limited to 5% of the work, and a number of materials (including newspapers, and print music) are excluded from the licences.⁹⁰

Technological protection measures

The UK has introduced provisions concerning TPMs to bring its legislation into compliance with Article 6 of the *Copyright (Harmonisation Information Society) Directive*.⁹¹ As a result, under UK law, it is an offence to manufacture, sell, hire, import for uses other than private and domestic use or in the course of business to sell, hire, offer, distribute, advertise, possess in the course of business, any device, product or component which is primarily created to circumvent TPMs.⁹²

It is also an offence to provide, promote, advertise or market in the course of a business, or otherwise to such an extent as to affect prejudicially the copyright owner, a service which enables the circumvention of TPMs.⁹³

It is also an offence for a person to circumvent a TPM knowing, or with reasonable grounds to know, that is what they are doing.⁹⁴

The Directive provides that member states can make an exception allowing the circumvention of TPMs to allow the reproduction and communication of copyright material for the benefit of people with a disability, for uses which are directly related to the disability and are of a non-commercial nature.⁹⁵

Under the CDPA (UK), where TPMs prevent a person carrying out “permitted acts” which may be done in relation to copyright works, they may complain to the Secretary of State.⁹⁶ Following receipt of the notice, the Secretary of State may give to the owner of that copyright work (or an exclusive licensee) directions to establish whether there is any voluntary agreement relevant to the copyright work subsists; or may give directions to ensure that the owner (or exclusive licensee) of the copyright work makes available to the complainant the means of carrying out the permitted act.⁹⁷

US law and practice

The “Chafee Amendment” to the US Copyright Act in 1996 allows “authorised entities” to make and distribute accessible copies for individuals who are eligible to receive books and other publications produced in specialised formats under an Act entitled *An Act to provide books for the adult blind*.⁹⁸

Many Australians look to the US print disability provisions as a desirable example to follow, and certainly there appears to be a far greater range of accessible published literary works in the US than in Australia. However, there are important limits to the US provisions, and in some respects they are more restrictive than the Australian ones.

Unlike the Australian provisions, the US provisions limit the formats that can be used to distribute digital files of accessible copies to those “exclusively designed for use by blind or other persons with disabilities”.

Unlike the Australian provisions, the US provisions do not allow copying of dramatic works. Further, the extent to which US educational institutions and libraries may make accessible copies for students is limited and uncertain, as they must in many cases rely on the “fair use” exception.⁹⁹ The scope of the fair use exception is particularly unclear in relation to the making and communication of digital copies.

Individuals with print disabilities may generally have better access to books in the US, partly because of non-legislative matters such as the size of the population and the resulting range of accessible material produced. However, students with print disabilities in educational institutions appear to be better served in Australia.

Print disability provisions

Definitions and eligibility

To be eligible for assistance under the Chafee Amendment, a person must be certified by a competent authority as being in one of the following categories:

- blind persons whose visual acuity, as determined by competent authority, is 20/200 or less in the better eye with correcting lenses, or whose widest diameter of visual field subtends an angular distance no greater than 20 degrees; or
- other physically handicapped persons in one of the following categories:
 - o persons whose visual disability, with correction and regardless of optical measurement, is certified by competent authority as preventing the reading of standard printed material;
 - o persons certified by competent authority as unable to read or unable to use standard printed material as a result of physical limitations; and
 - o persons certified by competent authority as having a reading disability resulting from organic dysfunction and of sufficient severity to prevent their reading printed material in a normal manner.¹⁰⁰

An “authorised entity” is a non-profit organisation or a governmental agency that has a primary mission to provide specialised services relating to the training, education, or adaptive reading or information access needs of blind or other persons with disabilities.¹⁰¹

Material that can and can't be copied

“Non-dramatic literary works” (in Australian terms, literary works) can be copied under the provisions. The provisions do **not** apply to “standardised, secure, or norm referenced tests and related testing material”, or to computer programs (except for the parts that are in conventional human language and displayed to users in the ordinary course of using the computer programs).¹⁰²

The following cannot therefore be copied under these provisions:

- music;
- audiovisual material;
- sound recordings; or
- artistic works.

Copying and distribution by “authorised entities”

Authorised entities can reproduce and distribute copies or phonorecords (sound recordings) of published literary works for people with disabilities in specialised formats.¹⁰³ Such formats are Braille, audio, or digital text exclusively designed for use by blind or other persons with disabilities.¹⁰⁴ Copying or distribution in a generally accessible format cannot be done under these provisions.¹⁰⁵

The requirement that digital text be exclusively designed for use by people with disabilities appears to place significant restrictions on the applicability of these provisions. It appears that, unlike the position in Australia, American producers could not rely on the print disability provisions to supply accessible copies in digital text or html files.

While the US Copyright Act does not expressly include a right of communication to the public, in practice a right to “distribute” copies appears to include communication.¹⁰⁶

All copies must bear a notice that any further reproduction or distribution in a format other than a specialised format is an infringement and copies must also include a copyright notice identifying the copyright owner and the date of the original publication.¹⁰⁷

There is no requirement to notify copyright owners of copying or communication under these provisions.

Checking for commercial availability

There is no requirement to check for commercial availability before copying or communicating under these provisions. It is extremely difficult to reconcile this aspect of the provisions with the requirements under the three-step test of the Berne Convention, to which the US is a signatory.¹⁰⁸

Copying by individuals

US copyright law includes a broad exception to copyright infringement for “fair use”.¹⁰⁹ This provision may allow individuals with print disabilities to make accessible copies for themselves. A House Report to Congress has stated:

While the making of multiple copies or phonorecords of a work for general circulation requires the permission of the copyright owner ... the making of a single copy or phonorecord by an individual as a free service for a blind person would properly be considered a fair use under s 107.¹¹⁰

The “fair use” doctrine can also cover copying by libraries and by educational institutions for students.¹¹¹ However, it is generally much more limited in scope, and less certain, than the Australian provisions for such organisations.¹¹²

Other US provisions relevant to people with print disabilities

Technological protection measures

Under the *Digital Millennium Copyright Act 1998* (DMCA), changes were made to Title 17 of the U.S. Code in relation to TPMs, to make it an offence to circumvent a TPM that controls access

to copyright works that are protected by US copyright law.¹¹³ It is also an offence to manufacture, import, offer to the public, provide, or otherwise traffic in technology or services that:

- are primarily designed to circumvent TPMs;
- have limited commercial purpose other than circumvention; or
- are marketed as being able to circumvent such TPMs.¹¹⁴

However, it is not currently an offence to purchase such technologies, products, services, devices or components.

The provision allows for the Librarian of Congress to announce special exemptions for users of specified “classes of works” who would be “adversely affected by virtue of such prohibition in their ability to make non-infringing uses” of the particular class of works.¹¹⁵ On 28 October 2003, the Librarian of Congress announced four classes of works that are subject to this exemption until 27 October 2006.¹¹⁶ One of the exempted classes of works is literary works distributed in ebook format, if the work is not available in an e-book format without access controls that prevent screen readers from working.¹¹⁷

Practical accessibility

There are three major services providing material in accessible form in the US:

- National Library Service for the blind and physically handicapped (NLS);¹¹⁸
- Recording for the Blind and Dyslexic;¹¹⁹ and
- Bookshare.¹²⁰

Under the terms of the Chafee Amendment, these services are available to people who are certified as being visually handicapped, and are both US citizens and US residents. People who meet all of these criteria can register and obtain material in accessible form from the services.

National repository scheme

The *Individuals with Disabilities Education Act 2004* (IDEA) requires US States, as a condition of receiving funding, to meet certain requirements, including adoption of the National Instructional Materials Accessibility Standard (NIMAS)¹²¹ for educational materials prepared within that State, and timely provision of accessible material to students with print disabilities.

The NIMAS Center is established under the IDEA. Its functions include establishing, maintaining and providing access to a catalogue of “print instructional materials” complying with the NIMAS standard. Textbook publishers and State and local educational agencies may be required (under their agreements with state educational agencies) to supply materials in appropriate formats. The US Copyright Act has been amended by IDEA to include an exception allowing educational publishers to comply with such requirements.¹²²

Canadian law and practice

Canadian law has, in most respects, the broadest print disability provisions of any of the countries reviewed. However, the provisions do not allow the making of large print versions, and they appear not to allow communication of accessible copies.

Prior to the introduction of these provisions in 1997, there were no specific provisions for individuals with print disabilities. Before the enactment of the Chafee Amendment in the US, the Canadian National Institute for the Blind (CNIB) was able to rely on cooperation with the US National Library Service, which cleared rights for Canada as well as the US. For the year between the coming into force of the Chafee Amendment and the Canadian provisions, the CNIB had to get permission for all accessible copies.

Special exceptions for libraries and educational institutions are extremely limited by comparison with the Australian provisions.

Print disability provisions

Individuals with a perceptual disability, or non-profit organisations acting on their behalf, are permitted to make a copy or sound recording of a literary, musical, artistic or dramatic work in “a format designed for people with perceptual disabilities”.¹²³ However, the making of large print copies is specifically precluded.¹²⁴ There are no marking or record keeping requirements.

Definitions and eligibility

A person has a “perceptual disability” if he or she has a disability that prevents or inhibits him/her from reading or hearing a literary, musical, dramatic or artistic work in its original format, and includes a disability resulting from:

- severe or total impairment of sight or hearing or the inability to focus or move one’s eyes;
- the inability to hold or manipulate a book; or
- an impairment relating to comprehension.¹²⁵

Material that can and can’t be copied

The provisions apply to literary, musical, artistic and dramatic works but exclude cinematographic works.¹²⁶

Checking for commercial availability

Copies cannot be made under these provisions if the work or sound recording is commercially available in a format specially designed to meet the needs of a person with a perceptual disability.¹²⁷ This test appears more flexible than the Australian commercial availability test, but less flexible than the UK one since it does not address individual needs.

Other Canadian provisions relevant to people with print disabilities

Research or private study

The Copyright Act (Canada) provides that a “fair dealing” for the purpose of research or private study does not infringe copyright.¹²⁸ No limitation on the type of material that can be reproduced is stated and no factors that are to be taken into consideration when determining if the use is a “fair dealing” are given.

Library provisions

The Canadian library provisions are similar to, but generally more limited than, the equivalent Australian provisions.¹²⁹ A Canadian library, archive or museum can:

- act on behalf of a person making a fair dealing of copyright material for the purposes of research, private study, criticism or review;¹³⁰
- make a single copy of a journal or newspaper article if requested by a client for his or her research or private study, provided the article was published more than 1 year earlier;¹³¹ and
- make a non-digital copy for a client of another library, archive or museum.¹³²

Educational institutions

The Canadian provisions allowing educational institutions to use copyright material are extremely limited.¹³³ However, a voluntary licence offered by Access Copyright greatly expands the range of what can be done. For some material, the amounts that can be copied are greater than under the Australian statutory licence. However some material is excluded, including most print music and material other than articles in newspapers and magazines.¹³⁴

Exemption from private copying levy

Under the Canadian Act, users of blank audio recording media must pay a levy when buying any such media sold in Canada. However, no levy is payable where the manufacturer or importer of a blank audio recording medium sells or otherwise disposes of it to a society, association or corporation that represents persons with a perceptual disability.¹³⁵

Technological protection measures

There are currently no anti-circumvention provisions under the Canadian Copyright Act. However, the Ministers of Industry and Canadian Heritage have announced on behalf of the government, proposed changes relating to anti-circumvention.¹³⁶

Practical accessibility

The Canadian National Institute for the Blind (CNIB)¹³⁷ is the major producer of accessible material in Canada. To facilitate making accessible copies, CNIB has entered contracts, or informal arrangements, with publishers to purchase digital files of books in print. Individual agreements

are negotiated with each publisher, tailored to fit the ways in which each publisher prefers to handle rights and permissions. Each agreement may have different clauses on issues such as:

- fees for supply of digital files (from zero to a normal library rate);
- format of electronic files (CNIB prefers HTML but in practice receives files in Quark and PDF);
- method by which files are supplied (email, FTP server, and on CD);
- supply of print copies (some supplied together with the digital file, others must be purchased separately); and
- limitations on what CNIB is authorised to do with the digital files.

In all cases, CNIB commits itself to protecting digital content in specified ways, including by using rights management information and protection where this does not interfere with access.¹³⁸

Clearing house for digital files from publishers

The major producer of accessible materials in Canada is the library of the Canadian National Institute for the Blind.¹³⁹ The CNIB has been active in negotiations with publishers, and has entered contracts with major publishers to receive digital files of material for converting to accessible formats.¹⁴⁰

The Canadian National Library, in conjunction with other organisations including CNIB, has initiated a pilot project to develop a clearinghouse for digital files, to provide access for Canadians with print disabilities. The project was due to be completed in March 2005.¹⁴¹

New Zealand law and practice

New Zealand has provisions for people with print disabilities that are broadly similar to, but somewhat more limited than, the Australian provisions. Communication is not addressed; nor is there a specific right to make master copies. The administrative requirements are somewhat more onerous: New Zealanders are required to notify copyright owners, and there does not appear to be a mechanism equivalent to the Australian one allowing producers to notify the collecting society instead.

The special provisions for libraries and educational institutions in New Zealand are broadly similar to the Australian provisions.

Print disability provisions

A non-profit body prescribed by the regulations is entitled to make copies or adaptations of literary or dramatic works for people with print disabilities, in Braille format or “otherwise modified for their special needs”.¹⁴² There is no statutory limit to the types of formats or modifications permissible. Although there is no specific right to make master copies, the provisions appear broad enough to allow this.

As soon as practicable after making it, the prescribed body must notify the copyright owner that the copy or adaptation has been made.¹⁴³ However, there are no marking or record-keeping requirements.

Copies made under these provisions may only be made available to people with print disabilities.¹⁴⁴

There is no right to communicate material copied under these provisions.

Definitions and eligibility

Under the Copyright Act (NZ), a person has a print disability if he or she:

- is blind;
- suffers from severe impairment of his/her sight;
- is unable to hold or manipulate books;
- is unable to focus or move his or her eyes; or
- suffers from a handicap with respect to visual perception.¹⁴⁵

Material that can and can't be copied

The print disability provisions only apply to published literary and dramatic works, and do not apply to artistic or musical works or to audiovisual material.

Checking for commercial availability

Before making a copy, the prescribed body must check whether an accessible copy of the work is commercially available.¹⁴⁶

Other NZ provisions relevant to people with print disabilities

Research or private study

There is no general right for individuals with a print disability to make accessible copies for themselves under the Copyright Act (NZ). However, such individuals can, in the right circumstances, rely on the exception which allows individuals to reproduce copyright material without the copyright owner's permission if the use of the material is a "fair dealing...for the purposes of research or private study".¹⁴⁷ To work out whether the reproduction of a work is a fair dealing, the factors considered are similar to those under Australian law.

Educational provisions

The educational provisions under the Copyright Act (NZ) are extremely limited, and do not allow the making of multiple photocopies for students.¹⁴⁸ However, a voluntary licence offered by Copyright Licensing Ltd allows more extensive copying.¹⁴⁹

Library provisions

The library provisions in the Copyright Act (NZ) are broadly similar to Australian provisions.

Technological protection measures

Under the Copyright Act (NZ) it is an offence to make, import, sell, let for hire, offer or expose for sale or hire, or advertise for sale or hire, any device or means specifically designed or adapted to circumvent the form of copy-protection employed on material; or to publish information intended to enable or assist persons to circumvent that form of copy-protection.¹⁵⁰ As in Australia, it is not an offence to purchase or use such a device or information.

There are no exceptions that specifically allow people with print disabilities to circumvent copy-protection. The government has proposed changes to enable circumvention of copy protection that would prevent a “permitted act” from being performed, however, it does not appear that the proposed permitted acts would include access to material by people with print disabilities.¹⁵¹

Addressing the problems

The Australian Copyright Council is engaged in a project, funded by CAL, to develop guidelines print disability organisations will be able to rely upon in interpreting the legislation, and to improve accessibility by agreement between these organisations and copyright owners. However, some of the issues identified in this paper go beyond what can readily be resolved by negotiation or informal guidelines. This section outlines some of these issues.

One important limitation of negotiated guidelines is that agreements with Australian publishers are not binding on those whose rights they do not control. A large proportion of the books distributed in Australia originate overseas, and the rights in them are controlled by overseas entities. Even for publications within Australia, the publishers generally have limited and variable rights, and may not be entitled to grant blanket permissions for their lists. For these and other reasons, some revision of the legislation is warranted.

Fixing problems in the current print disability provisions

Redundant regulations

As noted in the text, the requirement in subsections 135ZQ(3) and (4) to mark certain master copies with prescribed information appears to be anachronistic. The subsections should be repealed. Regulations 23JB and 23JC should also be repealed, as they refer to an obligation to destroy master copies, which no longer exists.

Music

Producers have commented that the absence of any right to copy music under the print disability provisions causes particular hardship, since a large proportion of people with visual disabilities play and study music. Organisations wishing to make accessible copies must get permission from each copyright owner. Music books set for students often include a number of musical

works, each with different copyright owners, making it difficult and time-consuming to get permission to copy the whole book.

One option for addressing this issue is to amend the legislation to include music in the categories of things that can be copied under Division 3 of Part VB.

Alternatively, a non-legislative option would be for producers of accessible material and the music collecting societies to negotiate an agreement allowing accessible copies of music to be made on agreed terms and conditions.

Artworks

In relation to artworks, the legislation could be amended either to include them generally or to permit reproduction, and any necessary alteration of, artworks that explain or illustrate text, in a similar way to s 135ZM (applying to educational institutions).

Checking for commercial availability

The guidelines being developed by the Copyright Council seek to clarify what print disability organisations need to do to meet requirements to check for commercial availability before copying for their client. However, it may not be possible to solve all the problems in this way, for the reasons discussed in this article. It is therefore desirable that a review of the print disability provisions address the requirement on institutions to check for commercial availability. It may be possible to amend them to make the requirements clearer, or to incorporate a reference to industry-agreed guidelines (as has been done with some recent amendments to the Act, such as the moral rights provisions).

Other legislative options

A right of access for print-disabled individuals?

Legislators should consider whether it is desirable to legislate for a right of access, or a specific exception to infringement, for people with print disabilities. The UK legislation provides a possible model, the effect of which in practice should be reviewed. The Copyright Council is exploring the possibility of developing a voluntary licence to this effect.

Obligation on publishers to make digital files available to producers?

Currently, there is no obligation on publishers to provide digital files or other assistance to producers of accessible material. Many publishers are happy to provide such assistance, but local representatives of international or overseas-based publishers do not always have the authority to provide permission or files. The guidelines being developed by the Copyright Council seek to simplify the process by developing a template for use in negotiations between publishers and print disability organisations.

Extensive consultation and investigation of safeguards would be needed before imposing any legislative obligation on publishers to provide digital files.

Who pays for accessibility?

Improvement in the accessibility of print material demands some commitment of resources and effort by copyright owners, especially publishers.

It is arguable that it is a societal responsibility to ensure that all members of society are able to participate and gain access to information. The Public Lending Right (PLR) and Educational Lending Right (ELR) schemes recognize this principle, and compensate copyright owners for loss of sales resulting from the borrowing of their books from libraries.

Although copyright owners are generally unlikely to lose sales because of the making of accessible copies of their material, they do incur costs in dealing with requests for permission and for digital files. Publishers may be able to recoup some of the costs they incur by charging licence fees, or fees for supply of digital files, but the size of such fees must be limited by the capacity of producers and people with print disabilities to pay. It is arguable that some part of the cost of making accessible copies should be borne by the community at large.

International accessibility

One of the most frustrating issues for people with print disabilities is the problem of national boundaries around accessible copies. In the absence of international agreements, someone who has made an accessible copy of an item in one country may not be entitled to provide a copy to someone in another country. This is particularly a sore point in relation to accessible copies made available to US citizens under the Chafee Amendment, as eligibility for assistance under that amendment is defined by reference to another US law that is quite restrictive.

Australian legislation appears technically to allow accessible copies made in Australia to be provided to individuals and institutions overseas, provided they meet the necessary requirements. Copies could be provided to branches of Australian educational institutions which run courses overseas, but other overseas institutions assisting people with print disabilities would need to persuade the Attorney-General to declare them for the purposes of the Australian print disability provisions—an unlikely situation. As a practical measure, a specific provision could be considered.

The aim of allowing international access to overseas repositories of accessible copies can only be met by international negotiation, and in many cases will require amendment of national laws. It may be that this aim is within the scope of the project currently under way under the auspices of WIPO.

Endnotes

- 1 *Information Meeting on Digital Content for the Visually Impaired*, Geneva, 3 November 2003. For this and other information, visit www.wipo.int/copyright/en/ (accessed 28/4/05).
- 2 *Standing Committee on Copyright and Related Rights*, Twelfth Session, Geneva, 17 to 19 November 2004. (SCCR/12/4). Research for this project is being conducted by Nic Garnett: nic.garnett@interight.com.
- 3 Article 9(2) Berne Convention. For a discussion of the ramifications of the test, see S Ricketson, *The three-step test, deemed quantities, libraries and closed exceptions* (2002, Centre for Copyright Studies, Sydney), available from www.copyright.org.au/publications/centrecopstudies.htm (accessed 27/4/05).
- 4 See page 109 of this article, under the heading "Definitions and eligibility".
- 5 For information on the standard, see www.daisy.org.
- 6 See www.rph.org.au for further information.
- 7 Websites are: www.gutenberg.org and www.bookshare.org/web/AboutInternationalMembership.html (accessed 28/4/05). Although most material on the Bookshare website is only available to US citizens and residents with print disabilities, overseas residents are entitled to join and access material for which Bookshare has succeeded in negotiating permission from publishers. Bookshare also provides some public domain material. Membership is not required to access such material.
- 8 "Communicate", in the Copyright Act, means "make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject matter, including a performance or live performance"—section 10(1).
- 9 Division 3 of Part VB of the Copyright Act.
- 10 Section 10(1), definition of "person with a print disability".
- 11 See P Durack, Attorney-General, "Second Reading Speech: Copyright Amendment Bill (No.2) 1979", Senate, para 43.
- 12 Section 10(1), definition of "institution assisting persons with a print disability". The procedure for the declaration by the Attorney-General is set out in section 10A(1).
- 13 For further information, see www.copyright.com.au/institutions_assisting.htm.
- 14 Section 135ZQ (1) and (2).
- 15 Section 135ZQ(4A) and (4B).
- 16 Section 135ZQ(3) and (4); regulations 23JB and 23JC.
- 17 Former Section 135ZQ(2)(b) was repealed by cl 6, Schedule 5, Copyright Amendment Act (No.1) 1998.
- 18 Section 135ZQ(2).
- 19 The provisions also cover "published editions": section 135ZN.
- 20 Section 135ZP.
- 21 Section 135ZP(1). Recordings can be made on any "disc, tape, paper or other device in which sounds are embodied" (section 10(1)), so CD or CD-ROM recordings are permissible.
- 22 A "photographic version" is defined as a copy of a work produced as a film strip, or a series of separate transparencies, designed to meet the needs of people with a print disability (section 135ZC).
- 23 Section 135ZP(2).
- 24 This implication arises from the wording of the print disability provisions, which allow the making and communication of copies "by, or on behalf of" producers of accessible material. Further, s 135ZP makes clear that provided the copies are made or communicated "solely for the purpose of use in the provision ... of assistance to persons with a print disability", the assistance may be provided by someone other than the producer of accessible material.
- 25 Sections 135ZP, 135ZX. This is discussed in information provided by CAL: *Statutory licence for institutions assisting people with a print disability*, available at www.copyright.com.au/institutions_assisting.htm.
- 26 Sections 135ZP, 135ZXA. The wording of this notice is set out in Schedule 11B of the Copyright Regulations and reads, in part: "This material has been reproduced and communicated to you by or on behalf of [*insert name of institution*] pursuant to Part VB of the *Copyright Act 1968 (the Act)*. The material in this communication may be subject to copyright under the Act. Any further reproduction or communication of this material by you may be the subject of copyright protection under the Act. Do not remove this notice."
- 27 Section 135ZP.
- 28 Such requirements are set out in relation to use of copyright material by libraries and educational institutions. A similar requirement is implied in the "fair dealing" provisions.
- 29 Section 135ZQ (3) to (6A).

- 30 However, the fact that an abridged “talking book” is commercially available need not prevent a producer from making a sound recording of the complete text. In copyright terms, the abridged version is a different work from the complete version.
- 31 Section 135ZZH.
- 32 For information on one such service, see www.hearabook.org.au/#org.
- 33 Sections 40, 103C.
- 34 Sections 40 (works) and 103C (other subject matter, such as AV material and broadcasts).
- 35 Section 49. A reasonable portion is defined as, in general terms, 10% or one chapter of the published work: s 10(2).
- 36 Subsection 40(3), subsection 10(1) (“reasonable portion”).
- 37 Subsection 40(3).
- 38 *Copyright Licensing v University of Auckland* (2002) 53 IPR 618, at 638.
- 39 See www.ag.gov.au (under “Current Issues”, click “Copyright – Review of Fair Use exception”).
- 40 Article 17.4(e)(viii) Australia-US Free Trade Agreement, available at www.dfat.gov.au/trade/negotiations/us.html (accessed 28/4/05).
- 41 Section 47A.
- 42 Section 47A(11)(b).
- 43 For information, see www.rph.org.au.
- 44 Part VA; Part VB Divisions 2 and 2A.
- 45 The amounts that may be copied are generally defined by reference to a “reasonable portion”, generally, 10% or one chapter of a published work, or the whole of an article from a journal: s 10(2).
- 46 The educational provisions do not include any concept of accessibility: an accessible copy of an entire work could not be made under the educational provisions if the work is commercially available, even if it is not available in accessible form. In such a case, the educational institution might be able to make an accessible copy under the print disability provisions.
- 47 It could be argued that a recording of someone reading out the text is an electronic copy of the text.
- 48 Part VA.
- 49 Section 183.
- 50 See www.copyright.com.au/govt_dept_agencies.htm for further information.
- 51 See www.screen.org/users/gov_dept.html for further information.
- 52 This issue is discussed below under the heading *Interaction between anti-discrimination laws and copyright*.
- 53 Subsection 183(11) makes clear that the government provisions do not apply to educational institutions owned or controlled by the government.
- 54 Generally, the limits are 10% or one chapter of a book — or more if it is not commercially available. The purpose for which copies can be made is broadly stated: for example, in the Corporate licence, copies may be made “in the course of and for the purposes of the Licensee’s business”.
- 55 In some cases, the *Disability Discrimination Act 1992* (Cth) might require the business to make the information available in accessible form. However, this requirement is displaced if it would cause “unjustifiable hardship”.
- 56 The definition of “literary work” includes a “compilation, expressed in words, figures or symbols”: s 10(1). A Braille version of a book could be a new work, even if the actual translation into Braille characters is done by computer software: *Coogi Australia v Hysport International* (1998) 41 IPR 593.
- 57 It is not clear who, if anyone, would own the copyright (to the extent that it subsists). However, in practical terms, the owner of copyright in the underlying material would (subject to the statutory licence) be entitled to control use of the accessible version.
- 58 Explanatory Memorandum, Copyright Amendment Bill 1988 (Senate), para 174. This view is also put by Professor Ricketson, *The Law of Intellectual Property*, Lawbook Co, 2002 [12.175].
- 59 This issue is unlikely to arise in practice. However, it could be relevant if, for example, a commercial publisher wished to publish a talking book made under the print disability provisions. In this case, the publisher would generally need permission from the owner of copyright in the original work. Whether it needed permission from the producer which made the sound recording would depend on the interpretation of s 135ZZG.
- 60 Section 24, DDA.
- 61 For information on the requirements, see www.hreoc.gov.au/disability_rights/education/education.html (accessed 28/4/05).
- 62 *Maguire v SOCOG* (HREOC No H 99/115, 18 October 1999), available at www.humanrights.gov.au/disability_rights/decisions/comdec/1999/DD000150.htm (accessed 16/2/05).
- 63 For further information, see www.hreoc.gov.au/disability_rights/faq/Goods_etc/goods_etc.html (accessed 28/4/05).
- 64 All subsequent references in this article to the CDPA (UK) are to that Act as amended by the Copyright (Visually Impaired Persons) Act 2002.

- 65 Section 31F(9) CDPA (UK).
- 66 Section 31F(3) CDPA (UK).
- 67 Section 31F(4) CDPA (UK). Changes that might be required to overcome problems caused by visual impairment could include reformatting, or replacement of illustrations or diagrams with text descriptions of their contents.
- 68 Sections 31A(1) and 31B(1) CDPA (UK).
- 69 Section 31A(2) CDPA (UK) and section 31B(2).
- 70 Section 31A(1) CDPA (UK).
- 71 Section 31A(5) CDPA (UK).
- 72 Sections 31A(4) CDPA (UK).
- 73 Section 31B(12) CDPA (UK).
- 74 Section 31B(1) CDPA (UK). As a result of the difference in wording, it appears that the approved body must actually **own** the item rather than simply being entitled to access it (as is the case for individuals).
- 75 Section 31C(1) CDPA (UK). Such copies are known in Australia as “master copies”, but note that in the UK legislation, a “master” refers to the original published work.
- 76 Section 31C(3) CDPA (UK).
- 77 Section 31B(5) CDPA (UK).
- 78 Section 31C(6)(a) and (b) CDPA (UK).
- 79 Section 31C(6)(c) CDPA (UK).
- 80 Section 31C(7) CDPA (UK).
- 81 Section 31B(8) CDPA (UK).
- 82 Sections 31A (3) and 31B(3)-(4) CDPA (UK). In this context, a copy is taken to be accessible only if it is as accessible to the individual as it would be if he were not visually impaired: s 31F(2).
- 83 Sections 31A(9) and 31B(10) CDPA (UK).
- 84 Section 31B(7) CDPA (UK).
- 85 Section 31D CDPA (UK).
- 86 For information on this licence, see www.cla.co.uk/licensing/vip.html.
- 87 See www.revealweb.org.uk/.
- 88 *CLA VIP Licensing Scheme: Guidelines for Licensees*, para 5.4, available from www.cla.co.uk/licensing/vip.html.
- 89 Sections 29 and 38-40 CDPA.
- 90 The educational provisions are sections 32-36A CDPA (UK). For information on the CLA licences, see www.cla.co.uk/licensing/.
- 91 The Directive is available at www.wipo.int/clea/docs_new/en/eu/eu049en.html (accessed 7/7/05).
- 92 Section 296ZB CDPA (UK).
- 93 Section 296ZB CDPA (UK).
- 94 Section 296ZA CDPA (UK). This does not apply to TPMs applied to computer programs.
- 95 Article 6 Copyright (Harmonisation Information Society) Directive.
- 96 Section 296ZE CDPA (UK). This exception excludes TPMs applied to computer programs. Under the CDPA “permitted acts” is defined to include acts permitted under sections 31A-C CDPA (UK).
- 97 Section 296ZE CDPA (UK).
- 98 17 U.S.C § 121(c)(2).
- 99 However, note that specific provisions allow libraries to copy for some purposes, including for a client who has requested a copy for “private study, scholarship, or research” — 17 U.S.C § 108(d).
- 100 17 U.S.C § 121(c)(2). For further information, see www.loc.gov/nls/eligible.html.
- 101 17 U.S.C § 121(c)(1).
- 102 17 U.S.C § 121(a) and 17 U.S.C § 121(b)(2).
- 103 17 U.S.C § 121(a).
- 104 17 U.S.C § 121(c)(3).
- 105 17 U.S.C § 121(b)(1)(A).
- 106 The right of distribution in combination with the right of public performance approximate a right of communication in the US Copyright Act. For a technical argument on how this is achieved, see Ficsor M *The Law of Copyright and the Internet* (2002) Oxford University Press, 502-504.
- 107 17 U.S.C § 121(b)(1)(B) and (C).
- 108 The US “fair use” exception may also fall short of the Berne Convention and TRIPS requirements. The three-step test is outlined above under the heading *Balancing interests of copyright owners and users*.
- 109 17 U.S.C § 107.
- 110 The House Report on the Copyright Act of 1976 (Report No. 94-1476) 94th Congress, 2nd session, page [73].
- 111 There is also a provision allowing copying and communication of material for distance students, known as the Technology, Education and Copyright Harmonization (TEACH) Act. For discussion of this legislation, see www.ala.org.
- 112 For discussion of the scope of the “fair use” exception in this context, see US Copyright Office Circular no. 21 *Reproduction of Copyrighted Works by Educators and Librarians*, available from www.copyright.gov. For a brief comparison of the US provisions with the Australian provisions, see the Australian Copyright Council’s information sheet *Access to copyright material in Australia & the US*, available from www.copyright.org.au.
- 113 17 U.S.C § 1201(a)(1)(A).
- 114 17 U.S.C § 1201(a)(2).

- 115 17 U.S.C § 1201(a)(1)(B).
- 116 The power to determine classes is conferred upon the Librarian and Registrar by section 17 U.S.C § 1201(a)(1)(C).
- 117 “Specialised format,” “digital text” and “authorised entities” have the same meaning as in 17 U.S.C. §121. The full text of the determination can be found on www.copyright.gov/1201/.
- 118 See www.loc.gov/nls/index.html.
- 119 See www.rfbd.org.
- 120 See www.bookshare.org. Bookshare also makes available to the general public digital copies of works in which copyright has expired.
- 121 NIMAS is a version of the DAISY standard, discussed above.
- 122 For information on this legislation, see www.afb.org and <http://nimas.cast.org>.
- 123 Section 32(1)(a) Copyright Act (Canada).
- 124 Section 32(2) Copyright Act (Canada).
- 125 Section 2 Copyright Act (Canada).
- 126 Section 32(1)(a) Copyright Act (Canada). Cinematographic works are defined as “any work expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack”.
- 127 Section 32 (3) Copyright Act (Canada).
- 128 Section 29 Copyright Act (Canada).
- 129 See Ian McDonald *A Comparative Study of Library Provisions: From Photocopying to Digital Communication*, (Centre for Copyright Studies, Sydney, 2001), available at www.copyright.org.au/publications/centrecopstudies.htm (accessed 20/5/05).
- 130 Section 30.2(1) Copyright Act (Canada).
- 131 Section 30.2 (2)(a) and (b) Copyright Act (Canada).
- 132 Section 30.2(5) Copyright Act (Canada).
- 133 See section 29.4 Copyright Act (Canada).
- 134 See www.accesscopyright.ca/ for information on the licences. For general discussion of the issues, See Ian McDonald *A Comparative Study of Library Provisions: From Photocopying to Digital Communication* (see Endnote 129).
- 135 Section 86 Copyright Act (Canada).
- 136 See http://pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement_e.cfm (accessed 23/5/05).
- 137 See www.cnib.ca/library/.
- 138 Information derived from V Owen, *Towards the Ideal: Steps to Improved Access* (paper delivered at the World Library and Information Congress, 22–27 August 2004), available at www.ifla.org/IV/ifla70/papers/121e-Owen.pdf (accessed 27/5/05).
- 139 See www.cnib.ca/library/.
- 140 These agreements are discussed in V Owen, *Towards the Ideal: Steps to Improved Access* (see Endnote 138).
- 141 The project is discussed in V Owen, *ibid.* As at 20 May 2005, no information on the project or its outcome was available on the designated website: www.collectionscanada.ca/accessinfo/index-e.html.
- 142 Section 69 Copyright Act (NZ).
- 143 Section 69(2)(c) Copyright Act (NZ).
- 144 Section 69(2)(b) Copyright Act (NZ).
- 145 Section 69(4) Copyright Act (NZ).
- 146 Section 69(2)(a) Copyright Act (NZ).
- 147 Section 43 Copyright Act (NZ).
- 148 Section 44 Copyright Act (NZ).
- 149 See www.copyright.co.nz/licences.schemes.html#educational (accessed 27/5/05).
- 150 Section 226 Copyright Act (NZ).
- 151 “Permitted acts and exceptions” include fair dealing, archiving and preservation, time-shifting and educational provisions. See www.med.govt.nz/buslt/int_prop/digital/cabinet/cabinet-03.html#P50_14032/.