
A05n18

Sample Agreement for publishers and print disability organisations

November 2005

This Agreement should be read in conjunction with the Print Disability Copyright Guidelines produced by the Australian Copyright Council. To see the latest versions of the Guidelines, including this Licence, go to <http://www.copyright.org.au/disability>.

This Sample Agreement can be used as a basis for agreements between print disability organisations and publishers (or other copyright owners); changes or additions can be made as required to reflect particular circumstances. The Sample Agreement has been developed through consultation with organisations and individuals in both the print disability community and the publishing industry. Notes at the end of this Part explain the clauses.

You may use the terms and conditions of this Sample Agreement as a basis for standard agreements or for individual agreements. You may make any changes required for your circumstances, provided that:

- **if the text of your agreement varies from the wording of the Sample Agreement, you do not represent your agreement as having any connection with the Australian Copyright Council;**
- **if your agreement contains any reference to the Australian Copyright Council, this is accompanied by an invitation to visit the Australian Copyright Council's website at <http://www.copyright.org.au/disability>; and**
- **you do not make any charge for making or supplying copies of the Sample Agreement or any variation of it.**

For all other uses of this material, please contact info@copyright.org.au.

AGREEMENT

Parties

This agreement is between:

_____ [“the Publisher”]

and

_____ [“the Organisation”].

The Publisher agrees to grant the Organisation the Licence set out in Part One of this Agreement. Where the Publisher agrees to provide digital files of its books to the Organisation, it does so on the terms and conditions set out in Part Two of this Agreement.

Definitions

“Individual Copies” means copies of the Master Copy made by the Organisation for use by individuals with a print disability.

“Interim Copies” means any copies of an Original File that the Organisation makes in the process of creating a Master Copy.

“Master Copy” means a copy of the Original File in one or more of the formats set out in Part 2 (whether or not that copy has been edited, amended or adapted or contains additional material) and held by the Organisation.

“Members” means individuals with a print disability who are members, clients or students of the Organisation.

The “Online Delivery Requirements” are that, whenever the Organisation makes a Master or Individual Copy, or a copy of any of the Publisher’s Books made under section 135ZP, available online:

- access to copies of the Publisher’s Books online is password-protected;
- access to copies of the Publisher’s Books online is available only to Members of the Organisation and to people acting on behalf of the Organisation;
- as a condition for having access to the Publisher’s Books online, the Organisation requires its Members to agree not to reveal their password to any other person and not to make copies of the Publisher’s Books (or the online material generally) available to any other person; and
- if the Organisation becomes aware that a Member has made copies of any substantial part of these books available to any other person, the Organisation takes action within 14 days to suspend that person’s online access to material for at least 30 days; and
- people working for the Organisation are made aware of the need to limit access to the Original File and all reproductions of it.

“Original File” means a digital file of a Book supplied by the Publisher under Part Two of this Agreement.

“the Publisher’s Books” means books for which the Publisher controls the rights to copy and communicate within Australia.

Part 1: Obligations under section 135ZP of the Copyright Act

1.1 Checking for commercial availability

a. Where Accessible Copy is to be made in Braille

If the Organisation wishes to make a copy of one of the Publisher’s Books under section 135ZP of the Copyright Act, it is not required to check for commercial availability if the Accessible Copy is to be made in Braille.

b. Where commercially available formats are not accessible to individuals with a print disability

If any of the Publisher’s Books is commercially available in one of the formats set out in section 135ZP of the Copyright Act, but is not accessible to a particular Member (for example because it is available as an e-book in a format that cannot be accessed by the user’s adaptive software), the Organisation may make and supply an accessible copy to that Member.

c. Checking for commercial availability where accessible copies are provided online

If the Organisation makes any of the Publisher’s Books available online to its Members under section 135ZP of the Copyright Act, it will meet the requirement to check for commercial availability by making the check once every twelve months while the work remains available online, provided it meets the Online Delivery Requirements.

Part 2: Digital files

2.1 Supply and use of Original Files

The Publisher may provide Original Files to the Organisation on request. The Organisation may use the Original Files in the ways set out in clause 2.2 to make copies in:

- any format for use by people with a print disability **OR**
- the following formats: _____.

(Strike out whichever is not applicable).

2.2 Ways in which the Organisation may use digital files provided by the Publisher

a. Making copies in accessible formats

When the Publisher supplies an Original File, the Organisation may:

- make Interim Copies and communicate them within the organisation as required for the purposes of making a Master Copy;
- make any alterations, deletions and additions necessary to make a Master Copy of the Original File (except any alterations that would infringe the moral rights of any person); and
- make Individual Copies as needed by its Members.

b. Supplying Individual copies to individuals with a print disability

The Organisation may lend, communicate or give Individual Copies to its Members, provided that:

- the Organisation requires its Members to agree not to make Individual Copies available to any other person or organisation (including by lending the Individual Copy); and
- to the extent that is practicable, copy-protection measures are used (if required by the Publisher and as agreed between the Publisher and the Organisation).

c. Making Individual Copies available online to Members

The Organisation may make Individual Copies available online to its Members, provided that, in addition to the requirements set out in clause 2.2b, it meets the Online Delivery Requirements.

2.3 Terms and conditions for supply of digital files

a. Publisher may set conditions on supply of Original File

The publisher may, by giving notice in writing on receipt of a request for an Original File:

- require payment for providing the Original File; and/or
- require the Organisation to destroy all copies of the Original File and any Interim Copies [and/or return the CD-ROM, if supplied], after making the Master Copy.

b. No warranty concerning third party material

The Publisher does not warrant that it controls the rights in all material in the Book. The Organisation acknowledges that it may need permission to use third party material in the Book (such as artwork that was not created by the author or Publisher).

The Publisher will provide information to assist the Organisation to contact the owner(s) of copyright in any third party material, if requested.

c. Moral rights

The Organisation will take all reasonable steps to ensure that it does not infringe the moral rights of any creator of material included in the Book.

d. Restrictions on use of the Original File and reproductions of it

The Organisation will not, without the written permission of the Publisher:

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- use the Original File, any Interim Copy, Master Copy or Individual Copy in any way apart from those set out in clause 2.2;
 - sell the Original File, any Interim Copies, or any Master Copy; or
 - sell any Individual Copy for more than the cost of making and supplying that copy.

e. Publisher may terminate right to provide Individual Copies online

The Publisher may, by notice in writing, require the Organisation to cease to make Individual Copies relating to a particular Original File available online.

2.4 Termination of a licence to use a digital file

a. Automatic termination for breaches of clause 2.3d

If the Organisation breaches subclause 2.3d, the Licence will terminate automatically in respect of that Original File.

b. Optional termination for other breaches

If the Organisation breaches any other obligations under this Licence in relation to any Original File supplied by the Publisher, the Publisher may give written notice specifying the breach. If the breach is not remedied within 14 days, the Licence will terminate in respect of that Original File.

c. Consequences of termination

If the Licence is terminated in relation to any of the Original Files supplied by the Publisher, the Organisation must cease making Individual Copies of that File and, if it has made any such copy available online, must cease doing so.

d. Publisher may require deletion or return of files after termination

Following termination of the Licence in relation to any of the Original Files supplied by the Publisher, the Publisher may require the Organisation by notice in writing to delete or deliver to the Publisher all copies of the specified Original File, and any Interim Copies and Master Copies of that File under its control.

Part 3: Duration of this Agreement

3.1 Agreement may be terminated by notice in writing

This Agreement takes effect from the date of signature by both parties and continues until either party notifies the other in writing that it intends to terminate the Agreement. In the event of such notification, the Agreement will terminate 90 days from the date of notification.

3.2 Effect of termination of the Agreement

The effect of termination of the Agreement will be:

- From the date of termination, the Organisation will no longer be able to rely on Part One in meeting its obligations to check for commercial availability under the Copyright Act; and
- any Licences in respect of Original Files granted by the Publisher under Part Two are automatically terminated on the date of termination of the Agreement, with the consequences set out in subclause 2.4c.

3.3 Publisher may require deletion or return of files after termination

Following termination of the Agreement, the Publisher may require the Organisation by notice in writing to delete or deliver to the Publisher:

- all copies of any or all Original Files the Publisher has provided under this Agreement, and
- any Interim Copies and Master Copies of Original Files supplied by the publisher under the Organisation's control.

Date of agreement: _____

Signed by

(on behalf of the Publisher)

(on behalf of the Organisation)

Notes on the Sample Agreement

Definitions

Master Copy The Organisation will normally keep the Master Copy and make copies of it for use by individuals with a print disability.

Members Our understanding is that the accepted practice for print disability organisations is to require individuals to provide some evidence that they have a print disability (such as a report from a health professional or other referee) before they can become members and gain access to material copied under the print disability provisions of the Copyright Act.

Original File This Sample Agreement is drafted on the understanding that print disability organisations will rarely, if ever, simply pass on the digital file to members in the form in which they receive it from the publisher. If this situation does arise, the Publisher might wish to make an agreement directly with the person who will receive the Original File.

Part 1. Obligations under section 135ZP of the Copyright Act

Section 135ZP of the Copyright Act allows print disability organisations to make copies of literary and dramatic works in accessible formats for individuals with a print disability. Before making and communicating each copy for an individual with a print disability, the print disability organisation must check whether the work is commercially available in that format.

This Part sets out a simplified process for checking for commercial availability. Technically, the process does not meet the requirements of the Copyright Act: this is why permission is needed.

For more details on the requirements of the Copyright Act, see [Part 4 of the Guidelines](http://www.copyright.org.au/disability) at <http://www.copyright.org.au/disability>.

Part 2. Licence for use of digital files

Clause 2.1

This clause permits the Organisation to make copies in accessible formats. The Publisher may leave it open to the Organisation to decide which formats to use, or may decide only to permit Master and Individual Copies to be made in certain formats. Publishers may prefer the second option if they are considering making a book commercially available in a particular format, or simply want to limit the Licence to formats that have been specifically discussed.

Clause 2.2

Subclause 2.1a makes clear that the Organisation is entitled to make necessary changes in order to make copies in accessible formats (Master and Individual Files).

Generally, print disability organisations need to make changes to a digital file (in addition to any technical issues such as converting a file into a text document) in order to make it useful to people with a print disability. Such changes may involve changing formatting or adding text to help a person with a print disability understand the material. For example, the editor may write a text description of an illustration or diagram, describing its content and explaining its significance. The editor may also incorporate additional text describing or explaining visual cues and formatting (such as dot points, page numbers or break-out boxes). Such changes are not intended to change the meaning or content of the work.

Subclause 2.2b: The things Organisations may do with Original Files differ from what they could do with a scanned copy under the Copyright Act in two ways:

- only the Organisation named in the Agreement is entitled to use the Original File and any Master Copies made from it (any other organisation wanting a digital file would have to deal directly with the Publisher, or create its own file as permitted by section 135ZQ of the Copyright Act); and
- the Organisation does not need to check for commercial availability either before making Individual Copies to send out, or when making copies available online.

If the Publisher is likely to publish e-books in accessible formats, it may wish to protect the commercial viability of such editions by adopting one or more of the following approaches:

- limiting the period of the Licence; or
- amending subclause 2.1 to provide for the Publisher notifying the Organisation at some later stage that the relevant format is excluded from the permitted formats.

In such cases, publishers might wish to cooperate with Organisations to produce and publish popular books in formats accessible to people with a print disability.

Subclause 2.2b also raises the possibility of using copy-protection measures. Our understanding is that at the present time, it is not practicable to use copy-control measures on digital material for the purposes of people with a print disability, as these measures make it impossible to use adaptive software. However, it may be practicable to use copy-control measures for some formats (such as sound recordings) and for other formats as the technology develops. For these reasons, while the issue is addressed, it is left to the parties to determine whether or not any form of protection is feasible or necessary in the circumstances.

Subclauses 2.2b and c require the Organisation to set certain conditions for supply of Individual Copies to its Members, including a requirement that they not give, lend or make the copies available to any other individual or organisation. The purpose of this requirement is to protect the Publisher by ensuring that, as far as possible, access to copies is mediated through the Organisation.

Clause 2.3

This clause sets out the terms and conditions on which the publisher supplies the Original Files.

Subclause 2.3a allows the publisher to require payment for supply of the original File and destruction or return of the Original File once a Master Copy has been made.

The Publisher may be willing to supply the file for no payment. (Currently, print disability organisations are not required to pay to copy under the statutory licence administered by

CAL.) Alternatively, the amount could be the RRP of the Book, for example, or the cost to the Publisher of supplying the file.

Destruction or return of the original File may not be necessary, but may provide additional reassurance for the Publisher, by ensuring that only Master Copies (which are likely to hold limited appeal to sighted people) are held by the Organisation.

Subclause 2.3b This subclause has been included because we understand that in many cases, publishers only receive limited rights in relation to certain material—especially where, for example, they use photographs licensed from agencies in their books. Where this is the case the Publisher may not be able to grant rights to print disability organisations to reproduce all material included in a Book. The subclause makes clear that the Publisher does not authorise the Organisation to exercise rights that the Publisher does not control.

In many cases, however, a print disability organisation will not need permission in relation to such material. For example, a Master Copy may include verbal descriptions of artistic works rather than reproductions of them. Alternatively, if the Organisation is an educational institution, it can rely on the educational provisions to copy artworks and print music for its students in many circumstances. In either of these cases, the Organisation would not need permission from the owner(s) of copyright in the relevant material.

Subclause 2.3c Creators of copyright works have moral rights, including the right to be attributed and not to have their material treated in a way that would prejudice their honour or reputation. This subclause makes clear that the Organisation takes responsibility for respecting the moral rights of the creators of the material. Many publishers are required by their contracts with authors to ensure that the author's moral rights are protected in subsequent agreements concerning the work.

Subclause 2.3d This subclause makes clear that the Organisation is not permitted to sell the Original File or any Interim or Master Copies for profit, but leaves open the possibility that the Organisation might charge an amount to cover the cost of making and/or supplying copies to people with a print disability.

Clause 2.4

This clause sets out the situations in which the Licence will terminate. Once the Licence terminates, the Organisation loses the right to make any copies of the relevant Original File, Master Copies and Interim Copies.

In addition, the clause allows the Publisher to require the destruction or return of the digital file and any copies (including Master Copies) that the Organisation has made. This obligation does not arise automatically: in some circumstances, the Organisation may be able to negotiate with the Publisher to resume use of a Master Copy after a breach of the Licence has occurred.

Termination of the Licence does not affect the rights of Members of the Organisation to keep copies they have received under the terms of the Licence.

Part 3: Duration of this Agreement

This clause sets out the process by which the whole Agreement may be terminated, and the consequences of termination. If the Agreement is not terminated, it continues in force indefinitely.

Note that in general terms, the Organisation would be able to retain any Original Files and use them as permitted by the Copyright Act. If the Publisher wishes to terminate this right, it will have to give written notice under subclause 3.3.