FACILITATING ACCESS TO PUBLISHED WORKS FOR PERSONS WITH A PRINT DISABILITY: AMENDING AUSTRALIAN COPYRIGHT LAWS TO ENSURE COMPLIANCE WITH THE *MARRAKESH TREATY*

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The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled *was ratified by Australia in December 2015 and came into force in September 2016. On 15 June 2017, Australia enacted the* Copyright Amendment (Disability Access and Other Measures) Act 2017 *(Cth) (*'Amending Act*') to fulfil its obligations under the* Treaty *by creating new exceptions to copyright to support access to published works by persons with a print disability. The objective of this article is to precisely identify areas of divergence between the* Marrakesh Treaty *and the* Copyright Act 1968 *(Cth) and analyse the operation of the* Amending Act *in order to determine whether the proposed reforms will enable Australia to fulfil its obligations under the* Treaty. *The article suggests that whilst the* Amending Act *addresses certain critical concerns, further reforms need to be undertaken in order to ensure full compliance with the* Treaty. *Specifically, the article recommends that the* Amending Act *be amended to remove the commercial availability test in the new fair use mechanism, retain the print disability radio licence, introduce an extended exception for the circumvention of technological protection measures, and establish a mechanism for free cross-border exchange in order to enhance the value of the* Treaty *to the print disabled.*

I INTRODUCTION

The *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* ('*Marrakesh Treaty*')[1] seeks to strengthen the rights of access to knowledge and information embodied in published works by persons with a print disability by creating exceptions to

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1 *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, opened for signature 28 June 2013, [2014] ATNIF 15 (entered into force 30 September 2016) ('*Marrakesh Treaty*').

copyright laws.[2] The *Marrakesh Treaty* was adopted by the World Intellectual Property Organization (WIPO) in June 2013, was ratified by Australia in December 2015, and entered into force on 30 September 2016. On 15 June 2017, Australia enacted the *Copyright Amendment (Disability Access and Other Measures) Bill Act* (Cth) ('*Amending Act*') to create new exceptions to copyright law to support access to published works by persons with a print disability and ensure that Australia's domestic law complies with the obligations imposed by the *Treaty*. The *Treaty* requires Member States to enact limitations or exceptions in their national copyright law to permit designated authorised entities to reproduce published works in braille, audiobooks and other accessible formats for persons with print disabilities without the authorisation of the copyright right holder. In the *Treaty*, 'persons with print disabilities' is expansively defined to include those who are unable to read printed works due to blindness or visual impairment, as well as persons who suffer a perceptual or reading disability which prevents them from reading printed works to the same degree as a person without such an impairment.[3] The *Treaty* further creates a framework for the distribution of such works to relevant beneficiaries. The aim of the present paper is to consider to what extent the rights and obligations created by the *Treaty* are fulfilled by the *Copyright Act 1968* (Cth) ('*Copyright Act*'), and the extent to which present areas of non-compliance are effectively addressed by the *Amending Act*. To this end, the paper will identify the gap between the international standards of equitable support to persons with a print disability embodied in the *Treaty* and Australian copyright law, analyse the effects of such divergence, and consider the law reform discourse to date. The paper will conclude by recommending further reforms to Australian copyright law to ensure full compliance with the *Treaty*.

The problem of inadequate access to knowledge by persons with a print disability is a critical matter of global concern. According to the World Health Organization, there is an estimated 253 million blind and visually impaired people worldwide.[4] In Australia, there are 357 000 people who are blind or have low vision, and the number is projected to grow up to 564 000 by 2030.[5] In such a context, the *Treaty* has been widely commended by scholars around the world for enhancing access to knowledge for persons with a print disability. Cameron, Wood and Suzor, for example, argue that access to information and cultural works is

2 Andrea Wechsler, 'WIPO's Global Copyright Policy Priorities: The *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*' in Christoph Herrmann, Markus Krajewski and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law 2015* (Springer, 2015) 391; Lida Ayoubi, 'The *Marrakesh Treaty*: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons' (2015) 13 *New Zealand Journal of Public and International Law* 255; Kaya Köklü, 'The *Marrakesh Treaty* — Time to End the Book Famine for Visually Impaired Persons Worldwide' (2014) 45 *International Review of Intellectual Property and Competition Law* 737.

3 *Marrakesh Treaty* art 3.

4 World Health Organization, *Vision Impairment and Blindness* (October 2017) <http://www.who.int/mediacentre/factsheets/fs282/en/>.

5 Australian Network on Disability, *Disability Statistics* <http://www.and.org.au/pages/disability-statistics.html>, citing Australian Bureau of Statistics, *4443.0 — Disability, Ageing and Carers, Australia: Summary of Findings, 2015* (18 October 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4430.0main+features202015>.

fundamentally important to enable people with disabilities to fully participate in economic, social, and political life, and that it is therefore 'both a pressing moral imperative and a legal requirement in international law'.[6] Similarly, Wang acknowledges the significance of the *Marrakesh Treaty* in dealing with the 'book famine', and suggests that China should encompass relevant provisions of the *Marrakesh Treaty* as part of its ongoing process of copyright law reform.[7] Van Wiele further analyses South African copyright law and its ability to facilitate access to copyright works for print disabled persons, and provides a proposal on how the *Marrakesh Treaty* could be implemented in South African copyright law to enhance social equity while also taking into account possible domestic policy barriers.[8] Thus, there is growing international interest for contracting parties to amend their national copyright laws so as to comply with the requirement of the *Marrakesh Treaty* and facilitate access to published works by persons with a print disability.

II THE OBLIGATIONS IMPOSED BY THE *MARRAKESH TREATY*

The *Marrakesh Treaty* is premised on an understanding that access to published works is critical to the realisation of human rights. The *Universal Declaration of Human Rights* declares that everyone is equally entitled to basic human rights so as to enjoy the freedom of speech, to get proper education and to participate in cultural life.[9] The *Convention on the Rights of Persons with Disabilities* ('*CRPD*'), in its Preamble, further recognises that access to the physical, social, economic and cultural environment enables persons with disabilities to fully enjoy human rights and fundamental freedoms.[10] Specifically, art 30 of the *CRPD* requires States Parties to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials. Shaheed in her report to the United Nations points out that a copyright exception or limitation mechanism could be used to reconcile copyright protection with the right to science and culture and other human rights.[11] In such a context, the *Marrakesh Treaty* seeks to provide a well-

6 Natalie Cameron, Suzannah Wood and Nicolas Suzor, Submission to Attorney-General's Department (Cth), *Marrakesh Treaty Options for Implementation*, November 2014, 1 <http://eprints.qut.edu.au/79122/1/2014-QUTIP-AGD-Marrakesh.pdf>.

7 王迁 [Wang Qian],《论<马拉喀什条约>及对我国著作权立法的影响》[The Influences of the *Marrakesh Treaty* on Chinese Copyright Legislation] (2013) 10 法学*Law Science* 51.

8 Bram Van Wiele, *The Ratification and Implementation of the Marrakesh Treaty: A Look at the Future of South African Copyright Law* (LLM Thesis, University of Cape Town, 2014).

9 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) arts 19, 26–7.

10 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), Preamble para v.

11 Farida Shaheed, *Report of the Special Rapporteur in the Field of Cultural Rights: Copyright Policy and the Right to Science and Culture*, 28th sess, Agenda Item 3, UN Doc A/HRC/28/57 (24 December 2014) 20 [102]. See also Paul Harpur, *Discrimination, Copyright and Equality: Opening the E-Book for the Print Disabled* (Cambridge University Press, 2017).

designed exception to copyright law in order to reconcile the enforcement of copyright law with the upholding of fundamental human rights.[12]

The *Marrakesh Treaty* imposes an obligation on its contracting parties to enact in their national laws copyright limitations or exceptions to facilitate access to published works in accessible formats for designated beneficiaries. Such access can be provided to the beneficiaries themselves or to authorised entities acting on behalf of such beneficiaries. Article 3 of this *Treaty* defines 'beneficiary' to include a person who is blind, has a visual impairment or a perceptual or reading disability, or is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading. Such a beneficiary can produce accessible format copies of a work for his/her personal use. Someone acting on behalf of the beneficiary person, including a primary caretaker or caregiver, may also assist the beneficiary to make and use accessible format copies where the beneficiary has lawful access to that work or a copy of that work.[13] In addition, 'authorized entity' is defined to be an institution 'authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis', as well as a 'government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations'.[14] Such an authorised entity is permitted to reproduce and communicate published works in accessible formats for print disabled persons without the authorisation of the copyright owner.[15] Pursuant to art 2(b), 'accessible format copy' is further defined to mean a 'copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability'. Hence, copies of a work in braille, large-print, audio and digital formats that can be apprehended by persons with a print disability are recognised as accessible format copies. In addition to creating a mechanism for the reproduction and communication of accessible format copies, the *Treaty* facilitates the free exchange of accessible format material among countries so as to expand the choices available to beneficiaries. Specifically, art 5 requires contracting parties to permit authorised entities to export accessible format copies to a beneficiary person or another authorised entity whilst art 6 permits authorised entities and beneficiary persons to import accessible format copies from other contracting parties. Finally, art 9 encourages contracting parties to share information to assist authorised entities in identifying one another so as to foster cross-border exchange of accessible format copies.

12 Jingyi Li and Niloufer Selvadurai, 'Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the *Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled*' (2014) 36 *European Intellectual Property Review* 653.

13 *Marrakesh Treaty* art 4(2)(b).

14 Ibid art 2(c).

15 Ibid art 4(2)(a).

The *Treaty* does however create a variety of restrictions on reproduction and communication so as to protect the legitimate interests of copyright proprietors. Firstly, an authorised entity wishing to produce and communicate accessible format copies of a copyright work without the permission of the copyright holder must have 'lawful access to that work or a copy of that work'.[16] Secondly, when converting a work into an accessible format copy, no changes can be made in the work apart from introducing necessary means to navigate information in the accessible format.[17] Thirdly, accessible format copies must be supplied exclusively for the use of the beneficiary person.[18] Fourthly, the activity must be 'undertaken on a non-profit basis'.[19] Fifthly, the *Marrakesh Treaty* provides that a contracting party may adopt a commercial availability test, which means production and distribution of accessible format copies of a work can only be allowed when copies of a particular accessible format of such a work 'cannot be obtained commercially under reasonable terms for beneficiary persons in that market'.[20] Finally, the *Treaty* empowers national lawmakers to determine whether the discussed limitations or exceptions are subject to remuneration to protect the economic interests of copyright owners.[21]

Therefore, by creating express provisions to support access to published works by print disabled persons and also creating express limitations to such provisions, the *Marrakesh Treaty* seeks to carefully calibrate the right of print disabled persons to access information and knowledge with the proprietary interests of copyright owners.

III THE AUSTRALIAN COPYRIGHT LAW GOVERNING ACCESS TO COPYRIGHT MATERIALS BY PERSONS WITH A PRINT DISABILITY

At present, the *Copyright Act* has a variety of provisions relating to fair dealing, format shifting, disability exceptions and statutory licences which enable designated parties to access copyright material for purposes of use by persons with a print disability.

A *Fair Dealing*

Australia's present fair dealing provisions provide a measure of access to published works by persons with a print disability. Copyright material may be used without permission of the proprietor if the use is a fair dealing for the purpose of research

16 Ibid art 4(2)(a)(i).
17 Ibid art 4(2)(a)(ii).
18 Ibid art 4(2)(a)(iii).
19 Ibid art 4(2)(a)(iv).
20 Ibid art 4(4).
21 Ibid art 4(5).

or study, criticism or review, parody or satire, reporting news or the provision of professional advice by a lawyer.[22] Accordingly, anyone, including those with a print disability, can reproduce and communicate a literary, dramatic, musical or artistic work, or an adaptation of a literary, dramatic or musical work, freely if it is for the above purposes. However, on the basis of *De Garis v Neville Jeffress Pidler*, this exception is restricted to the user's own fair dealing purposes.[23] It cannot extend to the supply of a copyright work to other persons for their fair dealing purposes.[24] Therefore, unlike the more expansive provisions of the *Treaty*, Australia's fair dealing provision does not entitle persons with a print disability to access materials for private use.

B *Format Shifting*

In addition to the fair dealing exception, reproducing books, newspapers and periodical publications in a different form for private and domestic use is recognised as a copyright exception pursuant to s 43C of the *Copyright Act*. In order for works of the above versions to be accessible to persons with print disabilities, they need to be reproduced in large print, audio, digital and other accessible formats. Section 43C covers this contingency by enabling users to make accessible format copies for private and domestic use, including lending to a family or household member who is print disabled. It should be noted however that this exception is restricted to private and domestic use, and that use is forbidden if the reproduced work is sold, let for hire by way of trade, offered or exposed for sale or hire, or distributed for the purpose of trade.[25] Further, whilst exceptions for format shifting for private and domestic use extend to photographs[26] and videotapes,[27] these two formats demand visual functions on the part of the beneficiary and hence do not cover the core of exceptions and limitations that are used to assist persons with a print disability to have access to published works.

C *Uses for Persons with a Disability*

Finally, before the enactment of the *Amending Act*, s 200AB(4) of the *Copyright Act*[28] specifically stipulated that a use made by a person with a disability that causes difficulty in reading, viewing or hearing the work or other subject matter in a particular form, or a use made by someone else for the purpose of the disabled person obtaining a reproduction or copy of the work or other subject matter in another form, or with a feature, that reduces the difficulty, is not an infringement

22 *Copyright Act* ss 40–1, 41A, 42–3. See also Australian Copyright Council, 'Fair Dealing' (Information Sheet No G079v08, December 2017).

23 (1990) 37 FCR 99.

24 Ibid.

25 *Copyright Act* s 43C(3).

26 Ibid s 47J.

27 Ibid s 110AA.

28 As repealed by *Amending Act* sch 1 s 56.

of copyright. The provision was subject to the condition that the use is not made wholly or partly for the purpose of obtaining a commercial advantage or profit.[29] Section 200AB applies to uses that do not conflict with a normal exploitation of the work, where the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.[30] The Australian Law Reform Commission (ALRC) noted that the conditions provided in this section are to be interpreted in the same way as the 'three-step test' of the *TRIPS*.[31] *TRIPS* in art 13 provides that '[M]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.'[32] It is also relevant to note that the World Trade Organization Expert Panel stipulated that a legitimate copyright exception should: (a) be clearly defined in national legislation, and should be narrow in its scope and reach;[33] (b) be confined in scope and degree so as not to conflict with a normal exploitation of the work;[34] and (c) not unreasonably prejudice the legitimate interests lawfully protected and justifiable in the light of the overall objectives that underlie the protection of exclusive rights.[35] The Panel holds that these three conditions apply on a cumulative basis, and each one is a separate and independent requirement that must be satisfied.[36] Scholars have noted that the 'three-step test' requires a comprehensive overall assessment, rather than a step-by-step application,[37] and that the test should not be interpreted in a narrow way that restricts the application of copyright exceptions and limitations. Instead, it should be interpreted in a manner that respects the legitimate interests of third parties, including interests deriving from human rights and fundamental freedoms.[38] Whilst there has been extensive consideration of the three-step test, the precise application of s 200AB(4) remains unclear.

29 Ibid s 200AB(4)(c), as repealed by *Amending Act* sch 1 s 56.

30 Ibid s 200AB(1)(c)–(d).

31 Australian Law Reform Commission, *Copyright and the Digital Economy,* Discussion Paper No 79 (2013) 222 [11.14].

32 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*TRIPS*') art 13. The 'three-step test' is also regulated in art 9(2) of the *Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works*, signed 24 July 1971, 1161 UNTS 30 (entered into force 15 December 1972) ('*Berne Convention*') and art 10 of the *WIPO Copyright Treaty*, opened for signature 20 December 1996, 2186 UNTS 121 (entered into force 6 March 2002).

33 Panel on United States — Section 110(5) of the US *Copyright Act*, 'United States — Section 110(5) of the US *Copyright Act*' (WTO Doc No WT/DS160/R, World Trade Organization, 15 June 2000) 34 [6.112] ('*WTO Panel Report*').

34 Jane C Ginsburg, 'Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions' (2001) 187(1) *Revue Internationale du Droit d'Auteur*, 17.

35 *WTO Panel Report*, above n 33, 57 [6.220], 58–9 [6.224]–[6.229].

36 *WTO Panel Report*, above n 33, 27 [6.74].

37 Christophe Geiger, Jonathan Griffins and Reto M Hilty, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 39 *International Review of Intellectual Property and Competition Law* 707.

38 Ibid.

D *Statutory Licences*

Supplementing these exceptions from liability, the *Copyright Act*, before the enactment of the *Amending Act*, also created a statutory licence for institutions assisting persons with a print disability. Such institutions were granted a licence to copy, reproduce and communicate literary and dramatic works in an accessible format pursuant to pt VB div 3 of the *Copyright Act*.[39] Relevant institutions included educational institutions, and any other institution, which had as its principal function or one of its principal functions, the provision of literary and dramatic works to persons with a print disability.[40] Section 10A established an administrative declaration procedure for institutions assisting persons with a print disability pursuant to which the Attorney-General may declare such an institution by publishing a written notice in the Gazette and must also give notice to each House of Parliament.[41] Pursuant to s 135ZP, there was no copyright infringement when an institution assisting persons with a print disability makes or communicates one or more records embodying a sound recording of a literary or dramatic work, or part of the work, solely for the purpose of providing assistance to persons with a print disability, provided that a remuneration notice is given by or on behalf of the body to the relevant collecting society.[42] Further, the copyright in a published literary or dramatic work was not infringed when an institution makes or communicates a version in braille, large-print, photographic or electronic format solely for the purpose of providing assistance to persons with a print disability, and a remuneration notice is in force.[43] Hence, once a literary or a dramatic work has been published, it could be produced and communicated in a broader scope of formats, including braille, large-print, photographic or electronic versions, by such an institution. In the above two cases, a remuneration notice specifying the amount of equitable remuneration payable to the collecting society by the administering body was to be assessed on the basis of an agreed system.[44] In most cases, collecting societies collect royalty payments from users of copyright works and distribute them to copyright owners.[45] For example, the Copyright Agency is appointed by the Australian government to manage the print disability statutory licence for text materials and images.[46]

Additional provisions have been facilitating the prescribed institutions to produce and communicate works in accessible formats for the print disabled. Section 135ZQ permitted relevant reproduction and communication by such institutions under s 135ZP. In this case, a notice was required to be given to the collecting

39 As repealed by *Amending Act* sch 1 s 39.

40 *Copyright Act* s 10(1) (definition of 'institution assisting persons with a print disability'), as repealed by *Amending Act* sch 1 s 10.

41 Ibid s 10A(2)–(3), as repealed by *Amending Act* sch 1 s 17.

42 Ibid s 135ZP(1), as repealed by *Amending Act* sch 1 s 39.

43 Ibid s 135ZP(2), as repealed by *Amending Act* sch 1 s 39.

44 Ibid s 135A (definition of 'agreed notice'), as repealed by *Amending Act* sch 1 s 39.

45 Ibid s 135P, as repealed by *Amending Act* sch 1 s 39.

46 Copyright Agency, *What We Do* (15 February 2016) <https://www.copyright.com.au/about-us/what-we-do/>.

society.[47] Additionally, s 135ZN allowed institutions assisting persons with a print disability to make necessary facsimile copies of a published edition of a work in the course of making a reproduction of the work. Apart from that, s 116AN(9)(c) provides an exception to the circumvention of access control technological protection measures where 'the doing of the act by the person is prescribed by the regulations'. Access control technological protection measure means a device, product, technology or component, a computer program that is used by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter in connection with the exercise of the copyright, and in the normal course of its operation, controls access to the work or other subject-matter.[48] According to item 3 of sch 10A of the *Copyright Regulations 1969* (Cth) ('*Copyright Regulations*'), 'the reproduction or communication by an institution assisting persons with a print disability for provision of assistance to those persons of copyright material' is a prescribed action that does not infringe copyright. However, an institution must have complied with the record keeping and notice requirements as provided in ss 135ZX or 135ZXA.

Whilst this statutory licence mechanism provides a measure of support to persons with a print disability, it can be argued that it was insufficient to meet the demand for converting printed works into accessible formats. Empirical studies show that Australian universities are not ensuring students with print disabilities have timely access to textbooks required for their university studies.[49] The reasons for the failure results from a combination of factors including inefficiencies caused by the statutory agency which regulates copyright.[50] What is more, institutions assisting persons with a print disability are not well adapted to developments in ICTs. A recent study conducted by Curtin University shows that students with visual impairment were noticeably more likely than average to have experienced problems accessing online learning platforms due to their disability.[51] The study found that being unable to access digital content online easily positions vision impaired students at a disadvantage compared to their peers in Australian universities.[52] In such a context a more comprehensive and efficient statutory licence is required to facilitate access to works for persons with a print disability.

In addition to the licence created by pt VB div 3 of the Act, print disability radio licences also supported access to information and knowledge for print disabled persons. 'Broadcast' in the *Copyright Act* refers to 'a communication to the

47 Ibid ss 135ZQ(4A)–(4B), as repealed by *Amending Act* sch 1 s 39.

48 Ibid s 10(1) (definition of 'access control technological protection measure').

49 Paul Harpur, 'Ensuring Equality in Education: How Australian Laws are Leaving Students with Print Disabilities Behind' (2010) 15 *Media & Arts Law Review* 70.

50 Paul Harpur and Rebecca Loudoun, 'The Barrier of the Written Word: Analysing Universities' Policies to Students with Print Disabilities' (2011) 33 *Journal of Higher Education Policy and Management* 153.

51 Mike Kent, 'Access and Barriers to Online Education for People with Disabilities' (Study, National Centre for Student Equity in Higher Education, Curtin University, May 2016) 106–7.

52 Ibid.

public delivered by a broadcasting service'.[53] Section 47A provided that sound broadcasting of a published literary or dramatic work made by a holder of a print disability radio licence does not constitute copyright infringement upon payment of equitable remuneration.[54] The beneficiaries of the broadcast licence are not limited to disabled people but also included persons who, by reason of old age or literacy problems, are unable to handle books or newspapers, or to read or comprehend written material.[55] Thus the print disability radio licence benefitted a wide range of people including the print disabled persons so that they could enjoy a published literary or dramatic work timely and conveniently via radio without the restriction of copyright protection.

IV THE COMPLIANCE GAP — COMPARING THE *MARRAKESH TREATY* AND AUSTRALIAN COPYRIGHT LAW

While the *Copyright Act* has established mechanisms to support access to copyright works for print disabled persons, the Act does not wholly fulfil Australia's obligations under the *Marrakesh Treaty*. It is hence useful to compare the provisions of the *Treaty* and the *Copyright Act* in order to precisely identify the nature and extent of this compliance gap.

A *Scope of Beneficiaries*

Australian copyright law also encompasses a broader range of potential beneficiaries than those covered under the *Marrakesh Treaty*. Under the *Marrakesh Treaty*, a 'beneficiary' is defined as a person who

> (a) is blind;
>
> (b) has a visual impairment or a perceptual or reading disability … or
>
> (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would normally be acceptable for reading.[56]

This definition includes visual and all other possible physical disabilities that impede a person in reading, and does not confine the concept of disability by referring to specific types of disability. In Australia however, different types of copyright exceptions have different scopes of operation dependent on the nature of the beneficiary. For example, before the enactment of the *Amending Act*, exceptions for using a work for certain purposes under s 200AB(1) applied to the use of works by or for 'a person with a disability that causes difficulty in reading,

53 *Copyright Act* s 10(1) (definition of 'broadcast').

54 Ibid s 47A, as repealed by *Amending Act* sch 1 s 17.

55 Ibid s 47A(11)(b), as repealed by *Amending Act* sch 1 s 17.

56 *Marrakesh Treaty* art 3.

viewing or hearing' copyright material.[57] '[A] disability that causes difficulty in reading' covers all kinds of disabilities that potentially affect a person's ability in reading. Further s 200AB benefitted both persons with a disability that cause reading difficulties and persons with disabilities that involve viewing or hearing difficulties. Pursuant to the *Copyright Act* the beneficiaries of print disability statutory licences included

(a) a person without sight; or

(b) a person whose sight is severely impaired; or

(c) a person unable to hold or manipulate books or to focus or move his or her eyes; or

(d) a person with a perceptual disability.[58]

Whilst the definition of 'print disability' is almost identical to that of the *Marrakesh Treaty*, the Australian law does not specifically mention 'reading disability'. The latter term is typically interpreted as encompassing reading difficulties with spelling, phonological processing and rapid visual-verbal responding which result from neurological factors which cause individuals to read at levels significantly lower than expected despite having normal intelligence.[59] This creates a divergence between the *Treaty* and Australian copyright law because a person with a 'reading disability' is covered by the *Treaty* whilst they cannot necessarily seek access to copyright works under the statutory licence.

In Australia, the beneficiaries of print disability radio licences included 'persons who by reason of old age, disability or literacy problems are unable to handle books or newspapers or to read or comprehend written material'.[60] As this provision gave consideration to persons who have no disability but still may have difficulties in reading, it was significantly wider than the scope of the exceptions provided by the *Marrakesh Treaty*. The Australian Act hence supported access by old-aged persons suffering from presbyopia, cataracts, glaucoma and other optical diseases who may find it difficult to hold a book for a long time because their arms are getting weak. The Act also extended to persons who are illiterate and cannot understand the meaning of printed words despite having no physical problems. Thus the *Copyright Act* provides for a wider range of eligible beneficiaries than does the *Marrakesh Treaty*.

B *Works Subject to Exceptions*

The scope of works subject to copyright exceptions in Australia is slightly different to that of the *Treaty*. The *Marrakesh Treaty* includes 'literary and artistic' works among those that can be made and communicated in accessible formats,

57 *Copyright Act* ss 200AB(1), (4). Section 200A(4) was repealed by *Amending Act* sch 1 s 56.

58 Ibid s 10(1) (definition of 'person with a print disability'), as repealed by *Amending Act* sch 1 s 12.

59 Joel B Talcott, Review of 'Reading Disabilities: Genetics and Neurological Influences by Bruce F Pennington ' (1994) 107 *American Journal of Psychology* 305, 305–6.

60 *Copyright Act* s 47A(11)(b), as repealed by *Amending Act* sch 1 s 17.

within the meaning of art 2(1) of the *Berne Convention*.[61] The *Berne Convention* protects literary and artistic works, which includes every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expressions, such as books, paintings, architecture, sculpture, photographic works, dramatic or dramatico-musical works, musical compositions, illustrations, and maps.[62] Additionally, the *Marrakesh Treaty* specifically notes that works subject to copyright exceptions include 'works in audio form, such as audiobooks'.[63] The only restriction is that works subject to copyright limitations and exceptions in the *Marrakesh Treaty* need to be 'published' works or works 'publicly available in any media'.[64]

In comparison, fair dealing applies to literary, dramatic, musical or artistic work, and use by or for persons with a print disability is regulated by s 200AB of the *Copyright Act* and generally applies to a work without any restriction or condition. These two types of exceptions comply with the requirements of the *Marrakesh Treaty*. Whilst s 135ZP of the *Copyright Act* created a statutory licence granting authorised institutions assisting persons with a print disability to make and communicate 'literary and dramatic' works to persons with a print disability, it did not specifically extend to artistic works and scientific works. Moreover, whilst the omission of scientific works can be overcome by the expansive interpretation of 'literary works' under Australian copyright law that covers productions falling within the scientific domain, artistic works such as paintings, photographs and sculptures are not unequivocally excluded from access. Similarly, the print disability radio licence only permitted a holder to make a sound broadcast of a 'literary or dramatic' work.[65] Format shifting applies to books, newspapers and periodical publications, which is even narrower in scope when compared with the ambit of the *Marrakesh Treaty*.

Additionally, in contrast to the *Marrakesh Treaty* which requires the relevant work to be 'published' or 'otherwise made publicly available in any media',[66] the *Copyright Act* did not strictly require being 'published' as a pre-condition for a work to be subject to exceptions. Section 135ZP of the *Copyright Act* provided two kinds of exceptions, depending on whether a work had been published or not. First, to make sound recordings as accessible copies of a work for the print disabled, there was no need for that work to be published.[67] Second, if a work was to be made or communicated in braille, large-print, photographic or electronic versions, such a work was deemed to be published.[68] Thus the *Copyright Act* provided a wider regime of works subject to copyright exceptions in that a work need not be published before produced into the format of sound recording.

61 *Marrakesh Treaty* art 2.
62 *Berne Convention* art 2(1).
63 *Marrakesh Treaty* n 1.
64 Ibid art 2(a).
65 *Copyright Act* s 47A, as repealed by *Amending Act* sch 1 s 17.
66 *Marrakesh Treaty* art 2(a).
67 *Copyright Act* s 135ZP(1), as repealed by *Amending Act* sch 1 s 39.
68 *Copyright Act* s 135ZP(2), as repealed by *Amending Act* sch 1 s 39.

Finally, under Australian law a precondition to obtaining a statutory licence for institutions assisting persons with a print disability was a finding that the relevant material is not commercially available. Specifically, s 135ZP provided that when a sound recording, braille, large-print or photographic version of a work had already been published, the same kind of accessible format could not be made or communicated by the qualified institutions unless copies in such format could not be obtained within a reasonable time at an ordinary commercial price after reasonable investigation. Such an evaluation of accessibility is not however a general requirement pursuant to the *Marrakesh Treaty*. Whilst art 4(4) stipulates that a contracting party *may* confine limitations or exceptions to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market, it is not a mandatory requirement. Contracting parties are hence free to choose whether to apply this restriction in their national copyright law or not. If a country chooses to avail itself of this possibility, it is required to declare this in a notification deposited with the Director General of WIPO.[69] As Australia lodged such a declaration at the time of ratification, compliance with the *Treaty* does not require amendment to its commercial availability provision.[70] Thus, there were a variety of divergences between the *Treaty* and Australian law before the codification of the *Amending Act* as to the scope of works subject to copyright exceptions or limitations to enable access to published works for the print disabled.

Table 1: Works, uses, accessible formats and restrictions to exceptions in the *Marrakesh Treaty*

Exception	Works subject to exception	Types of use	Accessible formats	Restriction
Authorised Entities	Literary, artistic, scientific and audio	Reproduction and communication	Any alternative manner that is feasible and comfortable for the print disabled	Published or publicly available Commercial availability test (optional)
Individuals	Literary, artistic, scientific and audio	Reproduction	Any alternative manner that is feasible and comfortable for the print disabled	Published or publicly available Commercial availability test (optional)

69 *Marrakesh Treaty* art 4(4).

70 In Australia's instrument of ratification of the Marrakesh Treaty, it is noted '[U]nder paragraph 4 of Article 4 of the *Treaty*, [that] limitations and exceptions applying to authorized entities, as defined in Article 2(c), provided for in Australia's national copyright law in accordance with paragraph 1 of Article 4 shall be confined, for Australia, to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons': World Intellectual Property Organization, *Marrakesh Notification No 12 — Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled: Ratification by Australia* (10 December 2015) <http://www.wipo.int/treaties/en/notifications/marrakesh/treaty_marrakesh_12.html>.

Table 2: Works, uses, accessible formats and restrictions to exceptions in the *Copyright Act*

Exception	Works subject to exception	Types of use	Accessible formats	Restriction
Print disability licence	Literary and dramatic	Reproduction and communication	Audio, braille, large print, photographic and electronic	Published (except recordings) Commercial availability test
Radio licence	Literary and dramatic	Broadcast	Radio broadcast	Published
Section 200AB	All	Reproduction	No requirement	Three-step test
Fair dealing	Literary, dramatic, musical or artistic	Reproduction	No requirement	No
Format shifting	Books, newspapers and periodical publications	Reproduction	Any different form	No

C *Provisions as to Non-Profit Operations and Remuneration*

The *Marrakesh Treaty* places a strong emphasis on the 'non-profit' nature of a potential use by a print disabled person when delineating the ambit of operation of its exceptions and limitations. The *Treaty* requires that authorised entities should undertake activities on a non-profit basis, whereas copyright exceptions for the print disabled in Australian copyright law are not limited to non-profit activities. Hence, under the *Marrakesh Treaty*, the 'authorised entity' is authorised or recognised by the government only when it provides education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, or is a government institution or non-profit organisation.[71] Furthermore, when authorised entities make or supply accessible format copies, these activities must be undertaken on a non-profit basis.[72]

In contrast, the *Copyright Act* does not expressly require all the regulated copyright exceptions or limitations for persons with a print disability to be for non-profit institutions. Only s 200AB(4)[73] specifically required the use of a work by or for a person with a disability not to be 'partly for the purpose of obtaining a commercial advantage or profit'. Some exceptions do however imply that 'making a profit' should not be a legitimate purpose. For example, s 40 requires the use of a work under the fair dealing exception to be 'for purpose of research or study'. Section 43C provides that a lawful format shifting of a work needs to be 'for private and domestic use'. Section 135ZP required an authorised institution

71 *Marrakesh Treaty* art 2(c).

72 Ibid art 4(2)(a)(iv).

73 As repealed by *Amending Act* sch 1 s 56.

to carry out its activities 'solely for the purpose of' assistance to persons with a print disability. The non-profit requirement is further confirmed by the Copyright Council announcing that selling or supplying accessible copies for a financial profit is not an authorised use of the statutory licence.[74] There is no implication that the holder of a print disability radio licence has to conduct activities on a non-profit basis. The licence holder was therefore required to pay equitable remuneration to the owner of the copyright.[75] The amount of such remuneration was as agreed upon between the owner of the copyright and the licence holder.[76] In default of such an agreement, it was determined by the Copyright Tribunal.[77] It is to be noted that s 152(8) of the *Copyright Act* provides a cap on remuneration being '1% of the amount determined by the Tribunal to be the gross earnings of the broadcaster' for the broadcasting of published sound recordings. However, as the *Treaty* leaves it to contracting parties' national laws to determine whether and how to collect remuneration,[78] and as Australia has lodged a notification that it will impose a requirement to remunerate, this divergence in provisions governing non-profit uses will not hinder Australia's compliance with the *Treaty*.

Table 3: Provisions as to profit and remuneration

Exception	Entities/individuals	Profit purpose	Remuneration
Marrakesh Treaty Entities	Non-profit authorised institutions	Non-profit activities	Parties self-determination
Marrakesh Treaty Individuals	Beneficiaries Someone on behalf of beneficiaries	Personal use	Parties self-determination
Copyright Act Institution licence	Declared institutions	Solely for the purpose of assisting print disabled	Yes In fact no collection
Copyright Act Radio licence	Licence holders	No requirement	Yes
Copyright Act s 200AB	Individuals	Non-profit activities	No
Copyright Act Fair dealing	Individuals	Research/study	No
Copyright Act Format shifting	Individuals	Private/domestic use	No

74 Australian Copyright Council, 'Print Disability Copyright Guidelines' (Guidelines No A07n08, August 2007), 14 <http://www.copyright.org.au/acc_prod/ACC/Research_Papers/Print_Disability_Copyright_Guidelines__2007_.aspx>.

75 *Copyright Act 1968 (Cth)* s 47A(8), as repealed by *Amending Act* sch 1 s 17.

76 Ibid.

77 Ibid.

78 *Marrakesh Treaty* art 4(5).

D *Cross-Border Exchange*

Whilst the *Marrakesh Treaty* establishes a mechanism for international exchange of copies in accessible formats, Australian copyright law merely provides restrictions on parallel importation of books 'first published in Australia' unless certain conditions are met. Specifically, art 5 of the *Marrakesh Treaty* allows an authorised entity in a Member State to export accessible format copies of a work to beneficiary persons or authorised entities in another Member State, and art 6 further permits the beneficiary persons and authorised entities to import works in accessible formats from other countries. Further, art 9 of the *Marrakesh Treaty* encourages contracting parties to share information between authorised entities so as to foster the cross-border exchange. Although the implementation of a cross-border exchange provision is not explicitly outlined and agreed upon between the countries, it is suggested that possible sources for implementation tools could include the adoption of choice of law rules, the exhaustion doctrine, and labelling.[79]

At present, the *Copyright Act* partially adopts the exhaustion doctrine by preventing parallel importation and providing exceptions under certain designated circumstances. Sections 37 and 102 of the Australian *Copyright Act* forbid the unauthorised importation of copies of literary, dramatic, musical or artistic works for the purpose of selling or letting for hire, or for distributing for the purpose of trade or for any other purpose that would prejudice the copyright owner. Exceptions to the restriction of parallel importation are provided by ss 44A and 112A of the *Copyright Act*. First, there is no restriction on the importation of books first published in a foreign country.[80] If a book is 'first published in Australia', being a book released in the Australian market within 30 days of being published overseas,[81] parallel importation is only allowed if it is to provide a single copy for a customer,[82] or to provide one or more copies for a non-profit library,[83] or after making written orders for copies of a work which have been unfilled for more than 90 days.[84] However, the permission of parallel importation does not extend to institutions assisting persons with a print disability to import more than two copies of a book 'first published in Australia' and distribute them to persons with a print disability. Such institutions can only legally import copies of a book after making a written order to the copyright owner and receiving no response in 90 days.[85] Neither does the current exception cover the importation and distribution of reading materials other than books for the use of persons with a print disability. Institutions assisting persons with a print disability still need to acquire a licence to import books or other copyrighted works before importing

79 Marketa Trimble, 'The Marrakesh Puzzle' (2014) 45 *International Review of Intellectual Property and Competition Law* 768.

80 *Copyright Act* s 44A(1).

81 Ibid s 29(5).

82 Ibid s 44A(3).

83 Ibid s 44A(4).

84 Ibid s 44A(2).

85 Ibid s 112A(2).

and distributing copyrighted works in accessible format copies. Additionally, s 44D of the *Copyright Act* provides that generally parallel importation of sound recordings does not infringe copyright in works recorded. This exception can benefit persons with a print disability in that they can have access to sound recordings imported from other countries.

In conclusion, works subject to copyright exceptions under the *Copyright Act* are narrower in scope than under the *Marrakesh Treaty* and their use is subject to more restrictions. In order to fulfil its obligations under the *Marrakesh Treaty*, Australia needs to address these areas of divergence.

V THE LAW REFORM DISCOURSE TO DATE

A *ALRC Reports*

The ALRC has issued a number of papers identifying differences between the obligations imposed by the *Copyright Act* and the *Marrakesh Treaty*. It is useful to examine this discourse and to consider the extent to which these discussions can shape laws to achieve full compliance with the *Treaty*.

The ALRC's *Copyright and the Digital Economy — Discussion Paper* notes that the existing fair dealing exception is restricted to limited purposes of research or study, criticism or review, parody or satire, reporting news and giving legal professional advice.[86] Private and domestic purposes are however not included.[87] Thus this exception is only available for the print disabled to research and study, and not, for example, for the purpose of leisure and entertaining. The ALRC argues that whilst format shifting permits a person to shift the format of a work when he/she legally owns the original copy, it is not clear whether another person could assist the original copy owner to convert the format of such a work.[88] Further, it notes that s 200AB(4) has rarely been used as the alternative exceptions of fair dealing, format shifting and statutory licences have been more useful in providing access to copyright materials for persons with a print disability.[89] This notion is echoed by Harpur and Suzor who argue that this provision has formed a 'timid legislative approach' as it largely overlaps with other existing copyright exceptions.[90]

The ALRC's *Copyright and the Digital Economy — Final Report* ('*Final Report*')[91] extends this analysis by identifying four specific problems with the existing print disability statutory licence. Firstly, the ALRC notes that the scope

86 Australian Law Reform Commission, *Copyright and the Digital Economy*, above n 31, 132.

87 Ibid 174–92.

88 Ibid 174.

89 Ibid 223.

90 Paul Harpur and Nicolas Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm' (2013) 36 *University of New South Wales Law Journal* 745, 752.

91 Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013) ('*Final Report*').

of authorised institutions under the s 135ZP statutory licence is restricted, and it does not consider the uses of institutions participating in facilitating access to the print disabled, but not as their principal function, such as libraries and archives.[92] Whilst libraries and archives may under s 49 reproduce and supply a periodical publication or a published work without authorisation to a private user, including the person with a print disability, for the purpose of research or study,[93] the requirement that they must then destroy such copies after a single use results in significant expense for the library or archive. It also results in delay for the second user. Secondly, the ALRC observes that publishers are not legally obliged to supply digital files for an authorised entity.[94] Lacking digital files can result in dramatic costs in terms of time and money for an authorised institution to reproduce a work in accessible formats. Thirdly, institutions must check for commercial availability before making each copy, which is criticised as 'pointlessly onerous', and makes it 'effectively impossible to make accessible material available online'.[95] Last, although institutions assisting persons with print disabilities are allowed to circumvent a technology measure according to the *Copyright Regulations*,[96] manufacturing, importing or distributing a circumvention device are still forbidden by the *Copyright Act*.[97] Technological measures are technological devices or tools that prevent unauthorised or illegal access to, or copying or reproduction of, copyright materials.[98] Special expertise and devices are always needed to facilitate the circumvention. Institutions assisting persons with a print disability are facing difficulties to obtain the necessary devices or services to circumvent a technology measure because the devices and services are under legal restrictions in terms of manufacture, importation and distribution.

In light of the above concerns, the *Final Report* recommends repealing s 200AB(4), together with a variety of other specific exceptions, and replacing it with a general 'fair use' exception.[99] The Commission notes that the integration of the three-step test into copyright exceptions makes such exceptions both narrow and uncertain in their application.[100] The ALRC's view echoes wider scholarly dissatisfaction with the test. Howse notes that the incorporation of the three-step

92 Ibid 358–9.

93 *Copyright Act* s 49(7A).

94 *Final Report,* above n 91, 358.

95 *Final Report,* above n 91, 358.

96 *Copyright Regulations* sch 10A.

97 *Copyright Act* s 132APC.

98 *Final Report,* above n 91, 358.

99 The ALRC suggests repealing the existing 'fair dealing' and other specific exceptions such as ss 40–1, 43C and 200AB because the proposed 'fair use' exception will cover the regime of these exceptions: *Final Report*, above n 91, 158. The repealing of such exceptions was also proposed by a number of stakeholders: see, eg, Cricket Australia, Submission No 700 to Australian Law Reform Commission, *Copyright and the Digital Economy*, 31 July 2013; Australian Copyright Council, Submission No 654 to Australian Law Reform Commission, *Copyright and the Digital Economy*, July 2013. However, there are other submissions in the view that the fair dealing exceptions should be retained and coexist with the fair use exception: see Free TV Australia, Submission No 865 to Australian Law Reform Commission, *Copyright and the Digital Economy*, 16 September 2013.

100 *Final Report,* above n 91, 270.

test in copyright exceptions means that such provisions become overly restrictive in favour of copyright owners instead of benefiting the user.[101] Geiger, Gervais and Senftleben further note that it can cause a copyright exception to be insufficiently deferential to other societal and governmental interests.[102] More relevant for the present discussion, Ayoubi argues that as the three-step test was framed in general public international law, it may not be fully conducive to the provision of access to copyright works for the print disabled.[103] In such a context, Vezzoso advocates that the *Marrakesh Treaty* should be used to reduce the reach of this controversial test.[104] In the *Final Report*, the ALRC recommends that the three-step test be replaced by a case-by-case determination of 'fairness'.[105] Significant for the present discussion, the ALRC expressly advocates designing the fair use exception to include the use for the benefit of people with a disability.[106] A non-exhaustive list of illustrative purposes is suggested to be included in the new fair use provision, containing the purposes 'research or study', 'non-commercial private use' and 'access for people with disability'.[107] The Copyright Law Review Committee recommends that the fair use exception should contain fairness factors which are 'sufficiently flexible to accommodate new uses' and to have 'enough detail to provide valuable guidance to both copyright owners and users'.[108] Thus, if Australia were to adopt the expansive fair use exception recommended by the ALRC, it would significantly enhance compliance with the *Marrakesh Treaty*.

B *The Attorney-General's Implementation Options Paper*

In 2014, the Attorney-General's Department published the '*Marrakesh Treaty* Implementation Options Paper' to discuss potential law reforms to ensure compliance with the *Treaty*. The paper outlines three possible options for law reform, namely, a minor amendment, a moderate amendment and a flexible amendment.[109] The minor amendment maintains the scheme in place before the enactment of the *Amending Act*. Institutions assisting persons with a print disability must appeal to *Copyright Act* s 200AB(4), instead of the statutory licence, to reproduce and communicate scientific works as well as artistic

101 Robert Howse, 'The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times' (2000) 3 *The Journal of World Intellectual Property* 493.

102 Christophe Geiger, Daniel Gervais and Martin Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29 *American University International Law Review* 581.

103 Ayoubi, above n 2.

104 Simonetta Vezzoso, 'The Marrakesh Spirit — A Ghost in Three Steps?' (2014) 45 *International Review of Intellectual Property and Competition Law* 796.

105 *Final Report*, above n 91, 25.

106 *Final Report,* above n 91, 148–9, 151, 162, 168.

107 Ibid 150–1.

108 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (Copyright Law Review Committee, 1998), 53 [6.08].

109 Attorney-General's Department (Cth), '*Marrakesh Treaty* Implementation Options Paper' (Options Paper, Australian Government, 1 Nov 2014). It is noted that now the Department of Communication and the Arts (Cth) has responsibility for issues regarding copyright amendment for print disabled persons.

works other than dramatic works. The moderate option suggests extending the statutory licensing scheme in pt VB div 3 to cover artistic works, rather than only literary and dramatic works. It suggests extending the types of accessible formats, not limiting it to the currently nominated five formats — namely, audio, braille, large print, photographic and electronic versions. The flexible approach further proposes a stand-alone fair dealing or fair use provision similar to the one proposed in the *Final Report*. Additionally, all the three options affirm the need to ensure cross-border exchange as required by the *Marrakesh Treaty*. However, whilst the paper outlines the public policy basis for such laws, it does not outline how to amend the current law governing the importation and exportation of a work with copyright in order to ensure compliance with the *Treaty*.

C *Consideration of Issue by the Parliamentary Joint Standing Committee on Treaties*

Finally, in September 2015, shortly before ratifying the *Marrakesh Treaty*, Parliament published *Report 153: Treaties Tabled on 16 June and 23 June 2015 ('Report 153')* providing a final evaluation of the *Copyright Act* in terms of its compliance with the requirement of the *Treaty*.[110] The report begins by acknowledging that a number of stakeholders have claimed that the commercial availability test is too prescriptive.[111] The report further addresses issues concerning the liability of circumventing technological measures as discussed in ALRC *Final Report*.[112] The Report indicates that the Attorney-General's Department opines that the Australian law is largely compliant with the *Marrakesh Treaty* but recognises that there is room for improvement.[113] In order to address remaining areas of concern, the report recommends that the existing print disability statutory licence mechanism be replaced by a print disability exception or a fair dealing exception for disability access. [114]

VI THE NATURE AND SCOPE OF THE *AMENDING ACT*

Following Australia's ratification of the *Treaty* in December 2015 and building upon the analysis of the law reform in the above reports, the Australian Government released an Exposure Draft of the Copyright Amendment (Disability Access and Other Measures) Bill ('*Exposure Draft*') in 2015.[115] After consulting

110 Joint Standing Committee on Treaties, Parliament of Australia, *Report 153: Treaties tabled on 16 June and 23 June 2015* (2015) ('*Report 153*').

111 Ibid 6.

112 Ibid 8.

113 Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 10 August 2015, 3 (Andrew Walter, Assistant Secretary, Civil Law Division, Commercial and Administrative Law Branch, Attorney-General's Department).

114 *Report 153,* above n 110, 9.

115 Department of Communication and the Arts, Australian Government, *Updating Australia's Copyright Laws*, <https://www.communications.gov.au/have-your-say/updating-australias-copyright-laws>.

and receiving submissions from stakeholders for over one year, the Copyright Amendment (Disability Access and Other Measures) Bill 2017 was introduced and read a first time in the House of Representatives in March 2017. The Amendment Bill remains essentially the same as the Exposure Draft. Finally, the *Copyright Amendments (Disability Access and Other Measures) Act 2017* was enacted on 15 June 2017. Schedule 1 commenced on 22 December 2017. It inserts a new pt IVA into the *Copyright Act* to regulate uses for the print disabled that do not infringe copyright.[116] The new part includes a new s 113E that recommends the use of a fair dealing provision for the purpose of access to copyright materials by persons with a disability. Further, s 113F creates an express exception for the use of copyright material by institutions assisting persons with a disability. Given the divergences between the *Marrakesh Treaty* and Australian copyright law discussed above, it is instructive to consider the nature and effect of the *Amending Act* to determine whether and to what extent they would ensure full compliance with the *Treaty*.

A *Beneficiaries Expanded to Persons with All Types of Disability*

It is useful to begin by noting that the scope of beneficiaries in the *Amending Act* is far wider than under both the *Marrakesh Treaty* and the existing *Copyright Act*. The beneficiary of *Copyright Act* pt IVA div 2 is 'persons with a disability', defined as 'a person with a disability that causes the person difficulty in reading, viewing, hearing or comprehending copyright material in a particular form'.[117] This is different from the *Marrakesh Treaty* which benefits 'persons with a print disability'; the scope of beneficiaries has been expanded so as to include all kinds of disabilities that potentially affect a person's ability to have access to copyright material. Thus this exception can effectively benefit more persons and enhance equity by supporting accessibility.

The new provisions have merged the previous statutory licences regarding copyright exceptions and limitations for intellectually disabled and print disabled persons. The 'organisation assisting persons with a disability' is not limited to assisting persons with a print disability, but expanded to include: (a) an educational institution; or (b) an institution that has as its principal function, or one of its principal functions, the provision of assistance to persons with a disability.[118] Intellectual disability can be characterised by significant limitations in intellectual function, as well as in adaptive behaviour relating to conceptual, social, and practical adaptive skills.[119] Print disabilities are mainly physical disabilities that negatively affect a person's ability to 'read' a work, whereas intellectual disabilities are normally mental problems that hinder a person's ability to comprehend the content of a work. Although the means of using a work

116 *Amending Act* sch 1 s 2.

117 *Copyright Act* s 10(1) (definition of 'person with a disability'), 113E.

118 *Copyright Act* s 10(1) (definition of 'organisation assisting persons with a disability').

119 Robert L Schalock et al, *Intellectual Disability: Definition, Classification, and Systems of Supports,* (American Association on Intellectual and Developmental Disabilities, 11th ed, 2010) 5.

to assist the print disabled are different from means to assist the intellectually disabled, having general exceptions clarifies the operation of the legislation by identifying the needs of people with different forms of disabilities. A general exception also enables more institutions to be involved in assisting disabled persons to have access to copyright works.

Additionally, the previous definitions for 'person with a print disability', and 'institution assisting persons with a print disability' have been repealed.[120] Provisions regarding persons with an intellectual disability and persons with a print disability in s 200AB(4) and pt VB have also been repealed.[121] Thus, the *Amending Act* significantly expands the scope of beneficiaries of copyright exceptions to ensure full compliance with the *Treaty*.

B *Introduction of a New Fair Dealing Exception*

The new s 113E contains a new fair dealing exception for the purpose of assisting persons with a disability to have access to copyright material. Works subject to this exception are proposed to be 'copyright material' meaning 'anything in which copyright subsists'.[122] The *Amending Act* specifies four factors to be used in determining whether a dealing is fair in s 113E. These are:

(a) the purpose and character of dealing;

(b) the nature of the copyright material;

(c) the effect of the dealing upon the potential market for, or value of, the material;

(d) if only part of the material is dealt with—the amount and substantiality of the part dealt with, taken in relation to the whole material.

When compared with the now repealed s 200AB(4), the mentioned four factors provide useful guidance for the court to decide whether a use falls within the scope of fair dealings. This provision provides criteria for the case-by-case determination, and helps to overcome the uncertainty of s 200AB(4). It also complies with the three-step test as required generally by *TRIPS*. As discussed in the previous section, the *Copyright Act*, when compared with the *Marrakesh Treaty*, has a narrow scope of works subject to the exception for the print disabled. The new 'copyright material' contains almost every kind of work with a copyright, and hence dramatically expands the scope of works subject to copyright exception to strengthen compliance with the *Treaty*. Furthermore, s 113D specifically notes that if a use falls into the new fair dealing regime, the exception to circumvent an access control technological protection measure under s 116AN(9)(c) may apply. Thus, persons with disabilities can enjoy more types of works in accessible formats in Australia than under the *Marrakesh Treaty*. This is a significant achievement and Australia's law in this area can form a useful template for nations around

120 *Amending Act* sch 1 ss 10, 12.

121 Ibid ss 39, 56.

122 *Copyright Act* s 10(1) (definition of 'copyright material').

the world who are not merely seeking to satisfy the minimum requirements of the *Treaty* but are seeking to introduce laws that effectively support access to copyright materials by the print disabled.

C *Exception of Uses by Institutions Assisting Persons with a Disability*

The *Amending Act* transfers the previous statutory licence under s 135ZP into a new exception of uses by institutions assisting persons with a disability. In the new s 113F, a definition of 'institution assisting persons with a disability' is provided. The new provision is widely defined to include an educational institution, or an institution that has as its principal function, or one of its principal functions, the provision of assistance to persons with a disability. Pursuant to the new s 113F, such an institution, as well as persons acting on behalf of such an institution, may use works without infringing copyright if

> (a) the use is for the sole purpose of assisting one or more persons with a disability to access the material in a format that the person or persons require because of the disability (whether the access is provided by or on behalf of the organisation or by another body or person); and
>
> (b) the organisation, or the person acting on behalf of the organisation, is satisfied that the material (or a relevant part of the material) cannot be obtained in that format within a reasonable time at an ordinary commercial price.

Unlike the statutory licence mechanism, institutions assisting persons with a disability under s 113F have no obligation to pay remuneration to the copyright owner. To ensure that the copyright owner's interests would not be unreasonably prejudiced, s 113F requires the use to be for the pure and sole purpose of assisting persons with a disability. What is more, it sets up a test of commercial availability to confirm that no new copy of a similar accessible version of the work can be obtained within a reasonable time at an ordinary commercial price before applying this exception. As discussed before, a policy of not seeking remuneration from institutions assisting persons with a print disability under s 135ZP of the *Copyright Act* has been widely applied by the Copyright Agency. Section 113F acknowledges this practice and codifies it so as to mitigate costs of the prescribed institutions. Further, s 113F significantly expands the exceptions of uses of a copyright work by prescribed institutions. Firstly, beneficiaries in this section is extended to persons with a wider scope of disabilities that may cause difficulties to have access to copyright materials. Secondly, unlike the now repealed s 135ZP only permitting the reproduction of literary and dramatic works, s 113F does not confine the types of works subject to copyright exceptions. Thirdly, whilst the now repealed s 135ZP specifically listed five types of accessible forms that may be reproduced and communicated, s 113F provides a flexibility to adopt a wider choice of accessible formats. A more inclusive scope of accessible formats in s 113F further helps to simplify the requirement of the commercial availability test into one subsection, instead of being six subsections in the now repealed

s 35ZP requiring the mentioned institutions to check before making a work into a particular type of accessible format. Thus, s 113F provides more opportunities for persons with a print disability to get access to copyright materials.

Thus, the *Amending Act* refines the copyright exceptions mechanism for the *Copyright Act* by expanding the scope of beneficiaries, tailoring the fair dealing exceptions and rendering statutory licences more practicable. The *Amending Act* enables the *Copyright Act* to better facilitate access to published works for persons with a print disability and comply with international standards of access.

VI RELEVANT ISSUES NOT FULLY ADDRESSED BY THE *AMENDING ACT*

However, beyond the above issues effectively addressed by the *Amending Act*, there are a number of areas of continuing concern and uncertainty that need to be considered.

A *The Commercial Availability Test*

There are serious concerns as to the workability and effect of the commercial availability test which is included in s 113F. The ALRC has commented that the commercial availability test leads to significantly increased costs to potential users as substantial time and financial resources are required to investigate the availability of a particular work.[123] Further, Universities Australia, in its submission to the *Marrakesh Treaty* Implementation Options Paper,[124] argues that the commercial availability test is preventing universities from making copies in a format that is actually accessible to their students.[125] In light of such cost concerns, the Australian Digital Alliance recommends removing the need for such a check, and proposes instead that rights holders should be required to protect their interests by lodging the information as to the availability of accessible copies in a central notification system.[126]

In light of these concerns, an alternative and more effective option would be to combine the lodgement of the works available in accessible format with the operation of the Master Copy Catalogue already established by the Copyright Agency for institutions assisting the visually impaired to share information about accessible-format master copies.[127] At present, the Copyright Agency

123 *Final Report,* above n 91, 358.

124 Attorney-General's Department (Cth), above n 109.

125 Universities Australia, Submission to Attorney-General's Department (Cth), *Marrakesh Treaty Options for Implementation*, 24 December 2015 <https://www.communications.gov.au/sites/g/files/net301/f/submissions/MarrakeshSubmissionUniversitiesAustralia.pdf>.

126 Australian Digital Alliance, Submission to Attorney-General's Department (Cth), *Marrakesh Treaty Options for Implementation*, 4 <https://www.communications.gov.au/sites/g/files/net301/f/submissions/MarrakeshSubmissionAustralianDigitalAlliance.pdf>.

127 Copyright Agency, *Master Copy Catalogue* <https://mastercopy.com.au/>.

Master Copy Catalogue enables authorised institutions and persons with print disabilities to upload and search for copyright works in alternate formats such as braille, large print, digital and audio. The function of the catalogue could be extended to enable a copyright owner to provide relevant information as to their works, and upload works in accessible formats into this database.[128] In this way, institutions could easily find the available copies, and help persons with a print disability to access such a work. Moreover, even if a work has an audio or digital format commercially available, such formats may not necessarily be accessible for the print disabled because they lack sufficient navigation information for print disabled persons. Additionally, technological measures attached to such works may prevent the use of screen readers.[129] Thus, the above option could support greater accessibility to appropriate formats for the print disabled.

A further matter that is inadequately addressed by the *Amending Act* is how to support the economic well-being of print disabled persons who commonly experience below average levels of income. As discussed above, disability commonly leads to greater needs which increases the risk of poverty.[130] The United Nations General Assembly noted that 80 per cent of persons with disabilities live in developing countries, and that the majority of them live in conditions of poverty.[131] In Australia, statistics show that people with a disability face a significantly higher risk of poverty than the average. The Australian Bureau of Statistics indicates that people with disability are twice as likely to be in the bottom 40 per cent of gross household incomes.[132] In 2009, 27.4 per cent of the disabled population lived in poverty.[133] This is dramatically high when compared with 12.8 per cent for the total population.[134] Hence, a 'reasonable price' on the market for the average person may well not be affordable for persons with a print disability. In the present regime, if there is disagreement as to what constitutes a 'reasonable price' it is often necessary to seek judicial intervention. In such a context, it would be valuable for the *Copyright Act* to more finely delineate the factors to be taken into account in determining a reasonable price and include factors which specifically include consideration of the income level of the person with a print disability.

128 Nicolas Suzor, Paul Harpur and Dylan Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13 *Media & Arts Law Review* 1.

129 Ibid.

130 Peter Saunders, 'The Costs of Disability and the Incidence of Poverty' (2007) 42 *Australian Journal of Social Issues* 461.

131 *Realizing the Millennium Development Goals for Persons with Disabilities through the Implementation of the World Programme of Action Concerning Disabled Persons and the Convention on the Rights of Persons with Disabilities*, GA Res 63/150, UN GAOR, 3rd Comm, 63rd sess, 70th plen mtg, Agenda Item 55(e), Supp No 49, UN Doc A/RES/63/150 (11 February 2009) Preamble para 4.

132 Australian Bureau of Statistics, *4443.0 — Disability, Ageing and Carers, Australia: Summary of Findings, 2015* (18 October 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4430.0Main%20Features202015?opendocument&tabname=Summary&prodno=4430.0&issue=2015&num=&view=>.

133 Australian Council of Social Service, 'Poverty in Australia 2014' (Report, 2014), 10 <http://www.acoss.org.au/images/uploads/ACOSS_Poverty_in_Australia_2014.pdf>.

134 Ibid.

B *The Print Disability Radio Licence*

A significant change in the *Amending Act* is to repeal s 47A regarding the print disability radio licence.[135] As a result, a radio station must rely on the fair dealing clause embodied in s 113F or prove itself as an institution assisting persons with a disability defined in s 113E so as to receive the benefit of the copyright exception in the current *Copyright Act*. It is suggested that the Print Disability Radio Licence should be retained because it is different from the proposed fair dealings and uses by prescribed institutions in the *Amending Act*, and it provides a meaningful supplement to the proposed copyright exception mechanism. First, if a radio station is to rely on the new fair dealing exception, it would have to prove that its use complies with the four fairness factors in s 113E. This would be almost practically impossible for these stations given that a great number of works are used on daily basis. Second, if a radio station proves itself within the scope of institutions assisting persons with a disability, being an institution that has as its principal function, or one of its principal functions, assisting persons with a disability, they still need to pass the commercial availability test required by s 113F. What is more, neither ss 113E nor 113F require the user to pay remuneration to the copyright owner, and it may harm the copyright holder's legitimate interests if the free use applies to a radio station. For example, RPH Australia, a group of radio stations providing news and information for the print disabled, declared that its radio programs are available in every state and territory of Australia, and are broadcasted to 70 per cent of the Australian population.[136] What is more, some radio stations may be involved in profit-making activities such as broadcasting commercials. Considering the wide-scope audience and the profit-making merits, sound broadcasting a work without paying the copyright holder equitable remuneration would unreasonably prejudice the right holder's economic interests. Therefore, the use of copyright works by a radio station is divergent from the merit of the proposed fair dealing and the use by the prescribed institutions. It is thus important to retain a separate and different mechanism for print disability radio stations.

The *Amending Act* fails to place adequate consideration on the issue of remuneration. Under the now repealed scheme in s 47A, the copyright owner or their agent could claim equitable remuneration from the licence holder for the making of a sound broadcast.[137] In contrast to what applies in the case of statutory licences for institutions assisting persons with a print disability, the collecting society has not officially announced to remove the obligation of the holder of a print disability radio licence to pay for copyright material. As discussed above, the mechanism of remuneration is legitimate to uphold copyright holders' economic interests in the absence of the non-profit purpose requirement and when copyright works are made available to persons without a disability. However a concern in the present context is that broadcasting is unable to be made without engaging in

135 *Amending Act* sch 1 s 17.

136 RPH Australia, *About RPH* (2018) <http://www.rph.org.au/about-us/>.

137 *Copyright Act* s 47A(8), as repealed by *Amending Act* sch 1 s 17.

time-consuming negotiations with individual publishers regarding the amount of remuneration.[138] Another controversial issue is the 1 per cent cap on remuneration placed on users under statutory licences.[139] This has been challenged by a number of stakeholders submitting to repeal the cap. Specifically, the Phonographic Performance Company of Australia Limited in its submission argues that the cap is 'inequitable, completely arbitrary and do[es] not involve any analysis of economic efficiency'.[140] It further argued that removing the cap would increase the income of recording artists and companies, provide a greater economic incentive for creativity and investment and enhance cultural opportunities so as to bring benefits to the sound recording industry in Australia.[141] Therefore the *Copyright Act* or *Copyright Regulations* should provide clear guidance for the criteria for calculating and collecting the remuneration so as to minimise time-consuming negotiations.

C *Digital Access*

Perhaps most significantly, the *Copyright Act* and *Amending Act* do not provide an adequate mechanism to promote digital access to works by print disabled persons. The past *Copyright Act* complied with the requirements of the *Marrakesh Treaty* by including digitally accessible formats and permitting circumvention of technological measures. Despite such schemes, critics have noted that it is in practice difficult for blind people to gain access to a wide selection of electronic texts in Australia as there is no scheme that facilitates such access.[142] Suzor, Harpur and Thampapillai argue that Australia's anti-circumvention law still prevents blind people from accessing the materials in an accessible form, and a broader exception needs to be created for liability for the circumvention for the purposes of assisting people with disabilities to utilise copyright material in an accessible form.[143] Specifically, Harpur and Suzor found that legal and practical critical barriers exist for people with disabilities having full accessibility of ebooks.[144] Cameron, Wood, and Suzor therefore propose that it is vitally important, in order to achieve equality, that Australia ensure that works that are currently being published electronically, and works that will be published in the future, are made available in an accessible form.[145]

Whilst overcoming the problems of digital dissemination has been partially addressed by the *Amending Act*, it is recommended that additional provisions are introduced to mitigate the problems generated by digital dissemination and

138 *Final Report*, above n 91, 416.

139 *Copyright Act* s 152(8).

140 *Final Report*, above n 91, 424.

141 Ibid.

142 Suzor, Harpur and Thampapillai, above n 128.

143 Ibid 10.

144 Paul Harpur and Nicolas Suzor, 'The Paradigm Shift in Realising the Right to Read: How Ebook Libraries are Enabling in the University Sector' (2014) 29 *Disability & Society* 1658. See also Harpur, *Discrimination, Copyright and Equality*, above n 11.

145 Cameron, Wood and Suzor, above n 6, 3.

satisfy Australia's obligations under the *Marrakesh Treaty*. Firstly, it is noted in s 113D of the *Copyright Act* that a person may, pursuant to s 116AN(9)(c), circumvent an access control technological protection measure to enable the person to do an act that, under pt IVA, does not infringe copyright. However, these new provisions fail to consider providing the exception to institutions assisting persons with a disability. The prescribed action noted in item 3 of sch 10A of the *Copyright Regulations* is by an institution assisting persons with a *print* disability, not the newly introduced actions by institution assisting persons with a disability. Therefore, a special note should be added in the *Amending Act* or the *Copyright Regulations* to permit the institutions assisting persons with a disability to circumvent technological measures.

Secondly, the exception of circumventing technological measures should extend to areas related to the manufacturing, importation and distribution of a circumvention device and to the provision and offering of services to circumvent technological measures for the print disabled. Currently, the provision of devices and services to overcome technological measures attached to a copy of copyright materials is illegal pursuant to ss 116AO and 116AP of the *Copyright Act*. However, a practical problem is that print disabled persons, as well as individuals and institutions assisting them, lack the expertise to circumvent technological measures without the help of professional devices or services. It is therefore necessary to expand the scope of the exception for circumvention and allow the importation, manufacture and use of devices to circumvent the technological measures.

D *Cross-Border Exchange*

Finally, the *Amending Act* fails to adequately address the issue of cross-border exchange and the importation of works in accessible formats. The *Marrakesh Treaty* promotes the cross-border exchange of accessible formats so as to avoid unnecessary duplication of efforts and resources in creating accessible copies. The *Amending Act* however does not mention cooperation with other relevant contracting parties of the *Marrakesh Treaty* to exchange works in accessible formats.

A technical amendment could be made to ss 44A and 112A of the *Copyright Act* so as to more effectively promote the cross-border exchange of works in accessible formats. It is suggested that an exception be introduced into ss 44A and 112A permitting an institution assisting persons with a print disability to import and distribute more than two accessible copies of a book, as well as other copyright works first published in Australia. Additionally, a legislative framework needs to be introduced to govern cross-border exchange. A government agency may be needed to promote the exchange of copies between countries. This agency could monitor the distribution so as to ensure no one other than the beneficiary would benefit from the exchange. Another related issue is that if Australia has a broader scope of beneficiary persons than another party to the *Marrakesh Treaty*, that country may refuse to export accessible copies to Australia so as to ensure the

copyright holder's interests. Therefore, it would be useful to amend the *Copyright Act* so as to enable Australia to exchange accessible copies with other nations.

VIII CONCLUSION

When Australia ratified the *Marrakesh Treaty* in December 2015, it was envisaged that only minor technical amendments to the domestic *Copyright Act* would be required to comply with the *Treaty*'s obligations.[146] This has not proven to be correct. Whilst Australia has a complex mechanism for persons with a print disability to gain access to copyright works, a detailed examination of the nature and ambit of both the *Marrakesh Treaty* and Australia's current copyright exceptions has revealed that substantial reforms are required. Further, whilst the Australian law reform discourse, culminating in the enactment of the *Amending Act*, has raised a number of critical matters that need to be addressed, there are further unaddressed issues which preclude Australia's full compliance with the *Treaty*. Hence, further amendments are necessary to facilitate effective access to copyright works for persons with a print disability. In this regard, it is suggested that the implementation of the *Treaty* would be strengthened by the retention of a separate arrangement for persons with a print disability, the removal of the commercial availability test for the proposed new fair use mechanism, and the retention of the print disability radio licence scheme subject to the introduction of a simplified administrative and remuneration collection scheme. Finally, it is advisable to support digital access to published works by introducing an extended exception arrangement for circumvention of technological protection measures and a framework for cross-border exchange. If such a matrix of law reforms were introduced, Australia would fully comply with its obligations under the *Marrakesh Treaty* and enact an equitable and efficient copyright law that would properly calibrate the needs of the print disabled with the rights and commercial interests of copyright proprietors.

146 Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 10 August 2015, 1 (Andrew Walter, Assistant Secretary, Civil Law Division, Commercial and Administrative Law Branch, Attorney-General's Department).