Response to Attorney-General’s Department consultation
WIPO SCCR proposed instrument on access to copyright works for person with a print disability

4 November 2011

Introduction

Thank you for the opportunity to respond to the proposal for an international instrument aimed at enhancing access to material by people with a print disability.

Copyright Agency was appointed in 1990 to manage the statutory licences in the Copyright Act that allow institutions to make accessible format copies for people with a disability. The statutory licences provide for payment to rightsholders, but our Board has decided not to seek payment.

In addition to the statutory licence, we have been involved in a range of other measures to further facilitate access for people with a print disability. These include:

• the establishment and management of an online Masters Catalogue (masters.com.au) that enables institutions to check if another institution has made an accessible format copy of a work, and, if so, to acquire that copy rather than making a new one;
• commissioning the Australian Copyright Council to write and publish guidelines on access to copyright material, and sample licences for publishers to license uses not covered by the statutory licence (archive.copyright.org.au/disability); and
• liaising with publishers and institutions assisting the print disabled to enable the export of accessible format copies to developing countries.

General views on proposal

The primary issue that limits the number and range of accessible-format copies is not copyright but the resources needed to produce those copies. This is evidenced by the position in Australia, where the copyright issues are addressed by a range of exceptions in the Copyright Act. If copyright were the sole barrier, then the proportion of accessible-format copies available in Australia should be much higher.

Having said that, technological developments are increasingly enabling the production of accessible-format copies in more affordable ways. In Australia, commercial operators have been able to harness technology to develop innovative and efficient ways of converting publishers’ files into accessible-format versions that are available in a timely fashion, and affordable.

A major concern we have is that the draft instrument is based on an assumption that the production of accessible-format copies will not occur unless subsidised, and must be done by specialist institutions providing services to the visually impaired. It is important that any instrument does not impede the innovative work of private sector organisations.
Would it benefit Australian people with a print disability?

The provisions in the Australian Copyright Act for the benefit of people with a print disability are already broad. They include the statutory licence provisions, section 200AB, and the format-shifting provisions.

The proposal would not seem to require changes to the Australian law to benefit Australian people. As noted below, it may require a change to enable an Australian institution to make a copy for a person with a print disability in another country.

Are there sufficient safeguards for rightsholders?

The instrument needs to be clearer that all the exceptions contemplated are subject to the three-step test in Article 9(2) of the Berne Convention and other treaties.

We think it is clear that the exceptions cannot, consistently with the three-step test, enable the production of an accessible-format copy, if a copy in that format is available within a reasonable time at an ordinary commercial price. The references to ‘may’ in Article C(3) and D(2) should therefore be ‘must’.

Status of proposed instrument

We query the perception that provisions in a new instrument that mandate rather than allow the making of accessible-format copies will produce practical benefits to people with a print disability. The mandatory requirement would only apply to countries that chose to be bound by the instrument.

We note the reference to a ‘joint recommendation’ in the last paragraph of the preamble. An approach which is more likely to have practical benefits is a joint statement, endorsed by all contracting parties to the Berne Convention, about the applicability of Article 9(2) to exceptions to assist people with a print disability.

‘Authorised entities’

The means by which an entity becomes authorised needs to be articulated. This requires specification of:

• the criteria necessary for authorisation;
• who is empowered to authorise;
• the authorisation process; and
• a process whereby the authorising person or body periodically reviews the entity’s compliance with the criteria, and revokes the authorisation if criteria have not been met.

We do not think that the criteria need to include a primary mission of assisting the visually impaired. In Australia, the statutory licences for people with a disability are available to educational institutions such as universities, whose primary missions do not include assistance to the visually impaired.

We do think the criteria should address:

• governance;
• reporting and accountability; and
• transparency (including to rightsholders).

We note that footnote 1 suggests that authorised entities might be jointly governed by rightsholders and people with a print disability. We would endorse such an approach.

We also note the requirements in the Copyright Act for a collecting society to be appointed (declared) by the Attorney General to administer the statutory licence for people with a disability, the reporting requirements associated with the declaration, and the power of the Attorney General to revoke the declaration. These provide a guide for the types of criteria that would be suitable for authorised intermediaries.

Other comments

**Distinction between copies embodied in physical items and digital files**

We think it would assist to avoid ambiguity if there were a distinction between accessible format copies embodied in a physical item (such as a Braille book, a large print book or an audio book on CD) and a digital file.

In Australian copyright law, provisions relating to importation only apply to physical items such as books and CDs. On the other hand, the right of making available only applies to digital files.

**Article C: National law exceptions**

As noted above, it needs to be made clear that all exceptions must comply with the three-step test. The contrary is implied by Article C(3).

In Article C(4), ‘may’ should read ‘must’, in order to comply with the three-step test.

In Article C(5), the remuneration may be required to meet the three-step test. In the Australian statutory licence, there is provision for payment of remuneration but Copyright Agency, which has been appointed to manage the licence, has decided not to seek remuneration.

**Article D: Cross-border exchange of accessible format copies**

Similarly as for Article C, in Article D it needs to be made clear that all exceptions must comply with the three-step test. The contrary is implied by Article D(3).

We understand that Article D is intended to enable an authorised entity in one country to supply an accessible format copy to a beneficiary person in another country, either directly or via an authorised entity in that country.

We are not sure what is meant by ‘export license’ in Article D(1).

Similarly as for Article C, in the last paragraph of Article D(2) ‘may’ should be ‘must’ to comply with the three-step test. The reference to the three-step test in Article D(3) should apply to all exceptions in the instrument.

We note that it is arguable that the Australian statutory licence for people with a disability could enable an Australian institution assisting people with a print disability to make a copy for a person with a disability in another country. If this is not the case, the statutory licence would need to be amended.
We also note that if the statutory licence does not enable the making of copy for a person with a print disability in another country, then we understand that an institution is prohibited (by section 135ZZH) from exporting a copy initially made for an Australian person with a print disability.

**Article E: importation of accessible format copies**

Under Australian law, it is likely that a person or institution could import and accessible format copy without contravening sections 37 or 102, because the importation is not for commercial purposes. A copy could be imported by an institution for lending under section 44A(4).

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