



**Response to Exposure Draft: Copyright  
Amendment (Disability Access and other  
Measures) Bill 2016**

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## **INTRODUCTION**

Copyright Agency welcomes the government's amendments to simplify the statutory licence for education, implementing a joint proposal from content creators and the education sector. The joint proposal also covers an extension of the exception for exams.

The amendments will deliver benefits for all those affected by the licence arrangements, including teachers, education authorities and content creators.

We and other parties to the joint proposal have made a joint submission on some drafting changes to better implement the proposal.

We have made some comments below on the amendments for people with disabilities and preservation of cultural institutions' collections.

We do not support the amendments to extend the safe harbour provisions.

We appreciate that aspects of these amendments are difficult to draft, and we have been pleased with government's process and the opportunities for input into both the substantive and technical aspects of the draft Bill.

## **ABOUT COPYRIGHT AGENCY**

Copyright Agency is a not-for-profit copyright management organisation that manages copyright licensing arrangements for writers, artists and publishers. It is appointed by the government to manage statutory licence schemes in the Copyright Act for education, government and people with disabilities, and also manages a range of other licence schemes as agent for its members.

## **SCHEDULE 1, DIVISION 2: PEOPLE WITH A DISABILITY**

Copyright Agency is currently appointed as the collecting society for works for the statutory licences for disabilities in Part VB of the Copyright Act. The statutory licences provide for equitable remuneration, but Copyright Agency has not sought any payment. Copyright Agency has, however, established an online catalogue for master copies of accessible format versions, which (in part) assists institutions to acquire an accessible format master copy from another institution rather than have to make their own. Users of the catalogue have indicated that they would like the catalogue to continue, and it is Copyright Agency's intention to do so.

### **Definition of 'person with a disability'**

The definition is consistent with the international standard set out in the Marrakesh treaty, and would enable the making of accessible format versions for people who may not otherwise be able to perceive the content.

### **Definition of 'institution assisting persons with a disability'**

Because the new exception for institutions assisting people with a disability has no provision for equitable remuneration in any circumstances (unlike the current provisions), it should be confined to organisations that are not for profit, and to services that are not for profit. The phrase used in s200AB – 'not made partly for the purpose of the body obtaining a commercial profit' – may be suitable in this context.

This is consistent with the definition of 'authorized entity' in the Marrakesh Treaty:

*“authorized entity” means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.*

### **Relationship between s113E and 113F**

The relationship between s113E and s113F is not clear from the draft legislation, though we understand that the government intends to provide guidance in the explanatory memorandum.

We think that it may be clearer if there were a single provision with a commercial availability test, as is contemplated by the Marrakesh Treaty. We note that the government is intending to provide guidance on commercial availability, and that there are fruitful discussions underway between publishers and institutions assisting people with a print disability. Amongst other things, these guidelines can cover situations where a person needs only part of a work.

A single provision could be drafted as follows:

### **113E Assisting persons with a disability**

- (1) It is not an infringement of copyright to use copyright material if:
  - (a) the use is for the sole purpose of assisting one or more persons with a disability to get access to copyright material; and
  - (b) the person making the use, and any person authorising the use, are satisfied that the copyright material cannot be obtained:
    - (i) in the format that, because of the disability, the persons with a disability require; and
    - (ii) within a reasonable time at an ordinary commercial price.
- (2) An institution assisting persons with a disability does not infringe copyright by supplying an item made under subsection (1) to a prescribed person in another country, for the sole purpose of assisting one or more persons in that country with a prescribed disability to get access to copyright material, provided that at the time of supply the institution and the prescribed person are satisfied that the copyright material cannot be obtained:
  - (i) in the format that, because of the disability, the persons with a disability require; and
  - (ii) within a reasonable time at an ordinary commercial price.

### **S113E: Fair dealing for the purposes of access by persons with a disability**

If the government decides to proceed with it rather than a single exception as suggested above, we have made some comments below on the proposed new exception for fair dealing.

The exception should state explicitly that is available to anyone making an accessible format version for a person with a disability, including the person themselves (as is the case under section 200AB).

The fair dealing factors should replicate those in section 40(2). We think that, in Australian law, paragraph 40(2)(c) – which originates from the Franki report<sup>1</sup> – may require different considerations to those required by paragraph 40(2)(e).

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<sup>1</sup> Report Copyright Law of the Committee on Reprographic Reproduction October 1976.

### **SCHEDULE 1, DIVISION 3: LIBRARIES AND ARCHIVES**

We do not object, in principle, to simplification of the provisions that allow the making of preservation copies of items in collections, and aligning those provisions with best practice for collecting institutions.

There are different considerations for preservation of 'original' (i.e. unique) versions than there are for published versions.

It is helpful to consider the preservation issue separately to the access issue, given that there are existing provisions that enable access to material in collections (that would not be repealed by the Bill). We note that section 51B deals with preservation only, and that access to items that have been preserved is covered by other provisions.

#### **Preservation**

We understand that the objective of the amendments is to enable the making of preservation copies, in accordance with best practice, of items in collections that are of historical or cultural importance to Australia. This criterion (historical or cultural importance to Australia) should be retained from section 51B. Without this, people may interpret the changes as allowing them to systematically digitise entire collections, and we do not understand that to be the government's intention.

Provided that criterion is retained, the exception may not need be confined to collections that are open to the public, but it should not be applicable to a collection that is owned or operated for the benefit of a for-profit entity.

Examples of best practice should also be included in the Explanatory Memorandum to the Bill. We assume that collecting institutions would be able to provide suitable examples.

#### **Access to published works**

Section 49 is sufficient to provide access to published versions of works in collections. It only applies to collections available to the public, which seems consistent with the government's intention for these amendments. We do not think there is a need for specific provisions for access to items in a collection merely because a preservation copy has been made.

#### **Access to unpublished works**

Section 51 allows access to unpublished works in collections.

#### **Access to preservation copies of original versions**

A work which is held in a collection as an original version (such as manuscript or painting) may be published or unpublished. Section 51 applies to original versions of works that are unpublished, but we think that section 49 does not apply to original versions of works that are published.

Section 51A(3A) – which would be repealed by the draft Bill – allows a preservation copy of an original artwork such as a painting to be viewed on a 'dumb' terminal (i.e. that does not allow a person using it to print, download, upload or email). It is a more limited provision than the dumb terminal provisions in the draft Bill, which allow printing and communication that is not to the public.

Given the other provisions in the Act, we think there is a case for a 'dumb terminal' provision only for original versions of works.

### **Replacement of lost, stolen or damaged items**

We note that the existing provisions that allow replacement of lost, stolen or damaged items would be repealed by the draft Bill. We also note, however, that a library may be able to acquire a replacement copy under section 50 where the criteria for that section apply.

### **SCHEDULE 1, DIVISION 4: EDUCATION INSTITUTIONS – STATUTORY LICENCE**

We have made a joint submission with Copyright Advisory Group to the COAG Education Council, Screenrights and Universities Australia.

There is one additional issue, which is also raised by Screenrights: we submit that subsections 135ZZA(3) and (4) should be retained.

### **SCHEDULE 2: LIMITATION ON REMEDIES AVAILABLE AGAINST SERVICE PROVIDERS**

We support the submission of the Australian Copyright Council on this issue.

The government should amend the Copyright Act to clarify the responsibilities of online service providers before extending them the benefits of the safe harbour scheme. We also note concerns that safe harbour provisions in other territories have impeded licensing arrangements, and that careful drafting is required to ensure that the government's intentions are implemented effectively.