

**WIPO Marrakesh Treaty
Submission from Copyright Licensing NZ
26 February 2016**

Copyright Licensing Limited (CLNZ) is a not-for-profit company owned by New Zealand authors and publishers through representative organisations, NZ Society of Authors and Publishers Association of NZ.

CLNZ is part of a global network of copyright collectives that provide centralised licensing services for the reproduction of extracts from books, magazines, newspapers, journals and other periodicals. Centralised licensing makes it easier for users of copyright works to legally reproduce material from published works, while generating a valuable revenue stream for content creators.

The recognised RRO (Reproduction Rights Organisation) in New Zealand and a member of IFRRO (International Federation of Reproduction Rights Organisations), CLNZ has non-exclusive mandates to represent authors and publishers from throughout the world in offering licensing services in New Zealand. CLNZ has copyright licenses with all of the universities and polytechnic institutions and wananga in New Zealand as well as schools, businesses and government agencies.

In 2012 CLNZ obtained mandates from New Zealand authors and publishers to provide rights clearance services so that the Blind Foundation could share accessible format copies (AFC) of books through the WIPO TIGAR (Trusted Intermediary Global Access Resources) Pilot Project. TIGAR was established to facilitate cross-border exchange of AFC's prior to the conclusion of the Marrakesh Treaty. CLNZ was the first RRO in the world to commit to providing clearance services for TIGAR on behalf of local copyright owners.

- We congratulate the government on exploring options for implementing the Marrakesh Treaty.
- CLNZ's experiences in working with New Zealand authors and publishers and the Blind Foundation during the TIGAR Project have helped to inform this submission.
- In light of this, we support Option 3 from the Discussion Document.
- We agree that the current exception needs clarification and can be improved upon during the implementation of Marrakesh in ways that provide more certainty for rights holders while ensuring that people with a print disability and the organisations that serve them continue to have legal access to copyright works.
- We support the submission of the Publisher's Association of New Zealand and particularly draw your attention to the feedback provided in their member survey.

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1. Do other prescribed bodies use the section 69 exception? If so, how do they create accessible format copies?
 - *CLNZ is aware of one other prescribed body (University of Auckland) that is active in creating AFC's. However, we are also aware of a number of other educational institutions that both create their own AFC's and that make direct contact with New Zealand publishers in order to secure digital files for their students.*
2. Are there any other barriers or impediments to produce accessible format copies under the existing exception that have not been canvassed above?
 - *We have no comment to make on this question*
3. How do other prescribed bodies apply the commercial availability test?
 - *The current application of the commercial availability test is not transparent to rights holders and CLNZ is not aware of how it is applied in practice. From the rights holders perspective this is one of the critical areas of the implementation where transparency of the procedures in place by prescribed bodies is needed.*
4. Does this section correctly describe the rights holders and organisations that represent rights holders in New Zealand who are involved in the publication of written material?
 - *See response to #5*
5. Are there any other relevant organisations or individuals?
 - *Other rights holders and organisations not included in the section include newspaper and magazine publishers. CLNZ has a business relationship with some of these organisations, and their licensing agency PMCA. Newspaper and magazine content has not been included in the TIGAR project to date.*
6. What kind of services do these organisations currently provide for the blind and people with other forms of print disability?
 - *We are not aware of the services provided*
7. Does the current operation of the exception limit what they can provide and if so, how?
 - *We have no comment to make on this question*
8. What impact, if any, are initiatives like DAISY, TIGAR and Bookshare having on the availability of accessible format copies of works in New Zealand? To what extent is this impact likely to change in future? What could be done to enhance their reach?

- *CLNZ's involvement with TIGAR has been to clear rights for New Zealand published AFC's to be sent overseas. We do not have information on files that have been imported through the project for New Zealand print disabled readers*
9. What challenges are faced by people with print disabilities in obtaining accessible format copies to meet their particular needs? Has this changed over time? Do you think any other factors are relevant in the description of the current circumstances facing people with a print disability when trying to access works?
- *TIGAR and Bookshare are both initiatives that have brought rights holders into the conversation about increasing the availability of AFC's for the print disabled and also lead to rights holders investing more widely in the creation of born-accessible publications that do not require conversion. In order to sustain and grow this investment, the market for born-accessible works needs to be maintained via use of the commercial availability test.*
10. Do you agree with the problem definition? What relative weight do you put on each problem listed above?
- *More clarity with all areas of the current exception will benefit both the print disabled and rights holders*
 - *With rights holders investing in many more born-accessible works, the need for "costly duplication" is already being reduced*
 - *We fully endorse what is stated in Para 66. The relationship between CLNZ, Publishers Association of NZ and the Blind Foundation is what has helped NZ rights holders make decisions to invest in born-accessible content. However the current exception does not provide guidance on compliance with the commercial availability test or other practices of prescribed bodies in relation to their use of the exception.*
11. Is the uncertainty resulting in either breaches of rights holders rights or leading to fewer accessible books being produced? Please provide details.
- *The PANZ member survey identified that some rights holders are not providing files which may mean that less AFC's are being produced or being produced at higher than necessary cost. Implementing Marrakesh provides an opportunity to both enable transparency and to allow prescribed bodies to work more collaboratively (convert a file once rather than multiple times) to minimize costs.*
12. Are there any other problems with the current exception?
- *Conversion and distribution of AFC's by non-prescribed bodies is a problem*
13. Do you agree with the policy objectives?
- *Yes*

14. Are there any other objectives that should be taken into account?

- *We suggest that Objective A (improved access) can be substantially enhanced with the establishment of a centralised database (the NZ equivalent to TIGAR) of NZ-created AFC's. This database could be openly available (it would only host metadata, not the AFC files) so that both organisations supporting the print disabled and rights holders could have access. Prior to investing in converting a work, the database could be searched to determine if the same work was already available in the required format.*

15. Do you think there are any other viable options? If so, please provide details

- *We have no comment to make on this question*

16. Do you think there are any other advantages or disadvantages in retaining the status quo?

- *Retaining the status quo allows the current uncertainty of the application of the exception and the activity of non-prescribed bodies to continue*

17. How could access to works in accessible format copies be improved without acceding to the Marrakesh Treaty and implementing legislative change?

- *The investment rights holders are making in producing born-accessible works is improving availability. Rights holders will be encouraged to invest further if implementing Marrakesh achieves more certainty for rights holders than that provided by the current exception.*

18. Should the definition of works be extended to include artistic works? What would the consequences be?

- *It is unlikely that individual creators of artistic works or organisations that represent them would be aware that this submission process may be relevant to them. Their specific views should be sought prior to considering extending the definition.*

19. Is clarity on export and import useful? What are the advantages? Are there any disadvantages?

- *Clarity is very useful to all parties. Consideration needs to be given to the implications to rights holders of the exporting of AFC's. A rights holder may have legal agreements in place that give exclusive rights to a third party in another country to distribute multiple formats of a work in that country. If an AFC enters the market from NZ, the publisher could be held to be in breach of the agreement. If the commercial availability test were operating in the receiving country, this issue should be avoided.*

20. Do you think there are any other advantages or disadvantages in joining Marrakesh by making the minimum legislative amendments required to meet our obligations and make the exception workable for cross-border exchange?

- *The statement in Para 92 in regard to “exposing New Zealand works to a larger audience” underpins the absolute need for enforcement of the commercial availability test. In circumstances where an author and/or a publisher have produced a work that is already in an accessible format, they must be able to maximize the financial return on their investment, both in NZ and through sale of publishing rights in overseas markets.*
- *We advise that in CLNZ’s experience in licensing worldwide content into New Zealand schools, less than 30% of the material used is from overseas. Working with publishers of New Zealand content to achieve more born-accessible content (in multiple languages) for New Zealand schools would be a laudable goal.*

21. Do you agree there is benefit in extending the exception to specifically allow people with a print disability and caregivers acting on their behalf to make and import accessible format copies? If possible, please provide examples.

- *One of the policy objectives is to provide greater certainty in relation to the operation of the exception. We submit that permitting individuals to make AFC’s would significantly reduce certainty for rights holders as to who was making AFC’s and how those AFC’s may be distributed.*

22. Are there any other advantages or disadvantages in allowing people with a print disability and caregivers acting on their behalf to make and import accessible format copies?

- *See response to Q21. We submit that organisations whose primary purpose is to serve people with print disabilities are in the best position to understand the needs of the print disabled and to appropriately meet their members needs in accessing content*

23. Would further guidance be required on the relationships between local authorised entities and authorised entities and beneficiaries in other countries?

- *It would be appropriate that authorised entities in other countries which local authorised entities wish to exchange files with, are subject to similar operational requirements as those of the local authorised entity.*

24. Is amendment required to provide clarity that reading disabilities such as dyslexia are included? What would be the impact of specifically extending the definition to include those with reading disabilities?

- *The number of individuals who access content currently through the exception is relatively well defined. Specifically extending the definition, while providing clarity, will also significantly increase the number of potential beneficiaries of the exception. This underlines the need for transparent procedures on the operations of prescribed bodies in determining if an individual qualifies for the exception. For rights holders it also emphasises the importance of the commercial availability test.*

25. Would it be useful to modernise the language used in the current definition of print disability?
- *Adding clarity to the exception is useful for all parties*
26. Do prescribed bodies currently have practices and procedures along the lines prescribed by the Marrakesh Treaty?
- *The 2 prescribed bodies CLNZ has had engagement with appear to have procedures in place, however external reporting of practices and procedures would provide certainty for rights holders, especially if other organisations wish to become prescribed bodies*
27. Would it be useful to provide greater clarity around the role and obligations of authorised entities, and make the role and obligations of prescribed bodies more explicit?
- *Yes – as in #26 above*
28. How will libraries and educational institutions use this exception compared to the normal library lending model?
- *The use of the exception enables the needs of an individual to be met in regard to the provision of content. The creation of digital files, while providing an opportunity to meet multiple individual's needs, also creates the possibility of files being easily disseminated to others who are not entitled to receive them.*
 - *The “normal library lending model” enables one copy of a work to be loaned to one reader. This is not the case with digital files which are able to be infinitely copied and/or made available to multiple readers at once¹.*
 - *Any organisation that wishes to use the exception should have to meet at least minimum standards of reporting and accountability for both content creation and distribution*
29. Would opening up the exception further, for example by allowing a wider range of entities to use the exception pose problems for rights holders? If so, how could those problems be addressed?
- *Yes. Only entities with a primary purpose of serving the print disabled (and therefore understanding their content needs) should be able to use the exception. These entities should have to meet at least minimum standards of reporting and accountability for both content creation and distribution*
30. Should there be specific remedies for rights holders in instances where a prescribed body or authorised entity is found to be breaching the Copyright Act, or where an organisation that is not prescribed undertakes accessible format production without permission?
- *Yes. Currently the only remedy for breach of the exception that is available to rights holders is to take legal action. This is expensive and places rights holders in a negative situation when they are simply taking steps to protect their rights and content*

31. Would a mandated reporting system, for example replicating the TIGAR system, be desirable?

- *Refer #14. An online database of AFC's created under the exception could serve the dual purpose as both a reporting and discovery tool. This would help to optimise the investment of prescribed bodies in the creation of AFC's, reduce duplication and therefore cost, as well as providing a level of assurance for rights holders*

32. Is the Bookshare model for determining whether a person has a print disability (requiring medical certificate or other prescribed documentation) useful? If not, are there alternative useful models?

- *Content provided via the TIGAR project is available to authorised entities that operate on a not for profit basis to serve the needs of the print disabled. Each entity determines its own membership criteria.*
- *The Bookshare model, where third-party certification of an individual's print disability is required, seems reasonable but existing New Zealand procedures for establishing print disability (e.g. NZQA's requirements for student access to a reader-writer for exams) should also be considered*

33. Should further guidance or regulation be provided on how the commercial availability test should be applied? If so, what sort of guidance would be useful?

- *CLNZ is experienced in locating New Zealand rights holders and in determining who a current rights holder may be as opposed to the original rights holder in a work. Contacting the rights owner – either directly or through CLNZ – should be the first step in applying the commercial availability test. It would not seem unreasonable that written confirmation of the availability (or otherwise) of the required format is obtained and archived by the prescribed body. During this initial contact with the rights owner, the availability of files that may be able to be provided to assist with conversion (if conversion is needed) can also be determined.*

34. Would it be useful to include a defined term similar to the Marrakesh Treaty which focusses on the needs of the end user rather than the format?

- *We have no comment to make on this question*

35. Would this ensure that the exception is better future-proofed by being able to respond to changing technologies?

- *We have no comment to make on this question*

36. Do you agree that joining the Marrakesh Treaty and considering other changes to improve the operation of the exception within the framework allowed for by Marrakesh is the best option?

- *Yes*

37. Are there any concerns regarding the quality of accessible format copies of work that may be imported or created under the Marrakesh Treaty framework?

- *We have no comment to make on this question*

38. Are there any other advantages or disadvantages in terms of greater certainty around legal rights and obligations?

- *The advantages and disadvantages have been well covered above. Any enhanced certainty and transparency in regard to obligations will be useful.*

39. Do you foresee any other advantages or disadvantages for New Zealand in joining the Marrakesh Treaty?

- *This is an excellent opportunity to reduce duplication of production of AFC's and enable easy discovery for New Zealanders who are print disabled while providing appropriate mechanisms for rights holders to ensure their content and rights are protected.*

ⁱ Services such as the Blind Foundation's Book Link <http://www.booklink.org.nz/welcome-members/> enable streaming of audio content to multiple users