

**WIPO Marrakesh Treaty Implementation
Exposure Draft
Submission from Copyright Licensing NZ
18 July 2018**

Copyright Licensing Limited (CLNZ) is a not-for-profit organisation 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 fast and efficient for users of copyright works to legally reproduce material from published works, while encouraging recognition of and generating a commercially-important revenue stream for content creators. Copyright performs a central role in helping our creators to tell New Zealand stories, supporting social cohesion and diversity.

As the recognised RRO (Reproduction Rights Organisation) in New Zealand and a member of IFRRO (International Federation of Reproduction Rights Organisations), CLNZ has been granted non-exclusive mandates by authors and publishers from throughout the world to license their material in New Zealand. CLNZ has copyright licenses with all of the universities, polytechnic institutions and wānanga in New Zealand as well as schools, businesses and government agencies. We take pride in the constructive role we perform in the copyright eco-system, particularly our facilitative role in providing fast, simple access to copyright material.

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 and continues to undertake rights clearances for AFC's with the agency that has been established to continue the TIGAR work – ABC Global Books Service.

- We congratulate the government for drafting legislation that goes towards providing more certainty for both publishers and authors and the print disabled and agencies who support them in New Zealand
- CLNZ's experiences in working with New Zealand authors and publishers and the Blind Foundation in relation to AFC's informs our comments in this submission
- We support the submissions of the Publisher's Association of New Zealand and the New Zealand Society of Authors
- We submit that there should be regulated procedures, policies and practice that Authorised Entities must implement and comply with in order to retain their status as an Authorised Entity, including how the Authorised Entity evidences that they are providing services only to people with a print disability as defined in the Act. This was identified in the Regulatory Impact Statement as one of the 3 main benefits of implementing the preferred option but is missing from the Exposure Draft (the Draft).

- The Draft outlines the provision of access to copyright works for individuals with a print disability or persons acting on their behalf, but there is no provision requiring an individual to evidence that they have a print disability that meets the definition in the Act.
- We note that the implementation of the Treaty is expected to have an immediate impact on the range of “reading for pleasure” titles available to New Zealanders with a print disability but will not have the same impact on the availability of educational materials in accessible formats. The diversity of materials used in New Zealand classrooms makes the provision of these in accessible formats a more difficult problem to resolve.
- We draw the government’s attention to the projects being undertaken by the Accessible Formats Forum NZ (AFFNZ) – a joint initiative of CLNZ and the Blind Foundation :
 - Development and implementation of **born-accessible standards**
 - **Online metadata repository** of works available in accessible formats
 - Training and support for using **accessibility features in digital devices**

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Submission

We provide comment on particular sections of the Draft below. In addition to these, we make the following general comments:

1. The Draft includes a requirement for record keeping by Authorised Entities. We are fully supportive of this requirement; however an opportunity is being missed by not requiring **publication of records** of the work that has been converted and the format it has been converted into. Publication would enable other Authorised Entities and individuals with, or acting on behalf of someone with, a print disability to readily discover works already converted and help to reduce the number of costly conversions being undertaken. AFFNZ has identified an Online Metadata Repository as a tool that would increase the impact of implementing the Marrakesh Treaty in New Zealand. The repository could be established by MBIE in conjunction with the process for publication of Authorised Entities' names.
2. The Draft provides no obligations on Authorised Entities and no legal remedy for copyright owners that is appropriate in relation to the unique circumstances of this particular copyright exception. Any breach of new sections 69, 69A, 69B and 69C would require a copyright owner to file court proceedings. We submit that **regulations that define the expected policies and practice of Authorised Entities**, and penalties for breach of those regulations, should be included as part of the Treaty implementation. Para 11 of the National Interest Analysis (repeated at para 42) states:

"...also, in legislation, clarify how Authorised Entities should observe each condition when providing or producing accessible format copies of works"

It is unreasonable, in the circumstances relating to this particular form of copyright exception, to impose the burden of evidencing and pursuing court proceedings solely on copyright owners. The Draft is silent in regard to the moral rights of authors, particularly the right to object to derogatory treatment of their work. This is especially important where organisations and individuals, with whom the author has no contractual connection, are making copies of the author's work.

3. Clear communication from government on the changes to the legislation and what this means in practice, is vital to ensuring ease of navigation for all parties. A **guide published by MBIE**, outlining the practice expected of Authorised Entities and individuals, would assist with providing certainty and any necessary interpretation of the rights and obligations under the new legislation. CLNZ offers its full support in the development of such a guide, based on our experience in working with the Blind Foundation and copyright owners.
4. The Blind Foundation 2017 Year in Review¹ records that:
 - a. "A significant agreement was reached with Vision Australia to bulk swap library content. This adds more than 10,000 titles to our library in one exchange, increasing our collection of audio titles by over 33% at no extra cost."
 - b. "More than 560,000 talking books and magazines were delivered to Blind Foundation library members across New Zealand."

¹ <https://bf-website-uploads-production.s3.amazonaws.com/uploads/2016/11/Year-in-Review-2017-1.pdf>

We provide this information to highlight that digital files provide exponential increase in access to works in an accessible format. We suggest that the government acknowledge the value of this public benefit by instigating a **lending right fund for digital lending by special libraries**. The technology being used to distribute the content by special libraries would also be able to capture data to enable distribution of a fund for digital lending. This would make the process a much simpler one than the existing PLR system. It would also demonstrate the governments' support for New Zealand authors in circumstances where there will be an exponential increase in the volume of "lending" (downloads) that will occur with the broadening of the exception to include a much wider group of beneficiaries.

5. Evaluation of the impact of implementing the Treaty was covered in the NIA (para 47) but is not mentioned in the Draft. We submit that in order for the evaluation to provide the full picture of the impact in New Zealand it must, in addition to drawing on data collected by Authorised Entities, **seek input from authors and publishers on their experiences with the operation of the new legislation in practice.**

Para 28

Section 69A(2)(a) provides that entities that want to make an accessible format copy of a work must *satisfy a 'commercial availability test'*. *This test, as set out in section 69A(2)(a), requires authorised entities to make reasonable efforts to obtain an accessible format copy at an ordinary commercial price. They may only make a copy under section 69A(1) if they have not been able to obtain an accessible format copy within a reasonable time.*

In order for a copyright owner to fully respond to requests regarding the commercial availability of a particular work, they need to be informed of what format is required to meet the needs of the print disabled person. The lack of information provided in some requests can result in delays in providing a response in what might be considered a "reasonable time". We recommend that the government issue guidelines on how the commercial availability test should be implemented by Authorised Entities.

Para 29

The 'commercial availability' test in s69A(2)(a) is carried over from current s69(2)(a). The commercial availability test is not required by the Marrakesh Treaty. However, Marrakesh member countries can, if they wish, require authorised entities wanting to make accessible format copies of works to comply with this test (see Article 4(4) of the Marrakesh Treaty).

CLNZ endorses the inclusion of the commercial availability test. The inclusion of this test provides an incentive for copyright owners to make their works available in accessible formats at the time of publication. This, in turn, means that the accessible format of the work becomes available to those with a print disability at the same time that the publication is made available to those who do not have a print disability and also negates the need for costly conversions of published works.

Para 30

Section 69A(2)(b) provides that the authorised entity must make reasonable efforts to let the copyright owner know that the entity is making an accessible format copy of the work. The accessible format copy must only be provided to persons with print disabilities, or persons acting on behalf of such a person, or to other authorised entities (section 69A(2)(c)).

CLNZ has considerable experience in identifying owners of copyrighted works. In our experience, for works published in New Zealand, it is rarely difficult to contact the copyright owner. If an authorised entity is complying with s69A(2)(a) it is likely that they will be in contact with the copyright owner and advising that an accessible format copy is to be made will be an expected step if a commercial copy is not available in the format needed by the person with the print disability.

Para 31

New section 69A(3) sets out other actions that an authorised entity may perform in relation to accessible format copies of a work without infringing copyright in the work. Section 69A(3) allows an authorised entity to:

- a. import an accessible format copy made by an authorised entity in another Marrakesh country*
- b. export an accessible format copy to an authorised entity or to a person with a print disability in another Marrakesh country*
- c. reproduce copies made or imported under s69A, or that were provided to the entity by a person with a print disability under s69B(2)(c)*
- d. distribute accessible format copies made under section 69A or provided to the entity under section 69B(2)(c). The accessible format copies must only be distributed to persons with a print disability or authorised entities in New Zealand.*

It is not clear whether s69A(2)(a) must be complied with prior to importing an accessible format copy. We submit that s69A(2)(a) should be complied with prior to both the making of, or the importing of, an accessible format copy. Even if the work has been published overseas, it is possible that, especially in a digital format, it is available in the New Zealand market.

In regard to exporting, we reiterate our comments from our February 2016 submission. A copyright owner 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 accessible format copy enters the market from NZ, the copyright owner could be held to be in breach of the agreement. If the commercial availability test were operating in the receiving country, this issue may be avoided.

Para 32

New section 69B allows persons with a print disability, or a person acting on their behalf, to make accessible format copies of a work, or import copies made by an authorised entity in a Marrakesh Treaty country, without infringing copyright. The accessible format copies must be for the use of the person who has a print disability.

It is uncertain whether s69A(2)(a) must be complied with prior to an individual importing an accessible format copy. As in our comment re Para 31, we submit that s69A(2)(a) should be complied with prior to both the making of, or the importing of, an accessible format copy regardless of who is making the copy.

The significant broadening of the exception to include provision for individuals to make accessible format copies comes with no balancing provision for copyright owners in circumstances where unauthorised use occurs. We submit that, at a minimum, the government must provide written

guidance for individuals wishing to convert published works. Our preference would be that such provisions are included in the legislation. We also note that digital files are more readily subject to unauthorised use which can have a detrimental impact on the author's and publisher's market for a work. We submit that section 93 of the Copyright Act is insufficient to deal with subsequent uses of copies made in reliance on the proposed section 69 amendments.

Para 34 and 35

New section 69C(1) provides that an authorised entity must keep records regarding its activities under s69A. These records must be made available for inspection by the copyright owner on request.

Authorised entities can charge a fee to provide an accessible format copy (new section 69C(2)(a)). If they do charge a fee, they cannot make a profit. The fee must only cover the cost of making, reproducing, importing or exporting the copy plus a reasonable contribution to the overhead costs of the entity (new section 69C(2)(b)). This provision is carried over from existing section 69.

We express our concern regarding the need for copyright owners to request records from an authorised entity. As mentioned above, an opportunity is being missed by not requiring publication of records of the work that has been converted and the format it has been converted into. Publication would enable other Authorised Entities and individuals with, or acting on behalf of someone with, a print disability to readily discover works already converted and help to reduce the number of costly conversions being undertaken. In the absence of a system for centralised publication of records, we submit that for charities that are authorised entities, the requirement to include this information in the Service Performance Reporting that is already required of them, would enable transparency for all parties. Similarly, other non-profits that are authorised entities could include the reporting in published annual reports.

The provision of "cost-recovery" is one of significant concern to copyright owners and, particularly, to authors. In the process of the creation and distribution of accessible format copies, the author – the creator of the work that is desired to be read – is unrewarded. We refer to our comments earlier in this submission regarding the need for a digital lending right for New Zealand authors.

Para 36

This section requires the Ministry responsible for the Act to publish on its website the names of those authorised entities that have notified the Ministry under section 69(2) that they intend to produce and distribute accessible format copies under new section 69A.

We fully support the transparency that the publication of authorised entities provides.