



New Zealand Copyright (Marrakesh Treaty Implementation) Amendment Bill

Submission by the International Federation of Library Associations and Institutions

The International Federation of Library Associations and Institutions (IFLA) is the global organisation for libraries. We represent all library types, with members in around 140 countries worldwide, working both to support professional development and excellence in service provision, and ensure a favourable legal and policy environment for libraries.

We are proud to count the Library and Information Association of New Zealand Te Aotearoa (LIANZA) among our members, and are looking forward to holding our annual conference in Auckland in 2020. This submission complements that of LIANZA.

Unfortunately, it is unlikely that we would be able to participate in a hearing in person.

Introduction

The Marrakesh Treaty represents a major step forwards in international law. It provides a practical response to the serious market failure created by copyright rules that seriously restricted the ability of libraries, charities and beneficiaries to make and share accessible format copies of works for people with print disabilities.

This failure led to the book famine – the unnecessary scarcity of books and other materials for people with print disabilities – which in turn has limited the rights of some of the most vulnerable in our societies to learn, enjoy, and benefit from knowledge and culture. Such a situation goes against global commitments to equity for people with disabilities, as set out for example in the Convention on the Rights of People with Disabilities.

The Treaty focuses notably on authorised entities (of which libraries are a prime example), giving them particular possibilities to help beneficiaries. This is not only important within any given country, but also internationally, given that developing countries, where the need is often greatest, are often also the worst affected by the book famine.

Therefore, in the implementation of the Treaty, it is important to bear in mind both the spirit of the Treaty – to maximise access to accessible format works – and the injunction in Article 21 of the Convention on the Rights of Persons with Disabilities¹ that the provision of information to people with disabilities should take place without additional costs.

Section 2(1) – Definitions

Definition of Authorised Entity: we support the use of the term ‘authorised entity’ as opposed to ‘prescribed body’. This is consistent with the language of the Marrakesh Treaty. See comments on Section 69 for further views on definitions.

Definition of Print Disability: we support the definition of print disability in point a), and echo the concern of LIANZA that the *theoretical possibility* of obtaining corrective lenses should not exclude

¹ Convention on the Rights of Persons with Disabilities (2006)
<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-21-freedom-of-expression-and-opinion-and-access-to-information.html>

someone from benefitting from the treaty when this, in reality, may be beyond their means. Sub-paragraph b) could be amended to read: *excludes an impairment of visual function that, **in the case of the beneficiary concerned, has been** improved, by the use of corrective lenses, to a level that is normally acceptable for reading without a special level or kind of light.*

Section 69 – Authorised Entity Types

We welcome the inclusion of all types of library as potential authorised entities. In order to ensure that people with print disabilities are able to access accessible format works locally, it is important to empower as many libraries as possible to draw on Marrakesh provisions.

As regards other potential authorised entities, we would prefer to see language more consistent with that of the Treaty, notably as concerns the reference to ‘charitable’ entities, as opposed to ‘non-profit’. ‘Non-profit’ is the term used in the Treaty, and would allow for a larger number of bodies to make use of Marrakesh Treaty provisions.

We strongly disagree with the proposed obligation for authorised entities to inform the Ministry of their intention to make use of the provisions contained within this act.

The text of the bill, as it currently stands, would place New Zealand in contravention of international law. As highlighted in the Agreed Statement to Article 9 of the Treaty: *‘It is understood that Article 9 does not imply mandatory registration for authorized entities nor does it constitute a precondition for authorized entities to engage in activities recognized under this Treaty; but it provides for a possibility for sharing information to facilitate the cross-border exchange of accessible format copies.’*

Therefore, while most authorised entities will likely be happy to join a register in order to facilitate exchanges of works, this cannot be made obligatory. Such a step would risk reducing the number of entities ready to come forwards to make use of Marrakesh Treaty obligations. The Sub-section 69(2) could be amended to read as follows: *Before beginning activities under section 69A for the first time, an authorised entity ~~must~~ **may** give notice to the Ministry that it intends to do so **in order to create the list of authorised entities provided for in Section 69D of this Act.***

Section 69A – Accessible Format Copy Activities by Authorised Entities

Prior Efforts to Obtain Commercial Copies (Sub-Section 2, Paragraph a, and Sub-Section 3, Paragraph a)

We are very concerned about the intention of the New Zealand government to oblige authorised entities to make efforts to find an appropriate commercially available copy of a work before making a copy themselves. While Article 4(4) of the Marrakesh Treaty does open this possibility, it is important to note that this represents a weakening of the Treaty’s impact. In order to comply with the spirit of the Treaty, we therefore recommend that New Zealand should not avail itself of this possibility.

This is the case for the following reasons:

- Such a check represents an administrative burden on authorised entities, and therefore takes time away from the provision of services to beneficiaries.

- Where a commercially available copy is already on the market, an authorised entity will logically seek to buy this anyway, given that this is usually cheaper than creating a copy. There is no need for a law.
- Reference to ‘reasonable efforts’ is vague, and risks having a chilling effect on the activities of authorised entities.
- The possibility of knowing if an appropriate copy is available depends strongly on the quality of classifications of different formats. Too often, such classifications do not provide the necessary detail. For example, a large print version of a book may exist on the market, but the print is not large enough for a particular reader. As a result, the authorised entity is not able to make a specific copy for the reader.
- The inclusion of commercial availability checks sets a highly negative example for other countries, where the quality of data about accessible formats is far lower, as are the resources available to authorised entities.
- As highlighted in the LIANZA submission, many have therefore chosen not to implement such provisions, including the European Union, Mexico, Uruguay and the United States. In Australia, it is not strictly necessary to carry out such a check².

We therefore recommend deleting these provisions.

Notification of Owners of Copyright (Sub-Section 2, Paragraph b, and Sub-Section 3, Paragraph b)

We strongly oppose any obligation to take steps to notify rightholders when an accessible copy format of a work is made. Such a requirement is not included in the Treaty, and would impose a completely unnecessary additional burden on the authorised entity carrying out the activity. Once again, the reference to ‘reasonable effort’ is likely to create uncertainty, and cause librarians and others to err on the side of caution, reducing the access of people with print disabilities to works.

Furthermore, it could be construed as discriminatory, given that copying works for other purposes under New Zealand law does not require such notification (for example Sections 51 to 57A of the Copyright Act).

We therefore recommend deleting these provisions.

Other Provisions

We welcome the language around ensuring that copies are delivered only to beneficiaries or people acting on their behalf (Sub-Section 2, Paragraph c, and Sub-Section 3, Paragraph c), which is in line with the Treaty. Similarly, the language around respecting the integrity of the work is also adequate (Sub-Section 2, Paragraph d, and Sub-Section 3, Paragraph d).

We also welcome the provisions in Sub-Section 4, in particular the proposal not to impose restrictions on the sharing of existing copies of accessible format works with individuals and authorised entities, both within New Zealand and beyond. In this way, New Zealand can contribute to combatting the global book famine.

² Please see IFLA’s Marrakesh Monitoring Report for more, most recently updated on 24 January 2019: <https://www.ifla.org/publications/node/81925>

Finally, we congratulate New Zealand on not seeking to implement supplementary remuneration provisions for rightholders. This is only an optional provision in the Treaty, and would inevitably lead to libraries and other authorised entities dedicated to supporting people with print disabilities needing to reduce acquisitions, and offer lower quality services. We trust that such a provision will remain outside of the Act.

Section 69B – Accessible format copy activities by person who is not an authorised entity

We support the provisions in this section, which will serve to ensure that more people with print disabilities can access works.

Section 69C – Duties of Authorised Entities in Regard to Records and Fees

IFLA notes that Article 2(c)(iv) of the Marrakesh Treaty sets out that an authorised entity *‘establishes and follows its own practices [...] to maintain due care in, and records of, its handling of copies of works, while respecting the privacy of beneficiary persons...’*.

We are concerned that the proposal in the New Zealand Bill strays from this language, not only by failing to recognise the competence of authorised entities to set out their own record-keeping practices, but also by failing to include specific provisions around the importance of privacy. Given the vulnerability of many potential beneficiaries of the Treaty, detailed records can be sensitive.

Furthermore, the requirement to allow inspection of records by rightholders is not foreseen in the Treaty, and so should be ideally be deleted. In order to ensure conformity with the Convention on the Rights of Persons with Disabilities (to which New Zealand is a State Party), such a provision should not lead to additional costs or burdens for libraries in serving users with print disabilities. Currently, such a provision only appears in Section 54 of the Copyright Act, but not in sections 51-53 or 55-56C. As such, the current wording of the Bill is likely discriminatory.

Section 69D - Ministry must publish list of authorised entities on Internet site

IFLA supports this provision, which will facilitate exchanges both between New Zealand authorised entities, and with those in other countries, with the proviso set out above that making registration with the ministry obligatory is likely illegal.

Additional Provisions

We echo the view of the Library and Information Association of New Zealand that it will be necessary to amend section 226D(3) of the Copyright Act 1994, in order to allow for the exercise of permitted acts under Sections 69A and 69B where works are protected by TPMs. This could be achieved by adding in a new sub-paragraph (e): *any person or entity entitled to carry out acts under sections 69A and 69B of this Act.*

Finally, we would strongly encourage the government of New Zealand to consider extending the benefits of these provisions to people with other disabilities. While this is not foreseen in the Treaty, many countries already do this, including Argentina, Chile, the Czech Republic, the Dominican

Republic, Ecuador, El Salvador, Estonia, India, Ireland, Israel, Latvia, Liberia, Lithuania, Moldova, Mongolia, and the United Kingdom.