

12 February, 2016

Copyright Law and Policy Section
Department of Communications and the Arts

Via email: copyright@communications.gov.au

The Australian Communications Consumer Action Network (ACCAN) thanks the Department of Communications and the Arts (DoCA) for the opportunity to contribute to the consultation on the Copyright Amendment (Disability Access and Other Measures) Bill 2016 (the Act). We are broadly supportive of the proposed changes, as they overcome some of the barriers faced by people with a disability – and the organisations who provide services to them – in obtaining material in accessible formats.

ACCAN has responded to a selection of the most relevant questions to our work and experience from the consultation document.

Q 1: Do you think the proposed provisions are sufficiently clear and will operate effectively to meet the objective of ensuring access to accessible format copies of works?

Definition of ‘person with a disability’

The proposed amendments introduce a consolidated definition of ‘person with a disability’, modelled on the existing definition in section 200AB(4) of the Act as *“a person with a disability that causes the person difficulty in reading, viewing or hearing copyright material in a particular form”*.

Much of the current theory of disability focuses on the importance of acknowledging that a disability is a result of social structures and their manifestation in the physical world that create barriers to access.¹ The proposed definition is fairly neutral on this point, simply noting that the disability causes difficulty reading, viewing or hearing copyright material in a particular form.

While we think the proposed definition is fit for purpose, it would be encouraging to have a strong recognition in the explanatory memorandum and second reading speech that these barriers are created by inaccessible forms of material, rather than by a person with a disability.

Guidelines on fair dealing

Due to the difficulty in unpacking a new set of legal terms, some may find it easier to apply the existing provisions in section 200AB rather than fair dealing. On balance ACCAN believes the fair

¹ Oliver, M., 2004, ‘The Social Model in Action: if I had a hammer’, Chapter 2 (In ‘Implementing the Social Model of Disability: Theory and Research’ edited by Colin Barnes and Geof Mercer, 2004, Leeds: The Disability Press, pp. 18-31

dealing test has the potential to provide greater certainty, especially if it is supported by clear, simple English guidelines on how it should be applied in practice.

Without guidelines terms like ‘the purpose and character of the dealing’ are confusing for an individual consumer. However, if interpretive guidance is provided (such as explaining that a consumer with a disability should be able to convert a copy of a book they have purchased into a readable format) there is less potential for confusion. Therefore we agree with DoCA’s suggestion that it prepare a set of guidelines in consultation with affected stakeholders. We would add that these guidelines should also be produced in simple English to aid comprehension for individual consumers.

Recommendation 1: The Department prepare simple English guidelines in consultation with affected stakeholders that would identify best practice approaches to dealing with accessible copies and other relevant matters relating to the practical application of the amendments.

Commercial availability test

The commercial availability test outlined in section 113F(b) is an unnecessary burden on already resource limited organisations and is unlikely to offer any additional benefit to rights holders. This section may force an organisation serving people with a disability to constantly check if material it has converted has subsequently been commercially produced. If an organisation fails to do this, and delete its copies, it may be in breach of this provision. For organisations managing significant libraries this is likely to become overly burdensome and ultimately weaken the purpose of the fair dealing exception.

It also fails to offer any additional benefit to rights holders. Given the effort in converting material to an accessible format, in practice a resource strapped organisation is unlikely to go to the expense of converting if there is an alternative available at a commercial price. The only time an organisation might consider producing its own version is where an existing copy costs well above an ordinary commercial price, in which case the exemption would apply anyway. Therefore we see little value in the inclusion of this test.

Recommendation 2: The commercial availability test outlined in section 113F(b) should be removed.

Q 2: Do you prefer the terminology ‘organisation assisting a person with a disability’?

ACCAN prefers the terminology ‘organisation assisting a person with a disability’. ‘Organisation’ better represents the range of organisations which are involved in making accessible material available to people with a disability.

The word 'institution' also has a number of negative connotations in this sector due to its historical use to describe places built to house people with mental disabilities.

The ordinary dictionary definition of institution tends to place it as a subset of organisations founded for a religious, educational, professional or social purpose.² In contrast 'organisation' is broader and has the ordinary definition of an organised group of people with a particular purpose, such as business or government.³

Recommendation 3: That the terminology '*organisation* assisting a person with a disability' replaces '*institution* assisting a person with a disability'.

We recommend that the fair dealing clause is amended to clarify that it can be used by third parties providing services to people with a disability. For example, this would require a change from the current section 113E wording "Fair dealing for purpose of access by persons with a disability" to "Fair dealing for purpose of access *for or* by persons with a disability".

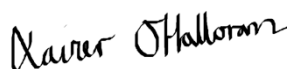
Recommendation 4: That the language of the fair dealing clause "Fair dealing for purpose of access *for or* by persons with a disability" replaces "Fair dealing for purpose of access by persons with a disability".

Copyright regulations

ACCAN is also interested in how DoCA is proposing to amend the Copyright International Protection Regulations to clarify that it is not an infringement of copyright to exchange literary and artistic works across borders for the purposes of compliance with the Marrakesh Treaty. ACCAN believes strong competitive markets are fostered when consumers have a choice in supply. The copyright law should not be used as a tool for rights holders to divide the market into geographies that serve to limit consumer choice, rather than protect copyright.

ACCAN would like to thank DoCA for consulting on this important amendment to the Copyright Act. Without clear fair dealing provisions people with a disability face significant barriers to accessing copyright protected materials. We look forward to working with DoCA further in developing guidelines to clearly explain these changes.

Sincerely,



Xavier O'Halloran
ACCAN Policy Officer

² Oxford Dictionaries, 'institution' definition.

³ Oxford Dictionaries, 'organisation' definition.