

LIBRARY AND INFORMATION ASSOCIATION OF NEW ZEALAND AOTEAROA (LIANZA)

Submission on the Copyright (Marrakesh Treaty implementation) Amendment Bill.

To: the Committee Secretariat

May it please the Committee:

Introduction

1. LIANZA, The Library and Information Association of New Zealand Aotearoa / Te Rau Herenga o Aotearoa is a non-profit, membership based organisation that advocates on behalf of library and information professionals within the sector. LIANZA represents public, educational, commercial, industrial, legal and government libraries in New Zealand.
2. LIANZA supports the intent of this Bill because it believes implementing the Marrakesh Treaty will significantly expand the availability of copyrighted works to print disabled people in New Zealand.
3. We are willing to appear in support of this submission. Jennifer Campion, chair of the LIANZA Standing Committee on Copyright, will appear if needed.

While LIANZA supports the intent of the Bill, we do have comments about specific sections and proposed requirements, and these are given below.

Clause 69: Authorised entity types

LIANZA supports the replacement of the concept of ‘prescribed bodies’ in current Copyright Act 1994 section 69 with the concept of ‘authorised entities’, which will include all “prescribed

libraries”. LIANZA agrees with the broad definition of authorised entity as this should support significantly increasing the content available to print disabled users. LIANZA supports the inclusion of all prescribed libraries.

LIANZA is pleased to see the definition of print disability can now include persons with a perceptual or reading disability as well as those with visual impairments. However, we have some concern that the definition “excludes an impairment of visual function that can be improved, by the use of corrective lenses”, as it may end up excluding persons who cannot afford corrective lenses.

Clause 69(2): Notice to Ministry

LIANZA does not support the requirement in 69(2) that an authorised entity must give notice to the Ministry before beginning activities under section 69A. This is not a requirement of the Marrakesh Treaty, and we note that the agreed statement to Article 9 of the Marrakesh Treaty says that “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.”¹ The Marrakesh Treaty does not require a government approval or any authorisation process for becoming a authorised entity, and LIANZA strongly recommends that the bill does not introduce any.

Clauses 69A(2)(a) and 69A(3)(a): Commercial Availability Check

LIANZA does not support the requirement for commercial availability checks in 69A(1)(a) and 69A(3)(a). We note that Article 4(4) of the Marrakesh Treaty allows for but does not require limitations and exceptions “to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market”.² We also note that there has been a lot of comment internationally about the undesirability of adopting a commercial availability requirement³.

The *World Blind Union Guide to the Marrakesh Treaty* notes that there are a number of unresolved questions relating to the commercial availability requirement and that having “such a restriction would be fundamentally inconsistent with the Marrakesh Treaty’s overarching goal of ensuring that individuals with print disabilities have an equal opportunity to enjoy covered works

¹ <https://wipolex.wipo.int/en/text/301019>

² <https://wipolex.wipo.int/en/text/301019>

³ For example: <http://benetech.blogspot.com/2016/02/commercial-availability-poison-pill-for.html>
http://eifl.net/system/files/resources/201708/malawi_marrakesh_statement.pdf

on the same terms as sighted peoples”.⁴ The difficulty in determining with any certainty whether a work is commercially available in a suitable accessible format would create a “chilling effect” for libraries and other authorised entities which would deter them from making books available.

The US does not have a commercial availability check. The EU also rejected including a commercial availability check in its implementation, stating that “In view of the specific nature of the exception, its targeted scope and the need for legal certainty for its beneficiaries, Member States should not be allowed to impose additional requirements for the application of the exception, such as compensation schemes or the prior verification of the commercial availability of accessible format copies.”⁵

LIANZA feels strongly that a commercial availability requirement would impede New Zealand’s libraries and other authorised entities to create accessible format copies, and so participate in cross-border sharing of such works. Being “part of an international regime for copyright exceptions that facilitate cross-border exchange of works in accessible formats”⁶ is one of the main reasons New Zealand acceded to the Marrakesh Treaty, so LIANZA questions why New Zealand would seek to limit our ability to participate in and benefit from global efforts to make and share accessible books.

LIANZA notes that many countries which have implemented the Marrakesh Treaty have done so without requiring a commercial availability test⁷ and urges New Zealand to do likewise.

Clause 69A(2)(b) and 69A(3)(b): Notification of intention to make an accessible format copy

LIANZA does not support the requirement in 69A(2)(b) and 69A(3)(b) that an authorised entity must have taken all reasonable steps to notify the owner of the copyright in a work of its intention to make or import an accessible format copy. We note that this is not a requirement of

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<http://www.worldblindunion.org/English/our-work/our-priorities/CRPD/WBU%20Guide%20to%20the%20Marrakesh%20Treaty-%20English.docx>: Section 2.5.5

⁵[http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/05/96/COM_COM\(2016\)0596_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/05/96/COM_COM(2016)0596_EN.pdf): P. 11

⁶*International treaty examination of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled: Report of the Commerce Committee: P. 4*
https://www.parliament.nz/resource/en-NZ/SCR_74562/51f51fb80a23c95c8c9719a25f31cfc49f42f127

⁷Implementing the Marrakesh Treaty: Monitoring Report
https://www.ifla.org/files/assets/clm/news/marrakesh_update_january_2019.pdf

the Treaty itself, and question why, when the Treaty provides for authorised entities to make an accessible format copy without the authorization of the copyright holder⁸, that such a notification requirement is being introduced.

Clause 69B: Accessible format copy activities by person who is not an authorised entity

LIANZA supports the provisions in 69B for activities by individuals with a print disability (or someone acting on their behalf). This is because even though the definition of authorised entity is broad, some of the organisations eligible to act as one will not have sufficient resourcing to do so and the timely provision of copies would be best served by the provisions for individuals proposed in 69B.

Clause 69C(b): Inspection of records

LIANZA notes that Article 2(c)(iv) of the Marrakesh Treaty requires an authorised entity to establish and follow its own practices to maintain due care in, and records of, its handling of copies of works, and gives copyright owners the right to inspect such records. Article 8 of the Treaty states that “in the implementation of the limitations and exceptions provided for in this Treaty, Contracting Parties shall endeavour to protect the privacy of beneficiary persons on an equal basis with others.”⁹ LIANZA is very concerned about the inspection of records relating to services only for a specific group of library users and recommends that respect for the privacy of beneficiary persons be explicitly stated in clause 69C(b).

Copyright Act 1994 Section 226D(3): Change required

Section 226D(3) needs amendment

LIANZA notes that 226D(3) of the Copyright Act 1994 will also need to be amended to allow exercise of permitted acts under ss 69A and 69B by authorised entities and individuals with a print disability or acting on behalf of someone who has a print disability where works are protected by TPMs.

⁸ <https://wipolex.wipo.int/en/text/301019>: Article 4(2)(a)

⁹ <https://wipolex.wipo.int/en/text/301019>

Concluding Remarks

As stated in the introduction, LIANZA supports the intent of this Bill because it believes implementing the Marrakesh Treaty will significantly expand the availability of copyrighted works to print disabled people in New Zealand. We agree with the reasons which were given for New Zealand becoming a party to the Marrakesh Treaty in National Interest Analysis prepared by MBIE.

“Becoming a Party to the Marrakesh Treaty would allow New Zealand to be part of an international regime for copyright exceptions that facilitate the cross-border exchange of works in accessible formats (such as braille, audio and large print).

This is likely to:

- a. provide more timely access to a greater variety of such works for New Zealanders with a print disability; and
- b. improve adherence to New Zealand’s international obligations under the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and the United Nations Convention on the Rights of the Child (UNCROC).”¹⁰

We are, however, very concerned that in several areas the Bill goes beyond the requirements of the Marrakesh Treaty in introducing additional requirements. As we have commented above, these requirements will reduce New Zealand’s ability to fully participate in, and benefit from the activities and services of the global community supporting the Marrakesh Treaty, and we strongly urge that the introduction of these requirements is reconsidered, particularly the requirement for a commercial availability test.

Jennifer Campion, Chair

LIANZA Standing Committee on Copyright

10 February 2019

¹⁰ *International treaty examination of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled: Report of the Commerce Committee: P. 4*

https://www.parliament.nz/resource/en-NZ/SCR_74562/51f51fb80a23c95c8c9719a25f31cfc49f42f127