



Articles

Digital copyright and disability discrimination: From braille books to bookshare

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In Australia, blind people are able to access texts in braille and books on tape, but the demand for these media is decreasing. Blind people today are increasingly reliant on texts in electronic form, and these are much less readily available in Australia. Electronic texts are more portable and less cumbersome than large braille volumes, and are much faster to navigate than audio recordings. However, in Australia it is difficult for blind people to get access to a wide range of electronic texts and there exists no scheme enabling such access. At the same time sighted people are using electronic text and other digital media at an ever-increasing rate. In order to approximate the same level of access as sighted people, blind people require access to accessible electronic versions of all published material. The authors suggest that given the legal imperatives of Australia's domestic legislation, treaty obligations and social values, that there exists a moral imperative to create a scheme providing blind people with access to digital print media.

Introduction

Australians pride themselves on fairness and equity. Human rights legislation in Australia such as the Disability Discrimination Act 1992 (Cth) (DDA) underscores our commitment to enabling disabled people to fully participate in our society. This participation would no doubt include the social, cultural and intellectual aspects of Australian life. It follows that there can be no excuse in our society to deny blind people the same level of access to information that sighted people enjoy. This means that as far as possible, we must ensure that printed material is available to blind people in an accessible electronic form, for use with screen readers or other enabling technologies. It is unacceptable that the level of access of blind persons in Australia is much worse than that of those in comparable jurisdictions such as North America.

In Australia, blind people are able to access texts in braille and books on tape, but the demand for these media is decreasing. Blind people today are increasingly reliant on texts in electronic form, and these are much less readily available in Australia. Electronic texts are more portable and less cumbersome

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than large Braille volumes, and are much faster to navigate than audio recordings. In order to approximate the same level of access as sighted people, blind people require access to accessible electronic versions of all published material. While it is desirable that these electronic versions are sourced from the publisher, it is also possible for third parties to scan and use optical character recognition (OCR) technology to create a (lesser quality) electronic copy. The goal of this article is to examine the legal difficulties with providing this level of access to blind people.

The first part of this article will briefly consider a model for providing electronic access to blind people in Australia, and describe the comparatively higher levels of access available to individuals with similar disabilities in Canada and the United States of America. The second part of this article will examine the role of Australia's copyright legislation in restricting blind people's access to information, and will expose the deficits in the current legislative scheme which is in place to assist people with print disabilities.

In examining Australia's copyright laws this article will consider the new exception which has been included in Australian copyright law to allow the copying and communication of copyright material for the benefit of people with disabilities. This article will also examine Australia's anti-circumvention law, which acts to legally enforce technical restrictions placed on electronic materials which prevent blind people from accessing the materials in an accessible form. Recent changes in Australian law impose significant penalties on the removal of digital locks on copyright material, to supplement an already existing regime of prohibition on the manufacture and supply of circumvention devices and services. It will be shown that although the introduction of liability for circumvention is ostensibly designed to harmonise Australian and US law, there are significant exceptions to the liability of blind persons in the United States which do not exist in Australia.

The fourth part of the article will consider the DDA and the Australian government's recent work in relation to a proposed United Nations Convention on Disability, as a basis for providing the policy imperative for an electronic repository. This article concludes with a call for a publisher and taxpayer supported non-commercial repository to be created under the current statutory licence. In the view of the authors this policy reform is both achievable and desirable.

A vision of an electronic repository

The most effective way to provide blind people with access to electronic versions of published texts would be to establish electronic libraries specifically for that purpose. These libraries would be able to minimise the costs of digitisation of printed material, and minimise the searching costs of users by providing a central repository. Such a repository would be able to scan printed material on demand, and retain a copy for future use. Optimally, with the cooperation of publishers, higher quality electronic versions could be provided at the same time as they are published, whether they are published in hardcopy or electronically.

Over time, a large repository of electronic texts would be created, and be able to be accessed at the touch of a button by blind users. Blind users may or may not be charged a fee for this access. A repository like this could provide

all blind people with the ability to read the same material as sighted people.¹ Such access would greatly improve the personal, educational, and professional growth of blind people in Australia.

In the United States, such a repository already exists. In 1996, the United States introduced an amendment which enabled non-profit organisations to provide copyright material to blind people in an alternative format. Section 121(a) of the US Copyright Act 1968 (Cth) provides that:

it is not an infringement of copyright for an authorised entity to reproduce or to distribute copies of a previously published, nondramatic literary work if such copies are reproduced or distributed in specialised formats exclusively for use by blind or other persons with disabilities.

This section has allowed American blind people to access thousands of otherwise inaccessible material with relative ease. The main American database for the blind, Bookshare,² has over 27,600 electronic books on its site. To access this site in full a person must be an American citizen and have proof from either a physician, ophthalmologist or optometrist that they are unable to read standard print material. Visitors are authorised to visit the site, search the database and download non-copyright protected material.

To reduce the fears of copyright holders, Bookshare has a number of protections in place, including:

1. The person must have medical proof that they are blind and an American citizen.
2. The user must have encryption software on their computer provided by Bookshare. Every user has a different encryption key. Without the key the downloaded file will be unusable.
3. Bookshare places a fingerprint file on every file download which enables Bookshare to identify which user downloaded a file. This means if a downloaded file was connected with an infringement of copyright, Bookshare could identify the user responsible for the download.
4. Bookshare monitors the download history of all its users and reserves the right to suspend any user's account which exhibits unusual downloads.

Through the careful enforcement of these policies, Bookshare is able to provide an excellent resource to blind people in the United States, with little adverse effect on the publishing industry.

Similarly, in Canada, s 32 of the Canadian Copyright Act was amended in 1997 to improve the access of blind people to copyright information. That section provides a broad exception to copy, translate, adapt, reproduce, or perform a work (not including films) 'in a format specially designed for persons with a perceptual disability'.³ This broad exception means that digital copies of works can be prepared and stored for blind users.

In Canada it is now lawful to operate electronic repositories of copyrighted

1 Computer literacy and access to a computer with internet access will still pose a barrier to a significant proportion of blind users but, as in other domains, we hope that this digital divide will narrow in the near future.

2 At <<http://www.bookshare.org>>.

3 Copyright Act (Canada) s 32.

information for the exclusive use of blind people. Overcoming the logistical considerations in developing a repository with sufficient security protection has been an arduous process.⁴ The Canadian Library Association Working Group to Define a National Network for Equitable Library Services has discussed the issues in developing a repository and proposed solutions, in its report *Opening the Book*.⁵ The report anticipates libraries will increasingly work together to create a fully accessible national electronic repository for blind people. The report claims one of the key features of successful and effective repositories is that all print disabled citizens can obtain access to the databases directly.⁶ At the time of publication, comprehensive databases are being developed in Canada to provide access to Canadians with print disabilities.

By stark contrast, there is no similar repository in Australia. Blind students do have a limited level of access to prescribed course materials through their universities, but this is not extended to non-students and only rarely to materials which are not prescribed. Interestingly, copyright law in Australia appears to provide for such a repository to be created under a statutory licence, albeit in a rather complicated way. The lack of a comprehensive repository must therefore be attributed to a combination of factors including a lack of interest or will, the prohibitive costs of digitising printed materials, and the complexity of the legislative scheme.

Copyright law in Australia

It is an infringement of copyright to make a reproduction of a substantial part of an original literary work.⁷ It is also an infringement to authorise another person to do so.⁸ The default rule in Australia is that it is not permissible to make a copy of a book or article, unless there is an applicable exception to infringement. There is no broad exception in Australia for reproductions made by or on the behalf of a person with a print disability, but there is a statutory licensing scheme contained within Pt VB of the Copyright Act.

Under s 135ZP an institution assisting persons with a print disability can make a copy of and communicate a work in an alternative accessible format. This section allows such an institution to create sound recordings, Braille versions, large-print versions, photographic versions or electronic versions of literary or dramatic works. Section 135ZP contains limits which require the institution to take reasonable steps to ensure that no similar accessible versions are available within a reasonable time at an ordinary commercial price. Section 135ZQ allows for incidental reproductions and communications which are needed in order to make the reproductions or communications in s 135ZP.

An 'institution assisting persons with a print disability' is defined in s 10(1)

4 N Joint, 'Libraries, digitisation and disability' (2006) 55 *Library Review* 4.

5 Working Group to Define a National Network for Equitable Library Services, 'Opening the Book: A Strategy for a National Network for Equitable Library Service for Canadians with Print Disability', 2005, at <http://www.cla.ca/issues/nnels_final.htm>.

6 Ibid, at 2.5.

7 Copyright Act 1968 (Cth) ss 36(1), 31(1), 14.

8 Copyright Act 1968 (Cth) ss 36(2).

as an educational institution or 'any other institution which has as its principal function, or one of its principal functions, the provision of literary or dramatic works to persons with a print disability and in relation to which a declaration under paragraph 10A(1)(c) is in force'. Section 10A(1)(c) provides that the Attorney-General may declare an institution to be an 'institution assisting persons with a print disability'. It would appear that most blind societies or related bodies in Australia could avail themselves of the statutory licence if they applied for a relevant declaration from the Attorney-General.

In order to rely on the licence in s 135ZP, institutions must give a remuneration notice to the relevant collecting society (the Copyright Agency Limited (CAL)), undertaking to pay for the use of the work and specifying how amounts are to be assessed.⁹ CAL does not currently charge a fee for use under this licence, but may do so in the future.¹⁰ The institution must also ensure that each reproduction, copy or communication is made 'solely for the purpose of use in the provision, whether by the institution or otherwise, of assistance to persons with a print disability'.¹¹ Finally, an institution must comply with the record keeping and notice provisions in ss 135ZX(1) or (3) or s 135ZXA, as the case requires.¹²

Pursuant to s 135ZQ(4A), the institution is required to inform CAL every time it scans or records material into an accessible format. This is an important feature, not just a governance issue. CAL provides all its subscribers with a database which indicates what material has already been scanned or obtained from the publisher. Once the material has been rendered into an alternative format, CAL keeps a record of which CAL subscriber has electronic copies of the data or CAL keeps a copy themselves if they are provided with a copy. The CAL system saves time in re-scanning and provides subscribers with an excellent resource.

Generally, the statutory licence provides that institutions can create and provide alternative access information where the material is provided for the sole purpose of assisting people with a print disability. If there is already a commercially available copy available, then the institution must either purchase that copy or obtain permission from the copyright owner.¹³ With electronic books this can become an issue where any given book is already available in an electronic format which is protected by technological protection measures. In this case, the institution would not be able to create an alternative copy as there is already a commercial version available, even though that version may not be in an accessible format.

The statutory licence in Pt VB would appear to provide the necessary legal protection for those who would set up a digital repository for the benefit of Australians with print disabilities. The fact that no database has been established, however, tends to suggest that the statutory licence is either too complicated, or that there is insufficient funding available for blind societies

⁹ Sections 135ZP, 135G.

¹⁰ See Copyright Agency Limited, 'Statutory licence for institutions assisting people with a print disability', at <http://www.copyright.com.au/institutions_assisting_print.htm> (accessed 13 August 2007).

¹¹ Section 135ZP.

¹² Ibid.

¹³ Ibid.

to undertake the difficult task of establishing a repository and digitising printed material. While the statutory licence has been relied on in the past to release audio and braille versions of published works, the fact that it is rarely used to provide electronic text versions suggests some difficulties in interpretation or implementation of the licence in the digital environment.

However, the most significant barrier is likely to be a lack of funding; the costs of reproduction and digitisation of printed material are very high, as each book must be manually scanned and run through optical character recognition software, then meticulously checked for conversion errors.

The high costs of establishing a repository could be overcome by (a) increased government funding; (b) assistance from publishers, who could provide high quality electronic versions of published books; and (c) cooperation from universities and other providers who already have large quantities of books scanned for provision to their students under either the education statutory licence or the print-disability statutory licence in Pt VB.

A digital print repository under Pt VB

It would seem uncontroversial that a digital print repository for blind people could be established under Pt VB of the Copyright Act. Furthermore, it is the view of the authors that Pt VB is per se compliant with Art 9(2) of the Berne Convention for the Protection of Literary and Artistic Works. However, recent legislative reform processes have shown that any amendment to the Copyright Act will be controversial and that the Australian government will adopt a conservative approach to treaty compliance. This would flow through to any policy reform implemented under the Copyright Act. The strictures relating to Australian copyright law and treaty compliance are discussed in greater detail below. The fundamental question that would need to be addressed were an Australian institution to undertake to create a digital print repository with the assistance of the Australian government is whether the resulting scheme would comply with Art 9(2) of the Berne Convention. In short a licence scheme that imposes upon a copyright owner a fee in exchange for the use of their work outside of the free market is effectively an exception to the general rights of the owner. As such any exception would need to comply with the three-step test. The three-step test requires that any exception to the reproduction rights of copyright owners amount to a special case, not conflict with a normal exploitation of the copyright material, and not unreasonably prejudice the legitimate interests of the owner of the copyright or a person licensed by the owner of the copyright.

It is abundantly clear that a digital print repository designed to aid blind people could be classified as a special case upon the ordinary meaning of the term 'special case'. Such a repository is well outside the normal exploitation of copyright works and the difficulties associated with the market establishing such a scheme underline the notion that this is a special case. However, the second and third limbs of the three-step test would still pose a difficulty.

To counter the potential compliance difficulties that might arise from the three-step test, the authors would put forward two reasons to suggest that an online repository would not fail the second and third elements of the three-step

test.¹⁴ Firstly, the provision of an online repository under the funding of the government would necessarily require that copyright owners be compensated. As such there would be no real inconsistency with the requirement that the use not conflict with a normal exploitation of copyright material. Provided that compensation is provided in what is effectively an emerging, or currently non-existent market, there can be no actual conflict with the requirement. The failure of the market to adequately provide the service contemplated in this article clearly evidences that there is no normal exploitation to be accounted for in this context. Secondly, providing compensation would easily satisfy the requirement that the use not unreasonably prejudice the legitimate interests of the copyright holder or their licensee.

In summary, the authors' view is that the legislative scheme provided by Pt VB is technically sufficient to support the creation of a digital print repository. We also believe that if such a scheme necessitated regulatory intervention, such policy change would be compliant with Australia's treaty obligations.

The Copyright Amendment Act 2006 (Cth)

In November 2006 the Australian government passed the Copyright Amendment Act 2006 (Cth), which implemented the final round of changes required by the Australia United States Free Trade Agreement (AUSFTA). The Copyright Amendment Act also included a number of other changes to various areas of Australia's copyright law. One of the significant new exceptions introduced by this Act is contained in s 200AB(4), which provides a limited exception for use by or on behalf of people with a disability that causes difficulty in reading, viewing, or hearing the material in a particular form. The exception allows use if it is 'for the purpose of [. . .] obtaining a reproduction or copy of the work or other subject-matter in another form, or with a feature, that reduces the difficulty'¹⁵ caused by a disability. The exception is restricted in that it can not be used even in part 'for the purpose of obtaining a commercial advantage'.¹⁶

The entire exception contained within s 200AB(4) is subject to three pre-conditions that are contained in a provision under s 200AB(1) which provides that the exception will only apply if:

1. The circumstances of the use amount to a special case;
2. The use does not conflict with a normal exploitation of the copyright material; and
3. The use does not unreasonably prejudice the legitimate interests of the owner of the copyright or a person licensed by the owner of the copyright.

This subsection imports an existing treaty obligation into Australian law. The language is designed to ensure that Australia remains in compliance with

¹⁴ This is essential as the three-step test is cumulative and it may be supposed that the proper interpretation of Art 9(2) of the Berne Convention is such that any proposed use must similarly satisfy the three elements on a cumulative basis.

¹⁵ Copyright Amendment Bill 2006 (Cth) s 200AB(4).

¹⁶ Ibid.

the Berne Convention¹⁷ and other international agreements which incorporate that convention, including the AUSFTA.¹⁸ The drafting of this provision has been criticised on the basis that the international agreements are designed to provide legislative guidance to member states, not to be proscriptive of the form of the legislation that member states are required to adopt.¹⁹ That Australia must in its domestic laws comply with the requirements of the three-step test is beyond contention. There is far too great an enforcement mechanism developed at an international level to countenance any overt departures from the international norm.²⁰ However, the adoption by Australia of the actual terms of the Berne Convention three-step test, instead of a more general exception, introduces less certainty into the law and has the potential to unnecessarily restrict the application of the exception.

While the exception contained in s 200AB(4) seems, on first inspection, to greatly reduce the barriers imposed by copyright on people with disabilities, the awkward language used raises important questions of when exactly a particular use will be classified as a *special case*, what the *legitimate* interests of the copyright owner are, and when prejudicing those interests will be *reasonable*.

There is no indication of what circumstances will need to be shown to form a special case — is lack of access to a hardcopy work sufficient, or does the person relying on this exception need to show that the work is crucially important to their research or livelihood, or any other significantly special justification? Furthermore, an organisation administering a repository or other facility to assist people with disabilities will require assurance, every time a copy is made of copyright material, that the making of that copy is a special case. However, in the submission of the authors it is uncontroversial that the creation of an exception to enable blind people to have access to digital print media, where they would otherwise have limited or no access, is a special case. It seems clear in light of the ‘travaux préparatoires’ to the Berne Convention (the record of negotiations) that the term special case would easily encompass a case such as the present one.²¹

There is certainly scope for a court to declare the needs of Australians with disabilities a special case in this area. Where difficulty might arise would lie in reconciling the uncompensated use of copyright material along with the reasonable and legitimate interests of copyright owners. To this end the particular difficulty is that where there is potentially a market for the dissemination of copyright works the operation of a free use exception may be construed as unreasonably prejudicing the legitimate interests of copyright

17 In the view of the authors, this decision is more a reflection of regulatory timidity than necessity.

18 Article 17.1.

19 See further the Senate Legal and Constitutional Affairs Committee Inquiry into the Copyright Amendment Bill 2006, in particular the submissions of Professor Brian Fitzgerald et al and Dilan Thampapillai, at <http://www.aph.gov.au/Senate/committee/legcon_ctte/copyright06/submissions/sublist.htm> (accessed 11 August 2007).

20 See further P Drahos, ‘Securing the Future of Intellectual Property: Intellectual Property Owners and their Nodally Coordinated Enforcement Pyramid’ (2004) 36(1) *Case Western Jnl of International Law* 53.

21 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond (Volume 1 and II)*, 2nd ed, Oxford University Press, Oxford, 2006.

holders. Similarly, in the view of the authors, the pursuit by copyright owners of their economic interests is part and parcel of the normal exploitation of their works. The right of copyright owners to operate in new or existing markets represents the normal exploitation of their works.

However, the most clear difficulty that arises in this area is that neither the copier nor the ultimate beneficiary of the copying, the blind user, can operate under s 200AB with any degree of certainty. Were copyright users to avail themselves of the exception it would be left to the courts to determine the threshold question of a special case, and the extent that any given use unreasonably prejudices the legitimate interests of a copyright owner. Furthermore, this would have to occur on a case by case basis. This prospective approach suffers from a great lack in certainty; until and unless the issues are resolved broadly and definitively by a high level appellate court, the provision of any services relying on this exception will be an extremely risky enterprise. The uncertain wording of this provision provides a great disincentive for an Australian organisation to create a facility to help individuals with disabilities in accessing copyright material.

It follows that in the view of the authors a repository could not be achieved under s 200AB as an unremunerated use of copyright. It is likely that a large scale repository will benefit from the certainty of relying on the statutory licence in Pt VB rather than the more flexible exception in s 200AB(4). However, the flexible exception may prove of some use for smaller scale dealings which would otherwise infringe copyright. For example, s 200AB(4) may allow a person to pass on an electronic copy of a book or article to a blind friend without infringing copyright law.

Anti-circumvention

Even where information is available in an electronic format to an individual with a print disability, it is not necessarily accessible. Technological protection measures (TPMs) imposed on an electronic document can prevent or inhibit screen readers and other technologies used by people with a print disability from working. Adobe's PDF format, for example, has the ability to restrict copying of the text into the computer's buffer, which will prevent screen readers from accessing the text from that buffer. Because these technologies are not able to distinguish between legitimate and illegitimate uses of a document, they greatly inhibit the ability of people with a print disability from accessing the information contained within.

TPMs are protected in Australia under the anti-circumvention provisions of the Copyright Act. Since 2000, it has been illegal to supply devices or services to circumvent TPMs on copyright material.²² Prior to 1 January 2007, it has nevertheless been permissible for a person to circumvent TPMs for their own uses, assuming they could get access to the information or tools to do so (for example, through non-commercial importation from international merchants). As part of the AUSFTA, Australia acquired obligations to provide civil remedies for actual circumvention, and criminal sanctions where

²² Copyright Amendment (Digital Agenda) Act 2000 (Cth).

circumvention occurs for commercial advantage or financial gain.²³

The Copyright Amendment Act implemented the changes required by the AUSFTA. It introduced a distinction between 'Access Control Technological Protection Measures' (ACTPMs) and TPMs.²⁴ An ACTPM is defined as a 'device, product, technology or component' used within Australia by or on behalf of the owner of copyright material that 'controls access' to that material.²⁵ TPMs, by contrast, include ACTPMs but also include devices which prevent, inhibit or restrict the doing of an act comprised in the copyright.²⁶

Under the new amendments to the Copyright Act, the removal of a digital lock on an electronic file by a person with a print disability will be unlawful if that lock is an ACTPM. It is likely that a measure which acts to restrict the ability of the user from using a screen reader will be an ACTPM, not merely a TPM. The distinction is important. If the lock is a TPM, but not an ACTPM, there will be no liability for the actual act of circumvention, but it will still be illegal for an Australian to manufacture or supply a circumvention device, or to provide a circumvention service within Australia. If, on the other hand, the lock is an ACTPM, it will be unlawful to circumvent at all. The new legislation provides civil remedies for circumvention of ACTPMs, as well as for the supply or manufacture of circumvention devices or services.²⁷ It also provides criminal penalties for actual circumvention of an ACTPM or supply or manufacture of circumvention devices or services with the intention of obtaining a commercial advantage or profit.²⁸

There are a small number of legislated exceptions to liability for interoperability, encryption research, security testing and law enforcement. None of these are helpful to people with a disability which makes it difficult to access copyright material which are covered by a TPM. The Act also provides a method for exceptions for actual circumvention to be made through regulations, where the Minister has recommended that a particular identified purpose be permissible.²⁹ The Act provides that circumvention of an ACTPM will be permissible if it is done in order to enable the person circumventing to do an act which (a) would not infringe copyright, and (b) is listed as a prescribed act.³⁰

The draft regulations which have been released include as a prescribed act 'the reproduction or communication by an institution assisting persons with a print disability for provision of assistance to those persons of copyright material of a kind, and in the circumstances, mentioned in Division 3 of Part VB of the Act'.³¹ Accordingly, it will not be unlawful for a university or other institution to circumvent an ACTPM in order to provide its students or members with a clear electronic copy of copyright material. This exception,

23 Article 17.4.7.

24 Schedule 12.

25 Copyright Act 1968 (Cth) s 10(1).

26 Ibid.

27 Sections 116AN, 116AO, 116AP

28 Sections 132APC, 132APD, 132APE.

29 Proposed s 249.

30 Proposed ss 116AN(9), 132APC(9).

31 Copyright Regulations 1969 (Cth) reg 20Z Sch 10A.

however, suffers from exactly the same problems as the statutory licence does in general. Most notably, there is no ability for individuals not members of these institutions to access copyright material, and the material that is accessible is limited to a certain subset of available copyright material. Furthermore, there are no exceptions for the supply or manufacture of circumvention services or devices. For practical purposes, this means that even where an individual may have a legitimate right to circumvent a TPM, they may not have the ability, because it is not possible for an Australian person to import or supply the tools necessary to do so.

In the United States, the regulations which provide exceptions for liability for circumvention of technological access controls specifically exempt circumvention for people who engage in non-infringing uses of:

Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorised entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialised format.³²

This exception, while not technologically neutral, provides a broad permission for a person within the United States to circumvent an ACTPM which prevents a blind person from accessing electronic material. This vital exception is without parallel in Australia.

The need for an exception was articulated by the American Federation for the Blind (AFB), the national peak body representing the views of blind people in America. As part of the triennial review hearings to determine the regulatory exceptions in 2003, the AFB stated:

Technological measures that control access to copyrighted works have been developed and deployed which prevent access to and fair use of this material by people who are blind or visually impaired. This is a significant abridgement of those rights. It is also a threat to the way in which people who are blind or visually impaired are educated, work, and conduct leisure activities like reading and entertainment.³³

Despite this clear need, there is no general exception in Australia to the circumvention of a TPM in order for a person to exercise the rights which may be conferred under s 200AB(4). For practical purposes, this means that the value of the exceptions to copyright infringement for people with a disability are almost completely diminished in the digital environment. Part of the reason for introducing stricter anti-circumvention provisions was to allow more material to be 'made available digitally and through online distribution channels'.³⁴ The provision of material in a digital form, subject to a TPM, will often restrict the ability of people with a disability from accessing that material, and it is unacceptable that the general exception to copyright infringement for people with a disability is not extended to digital distribution.

³² 37 CFR § 201.40 (2006).

³³ American Federation for the Blind Comments to LOC, 2003: Exemption for Literary Works, Comments to Library of Congress, 2003: AFB Seeks Exemption for Literary Works, Before the Copyright Office.

³⁴ Press release, Attorney-General, Exposure Drafts — Copyright Amendment (Technological Protection Measures) Bill 2006 and related Regulations.

Copyright and the DDA

In the view of the authors the DDA imposes no overt legal obligation on copyright owners to make their works available in formats suitable for the print disabled. But as it currently stands the practical operation of the copyright laws of Australia are inconsistent with the underlying purposes of the DDA. The fundamental purpose of the DDA is to remove barriers to the full participation of the disabled in the civic, commercial and cultural life of Australia.³⁵ In this regard the authors propose that a government-sponsored electronic repository would redress the imbalance that currently exists. The basic objective should be to provide equality of opportunity to blind people by providing access to digitised literary resources. This would also be a direct attempt at improving employment and educational outcomes for disabled Australians.³⁶ The current status quo in relation to copyright reflects formal equality which has produced undesirable outcomes in real terms.

The Productivity Commission in a 2004 report noted that the impact of the DDA had improved educational outcomes for disabled tertiary students.³⁷ However the outcomes in the schools sector had been mixed and the measures required to address the discrimination had strained the resources of non-government schools.³⁸ Accordingly, it would appear that there is market failure in this area and that it is necessary that the government play a constructive role in providing access at a schools level.

In the 15 years in which the DDA has operated it has been instrumental in reducing discrimination against the disabled. The Act is also a symbol of the Australian community's commitment to creating an environment in which disabled people can function to their full potential.³⁹ The Australian government has also furthered the commitment to equity for the disabled by participating in negotiations for a United Nations Convention on the Rights of Persons with Disabilities.⁴⁰ Viewed in this light it is difficult to accept, even where the DDA and the Copyright Act are not in explicit conflict, that the latter Act could be employed to frustrate the purposes of the former. Accordingly, it makes sense to harmonise Australia's legal regime and social philosophy by offering an electronic repository for the blind.

35 See further Human Rights and Equal Opportunity Commission, 'A brief guide to the Disability Discrimination Act', at <http://www.humanrights.gov.au/disability_rights/dda_guide/brief.doc> (accessed 11 August 2007).

36 Productivity Commission Report — Inquiry into the Disability Discrimination Act 1992 published 14 July 2004. The report is available at <<http://www.pc.gov.au/inquiry/dda/index.html>> (accessed 11 August 2007). The commission's statistics indicated lower education and employment outcomes for disabled Australians.

37 Productivity Commission Report, p XXXIII.

38 Ibid.

39 The DDA is also complemented by other state and territory legislation.

40 Negotiations for the Draft Convention have been completed and it will be put to the General Assembly for adopting in the 61st session of the UN. See further <http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Disabilitydiscrimination> (accessed 11 August 2007).

A way forward for Australia?

The benefits of providing easy access to published material to blind people far outweigh the risks associated with potential copyright infringement. The use of a statutory licence guarantees that publishers and authors are remunerated at a fair rate for the use of the works by blind people.⁴¹ Publishers may fear that the provision of unlocked digital copies to blind people will lead to an increase in book piracy, but this fear is simply unfounded.

A person who wanted to infringe the copyright in a printed book could spend two or three hours tearing the book apart and manually feeding it through a scanner with very little difficulty. The digitised copy could then be made available on the internet to any number of people. This process is in no way reliant on the availability of electronic copies to persons with a print disability. By contrast, however, requiring each and every blind user who wanted to access a book to spend three or more hours manually scanning it would be manifestly unreasonable. As such it is abundantly clear that the status quo has an extremely detrimental effect on the ability of blind people to learn, grow and participate in our shared cultural heritage.

It is likely that the fear that publishers associate with providing electronic copies of books is a large factor which has prevented the emergence of a market solution. No major publishers have voluntarily licensed their copyright works for sale to blind Australians. While some publishers release DRM-laden e-books, very few publishers provide unencumbered electronic books which are accessible to blind people at an ordinary commercial price. This market failure is justification in itself of a special legislative scheme which enables other organisations to make such books available. If the statutory licensing scheme in Pt VB of the Copyright Act is not effective, amendments may be required to provide the necessary incentives for a commercial model to develop.

A broad based exception

It is unclear why the statutory licence in Pt VB has not proven effective to allow the creation of a digital repository of published material. If it is the case that the complicated statutory licence framework is too unclear or uncertain to allow a repository to be created, Australia should consider introducing a broader and simpler exception to copyright infringement modelled on the US s 121. Such a change would reduce the compliance costs and overheads associated with a statutory licensing scheme, and may make it easier for a non-profit database to be established.

If such an exception is not likely to provide the necessary certainty to allow a non-profit database to be developed, it may be necessary to remove the non-profit requirement and allow private entities to develop a competitive business model to provide access to blind users. This extra commercial incentive may be necessary considering there has been little movement for blind societies to take advantage of the current statutory licence in Australia.

The primary limitation on the ability to create such a broad exception comes

⁴¹ It appears that while the statutory licence provides for remuneration, CAL does not currently seek a fee for access to material for people with a print disability.

from the 'three-step test' first developed in the Berne Convention. The limitation originally only applied to the reproduction right, but was extended to all rights granted under the Berne Convention by Art 10 of the WIPO Copyright Treaty.⁴² Most broadly, Art 13 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) provides that:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.⁴³

Any exception that Australia provides for infringement by or on the behalf of a person with a disability must be constrained to the terms of this agreement. However, Australia is by no means required to implement any such exception in the form provided by Art 13, as is currently the case for s 200AB(4). It is legitimate for Australia, as a member state, to interpret the meaning of 'special cases' to include access by people with disabilities, and to determine that the reproduction of material for people with disabilities, where appropriate, does not unreasonably prejudice the legitimate interests of the copyright owner. It would also be legitimate for the Australian government to determine that the provision of copyright material to people with a print disability, even on an arguably commercial basis, does not unreasonably prejudice the legitimate interests of copyright holders, as the copyright owners have so far shown little interests in entering this market.

By implementing this change, instead of the uncertain terms of the current s 200AB(4), Australia could provide much greater certainty, and a much greater level of access, to Australians with disabilities. While this change is not necessarily desirable, if public funding is not available to meet the costs of digitising material and complying with a statutory licence, and publishers are not willing to provide assistance to non-profit repositories, a commercial model may be the only way in which blind Australians can have access to published material.

An exception for liability for circumvention

In addition to an exception or statutory licence which allows reproduction of copyright material in an accessible form, a broader exception needs to be created for liability for the circumvention of ACTPMs, and for the manufacture and supply of circumvention devices and services, for the purposes of assisting people with disabilities to utilise copyright material in an accessible form. Under the AUSFTA, exceptions to liability for actual circumvention of this nature must be limited to:

non-infringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative

⁴² See further M Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation*, Oxford University Press, 2002.

⁴³ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Art 13.

review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding.⁴⁴

While the scope for an exception under this agreement is relatively small, it is open for the Australian government to adopt the same approach as the US government in explicitly permitting circumvention of ACTPMs on e-books (or other electronic resources) which prevent people with disabilities from using the material in an accessible form. This would remove most of the liability for actual circumvention which prevents blind people from having the same level of access as sighted people.

There is no valid reason for the regulations to exempt liability for circumvention for the purpose of providing access under Pt VB and not to provide a similar exemption for access under s 200AB(4). The regulations should be updated to allow circumvention of digital locks on electronic content distributed under the 'special case' provision. Failure to do so as more content becomes distributed with technological restrictions will increasingly lessen the utility of s 200AB(4) to help blind people access copyright material.

While the removal of liability for actual circumvention would provide significant relief for blind people, a large gap would remain in the legislative regime for the manufacture and provision of circumvention devices and services. This scheme presents a threat of a two-tiered level of access for people with disabilities, between those who have the technical skills to circumvent technological locks themselves, and those who do not. This problem cannot be addressed without first renegotiating our international obligations. It remains, however, a critical barrier to providing an equal level of access to information to people with disabilities.

Conclusion

In Australia blind people struggle to succeed in their education, careers and personal growth due to the difficulty which they face in accessing published texts. The current legislative scheme allows for the possibility of an electronic repository to be created, but no such repository exists. In contrast, blind people in Canada and the United States have ready access to tens of thousands of books. There is no evidence that this access has resulted in widespread piracy of copyright materials or significant loss to copyright owners. The benefits of such schemes, on the other hand, greatly increase the level of access of a large number of people living with disabilities.

It is clear, in these circumstances, that there is no reason to continue to deny blind people access to information that is readily available to sighted people. This article accordingly calls for blind societies to take advantage of the statutory licence in Pt VB of the Copyright Act and establish an electronic repository. To meet the costs of doing so, we suggest that:

- (a) the Australian government subsidise the digitisation of printed material which is not available in an accessible electronic form;
- (b) publishers aid in the creation of a repository by making available high quality accessible electronic copies of published materials; and

44 AUSFTA Art 17.4.7(e)(viii).

- (c) optionally, if necessary and where to do so would not be inequitable, blind people be charged a reasonable fee for access to this material, whether per book or through a yearly membership fee.

If this is not done, it may be necessary to pursue a market solution. Particularly, if publishers continue to refuse to provide blind people with access to their works, then the Australian government should consider the introduction of a broad exception from copyright liability for any person providing access to published material to those with a print disability. This would allow commercial business models to emerge and allow blind people to access published materials on a competitive basis.