

To the Economic Development, Science and Innovation Committee

SUBMISSION ON THE COPYRIGHT (MARRAKESH TREATY IMPLEMENTATION) AMENDMENT BILL

1. **This submission is from Universities New Zealand.**
2. Universities New Zealand is the operating name of the New Zealand Vice-Chancellors' Committee, a statutory body established under Part 19 of the Education Act 1989. It has statutory responsibilities for university quality assurance, the approval and accreditation of university academic programmes, entrance to universities, and scholarships. It also represents the interests of New Zealand's eight universities on a wide range of other matters.
3. The Universities New Zealand Copyright Expert Committee, which consists of representatives of New Zealand's eight universities, administrative staff of the universities who support students with print disabilities, and academic staff whose research topics include human rights and the Marrakesh Treaty in particular were all consulted in the development of this submission. This submission relates to the Copyright (Marrakesh Treaty Implementation) Amendment Bill (the **Bill**).
4. We are willing to appear before the Select Committee in support of this submission.
5. **Summary**

All eight universities support amendments to the Copyright Act 1994 as required for New Zealand to accede to the Marrakesh Treaty as we believe that this will significantly expand the availability of copyright works to the print disabled.
- 5.1 Universities, however, do not support the inclusion of a commercial availability test in s 69A. The Marrakesh Treaty does not require a commercial availability test and very few countries have included the test in their legislation. Countries that implement such a test are required to notify the Director General of WIPO.
- 5.2 Universities submit that the commercial availability test in the new sections 69A(2) and (3) be removed. This is the same commercial availability test as in the existing section 69(2)(a). Retention of this test will continue to result in delays for print disabled academic staff and students getting timely access to the specialised books they need to succeed at university and undertake research. The cost and delays associated with making accessible format works means the preferred option is to obtain a copy already in an accessible form. For this reason there is unlikely to be any impact on the ability of publishers to sell accessible formatted copies of works.
- 5.3 Universities support the proposed section 69A(3) which allows the obtaining and sharing of accessible format works with other authorised entities both in New Zealand and overseas, but do not support the inclusion of the commercial availability test. The inclusion of this test will limit authorised entities and print disabled person's ability to source texts from the US and Europe in particular where there is no such requirement under equivalent law.

- 5.4 Universities support allowing 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.
- 5.5 The Universities submit that s 226D(3) needs to be amended to include charitable entities and persons authorised under s 69B to enable them to exercise permitted acts under ss 69A and B where works may be protected by Technological Protection Measures (TPMs).

6. Submission

Clause 4: Section 2 amended (Interpretation)

Accessible format copy

Universities New Zealand supports the definition of “accessible format copy” and the inclusion of artistic works. The broad definition will provide greater flexibility in the future as technology and research advance. This will provide access to more resources and a greater understanding of how to meet the needs of those with vision impairments and difficulty in perceiving text and images.

Authorised entity

Universities New Zealand supports the amended definition of authorised entity. Extending the definition to educational establishments, educational resource suppliers, prescribed libraries and charitable entities, will be particularly helpful to students who may have a range of disabilities, including difficulty with mobility.

Being able to source accessible format works from a range of different types of entities will assist those students. The virtual classroom means students do not have the same needs to attend university in person. Furthermore, extending the types of authorised entities to prescribed libraries will make it easier for students to access the works they need in a more timely fashion.

Universities do not believe that allowing a wider range of entities to use the exception would pose problems for rights holders. For example, expanding the range of entities would be consistent with the ability of prescribed libraries to make electronic copies of works under the existing library provisions under ss 50 to 56C of the Act.

Print disability

Universities consider the broad definition of print disability would cover those who would benefit from the ability to use an accessible format work to meet their needs. By far the largest numbers of students who need assistance with print are students who have a learning disability. The definition in s 69(4) of the current Act does not clearly cover these types of disabilities.

Universities support the removal of the word “handicap” and replacing it with “impairment of visual function”.

New Zealand universities offer a range of learning support and academic development to students with specific learning and other invisible disabilities such as dyslexia, dyspraxia, Attention Deficit Disorders and Autism Spectrum Disorder.

Expanding the definition to include persons with learning disabilities will provide greater certainty around making accessible copies for this group of students.

Clause 6 Section 69 replaced

Universities support the change of wording from “prescribed bodies” in s 69 of the Act to authorised entities in the new section 69. The previous provision was confusing for those educational

institutions who assumed they were prescribed bodies. The proposed change will create a more transparent process.

It also gives those with a print disability the means to identify the most convenient entity that can assist them to source the content they need.

Commercial Availability Test - New subsections 69A(2) and (3)

Universities submit that the commercial availability test in the new sections 69A(2)(a) and 69A(3)(a) be removed. There is no requirement in Article 4(4) of the Marrakesh Treaty to implement such a test in national copyright law. Countries doing so have to let WIPO know formally that their domestic law requires a commerciality test, and also whether they intend it to affect imports of accessible materials into that country from elsewhere. There is no “commercial availability” requirement in the Treaty for exporters of accessible books.

The World Blind Union Guide to the Marrakesh Treaty notes that there are a number of unresolved questions relating to the commercial availability requirement. The absence of settled answers to these questions counsels states to reject restriction of the exception to works that are commercially unavailable. “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 on the same terms as sighted peoples”.¹

The International Federation of Library Associations and Institutions (IFLA), the global voice of the library and information profession, has called for the removal of a commercial availability test as it undermines the objective of the Marrakesh Treaty to end the global ‘book famine’.

There is no commercial availability test in the US and the EU. The EU rejected the test in its implementation. “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.”²

The commercial availability test can cause time delays, especially in the university context where expeditious access to reading and research material is crucial. Processing text is also challenging for print disabled, which means that time is even more critical for them. It also imposes a costly and unnecessary administrative burden on universities and others creating or sourcing accessible copies for print disabled students. It can create uncertainty as to when and under what circumstances an accessible work is “commercially available”. The associated risk of breaching the law could act as a deterrent for authorised entities to make otherwise legal copies for students and other users. Finally, limiting or restricting access goes against the human rights values recognised in the Marrakesh Treaty and its purpose being to improve access for the print disabled.

The proposed sections that reinstate the test in existing section 69(2)(a) will continue to result in delays for staff and students obtaining access to the specialised books they need to succeed at university and undertake research.

Research has confirmed the print disabled students face significant delays in obtaining the texts they need. Harper and Loudin³ surveyed Australian universities and found that where universities did provide their print disabled students access to essential or prescribed readings in accessible formats,

¹ <http://www.worldblindunion.org/English/our-work/our-priorities/Pages/WBU-Guide-to-the-Marrakesh-Treaty.aspx> Page 122

² [http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0596/COM_COM\(2016\)0596_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0596/COM_COM(2016)0596_EN.pdf)

³ Paul Harpur & Rebecca Loudaun, “The Barrier of the written word: analysing universities’ policies to students with print disabilities” *Journal of Higher Education Policy and Management* 33:2 153,159 (2011)

these students generally obtained readings late. Only 50% indicated that first year students with print disabilities had access to prescribed textbooks before semester started. Most students obtained the full set of their readings within the first 2 weeks of a 14-week semester. Some universities reported far more substantial delays, with two reporting that students did not receive all their essential readings in accessible formats until week 5 of a 12-week semester. Many print disabled students may not receive their essential readings until very late in the semester or after the semester is over. The reasons given for delays were that students do not notify the university that they will require assistance; faculties do not finalise the reading list until the first week of semester; and publishers fail to respond to requests to provide accessible texts or do not respond in a timely manner.

New Zealand students face similar delays for the same reasons, with some students not obtaining required texts before the end of semester. The barriers that students face are often difficult to surmount. The requirement for an authorised entity to make “reasonable efforts to obtain an accessible format copy” inevitably creates delay as well as uncertainty. For example, a major difficulty is establishing what is commercially available and obtaining it in a timely fashion. In the current climate of rapid change, it can be difficult even to establish which publisher to approach. When contacted, most publishers can provide an electronic copy of the text. However, they may never reply or there can be a delay of several weeks getting the text to the student. Some allow students to purchase an e-text outright; others only provide a short-term lease. Some are willing to provide download links, while others, particularly those based in the United States, often prefer to post or courier disc copies. Sometimes works are only available as preprint versions, which require a considerable amount of editing before students receive copies. This is a drain on already scarce financial resources and staff time. How long should one wait for a response? In the limited period in which to check availability, convert a text to accessible format (this can take up to 6 weeks). Consequently, by no means all the students who would benefit from having texts in alternative formats currently obtain them. This compromises their chances of demonstrating their full potential.

Meeting the commercial availability test is not always possible in practice and renders the Treaty very difficult or impossible to use. We do not believe that publishers would be negatively impacted if the commercial availability test was removed. By far the cheapest, fastest and most convenient means of obtaining accessible format works is if the work is available for sale in an accessible format through the normal channels. Therefore, it is highly unlikely that an individual or institution would choose to go through the time-consuming and costly process of producing an accessible copy of a work if a commercial copy is already available and easily obtained.

New Section 69A(3)

Why it is important we have access to content from overseas

Universities support the proposed section 69A(3) which allows the sharing of accessible format works with other authorised entities both in New Zealand and overseas, however the inclusion of the commercial availability test makes this more difficult. The cross-border exchange of accessible versions of books and other print materials has the potential to greatly speed up the availability of texts, however applying a commercial availability test threatens this.

Making OCR scans of foreign language texts, mathematics, and science texts is particularly time consuming and expensive. Foreign language texts require payment of a speaker of that language to check each word in the book, as typically the scanning is not accurate. A stage III textbook in Spanish recently cost \$1500 to convert to OCR as a Spanish speaker was required to check the accuracy of the scan.

There are very few academic texts at university level available in DAISY format. Changing the law so that entities can source content from the large online libraries in the US and the EU and enabling entities to legally share the resources they have created with other higher education entities around

the world would be of huge benefit to print disabled students both in New Zealand and overseas. It would enable students with print disabilities to “take part on an equal basis with others” who do not have the same impairments.

Because of the specialised nature of the books typically sourced for students, the ability to have access to textbooks that have been created in accessible formats in other jurisdictions would greatly speed up access to content and it would be a huge cost saving that could be put into other resources to support students with impairments. Including the commercial availability test threatens the ability of those with print disabilities to access the books they need, which may be available overseas.

Jim Fruchterman, the Founder/CEO of Bookshare, the world’s largest accessible online library for people with print disabilities has said, “The diversion of limited resources available for accessibility work to commercial availability research is, from our point of view, an unacceptable waste of philanthropic and public resources. Therefore we won’t provide Bookshare content under the Marrakesh Treaty to countries with a commercial availability test. Nor will we offer the Bookshare technology platform for domestic accessible library services in such countries.”⁴

While Bookshare has worked cooperatively with publishers, however, the creation of this resource would not have been possible without s 121 of the US Copyright Act, known as the Chafee Amendment and the fair use exception in s 117. These exceptions allow Bookshare to create a database of accessible works, without the need to obtain rights holder permission or check for commercial availability, providing the copies are only provided to people with bona fide print disabilities.

Print disabled users from New Zealand are able to access some Bookshare content, but only if the publisher has authorised this. This is because Bookshare relies on the Chafee Amendment and this does not apply when providing access to users outside of the US. US users, on the other hand, are able to access the entire database, whether or not the content has been included with the permission of the publisher.

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

The universities do 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 an accessible format copy. We note that this is not a requirement of 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 holder, that such a notification requirement is being introduced.

New Section 69B

Universities support allowing 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. Students have limited time to research and write essays and assignments. They rely on locating texts quickly. Without the time allowance to obtain accessible copies, students with print disabilities may be limited to a very specific pool of readings, which is again an unfair disadvantage.

Students self-declare disabilities, either on enrolment, or at their own discretion during their studies. Often students may be reluctant to disclose an impairment, preferring to attempt to cope on their

⁴ <http://infojustice.org/archives/38691>;
http://eifl.net/system/files/resources/201708/malawi_marrakesh_statement.pdf (22 July 2017)

own, at least initially. Universities have placed an emphasis on the fact that they provide a safe place for disclosure, but this remains an issue in the speedy provision of services.

The increase in the availability of electronic texts has helped to meet needs, but this isn't keeping pace with student demand and expectation. Due to the increasingly technology savvy student population we are seeing, print disabled students are now requesting electronic versions of texts and using their personal adaptive technology to adapt this to their needs. Students we see no longer want enlarged or scanned material as this is much harder to manipulate.

The new section 69B will provide print disabled students with the ability to create their own accessible format works, or source their own without necessarily having to identify as print disabled. The ability to share those print copies with their library or university is of potential benefit to other students who may require a similar text.

As previously noted, there are likely to be many students at university with either undiagnosed disabilities or known disabilities who chose not to disclose. The capacity to access works in electronic form will also improve their learning experience. The benefits of information communication technologies (ICT's) and assistive technologies is well documented. Pina and Morton's 2014 systematic review of studies, the authors report positive experiences in courses where there are "(1) opportunities to access contents in multiple formats; and (2) use of media to enhance student control and self-pacing (as evidenced in studies focusing on the use of ICTs).⁵ This supports the comments above – students learn better when they have a choice of media, both print and electronic.

New Section 69C(b)

Universities submit that allowing copyright owners to inspect records in this clause discriminates against the print disabled and should be removed. While universities support the keeping of records consistent with Article 2(c) of the Treaty, clause 69C(b) of the Bill goes beyond the requirements of the Treaty in giving copyright owners the right to inspect such records. There is no requirement for libraries to keep such records for inspection by copyright owners under ss 51, 52 and 53 of the Copyright Act. Such an inspection of records relating to services only for a specific group of library users would be discriminatory.

New Section 69D

Universities support the publication of the names of authorised entities on the Ministry's website.

Section 226D(3) needs amendment

The Universities submit that s 226D(3) of the current Act needs to be amended to allow the exercise of the permitted acts under ss 69A and B by authorised entities and individuals with a print disability where works may be protected by TPMs. TPMs are sometimes put on digital books to stop it being passed on or accessed illegally, by publishers (and sometimes blind people's organisations themselves). Unfortunately, this padlock can also inadvertently block legitimate access by print disabled people, for instance those using screen-reading text-to-speech software. It should therefore be legal to circumvent (i.e. break) TPMs so that a person with a print disability can get access to books.

⁵ Pino, M & Mortari, L., (2014) The Inclusion of Students with Dyslexia in Higher Education: A Systematic Review Using Narrative Synthesis *Dyslexia*, 20 (4), 346-369 Retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4253321/>

Concluding Remarks

Universities support 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 are very concerned that in several areas the bill goes beyond the requirements of the Marrakesh Treaty in introducing additional requirements including the commercial availability test. For the reasons set out above, we believe 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.