

Copyright (Marrakesh Treaty Implementation) Amendment Bill

Government Bill

As reported from the Economic Development, Science and Innovation
Committee

Commentary

Recommendation

The Economic Development, Science and Innovation Committee has examined the Copyright (Marrakesh Treaty Implementation) Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

This bill seeks to amend the Copyright Act 1994 to allow New Zealand to accede to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled (the Marrakesh Treaty).

The Marrakesh Treaty is a multilateral treaty negotiated by the World Intellectual Property Organization (WIPO). The Commerce Committee of the 51st Parliament reported on its international treaty examination of the Marrakesh Treaty in July 2017.

The current section 69 of the Copyright Act provides an exception that enables bodies prescribed in the Copyright (General Matters) Regulations 1995 (known as “prescribed bodies”) to make or communicate accessible format copies of literary or dramatic works without the permission of the copyright owner. Accessible format copies are copies that have been modified so they are accessible to persons with a print disability. However, the section 69 exception does not provide for the import or export of those copies. Accession by New Zealand to the Marrakesh Treaty will allow those works to be imported from or exported to other countries which have acceded to the treaty (Marrakesh Treaty countries).

To give effect to the Marrakesh Treaty in New Zealand law, changes are required to the Copyright Act. The bill proposes:

- replacing the current concept of “prescribed body” with the new concept of “authorised entity”
- explicitly providing for the import and export of accessible format copies from and to authorised entities in other Marrakesh Treaty countries
- extending the definition of the works covered by the copyright exception to include artistic works
- clarifying that the definition of “print disability” includes individuals who have a visual impairment or a perceptual or reading disability which cannot be improved to give substantially similar function without such impairment
- requiring authorised entities to make and keep records of accessible format copies that they have made, distributed, imported, or exported, and to permit copyright owners to inspect these records.

To give effect to these changes, the bill as introduced proposes to replace section 69 of the Copyright Act with new sections 69 and 69A–69D.

Proposed new sections 69 and 69A–69D include provisions permitted, but not required, by the Marrakesh Treaty. One is the “commercial availability test” which has been carried over from the current section 69 of the Copyright Act. This would require that authorised entities could only make or import an accessible format copy of a work if:

- they have made reasonable efforts to obtain a commercially available format copy; and
- they have been unable to obtain an accessible format copy within a reasonable time and at an ordinary commercial price.

The bill would also insert new definitions into the interpretation section of the Copyright Act, particularly in relation to “accessible format copy”, “authorised entity”, and “print disability”.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss all minor or technical amendments.

Removal of the commercial availability test

We recommend removing the commercial availability test from the bill as introduced. We discuss this below.

Commercial availability test in the bill as introduced

As mentioned earlier, the commercial availability requirement in the Act was carried over in the bill as introduced.

In clause 6 of the bill, proposed new sections 69A(2)(a) and 69A(3)(a) would require an authorised entity to make reasonable efforts to obtain a commercially available copy before making or importing an accessible format copy.

Assessing the value of having a commercial availability test

Some submitters support the commercial availability test, as they see it as an important step to ensure the viability of commercially available accessible format copies. They argued that the test should be strengthened. We acknowledge that it is important to ensure the commercial viability of the creation and dissemination of works, including accessible format copies.

Other submitters expressed the view that the commercial availability test is an unnecessary formality. They believe it increases the delay between a request for an accessible format copy and the production of one. This is problematic for people who rely on accessible format copies of textbooks, for example to study, as they are disadvantaged by delays.

Additionally, there is concern that the test's requirements are not entirely clear, such as references to the copy being available "within a reasonable time" and at an "ordinary commercial price". There does not appear to be clear judicial precedent as to what "reasonable time" would mean in this context. This uncertainty about the requirements of the test could lead to further delays and increased production costs, and could deter the creation of accessible format copies.

We note that most other Marrakesh Treaty countries do not have a commercial availability test, including the United States of America and the European Union. Of the 55 Marrakesh Treaty countries as of April 2019, only four (Australia, Singapore, Canada, and Japan) require authorised entities to apply the commercial availability test.

We consider that, given the relatively high cost of producing accessible format copies, there is a strong incentive for authorised entities to seek out existing commercially available copies. They are likely to be the cheaper option for the foreseeable future.

Our recommendation

We are sympathetic to arguments both for and against the commercial availability test.

On balance, we consider that a formal requirement for a commercial availability test would disadvantage print-disabled people disproportionately to the benefit gained by copyright holders.

We believe authors' interests will be sufficiently covered if the commercial availability test requirement is removed because authorised entities and print-disabled people will be motivated to seek the lowest-cost copies. We also note that an authorised entity would still be required under new section 69A to take all reasonable steps to notify the copyright owner of its intention to make an accessible format copy. This means authorised entities and copyright holders will be incentivised to work together to ensure a successful market-driven approach to meeting demand, given the high cost of producing accessible format copies.

We recommend removing the commercial availability test from the bill. Specifically, we recommend amending clause 6 by deleting new sections 69A(2)(a) and 69A(3)(a).

Clarifying record-keeping obligations

Under clause 6 of the bill as introduced, new section 69C would require an authorised entity to make and keep a record of a work it has handled under new section 69A.

New section 69B(2) would allow certain individuals who are not an authorised entity to make or import into New Zealand an accessible format copy of a work. Under section 69B(2)(c), they could provide that accessible format copy to an authorised entity. However, the individual would not be required to keep a record of that work in the same way an authorised entity would if it had made or imported the accessible format copy.

We consider that authorised entities receiving those accessible format copies from individuals should be required to make and keep a copy of the work.

Therefore, for clarity, we recommend amending clause 6, new section 69C(1)(a), to explicitly state that authorised entities which receive accessible format copies from individuals under new section 69B(2)(c) would still be subject to the records requirements of new section 69C.

Clarifying references to exports and imports

Where there are references to the import or export of accessible format copies, we recommend clarifying whether this is to or from New Zealand. We propose amending clause 6, new sections 69A(3), 69A(4)(a), and 69B(2)(b) accordingly.

Reflecting technical changes to the Copyright Act since the introduction of this bill

Following the introduction of this bill, Part 1 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Amendment Act 2018 (CPATPPA Act) made amendments to the Copyright Act. Some of these amendments came into effect in December 2018.

We recommend amending the bill to reflect those changes by deleting clauses 5, 9, 10, 11, and 12.

We also recommend amending clause 13 to change the numbering in the new Part 3 of Schedule 1 to the Copyright Act. This would take into account other amendments to the Act which have not yet come into force.

Other policy matters considered

We considered several matters on which we are not recommending amendments, for various reasons. However, we note some of these matters below to indicate the wide-ranging discussions, for future reference.

Extension of the Marrakesh exception to other disabilities

The purpose of this bill is to accede to the Marrakesh Treaty. The treaty does not cover other disabilities, such as hearing impairment, so we do not consider changes to broaden the exception to be within the ambit of the current bill. However, we note

that assistance for other disabilities could be considered as part of the wider review of the Copyright Act that is currently in progress.

Definition of authorised entity

Some submitters expressed concern that the definition of “authorised entity” is too broad. We were advised that, in practice, only a small proportion of organisations that would qualify as authorised entities are likely to be interested in making accessible format copies.

Provisions for compliance and remedies

We note that the bill does not contain specific provisions to address situations where authorised entities breach the conditions of the section 69 exception. There are also no strict guidelines or procedures set out in regulations for authorised entities to follow before making accessible format copies.

We suggest that stakeholders consider developing voluntary guidelines, or a self-regulation regime for authorised entities. We understand that this could be done through the Accessible Formats Forum.

We also consider that breaches of the conditions of the section 69 exception by authorised entities should be dealt with through the general remedies for copyright infringement in Part 6 of the Copyright Act. These remedies include remedies for breaches of conditions attached to the other exceptions in Part 3 of the Act. We suggest that further consideration to infringements and remedies be given under the wider review of the Copyright Act that is currently in progress.

Central repository of accessible format copies

There is currently no central New Zealand database of accessible format copies. We note that the Accessible Formats Forum is seeking to create one. We encourage stakeholders to continue exploring collaborative solutions in this area.

Appendix

Committee process

The Copyright (Marrakesh Treaty Implementation) Amendment Bill was referred to the committee on 8 November 2018. The closing date for submissions was 10 February 2019. We received and considered 20 submissions from interested groups and individuals. We heard oral evidence from 9 submitters.

We received advice from the Ministry of Business, Innovation and Employment.

Committee membership

Jonathan Young (Chairperson)

Tamati Coffey

Andrew Falloon

Hon Paul Goldsmith

Gareth Hughes

Melissa Lee

Jo Luxton

Clayton Mitchell

Poto Williams

Lawrence Yule

Brett Hudson participated in some of our consideration.

**Copyright (Marrakesh Treaty Implementation)
Amendment Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Kris Faafoi

Copyright (Marrakesh Treaty Implementation) Amendment Bill

Government Bill

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15	Regulation 5 revoked (Prescribed bodies for purposes of section 69 of Act)	7
	Schedule	8
	New Part 2.3 of Schedule 1 inserted	

The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Copyright (Marrakesh Treaty Implementation) Amendment Act **2018**.
- 2 Commencement** 5
(1) This Act comes into force on a date appointed by the Governor-General by Order in Council.
(2) That date must be the date on which the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, done at Marrakesh on 27 June 2013, enters into force for New Zealand. 10
- 3 Principal Act**
This Act amends the Copyright Act 1994 (the **principal Act**).

- Part 1**
- Amendments to principal Act** 15
- 4 Section 2 amended (Interpretation)**
In section 2(1), insert in their appropriate alphabetical order:
accessible format copy means a copy of a published literary, dramatic, musical, or artistic work, or a part of the work, in an alternative manner or form that gives persons who have a print disability access to the work 20
authorised entity means—
(a) an entity of a type set out in **section 69(1)**; and

- (b) in relation to the import into and export from New Zealand of accessible format copies, includes an entity authorised or recognised by the government of the relevant Marrakesh Treaty country as an authorised entity for the purposes of the Treaty

charitable entity has the meaning given in section 4(1) of the Charities Act 2005 5

Marrakesh Treaty country means a Contracting Party to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, done at Marrakesh on 27 June 2013 10

print disability, in relation to a person,—

- (a) means an impairment that prevents the person from enjoying a printed copyright work to the same degree as a person who does not have that impairment; but
- (b) excludes an impairment of visual function that can be improved, by the use of corrective lenses, to a level that is normally acceptable for reading without a special level or kind of light 15

5 ~~New section 12A inserted (Transitional, savings, and related provisions)~~

After section 12, insert:

~~12A Transitional, savings, and related provisions~~ 20

~~The transitional, savings, and related provisions set out in Schedule 1 have effect according to their terms.~~

6 Section 69 replaced (Provision of Braille copies of literary or dramatic works)

Replace section 69 with: 25

69 Authorised entity types

(1) An entity that is 1 or more of the following may undertake the activities set out in **section 69A**:

- (a) an educational establishment;
- (b) an educational resource supplier: 30
- (c) a prescribed library within the meaning given in section 50(1);
- (d) a charitable entity that has a purpose consistent with making accessible format copies available to persons who have a print disability.

(2) Before beginning activities under **section 69A** for the first time, an authorised entity must give notice to the Ministry that it intends to do so. 35

69A Accessible format copy activities by authorised entity

- (1) An authorised entity does not infringe copyright in the relevant work if the entity acts in accordance with this section.
- (2) An authorised entity may make an accessible format copy if the entity—
- (a) ~~has made reasonable efforts to obtain an accessible format copy of the work in the manner or form needed by the persons to whom it is to be provided, within a reasonable time and at an ordinary commercial price, but has been unable to do so; and~~ 5
 - (b) has taken all reasonable steps to notify the owner of the copyright in the work of its intention to make an accessible format copy; and 10
 - (c) is making the copy to provide it only to persons who have a print disability, persons acting on their behalf, or other authorised entities; and
 - (d) ensures that the copy respects the integrity of the original work, as far as is reasonably possible and taking into account changes needed to make the work accessible in the alternative format. 15
- (3) An authorised entity (A) may import into New Zealand an accessible format copy from an authorised entity (B) in another Marrakesh Treaty country if A—
- (a) ~~has made reasonable efforts to obtain an accessible format copy of the work in the manner or form needed by the persons to whom it is to be provided, within a reasonable time and at an ordinary commercial price, but has been unable to do so; and~~ 20
 - (b) has taken all reasonable steps to notify the owner of the copyright in the work of its intention to make an accessible format copy; and
 - (c) is importing the copy to provide it only to persons who have a print disability, persons acting on their behalf, or other authorised entities; and 25
 - (d) has taken all reasonable steps to ensure that the copy respects the integrity of the original work, as far as is reasonably possible and taking into account changes needed to make the work accessible in the alternative format.
- (4) An authorised entity may do 1 or more of the following: 30
- (a) export from New Zealand an accessible format copy to an authorised entity, or a person who has a print disability, in another Marrakesh Treaty country:
 - (b) ~~reproduce copies made or imported under this section or provided to the entity under **section 69B(2)(c)**:~~ 35
 - (b) reproduce copies—
 - (i) made or imported into New Zealand under this section; or
 - (ii) provided to the entity under **section 69B(2)(c)**:

- (c) provide, by communication or otherwise, accessible format copies made or imported under this section or provided to the entity under **section 69B(2)(c)** to—
- (i) persons in New Zealand who have a print disability or persons acting on their behalf; and 5
 - (ii) other authorised entities in New Zealand.
- 69B Accessible format copy activities by person who is not authorised entity**
- (1) A person who is not an authorised entity does not infringe copyright in the relevant work if he or she—
- (a) has a print disability or is acting on behalf of someone who has a print disability; and 10
 - (b) intends the accessible format copy to be only for the use of the person who has a print disability; and
 - (c) acts in accordance with **subsection (2)**.
- (2) The person may do 1 or more of the following: 15
- (a) make an accessible format copy that respects the integrity of the original work, as far as is reasonably possible and taking into account changes needed to make the work accessible in the alternative format:
 - (b) import into New Zealand an accessible format copy from an authorised entity in another Marrakesh Treaty country: 20
 - (c) provide the accessible format copy that he or she made or imported under **paragraph (a) or (b)** to an authorised entity.
- 69C Duties of authorised entity in regard to records and fees**
- (1) An authorised entity must—
- (a) ~~make and keep a record of a work of which it has made, provided, reproduced, imported, or exported an accessible format copy under **section 69A**; and~~ 25
 - (a) make and keep a record of a work of which it has—
 - (i) made, provided, reproduced, imported, or exported an accessible format copy under **section 69A**; or 30
 - (ii) received an accessible format copy under **section 69B(2)(c)**; and
 - (b) permit the copyright owner to inspect the record—
 - (i) during normal office hours; or
 - (ii) at any reasonable time, if the entity does not have office hours. 35
- (2) An authorised entity may charge a fee for providing an accessible format copy to a person, but the fee must not be higher than the sum of the cost to the entity

	of making, providing, reproducing, importing, or exporting the copy (as applicable) and a reasonable contribution to the general expenses of the entity.	
69D	Ministry must publish list of authorised entities on Internet site The Ministry must publish on its Internet site a list of authorised entities that have given notice under section 69(2) .	5
7	Section 93 amended (Subsequent dealings with copies made under this Part) Replace section 93(2)(n) with: (n) sections 69A and 69B (which relate to accessible format copies):	
8	Section 234 amended (Regulations) Replace section 234(d) with: (d) prescribing bodies for the purposes of section 72, 89, 90, 185, 190, or 191:	10
9	Section 235 and cross-heading repealed Repeal section 235 and the cross-heading above section 235 .	15
10	New cross-heading above section 236 inserted Above section 236 , insert: <i>Consequential amendments and repeals</i>	
11	Schedule 1 heading replaced Replace the Schedule 1 heading with: Schedule 1 Transitional, savings, and related provisions s 12A	20
12	Schedule 1 amended After the heading to Schedule 1, insert: Part 1 Provisions relating to this Act as enacted	25
13	New Part 2 3 of Schedule 1 inserted In Schedule 1, after Part 4 2 , insert the Part 2 3 set out in the Schedule of this Act.	30

Part 2
Consequential amendment to Copyright (General Matters)
Regulations 1995

- 14 Consequential amendment to Copyright (General Matters) Regulations 1995** 5
This Part amends the Copyright (General Matters) Regulations 1995.
- 15 Regulation 5 revoked (Prescribed bodies for purposes of section 69 of Act)**
Revoke regulation 5.

Schedule
New Part ~~2~~ 3 of Schedule 1 inserted

s 13

Part ~~2~~ 3
**Provisions relating to Copyright (Marrakesh Treaty
Implementation) Amendment Act 2018**

4451 Interpretation

In this Part,—

commencement date means the date on which this Part comes into force**former section 69** means section 69 as in force immediately before the commencement date 10**prescribed body** means a body declared in regulation 5 to be a prescribed body for the purposes of former section 69**regulation 5** means regulation 5 of the Copyright (General Matters) Regulations 1995 as in force immediately before the commencement date. 15**4552 Braille or otherwise modified copies made under former section 69 treated as if made under Act as amended**A copy or an adaptation made or communicated by a prescribed body before the commencement date in compliance with the conditions of the former section 69 is to be treated on and after the commencement date as an accessible format copy that was made or provided in compliance with **sections 69A and 69B.** 20**Legislative history**1 November 2018
8 November 2018Introduction (Bill 109–1)
First reading and referral to Economic Development, Science
and Innovation Committee