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# A Submission to the Australian Law Reform Commission on Copyright and the Digital Economy: Disability Rights

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A SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

## **COPYRIGHT AND THE DIGITAL ECONOMY: DISABILITY RIGHTS**



*Debate over the WIPO Copyright Treaty for the Blind - Rimmer*

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## BIOGRAPHY

I am an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change. I am an associate professor at the ANU College of Law, and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). I hold a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University. I received a PhD in law from the University of New South Wales for my dissertation on *The Pirate Bazaar: The Social Life of Copyright Law*. I am a member of the ANU Climate Change Institute. I have published widely on copyright law and information technology, patent law and biotechnology, access to medicines, clean technologies, and traditional knowledge. My work is archived at *SSRN Abstracts* and *Bepress Selected Works*.

I am the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US). I explore the significance of key judicial rulings and consider legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons. I have also participated in a number of policy debates over Film Directors' copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement* 2010, and the *Trans-Pacific Partnership*.

I am also the author of *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical contribution to the controversial public debate over the commercialisation of biological inventions. I edited the thematic issue of *Law in Context*, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). I was also a chief investigator in an Australian Research Council Discovery Project, 'Gene Patents In Australia: Options For Reform' (2003-2005), and an Australian Research Council Linkage Grant, 'The Protection of Botanical Inventions (2003). I

am currently a chief investigator in an Australian Research Council Discovery Project, 'Promoting Plant Innovation in Australia' (2009-2011). I have participated in inquiries into plant breeders' rights, gene patents, and access to genetic resources.

I am a co-editor of a collection on access to medicines entitled *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010) with Professor Kim Rubenstein and Professor Thomas Pogge. The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (RED) Campaign, the Gates Foundation, and the Clinton Foundation. I am also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012), with Alison McLennan.

I am a researcher and commentator on the topic of intellectual property, public health, and tobacco control. I have undertaken research on trade mark law and the plain packaging of tobacco products, and given evidence to an Australian parliamentary inquiry on the topic.

I am the author of a monograph, *Intellectual Property and Climate Change: Inventing Clean Technologies* (Edward Elgar, September 2011). This book charts the patent landscapes and legal conflicts emerging in a range of fields of innovation – including renewable forms of energy, such as solar power, wind power, and geothermal energy; as well as biofuels, green chemistry, green vehicles, energy efficiency, and smart grids. As well as reviewing key international treaties, this book provides a detailed analysis of current trends in patent policy and administration in key nation states, and offers clear recommendations for law reform. It considers such options as technology transfer, compulsory licensing, public sector licensing, and patent pools; and analyses the development of Climate Innovation Centres, the Eco-Patent Commons, and environmental prizes, such as the L-Prize, the H-Prize, and the X-Prizes. I am currently working on a manuscript, looking at green branding, trade mark law, and environmental activism.

I also have a research interest in intellectual property and traditional knowledge. I have written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics

## DISCUSSION

The Terms of Reference for the Australian Law Reform Commission for the inquiry on *Copyright and the Digital Economy* indicates that it should ‘not duplicate work being undertaken on... increased access to copyright works for persons with a print disability’. This instruction is perplexing on a number of levels. First, it should be noted that the *Disability Discrimination Act* 1992 (Cth) takes a broad and inclusive definition of ‘disability’. Drawing a distinction between ‘print disability’ and other forms of disability is somewhat arbitrary. Access to copyright works is a significant issue both for persons with print disabilities, and for persons with other kinds of disabilities. Second, the Terms of Reference presuppose that there is other work in the Australian Government going on in relation to copyright law and print disability. I am not aware of any working going on at present. Perhaps, the instructions presuppose that there would be an outcome from the international discussions in respect of a *WIPO Copyright Treaty for the Blind*. If so, it is worth noting that such negotiations have stalled at present. When I watched the negotiations in Geneva, a number of countries were opposing a binding *WIPO Copyright Treaty for the Blind*. Third, in any case, I am of the view that Australia’s copyright laws engage in direct and indirect disability discrimination. There is an urgent need for revision. The Australian Law Reform Commission could be of assistance in modernising Australia’s copyright laws to provide access to copyright materials for those with disabilities.

Article 30 (3) of the *United Nations Convention on the Rights of Persons with Disabilities* 2006 provides that ‘States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials’.

Australia's current laws in respect of copyright law and disability rights are a disgrace. The messy provisions are summarized here: [http://humanrights.gov.au/disability\\_rights/education/copyfaq.htm](http://humanrights.gov.au/disability_rights/education/copyfaq.htm) The copyright exceptions are technology-specific; copyright subject-matter specific; disability-specific; and sometimes limited to institutions. Section 47A deals with sound broadcasts by holders of print disability radio licences. Sections 135ZN, 135ZP and 135ZQ deal with reproduction and communication of works by institutions assisting persons with a print disability. Sections 135ZR, 135S and 135ZT deal with reproduction and communication of works by institutions assisting persons with an intellectual disability. Section 200AA deals with the use of broadcasts by institutions assisting persons with an intellectual disability. Section 200AB (4) provides a flexible dealing defence – which covers a use where: '(a) the use is made by: (i) a person with a disability that causes difficulty in reading, viewing or hearing the work or other subject-matter in a particular form; or (ii) someone else; (b) the use is made for the purpose of the person obtaining a reproduction or copy of the work or other subject-matter in another form, or with a feature, that reduces the difficulty; (c) the use is not made partly for the purpose of obtaining a commercial advantage or profit. This section does not apply if under another provision the use does not, or might not, infringe copyright'. However, such a defence is subject to the interpretation of the three-step test under international copyright law. It would appear a complicated exercise for those with disabilities to have to grappled with international copyright jurisprudence before they could access a copyright work under section 200AB.

Such provisions could be replaced by a general copyright exception for those with disabilities to provide access to copyright materials.

Lamentably, Australia's copyright regime fails to adequately address the problem of disability discrimination, particularly in respect of copyright works in a digital form. In a classic article, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare', Nicolas Suzor, Paul Harpur and Dilan Thampapillai comment:

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.<sup>1</sup>

The authors note: '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.'<sup>2</sup> They conclude: 'If publishers continue to refuse to provide blind people with access to their works, then the Australian government should consider the

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<sup>1</sup> Nicolas Suzor, Paul Harpur and Dilan Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare', (2008) 13 (1) *Media and Arts Law Review* 1-16 [http://nic.suzor.net/\\_media/publications/2008-digital\\_copyright\\_and\\_disability\\_discrimination\\_2008\\_13\\_1\\_malr1.pdf](http://nic.suzor.net/_media/publications/2008-digital_copyright_and_disability_discrimination_2008_13_1_malr1.pdf)

<sup>2</sup> Ibid.

introduction of a broad exception from copyright liability for any person providing access to published material to those with a print disability'.<sup>3</sup> The authors comment that: 'This would allow commercial business models to emerge and allow blind people to access published materials on a competitive basis.'<sup>4</sup>

In its submission to the IT Pricing inquiry, the Australian Communications Consumer Action Network commented upon disability discrimination in respect of IT pricing:

There is a notable difference between prices in Australia and other markets for hardware and software designed for people with disability. For example, the Nokia LPS-5 Wireless Loopset, a mobile phone attachment for people with a hearing impairment, sells for US \$19921 in the USA but AU \$29922 in Australia. Another example is the Wireless DECT Telephone Headset Jabra PRO 9450 which allows people with Complex Communication Needs (CCN) to communicate using a mobile phone. This product sells for US \$279.9523 in the USA but AU \$43524 in Australia. People with disability are acutely aware that they are paying more for some hardware and software products compared to people in the US, UK or other similar markets.<sup>5</sup>

So, in addition to problems with access to copyright material, there have also been problems in respect of pricing for copyright material for those with disabilities.

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Australian Communications Consumer Action Network, *Submission on Inquiry into IT pricing, the House Standing Committee on Infrastructure and Communications*, August 2012, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=ic/itpricing/subs/sub074.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/subs/sub074.pdf)



The Australian Federal Government has, though, shown an interest more generally in disability rights. The Cabinet Minister Bill Shorten has emphasized that disability rights are an important matter of social justice and economic justice:

The long boom of the last 20 years cruelly passed-by people with a disability and their carers. Right now, more than 30 percent of households with a person with disability live on less than half the median income – but they pay the highest prices for the basics. Economists believe the impact of disability amounts to around one third of household income. In other words, having a disability makes and keeps people poor. In Australia in 2011, what does it mean to have an intellectual disability or a serious episodic mental illness or mobility impairment? Practically speaking, it means:

- ▷ you are less likely to finish secondary education,
- ▷ you are less likely to enjoy tertiary education,
- ▷ you are more likely to be unemployed,
- ▷ you are more likely to have a lower income,
- ▷ you are more likely to be in public housing,
- ▷ and you are more likely to be in jail.

If I was to ring-fence the great cities of Australia – populations in their millions – , and tell every parent in these ghettos that their child was likely to have a worse life-outcome in each of those categories, there would be outrage. There would be upheaval. Now, Australia is a great country. We have been the land of the long economic miracle – ever since the introduction of the Hawke and Keating governments' hard-fought national and competition reforms. How is it, then, that we can live with such inequity? In my view, we cannot. And so, we must work

together – with discipline, perseverance and unity – to extend the Australian notion of a fair go to all our citizens.<sup>6</sup>

In the context of the Australian Law Reform Commission’s inquiry, there is a need to ensure that those with disabilities get a ‘fair go’ in the digital economy. There is a need to ensure that those with disabilities are not excluded from participation in the digital economy, because of direct or indirect discrimination under copyright law.

In 2010, Stevie Wonder addressed the World Intellectual Property Organization on the topic of copyright law and disability rights.<sup>7</sup> He contended:

We must declare a state of emergency, and end the information deprivation that continues to keep the visually impaired in the dark. We must spread the word that the untapped genius of the 300 plus million who have a visual disability are in need of our love and action, today; not tomorrow, but today. While I know that it is critical not to act to the detriment of the authors who labor to create the great works that enlighten and nourish our minds, hearts and souls, we must develop a protocol that allows the easy import and export of copyright materials so that people with print disabilities can join the mainstream of the literate world. There are many proposals on the table that will create a safe clearinghouse for the exchange and translation of books, please work towards a consensus. I beg you, now is the time to love. And your love is

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<sup>6</sup> Bill Shorten, *National Disability and Carer Congress*, 2 May 2011, [http://everyaustraliancounts.com.au/bill\\_shortens\\_speech\\_national\\_disability\\_and\\_carer\\_congress/](http://everyaustraliancounts.com.au/bill_shortens_speech_national_disability_and_carer_congress/)

<sup>7</sup> ‘Stevie Wonder calls for International Action to Enhance Accessibility for Visually Impaired Persons’, Geneva, September 20, 2010 PR/2010/661

[http://www.wipo.int/export/sites/www/pressroom/en/articles/2010/doc/stevie\\_wonder\\_speech\\_10\\_09\\_2010.pdf](http://www.wipo.int/export/sites/www/pressroom/en/articles/2010/doc/stevie_wonder_speech_10_09_2010.pdf)

the key to unlock the blinders that block the accessibility of translating books into a readable format for people with print disabilities.<sup>8</sup>

He asked the delegates to ‘join my declaration of freedom for the many print disabled and visually impaired by giving them the tools to think their way out of poverty and the darkness that is created when the mind does not have access to something as simple, but as powerful as a book’.<sup>9</sup>

In June 2012, the disability commissioner Graeme Innes encouraged the Australian Government to address this issue.<sup>10</sup> He observed that only 5% of all books produced in Australia are published in accessible formats such as large print, audio or braille, while in developing countries it is just 1%. He commented: ‘People with a print disability throughout the world are currently experiencing a ‘book famine’, yet the Australian government has failed to take action that could change the situation.’ He added: ‘Australia should change its position and take the lead in ending this ‘book famine’.<sup>11</sup> Graeme Innes urged the Australian government not to fund the publishers; Trusted Intermediary Global Accessible Resources project, or TIGAR. He observed that, while publishers have had the chance for more than 20 years to voluntarily end the book famine, they had chosen not to do so. Innes commented: ‘I support the call on the Australian government by Maryanne Diamond, President of the World Blind Union, to publicly support and actively pursue a treaty in this area.’<sup>12</sup> He observed:

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Graeme Innes, ‘Australia can help end world book famine’, Australian Human Rights Commission, 28 June 2012, [http://www.hreoc.gov.au/about/media/news/2012/62\\_12.html](http://www.hreoc.gov.au/about/media/news/2012/62_12.html)

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

‘Australia could lead the change to international law in this area and, at little cost to us, provide the opportunity to read to millions more people with print disability throughout the world.’<sup>13</sup>

Unfortunately, the July discussions at the World Intellectual Property Organization regarding a treaty on copyright law and disability rights was frustrated by some nation states, particularly the United States, and countries within the European Union. Australian disability activists and advocates attended the hearing. For the *Huffington Post*, Zach Carter reported on the event:

Trade negotiators are currently wrangling over a treaty designed to provide access to reading materials in formats that are accessible to blind people, including Braille and audiobook platforms. Works used by the visually impaired are far more costly to create and distribute than traditional print publications, and have a much smaller market. Many nations have specific copyright exceptions protecting such works, exempting their producers from having to pay high royalties to publishers. But poor countries still have very limited resources to produce works for the blind, and thus have extremely limited libraries. An international treaty would allow wealthier nations, like the United States, to share works with other countries. By focusing on intellectual property issues, rather than government subsidies, the treaty would not cost governments any money.

The U.S. Patent and Trademark Office, which is leading negotiations for the Obama administration, declined to comment for this article. The administration has resisted efforts throughout negotiations to ensure that the final deal is an enforceable treaty, pushing instead to make any agreement an informal set of policy recommendations. Advocates for the blind warn that only an enforceable treaty would effectively expand access to reading materials, noting that nations have long been able to pass legislation to permit the sharing of blind-accessible

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<sup>13</sup>

Ibid.

works across borders, but have decided not to. There is no legislation pending in the U.S. Congress to establish such a program.<sup>14</sup>

Given such intransigence and procrastination, it seems unlikely that there will be a binding, comprehensive treaty on copyright law and disability rights under the auspices of the World Intellectual Property Organization.

The proposed Treaty on Access to Knowledge provided some thoughtful text on copyright law and disability rights:

***Article 3-3 - The Rights of Persons with Disabilities***

(a) Members recognize the importance of accessibility in the process of the equalization of opportunities in all spheres of society, and the right of equitable access to knowledge irrespective of disability. This requires:

1. A right to access knowledge through a diversity of formats to meet the individual's specific needs,
2. A right to transcend national frontiers,
3. A functional definition of accessibility, and
4. A functional definition of disability.

(b) Libraries, education institutions, or other institutions or organizations duly designated shall have the authority to convert material from one format to another to make it accessible to persons with disabilities.

(c) The dissemination of works in formats that enable access by disabled persons shall be permitted to any country that duly authorizes the non-voluntary use of such works.

(d) Inclusive design principles to promote accessibility shall apply to government web pages and other public documents.

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<sup>14</sup> Zach Carter, 'Obama Administration Wants Treaty for the Blind Delayed, Sources Say', *The Huffington Post*, 24 July 2012, [http://www.huffingtonpost.com/2012/07/24/treaty-for-the-blind-obama\\_n\\_1699678.html](http://www.huffingtonpost.com/2012/07/24/treaty-for-the-blind-obama_n_1699678.html)

(e) National legislation to protect copyrighted or non-copyrighted works using digital rights management or technological protection measures shall provide for appropriate exceptions that are necessary to ensure access by persons with disabilities.

This proposal provides a useful blueprint for law reform in respect of copyright law and disability rights.

## RECOMMENDATIONS

### Recommendation 1

The Australian Government should take legislative action to implement Article 30 (3) of the *United Nations Convention on the Rights of Persons with Disabilities* 2006, which provides that ‘States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials’. This will involve revising the *Copyright Act 1968* (Cth) – and addressing any direct or indirect disability discrimination.

### Recommendation 2

The Australian Law Reform Commission should consider revising the *Copyright Act 1968* (Cth) to remove all direct and indirect discriminatory barriers to access by persons with disabilities to cultural materials.

### Recommendation 3

The Australian Law Reform Commission should recommend that the *Copyright Act 1968* (Cth) be revised to take a broad and inclusive definition of ‘disability’ based on the *Disability Discrimination Act 1992* (Cth).

### Recommendation 4

The Australian Law Reform Commission should replace existing copyright exceptions for those disabilities – such as section 200AB - with a broad,

technology-neutral and flexible defence under the *Copyright Act 1968* (Cth) to provide access to copyright materials for those with disabilities.

#### **Recommendation 5**

The Australian Law Reform Commission should also provide that such a defence is available to carers, assistants, and institutions involved with helping those with disabilities – such as libraries, educational institutions, and disability institutions.

#### **Recommendation 6**

The Australian Law Reform Commission should take notice of the recent ruling in *The Authors Guild Inc. v. HathiTrust* 2012 WL 4808939 SDNY (2012). The HathiTrust was able to raise the defence of fair use in the context of providing access to copyright materials for those with disabilities. The judge held: ‘The totality of the fair-use factors suggest that copyright law’s “goal of promoting the Progress of Science ... would be better served by allowing the use than by preventing it.” *Bill Graham*, 448 F.3d at 608. The enhanced search capabilities that reveal no in-copyright material, the protection of Defendants’ fragile books, and, perhaps most importantly, the unprecedented ability of print-disabled individuals to have an equal opportunity to compete with their sighted peers in the ways imagined by the ADA protect the copies made by Defendants as fair use to the extent that Plaintiffs have established a *prima facie* case of infringement’.



**Recommendation 7**

**The Australian Law Reform Commission should recommend that copyright exceptions for those with disabilities – and their carers, and assistants – should not be undermined by contract law or technological protection measures.**

**Recommendation 8**

**Statutory licensing is not a good means of providing access to cultural materials for those with disabilities.**

**Recommendation 9**

**As part of the Australian National Disability Strategy 2010-2020, the Australian Government should promote the digitisation of copyright works into accessible formats for those with disabilities.**

**Recommendation 10**

**The Australian Government should also play a role in the dissemination of such digitised copyright works both locally and internationally.**

**Recommendation 11**

**The Australian Government should also play a leadership role in promoting international agreements on copyright law and disability rights – including the proposed *WIPO Copyright Treaty of the Blind*. There is a need to facilitate the cross-border exchange of copyright works in accessible formats for those with disabilities.**

## **Recommendation 12**

**Australia's approach to copyright law reform should be informed by larger considerations of human rights. In respect of disability rights, there is a need to take into account the key principles of the *United Nations Convention on the Rights of Persons with Disabilities* 2006, including:**

- \* respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons**
- \* non-discrimination**
- \* full and effective participation and inclusion in society respect for difference and acceptance of persons with disabilities as part of human diversity and humanity**
- \* equality of opportunity**
- \* accessibility**
- \* equality between men and women**
- \* respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.**