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Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Persons with Other Disabilities

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I submit this statement on behalf of the National Federation of the Blind, the largest organization of blind people in the United States, with members in every state, the District of Columbia, and Puerto Rico. The National Federation of the Blind was established in 1940 and currently has over 50,000 members with chapters in most cities in the United States.

Access to information is among the most important needs that blind people have. However, many times the intellectual property that creates education, or informs, or entertains is not available to the blind. In the 1990s, the National Federation of the Blind brought a number of organizations together to discuss copyright issues facing blind people. Copyright permissions, at that time in the United States, were required to transcribe a work from print to another format. Many leaders of organizations of the blind felt that a copyright exception would make it possible to produce works in alternate formats for which copyright permissions could not be obtained, or get works into Braille or recorded form much faster than had been true in the past. A proposed change to the Copyright Act became law in 1997, which authorized nonprofit organizations or government entities to produce copyrighted works in alternate formats from the ones offered by publishers if they were intended to be used by the blind. The National Library Service for the Blind and Physically Handicapped of the Library of Congress and its more than 800,000 blind and physically handicapped patrons are the primary beneficiaries of this change to the Copyright Act, but a number of private nonprofit organizations also may make specialized books for the blind more readily than in former times. The program operated by the Library of Congress was authorized by an act of Congress adopted in 1931. Over the period of years that this program has been in operation in the neighborhood of 450,000 different book titles have been recorded, and in the neighborhood of 100,000 other book titles have been produced in Braille.

Only a small fraction of the books that are published ever become available to the blind through the efforts of these programs. However, the change in the Copyright Act has speeded the process of making books available to the blind and has caused some books to be transcribed that would never have been produced for the blind. In the past, programs with an interest in making material available to the blind were required to obtain permission from the publisher or the owner of the copyright to do so. Sometimes the permission was withheld either because the owner of the copyright feared that the book would be transmitted to somebody without authorization to possess it, or because the owner of the copyright could not be found. In unusual cases the author of a work would ask for assurance of the good moral character of the intended recipients before granting permission to transcribe a book.

In the United States it is estimated that there are 1.3 million blind people. Of these it is estimated that approximately 60,000 are attending elementary or secondary schools. Of this number it is estimated that 9 to 10 percent read Braille. The remaining people get the information they seek by listening to recorded material or by reading enlarged print. Recorded material is prepared by the Library of Congress and by a number of nonprofit organizations, with the Library of Congress producing the most substantial part of the literature. Probably the largest quantity of educational material is created by Recording for the Blind and Dyslexic (RFB&D). Many of the separate titles offered by this organization are different editions of the same book. Consequently the number of separate titles sometimes seems greater than usage would suggest, inasmuch as the most recent edition is generally the only one that gets a lot of use. Estimates put this collection of titles well under that of the Library of Congress.

Most books for blind people in the United States come from the Library of Congress program, which concentrates on literary and popular fiction and nonfiction material; RFB&D, which concentrates on requested educational or professional titles; and other programs that make recorded material available to the general public, such as bookstores that have recorded popular fiction.

Another emerging method for the blind to obtain access to books is through online sites that offer plain text versions of books scanned by volunteers. Two of the best known are Bookshare and project Gutenberg. Bookshare is dedicated to the blind. In the beginning it collected scanned books from college students who had been required to scan texts in order to gain access to them. The quality of these books was not completely reliable. However, many other students felt that a scanned text with errors was preferable to no text at all. Bookshare has expanded collection methods to texts provided by some publishers.

The United States has more books produced for the blind than any other country in the world. However, works of interest to the blind of the United States are published in other countries, and getting them into our country would be useful. Sometimes titles are published in other countries that could be obtained for use in the United States instead of requiring expenditure of money or talent in the U.S. to make copies here. Many of the books in question are of such limited interest that the effort to produce them twice has the practical result of having them be unobtainable for some who would like to read them. Recently, a student reported that getting a transcribed copy of a mathematics text cost him twenty-five hundred dollars. If this text had been transcribed elsewhere, obtaining a copy of the book would have been much less costly.

The blindness market is so small that it is sometimes referred to as an orphan market. It takes a lot of money to make these books. If they must be made more than once, the cost prohibits blind people from getting them. Furthermore, some countries concentrate on subjects that are not a high priority in the United States. French books are hard to find in this country in Braille, and not many can be obtained in recorded form.

Emerging technologies hold much promise for producing material in a way that will permit the blind to be a part of a much larger market. However, until these technologies have been harnessed it would be most useful for the blind to have access to the books that are being produced throughout the world to assist in getting knowledge into the hands and minds of blind people who have been unable to get at the books.

When the National Federation of the Blind conducted the Louis Braille Bicentennial Silver Dollar Coin Launch in March of this year, part of the public ceremony was a presentation by a seven-year-old who read Braille for the assembled gathering. He read as a first grader would, slowly and with some hesitation. Some of the words in the prepared text were pretty big for him. But he read. He was training his mind. The number of books now available for this small boy is severely limited. A worldwide copyright change to permit sharing of books would not solve all the problems of availability of reading matter for this first grader, but it would help.

Although "recorded books" and Brailled volumes continue to play a role, electronic texts (preferably encoded in standard formats such as DAISY) represent the emerging "gold standard." Because most new text production passes through a digital mark-up stage, e-texts suitable for use by the blind (and others) are relatively inexpensive to produce. Where production of an e-text requires scanning a print volume, the costs are higher; but if an e-text produced in this manner can be shared within the print-disabled community, those costs are potentially worthwhile.

Currently, e-texts also are unmatched in versatility. Digital text files can be rendered by various hardware and software technologies that are increasingly available to people who are blind. Specifically, e-texts can be used to generate automated text-to-speech on computers equipped with "screen reader" programs, as well as on a variety of devices, some of which also can produce refreshable Braille code. These e-text alternatives can, in turn, be customized for the individual user, who can choose the speed of playback, navigate within the text, insert markers, etc. Of course, many of the same features that make e-texts attractive to print-disabled users also contribute to their potential mainstream appeal.

The National Federation of the Blind has been striving, and will continue to strive, to find ways to make e-texts of wanted books and other materials widely available to our community and others through partnership with the private sector. In effect, there are two ways in which this might come about. One is through special arrangements that would make e-texts available to certain print-disabled users on terms different from (and more favorable than) those on which they can be obtained by mainstream consumers. The other would involve measures to assure that generally available e-texts also are accessible to people with print disabilities. Our preferred approach is, in effect, a "two-pronged" one, promoting accessibility by means of e-texts so that blind people enjoy functionally the same opportunities to read as do sighted individuals. Under such a solution, blind students and library patrons would have the same ready access to e-texts that their sighted peers have to physical ones, on effectively the same terms. At the same time, blind consumers would be in a position to purchase the same wide range of e-texts available in the general market place, at the same price. Taken together, these two prongs are designed to further a policy position that might be termed "accessibility without discrimination."

Unfortunately, our efforts to date to bring this about through cooperation with publishers and other text rights holders have not been successful. In discussions, rights holders have expressed concerns about the "leakage" of material made available to the blind into the general market, where the material might compete with other products. More to the point, rights holders do not regard the blind (and other people with print disabilities) as potentially significant markets, and are therefore unwilling to re-imagine their general distribution practices and business models to promote accessibility. Many publishers do make limited voluntary donations of recorded books (as distinct from e-books) to special services such as RFB&D). Welcome as these contributions are, they are no substitute for efforts to promote accessibility as a general proposition.

The National Library Service for the Blind and Physically Handicapped of the Library of Congress makes 2,000 of the approximately 200,000 books published in the United States available to the blind. This means that 99 percent of the published books are not available in an accessible format through the National Library Service.

Therefore, the National Federation of the Blind also has assessed the legal environment for text accessibility to determine what initiatives print-disabled communities and related institutions could take to improve access to e-texts even in the absence of direct private sector cooperation. An obvious starting point is 17 U.S.C. Sec. 121 (the "Chafee Amendment" that took effect in 1997). Several features of the statutory language raise questions about whether it can be extended to the production of e-texts to meet general accessibility needs. One, of course, is the definition of a text in a "specialized format," which Sec. 121(d) (4) states is "exclusively for use by blind or other persons with disabilities." Formatting standards designed with accessibility for people with print disabilities in mind (such as DAISY or EPUB) are, of course, not useful just for this community. In fact, they are "universal" designs, which could potentially be equally useful for the mainstream population. The National Federation of the Blind strongly believes that, correctly interpreted, the Chafee Amendment covers e-texts, but acknowledges that authoritative support for this interpretation would be welcome.

Likewise, Sec. 121 permits production and distribution of texts in specialized formats only by an "authorized entity," defined as a "nonprofit organization or government agency that has a primary mission" to promote accessibility. The crux here is the phrase "primary mission." Publishers and others have taken the position that only specialized agencies can qualify under the Chafee Amendment, while the National Federation of the Blind and others are convinced that the proper interpretation is one under which (for example) the Disability Services Office of a university, or the accessibility service of a public library system, would be eligible as well. Again, support for that reading of the provision would be welcome.

In passing, I also should note another limitation of the Chafee Amendment. While the provisions on qualifying for eligibility to receive services under Sec. 121 (which are linked to other legislation) are not particularly onerous for the blind, compliance with them has proven far more difficult and costly for members of other print-disabled communities (the learning disabled, for example) to qualify.

Without doubt, the prevailing conceptual model of text accessibility at the time Sec. 121 was adopted involved the production of unique, individual, physically accessible copies (in Braille or recorded book format), which were designed to be consumed by individual users; each request from such a user typically would trigger the making of another such copy. Obviously, this model is a poor fit for e-texts, which

(once they have been generated) can be widely shared at relatively low cost. In other words, if one “authorized entity” were to produce an e-text for a constituent, it would be effective and efficient to allow that digital file to be saved for the use of future patrons and even shared with other service providers. The National Federation of the Blind notes that the literal language of the Section appears to authorize such practices, since it authorizes “reproduction and distribution” without apparent limitation. Again, authoritative confirmation of this understanding would help to enable wider use of the Sec. 121 provisions.

In part because of the ambiguities surrounding the interpretation of the Chaffee Amendment, The National Federation of the Blind is interested in exploring the application of the “fair use” doctrine of copyright law to the provision of accessible texts, especially in e-text formats. To begin, I should note that the relationship between Sec. 107 and Sec. 121 is accretive: specific provisions for accessibility included in the latter cannot limit or constrain future interpretation of the former. Fair use, after all, is designed to be a dynamic and responsive doctrine, capable of adapting to changes in culture, technology, and economic ordering.

The legislative history of the Copyright Act of 1976 contains language that confirms the relationship between fair use and accessibility. Without indicating that the example would in any way exhaust the scope of the doctrine’s applicability, the House Report states that a clear example of fair use would be “the making of a single [Braille] copy or phonorecord by an individual as a free service for a blind person...” And in its 1984 Sony decision, the Supreme Court specifically identified as an example of fair use the “making of a copy of a copyrighted work for the convenience of a blind person” with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying.

The potential for the application of fair use to producing and distributing accessible texts is perhaps greater today than in the past. This is because during the last 20 years, courts have been moving toward a form of fair use analysis that emphasizes the issue of “transformativeness”-- focusing analytic attention on whether a new use adds significant value to an existing work and presents that work to an audience different from that for which it originally was intended. The National Federation of the Blind believes that recasting text works in accessible formats for the benefit of underserved blind and other print-disabled communities is--in fact--a core example of such transformative use.

Before turning to the question of what benefits might flow from developing new international norms on information access for people with print disabilities, I should note another feature of the current legal environment that complicates the effort to achieve text access for people with print disabilities on terms of functional equivalency with others. Unfortunately, many e-texts that are offered for sale in the general market employ proprietary formats with built-in limits on cross-platform compatibility, or are subject to “locks” that prevent their being (for example) rendered as text-to-speech. I refer here particularly to “the anti-circumvention” provisions of 17 U.S.C. Sec. 1201, which generally prohibit both overcoming such “digital rights management” technology (DRMs) and providing others with the means to do so. These statutory default settings make general market e-books far less useful than might otherwise be the case.

In 2003 and 2006, the Librarian of Congress, acting pursuant to the rulemaking authority conferred in Sec. 1201(a)(1), created a temporary, partial exemption to the anti-circumvention provisions, applicable to “literary works distributed in e-book format when all existing e-book editions of the work (including digital text editions made available by authorized 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 specialized format.” However, since most people with print disabilities do not have the means to create specialized software to implement this rule-based privilege, and the prohibitions against providing circumvention assistance remain intact, the exemption so far has been of limited real value. The National Federation of the Blind believes that, when faced with the issue, Congress or the courts should devise accessibility exceptions to the Sec. 1201(a)(2) and (b) prohibitions, mirroring those provided in the Sec. 1201(a)(1) rulemaking and enabling organizations that serve people with print disabilities to make necessary “circumvention tools” available on a limited basis.

Finally, I will address the question of how new international norms for copyright limitations and exceptions to promote text accessibility would benefit the constituents of the National Federation of the Blind and other print-disabled communities. Three potential kinds of benefits can be identified immediately:

- First, a treaty or other codification of norms would provide a sound foundation for implementation of a pro-access approach in existing U.S. copyright law. Earlier, I detailed some of the issues of interpretation that arise with respect to Sections 107 and 121 of the Copyright Act. If widely recognized international norms favored the principle of accessibility without discrimination, print-disabled people in the United States would be among the most direct beneficiaries. Organizations serving the blind and people with print disabilities would be encouraged to adopt progressive interpretations of existing law, and were such interpretations challenged in court; judges would have an important new source of information on which to draw in arriving at their decisions.

- Second, international norms that recognized the importance of cross-border movement of accessible texts would yield great benefits for people with print disabilities worldwide. It is a fact of the present legal environment that whatever exceptions in favor of the print disabled are provided under national law operate only within the territories of the countries in question. U.S.-based communities would benefit if--following an international lead--our domestic laws were revised to permit importation of accessible texts. People with print disabilities in other countries, where accessibility services are less developed than in the U.S., would benefit even more. On behalf of the blind of the United States, I recommend positive consideration of the proposal to permit transmission of copyrighted material for the use of the blind across country borders.
- Third, and finally, new international norms might help the print disabled to cut the Gordian knot of digital rights management and anti-circumvention legislation, at least where the print disabled are concerned. A strong statement by the countries of the world that technological locks should not be allowed to interfere unnecessarily with text accessibility would be an important message to legislatures and courts everywhere. By the same token, if any set of norms on limitations and exceptions for text accessibility were to omit such a statement, the message would be an unfortunate one. Electronic texts have the potential to help usher in a new age of opportunity for people with print disabilities. It would be both ironic and unfortunate if digital protectionism were to be allowed to interfere with the realization of technology's own promise.

The National Federation of the Blind stands ready to work with the Copyright Office, the Patent and Trademark Office, and the United States delegation to the World Intellectual Property Office to assure that the norm-setting exercise now being contemplated in the Standing Committee on Copyright and Related Rights is successfully concluded.

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