

December 4, 2009

Benetech's Reply Comments

in response to the Copyright Office Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons With Disabilities

The issue all comes down to human rights vs. money.

The human rights issue we're discussing are the human rights of people with disabilities that cannot effectively use the printed word. The printed word is essential for education, employment and social inclusion. The status quo is that people with print disabilities are experiencing a book famine. And famines have consequences. Most of this community doesn't have access to formal education, most of this community doesn't have access to jobs and most of this community isn't recognized by larger society as equals. Doing something about this is within our reach.

The money issue is actually not about serving people with disabilities, amazingly enough. They seem to be collateral damage in a larger debate over the question of intellectual property. Many of the comments critical of the proposed treaty come from parties that object in principle to copyright exceptions, rather than having a direct stake in the issue at hand. If the question at hand was a global treaty setting "fair use" as a global norm, I would expect the same objections.

The message of the skeptics is that we don't need things like exceptions. Society's interests can be addressed on an ad hoc basis. Everything that needs doing can be done by license voluntarily. They claim exceptions aren't needed, because IP owners are happy to help.

Except, that's the status quo. And access doesn't happen. Because of money. Actually, lack of money. Everything is negotiable under license, except in practice, they don't want to negotiate about access -- because there's not enough money involved.

It's completely rational for a publisher to not bother signing a license that represents either zero or trivial sums of money. It's a tribute to many publishers and authors that they do engage on a voluntary basis in these activities, but it does go against the normal course of business to focus on things that make money.

Microsoft Press is a great example of this. The irony of this was clear when I saw Microsoft file comments advocating for voluntary solutions. Through the intervention of a senior Microsoft executive, I got to meet with the MS Press publisher to ask for direct access to their content with rights to serve people with disabilities globally through our Bookshare service. Over two years

ago, we agreed that this would be a good thing to do. So, we were both favorably inclined. But, it hasn't happened.

I'm sure the fact that it hasn't happened isn't based on anything malicious or negative. The permission form went into the Microsoft legal department and hasn't been seen in years. But, if you were in the legal department at Microsoft, where it probably costs the equivalent of tens of thousands of dollars to review and process any contract, it makes a ton of sense. Do I work on this \$50 million licensing deal on a short deadline? Or this free license that might involve some kind of risk of liability?

And on the nonprofit side, to the people who try to meet the needs of the disabled, it doesn't make economic sense to expend hundreds of dollars on each book to clear the rights. The reason there's a global book famine is because the money to do this voluntarily, and do it for each and every country over and over again, doesn't exist and will not exist in the foreseeable future. And so, a good part of why the Microsoft Press deal hasn't happened is because we don't think it makes sense to pester them more than once every six or twelve months.

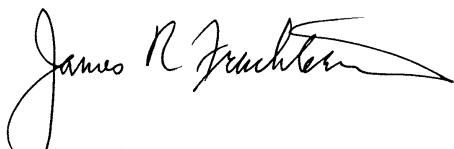
The good news is that for any Microsoft Press book that a U.S. student with a qualified print disability needs, we have a wonderful domestic copyright exemption. We can and will scan it and get it to that student in under a month. That's why we have an exemption for this: it doesn't make money for the publishers and the transaction cost for negotiating a license makes it impractical.

In 1996, the publishing industry and the disability community in the United States got together and agreed on an exemption to copyright to solve this problem. We stopped making access contingent on the need to complete a no-revenue contract. And, when it comes to access to the books in the most demand, we can and are solving the book famine in the U.S. Every New York Times Bestseller from the last few years, every Newbery award winning book ever, are all available to Americans with qualifying print disabilities on Bookshare today. In fact, there are over 60,000 books and periodicals available on Bookshare.

And, the book industry hasn't collapsed. At least, not because of Bookshare!

And this raises the central human rights question. If an exemption regime is good enough for Americans, in the largest market for English language books on the planet, why isn't it good enough for people in other countries?

Sincerely,

A handwritten signature in black ink that reads "James R. Fruchterman". The signature is written in a cursive style with a large, looping initial "J".

Jim Fruchterman
President & CEO