

UNITED STATES COPYRIGHT OFFICE

**Exemption to Prohibition on Circumvention of
Copyright Protection Systems for Access Control Technologies**

Docket No. RM 2011-7

REPLY COMMENT

*In general support of Class 2, proposed by the American Council of the Blind and the
American Foundation for the Blind, and in response to the Joint Comments
of the AAP, ASMP, ESA, MPAA, PACA, RIAA*

of

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*In a word, literature is my Utopia. Here I am not disenfranchised.
No barrier of the senses shuts me out from the sweet, gracious discourses
of my book friends. They talk to me without embarrassment or awkwardness.¹*

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¹ HELEN KELLER, THE STORY OF MY LIFE 85 (Bantam Books 2005) (1902).

I. Introduction

Class: Literary Works

Proposed Class: The American Council for the Blind (“ACB”) and the American Foundation for the Blind (“AFB”) propose the following exemption:

Literary works, distributed electronically, that: (1) contain digital rights management and/or other access controls which either prevent the enabling of the book’s read-aloud functionality or which interfere with screen readers or other applications or assistive technologies that render the text in specialized formats; and (2) are legally obtained by blind or other persons with print disabilities (as such persons are defined in section 121 of Title 17, United States Code), or are legally obtained by authorized entities (as defined in such section) distributing such work exclusively to such persons.”

Summary of Response: We write in general support of the proposed class, but in an effort to seek a balanced resolution between the concerns of copyrights holders and the needs of the blind or other users with print disabilities, and to stay within the jurisdictional authority of the Librarian of Congress, we offer the following draft language:

Literary works, distributed electronically, that contain technological measures that control access to such works, when circumvention is accomplished to facilitate the rendering of specialized formats, when the purpose of circumvention is for the purpose of improving the ability of blind or other persons with print disabilities, who have lawful access to such works, to perceive such works.

Summary of the Argument: 37 C.F.R. § 201.40(b)(6), as currently written, requires that a blind or print-disabled user buy several ereaders in order to access the one accessible version of an ebook, or else fear infringing copyright by breaking the DRM on a more readily available version. Text-to-speech (“TTS”) is a necessary technology because of the growing literacy crisis among the blind. Braille literacy rates are dropping, and those who become blind late in life due to adult-onset diseases will not have learned Braille as children and will be dependent on text-to-speech technology.

TTS does not mimic an audiobook and does not cut into the audiobook market. The technology creates an audible version of an ebook that only exists while a user is listening. Copyright law is unclear on whether this sort of work is considered “fixed” and therefore infringing on copyright. This uncertainty about whether TTS infringes copyright requires an exemption to the DMCA. If a work is fixed, then TTS may lack or may contain the creative elements necessary to be considered a derivative work. Even if a TTS system is an infringing work, however, it may be argued that it is a fair use under the four fair-use factors in § 107. Unfortunately, uncertainty surrounding the law today chills use of TTS. Accordingly, the instant proceeding presents a crucial opportunity to clarify that use of TTS is welcome as a bridge to span the literacy gap for Americans who are blind or have other print disabilities.

We therefore propose language that balances the needs of the blind and print-disabled with the concerns of copyright holders. Our draft language will allow advocates to use technological tools, which may currently be available but could be legally prohibited under the DMCA, to help bridge the literacy gap in the blind and print-disabled community. The use of these tools is chilled because of the uncertainty about whether the tools infringe copyright. Our language also removes the current language’s chilling effect on use of TTS by the blind and print-disabled community, especially amongst those users who are in a low-income bracket. We ask that the Register recommend our proposed language, or in, the alternative, we suggest that the Register recommend retaining the current exemption.

II. The Current Exemption Does Not Address Barriers to Blind or Print-Disabled Users Who Cannot Purchase Multiple Ereaders

We write in general support of the proposed class because the lack of available, accessible formats restricts blind or print-disabled users from enjoying literary works.

“There is no need for an exemption where a work is available in accessible formats.”² And indeed, many Amazon Kindle ebooks have TTS enabled, “Kindle DX can read to you. . . unless the book’s rights holder made the feature unavailable.”³ Rights holders of ebooks strike different TTS deals with different distributors. This places an unfair burden on blind or print-disabled users of ereaders or tablet computer (both shall herein be referred to as “ereaders”). The need for an expansion of 37 C.F.R. § 201.40(b)(6) arises in the following example: For a user running the Kindle App on an iPad, the iPad TTS system is blocked by DRM as to any ebooks purchased through Amazon.⁴ This means that depending upon a blind or print-disabled user’s choice of ereader, she may not have access to entire collections of TTS-enabled ebooks without purchasing a compatible ereader for each ebook. And if a blind user cannot read Braille or does not have someone to read to her, TTS may be the only way she will have access to a particular literary work.

For example, as of February 20, 2012, Amazon’s best-selling ebook was *The Hunger Games* by Suzanne Collins.⁵ *The Hunger Games* is TTS-enabled for Kindle users.⁶ However, as of the same date, *The Hunger Games* is not available through Apple’s iBookstore. Therefore, a

² *Joint Comments of the Joint Creators and Copyright Owners*, U.S. Copyright Office Docket No. RM 2011-7, at 17, (Feb. 10, 2012) [hereinafter “Copyright Owners”] available at http://www.copyright.gov/1201/2012/comments/Steven_J_Metalitz.pdf.

³ Wireless Reading Display Globally Generation, Amazon.com, <http://www.amazon.com/Wireless-Reading-Display-Globally-Generation/dp/B0015TG12Q> (last visited Feb. 26, 2010).

⁴ I used the “Contact Us” feature on Amazon.com to send an inquiry to Amazon asking if TTS was enabled when using the Amazon Kindle App, to read ebooks purchased from Amazon, on the iPad. The emailed response I received from Amazon stated this: “Hello, I’m sorry to inform you that currently Text To speech [sic] is not available on Kindle for iPad application. However, I’ve forwarded your concern to our development team and we’ll consider this as your feedback as we plan further improvements. . . .” (Feb. 20, 2012) (email on file with Candyce Choi); Amazon forum: TTS on iPad kindle app, AMAZON.COM, http://www.amazon.com/forum/kindle?_encoding=UTF8&cdForum=Fx1D7SY3BVSESG&cdThread=TxT5LQRV P42BAI (last visited Feb. 20, 2012).

⁵ Amazon Best Sellers, AMAZON.COM, http://www.amazon.com/Best-Sellers-Kindle-Store-eBooks/zgbs/digital-text/154606011/ref=pd_ts_zgc_kstore_154606011_morl?pf_rd_p=1308356082&pf_rd_s=right-3&pf_rd_t=101&pf_rd_i=1286228011&pf_rd_m=ATVPDKIKX0DER&pf_rd_r=0YERXSM5QVZP2ZBEHT84 (last visited Feb. 20, 2012).

⁶ *The Hunger Games* e-book, AMAZON.COM, http://www.amazon.com/The-Hunger-Games-ebook/dp/B002MQYOFW/ref=zg_bs_154606011_1 (last visited Feb. 20, 2012)

disabled user, using iPad for its great accessibility features like read-aloud capability of menu options, would not have access to the ebook version of *The Hunger Games* without also obtaining a Kindle. Herein lies the problem with the 37 C.F.R. § 201.40(b)(6) as currently written – it falls short of addressing comprehensive barriers to blind or print-disabled users who cannot afford to purchase multiple types of compatible ereaders.

We write in general support of the proposed class as put forth by the ACB and AFB,⁷ and in response to the Joint Comments as put forth by the Association of American Publishers, American Society of Media Photographers, Business Software Alliance, Entertainment Software Association, Motion Picture Association of America, Picture Archive Council of America, and Recording Industry Association of America (hereinafter, the “Copyright Owners”).⁸ The Copyright Owners state that “[t]here is nothing in the record at this point to suggest that the exemption has been used at all.”⁹ In order to respond, we start from the proposition that there is a literacy crisis in the blind community and that a technological supplement to Braille education, such as TTS on an ereader, could emerge as a critical bridge to help span this literacy gap. This Reply Comment then proceeds in three parts: (1) uncertainty in copyright law chills the use of TTS by blind and print-disabled users, and until the law is clarified, an expanded version of § 201.40(b)(6) would protect such users; (2) if running a TTS system on a non-enabled ebook is copyright infringement, then an expanded exemption should pre-emptively shield users from liability under fair use; and (3) our proposed exemption would not run afoul of the Copyright Act’s anti-trafficking provisions.

⁷ *Joint Comments of the American Council of the Blind and the American Foundation for the Blind*, U.S. Copyright Office Docket No. RM 2011-7, (Dec. 1, 2011), available at http://www.copyright.gov/1201/2011/initial/american_foundation_blind.pdf.

⁸ *Copyright Owners Joint Comments*.

⁹ *Id.* at 18.

Our proposed exemption, which is slightly broader than § 201.40(b)(6) as currently written, but is narrower than the ACB's and AFB's exemption, seeks to balance the concerns of the Copyright Owners while realistically making all ebooks accessible to the blind and print-disabled. We propose the following draft language:

Literary works, distributed electronically, that contain technological measures that control access to such works, when circumvention is accomplished to facilitate the rendering of specialized formats, when the purpose of circumvention is for the purpose of improving the ability of blind or other persons with print disabilities, who have lawful access to such works, to perceive such works.

Codifying this compromise within the DMCA would make the current supply of digital literary works accessible to the disabled while maintaining the legal protections of copyright holders. This compromise goes to the heart of the DMCA, an Act that was designed “to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development and education in the digital age.”¹⁰ And per the purpose of the DMCA, when the Triennial Review process begins anew in 2014, the exemption may be renewed or scaled back in order to dynamically adapt the law to the digital era.¹¹

III. Text-to-Speech is Critical to Combat the Literacy Crisis among the Blind and Print-Disabled

a. The Statistics Show a Growing Need for Text-to-Speech Availability

The numbers of blind and print-disabled persons are growing, and fewer of them know how to read Braille. The availability of TTS is therefore vitally important, and the proposed exemption aims to increase the marketplace's number of accessible ebooks faster than would occur without the expanded exemption.

¹⁰ H.R. REP. No. 105-551, pt. 2 at 23 (1998).

¹¹ See U.S. Copyright Office, Joint Study of Section 1201(g) of The Digital Millennium Copyright Act, May 2000 http://www.copyright.gov/reports/studies/dmca_report.html#N_3_.

Statistics underscore the literacy crisis in the blind and print-disabled community. Fewer than 10 percent of the 1.3 million people who are legally blind are Braille readers and a mere 10 percent of blind children are learning to read Braille.¹² Eighty-nine percent of teachers of blind students agree that technology should be used as a supplement to Braille, not a replacement.¹³ The literacy crisis in the blind and print-disabled community, especially in the low-income blind and print-disabled community, is a call for lawmakers to create ease of access to accessibility technology. In a sense, the dire need for accessibility to ebooks and the literacy crisis in the blind and print-disabled community satisfies the ACB and the AFB's burden of proof that 37 C.F.R. § 201.40(b)(6) should be expanded, or in the alternative, retained as it currently reads.

Moreover, the need for this exemption is increasing. The Centers for Disease Control and Prevention predict that Americans who may lose their vision due to diabetes-related eye diseases is going to skyrocket over the next four decades as Type 2 diabetes hits elderly populations.¹⁴ Many of those affected will be "working people"¹⁵ who will not be able to afford both an iPad for audio navigation of menu options and a Kindle for TTS accessibility of ebooks. Additionally, adults who were not visually impaired as children are likely to not know how to read Braille, and will be less likely to learn Braille as their vision deteriorates. An expansion of the current exemption would promote creativity of the useful arts by opening the world of literacy to users unable to read Braille.

¹² *The Braille Literacy Crisis in America Facing the Truth, Reversing the Trend, Empowering the Blind*, NATIONAL FEDERATION OF THE BLIND JERNIGAN INSTITUTE, Mar. 26, 2009, available at http://www.nfb.org/images/nfb/documents/word/The_Braille_Literacy_Crisis_In_America.doc.

¹³ *Id.*

¹⁴ Roni Caryn Rabin, *Diabetes Epidemic Signals an Increase in Blindness, Too*, N.Y. TIMES, Dec. 10, 2008, <http://www.nytimes.com/2008/12/10/health/research/10diabetes.html>.

¹⁵ *Id.*

The Copyright Owners state: “[T]he extent to which the existing exemption is being used at all is unclear, which undermines the call for an expansion thereof.”¹⁶ They cite the increased availability of ereaders and ebooks and their rising popularity as evidence that accessible versions of ebooks are plentiful.¹⁷ However, the Copyright Owners cite sources that describe the increased availability of ebooks, not the increased availability of *accessible* ebooks. While they correctly note that Apple’s iBookstore contains hundreds of accessible titles,¹⁸ the Copyright Owners do not take into account the fact that those titles can only be accessed through an iPad, iPhone, or other Apple device.¹⁹ A blind or print-disabled user will need to purchase an iPad to read these titles, and also an Amazon Kindle to read the titles only available on that device — assuming the publisher has agreed to allow Amazon to enable TTS for that title.

While there are accessible versions of many books, those versions cannot always be read on an ereader. Even when available on an ereader, a book might only be available on one brand. The most common and most accessible format for ebooks is ePUB, which is a product of Adobe. While ePUB has accessibility capabilities, no current ereader offers accessibility support for ePUB documents.²⁰ While accessible versions of books might exist that can be opened on a computer and read using accessibility software, those versions are much less likely to be accessible on an ereader.²¹ Three organizations — Bookshare, the National Service for the Blind

¹⁶ *Copyright Owners Joint Comments* at 18.

¹⁷ *Id.* at 10 (citing Julie Bosman, *Tablet and E-Reader Sales Soar*, N.Y. TIMES, Jan. 22, 2012, <http://mediadecoder.blogs.nytimes.com/2012/01/22/tablet-and-e-reader-sales-soar/?ref=technology>).

¹⁸ *Copyright Owners Joint Comments* at 17; see also APPLE iTUNES PREVIEW, <http://itunes.apple.com/us/app/ibooks/id364709193?mt=8> (last visited Feb. 26, 2012) (describing iBooks accessibility features).

¹⁹ See Ed Bott, *How Apple is Sabotaging an Open Standard for Digital Books*, ZDNET (Jan. 22, 2012, 3 p.m.), <http://www.zdnet.com/blog/bott/how-apple-is-sabotaging-an-open-standard-for-digital-books/4378>.

²⁰ Slides from Presentation of Andrew Kirkpatrick, Adobe Systems, to the 2010 CSUN International Conference on Assistive Technology and Persons with Disabilities, Mar. 24, 2010, *available at* http://blogs.adobe.com/accessibility/files/accessibility/assets/adobe_ebooks_csun2010.pdf.

²¹ “E-readers are becoming increasingly popular, due in part to plummeting prices and the growing availability of books in various digital formats. One area where these companies are notoriously weak, however, is accessibility—and we’re not talking about the Internet kind.” Jacqui Cheng, *In e-Reader Accessibility Race, New Kindle, iPad in*

and Physically Handicapped at the Library of Congress (“NLS”), and Learning Ally (formerly Recording for the Blind & Dyslexic) — create audiobooks or otherwise accessible books from print versions as authorized under 17 U.S.C. § 121.²² Learning Ally offers audiobooks through its website and an iOS app, while NLS offers audiobooks (as well as print Braille books) only through its website.²³ It takes several months for Bookshare to bring a title from print book to accessible, digital version.²⁴ In contrast, Kindle books are often available the same day as print editions.²⁵

Bookshare maintains a “wish list” of books that its users request, but that it does not have available in accessible versions (see Appendix A). Many of these books are bestsellers that are available through Amazon’s Kindle bookstore but are not available from any of the three organizations that specialize in accessible books. For example, *The Type 2 Diabetes Diet* by Calvin Ezrin and Robert Kowalski is listed on the Bookshare “wish list,”²⁶ and is not yet available from either Learning Ally or the NLS. Nor is it available in an iBooks version. It is, however, available in a Kindle version.²⁷ Other titles, such as *Anne of the Windy Poplars* by L.M. Montgomery, are available from Learning Ally but not from Bookshare. A blind or print-disabled user seeking an accessible version of a title must check with all three organizations as

Front, ARS TECHNICA (August 2010) <http://arstechnica.com/gadgets/news/2010/08/for-visually-impaired-most-e-readers-barely-measure-up.ars>.

²² BOOKSHARE, www.bookshare.org (last visited Feb. 27, 2012); LEARNING ALLY, www.learningally.org (last visited Feb. 27, 2012); NATIONAL LIBRARY SERVICE FOR THE BLIND AND PHYSICALLY HANDICAPPED THROUGH THE LIBRARY OF CONGRESS (“NLS”), <http://www.loc.gov/nls/index.html> (last visited Feb. 27, 2012).

²³ NLS FAQ page, <http://www.loc.gov/nls/faq.html#q2> (last visited Feb. 27, 2012); *Browse and Order Audiobooks*, LEARNING ALLY, <http://www.learningally.org/Audiobooks/21/> (last visited Feb. 27, 2012).

²⁴ Telephone interview with Carrie Karnos of Bookshare (Feb. 27, 2012) (notes on file with Janna Fischer).

²⁵ For example, the young-adult fiction book *Insurgent* by Veronica Roth, the sequel to the popular book *Divergent*, will be available May 1, 2012, from Amazon in both print and Kindle versions. See AMAZON, http://www.amazon.com/s/ref=nb_sb_ss_i_0_11?url=search-alias%3Daps&field-keywords=insurgent+veronica+roth&rh=i%3Aaps%2Ck%3Ainsurgent+veronica+roth.

²⁶ Appendix A at 7.

²⁷ See AMAZON, the Kindle Store, http://www.amazon.com/s/ref=nb_sb_noss?url=search-alias%3Ddigital-text&field-keywords=The+Type+2+Diabetes+Diet&x=0&y=0 (last visited Feb. 27, 2012).

well as Apple's iBookstore, while a sighted user has many more, and faster, resources to find a title, including print bookstores and the local library.

In addition, in order to get copies of books through any of the three organizations, a user must be certified by a doctor or therapist, join that organization's registry, and, in the case of Learning Ally, and Bookshare, pay a membership fee.²⁸ Not everyone with reading difficulties fits within each organization's parameters. The NLS requires that the user's visual disability be organic and be determined by a qualified doctor.²⁹ Therefore, a user who does not fit a particular organization's parameters, or who is concerned about registering with that organization for insurance or privacy reasons but nonetheless has a visual disability, cannot gain access to these accessible ebooks. The proposed exemption would cover nonregistered, blind or print-disabled users who currently do not have access to NLS, Bookshare, or Learning Ally accessible books.

b. Text-to-Speech Technology Does not Duplicate Audiobooks

In order to discuss the copyright implications of a TTS system, a brief overview of the mechanics of a TTS system illustrates the functional differences between TTS and an audiobook. First, to create a TTS system, a professional reader or narrator reads and records a variety of texts, specially chosen for their phonemic diversity.³⁰ Texts chosen for their phonemic diversity range from poetry, political news, sports results, stock exchange updates, etc., because such a variety aims to capture every possible sound in the recorded language.³¹ The engineer then takes these recordings and then slices the sounds into the following segments: diphones, syllables,

²⁸ BOOKSHARE, Membership Options, <http://www.bookshare.org/membershipOptions> (last visited Feb. 27, 2012); LEARNING ALLY, Membership, <https://custhub.rfbd.org/SearchResults.asp> (last visited Feb. 27, 2012); NLS, Eligibility for Service, <http://www.loc.gov/nls/eligible.html> (last visited Feb. 27, 2012).

²⁹ See NLS, *Eligibility for Service*, *supra* note 22.

³⁰ Acapela Group FAQ: How Does TTS Work?, ACAPELA GROUP, <http://www.acapela-group.com/how-does-text-to-speech-work.html> (last visited Feb. 20, 2012); http://news.cnet.com/8301-1023_3-10172412-93.html?tag=mncol;txt

³¹ *Id.*

morphemes, words, phrases, and sentences.³² Once sliced into these categories, the sounds are organized into an acoustic database.³³ To translate the text of an ebook into phonetic text, the TTS system uses a sophisticated algorithm to enable it to pronounce each word, and more than that, it attempts to give rhythm and intonation to each sentence.³⁴ In its final step, the TTS system produces information that matches the phonetic writing with the tone and required length of the pronunciation.³⁵ “The chain of analysis ends here and sound is generated by selecting the best units stocked in the acoustic database.”³⁶ This process is called “automaticity.”³⁷ The end product is a phonetic rendering of the literary work, the quality of which is intelligible but by no means compares with a human reading of the work.³⁸

³² *Id.*

³³ *Id.*

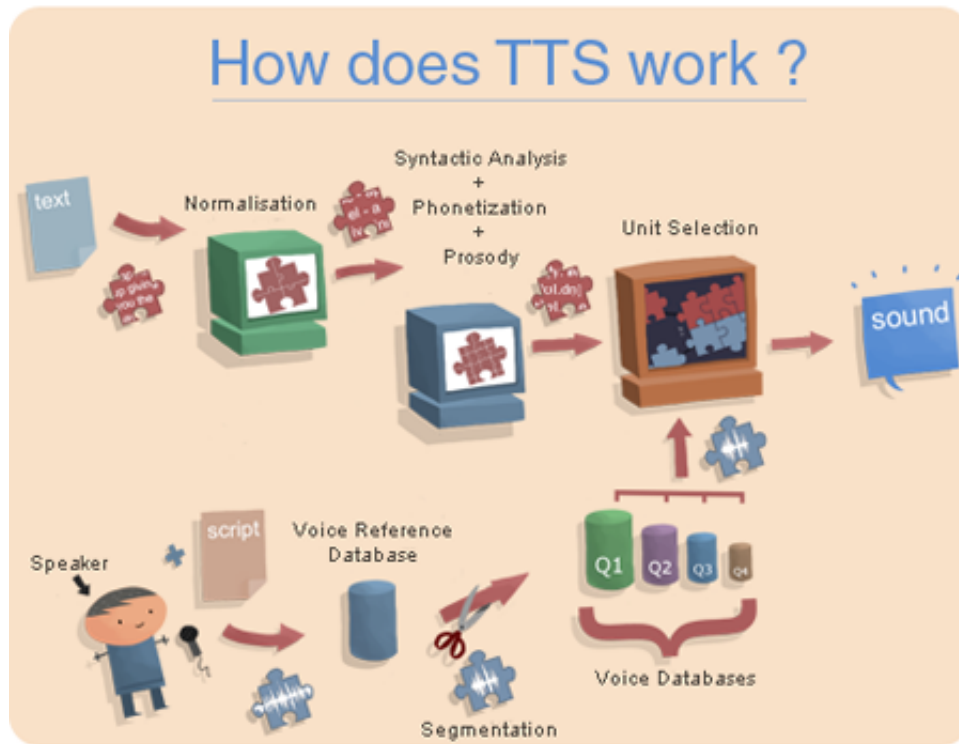
³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ The term “automaticity” is borrowed from Mr. Francis’ Note. Note, Jeremy B. Francis, *The Kindle Controversy: An Economic Analysis of How the Amazon Kindle’s Text-to-Speech Feature Violates Copyright Law*, 13 VAND. J. ENT. & TECH L. 407, 417 (2011).

³⁸ For an example of TTS on the Kindle 3, see Kindle 3- Text to Speech Demo, YOUTUBE (<http://youtu.be/Q39vP43yzjo> (*hereinafter* Kindle Demonstration Video)).



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IV. Uncertainty in Copyright Law Chills Use of Text-to-Speech and Must be Clarified

The current uncertainty in copyright law about whether TTS is a reproduction, a public performance of a work, or a derivative work chills the accessibility of ebooks.⁴⁰ Until the law is clarified, our proposed exemption would protect good faith disabled users from possible legal liability.

“Kindle 2’s experimental text-to-speech feature is legal: no copy is made, no derivative work is created, and no performance is being given.”⁴¹ However, in the same 2009 press release,

³⁹ *Id.*

⁴⁰ The legal liability implications of TTS do not just affect the blind and print-disabled community. Website developers, who implement related TTS technology, are concerned that because their servers access the content of others, a court might consider their activity to be copyright infringement. Clarity of the law with regard to TTS is needed. Telephone interview with Jeffrey P. Bigham, Ph.D., Professor, Human-Computer Interaction, University of Rochester (March 1, 2012) (notes on file with Janna Fischer).

⁴¹ Peter Glaskowsky, *Ex-default for Kindle 2 Text-to-Speech: Legal?*, CNET, Mar. 2, 2009, http://news.cnet.com/8301-13512_3-10184974-23.html; Greg Sandoval, *Amazon Retreats on Kindle’s Text-to-Speech Issue*, CNET, Feb. 27, 2009, <http://news.cnet.com/amazon-retreats-on-kindles-text-to-speech-issue/?tag=mncol;txt>.

Amazon went on to state that it would modify its Kindle systems such that the TTS system would only be enabled where copyright owners had given permission to do so.⁴² Thus, the question remains: Where an ebook's copyright owner has denied permission for TTS, but the user circumvents such DRM in order to access a TTS system, does this act constitute copyright infringement? And if copyright infringement does occur, which 17 U.S.C. § 106 right is infringed – reproduction, derivative work, or public performance?

a. Reproduction Right

If the user circumvents DRM in order to run a TTS system, would the phonetic rendering of the written text constitute infringement of the reproduction right? The answer is unclear. The Copyright Act grants the copyright holder the exclusive right to do and to authorize reproductions of a copyrighted literary work in copies or reproductions.⁴³ A copy must be substantially similar to the original work in order to infringe,⁴⁴ and it must be fixed in a tangible medium of expression.⁴⁵

As to substantial similarity, merely changing the medium in which the reproduction is copied does not militate against possible infringement of the reproduction right. “The fact that a work in one medium has been copied from a work in another medium does not render it any less a ‘copy.’”⁴⁶ Per the Second Circuit, the test for infringement of the reproduction right is whether an average lay observer would recognize one work as having been appropriated from another.⁴⁷ On the one hand, the average lay observer might recognize a TTS system rendering, “It was the

⁴² Sandoval, *supra* note 41, <http://news.cnet.com/amazon-retreats-on-kindles-text-to-speech-issue/?tag=mncol;txt>.

⁴³ 17 U.S.C. § 106(1) (2011).

⁴⁴ Castle Rock Entmt. Inc. v. Carol Publ'g. Group, Inc., 150 F.3d 132, 137 (2d Cir. 1998).

⁴⁵ 17 U.S.C. § 102(a) (2011).

⁴⁶ Rogers v. Koons, 751 F. Supp. 474, 478 (S.D.N.Y. 1990) (quoting MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08 [E] (1989)), *aff'd*, 960 F.2d 301 (2d Cir. 1992) (an artist created a sculptural work based on a copyrighted photograph and the Second Circuit, affirming the district court, rejected the sculptor's argument that because he had used a different medium in which to create the work, there was no infringement reproduction right with regard to the original photograph's copyright).

⁴⁷ Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992).

best of times, it was the worst of times . . .” into phonetic text as the opening of Charles Dickens’s *A Tale of Two Cities*. In recognizing the work as a phonetic rendering of the Dickens tale, the average lay observer may find that nothing more has occurred than a change in medium from the original, from written to audio. Thus, the change in medium would not militate against a finding of substantial similarity between the ebook version of the literary work and the audio rendering of the literary work. On the other hand, the average lay observer could find that the automated playback of the TTS system adds some sort of creative element not found in the written text of the literary work.⁴⁸ If the TTS system does add an element of creativity, then this is not infringement of the reproduction right, but it could be an infringement of the derivative work right (see Section V(c) below).

As to fixation, the answer is equally unclear. In *Cartoon Network*, the Second Circuit held that copies held in RAM are stored only for a “transitory duration” and therefore failed the fixation requirement of an infringing reproduction.⁴⁹ Conversely, in *MAI Systems*, the Ninth Circuit held that copies held in RAM are sufficiently fixed so long as the embodiment endures long enough to be perceived, reproduced, or communicated.⁵⁰ If buffer copies held in RAM are sufficiently fixed, then the TTS system would create infringing audio reproductions of the written text. But if the buffer copies are “so transient” as to lack fixation under *Cartoon Network*, then audio renderings of written text would not create an infringing reproduction. Looking to other sections of the Copyright Act, Congress has been careful to not endorse a position on whether embodiments stored in RAM are copies for copyright purposes.⁵¹ The

⁴⁸ Watch this video and determine for yourself if the TTS playback of the text adds an element of creativity to the original literary work, or if it is so substantially similar to the original as to constitute infringement of the original work. Kindle Demonstration Video, *supra* note 38. (last visited Feb. 29, 2012).

⁴⁹ *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008)

⁵⁰ *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993).

⁵¹ S. Rep. No. 105-190, at 56-57 (1998) (noting only that the exceptions codified in 17 USC § 117(c) are minor yet important clarifications which were necessary in light of judicial decisions, specifically, *MAI Systems*).

phonetic renderings of written text on the Kindle may be buffered in RAM for mere moments, but without any clear case law, rules, or statutes as to whether a transiently buffered embodiment constitutes fixation for copyright purposes, the question of whether a TTS system violates the reproduction right is unclear.

b. Public Performance Right

If the user circumvents DRM in order to run a TTS system, would the phonetic rendering of the written text constitute infringement of the public performance right? The answer is, almost certainly, no. The Copyright Act grants the copyright holder the exclusive right to do and to authorize the performance of a copyrighted literary work publically.⁵² The question can be broken down into two parts, performance and public.

To “perform” a work means to “recite, render, or play . . . either directly or by means of any device or process.”⁵³ The only case law on point with regard whether a digital download is a performance refers to musical works. The Second Circuit interpreted the definition of “to perform” a musical work to require “contemporaneous perceptibility.”⁵⁴ Thus, a digital download of a musical work cannot be contemporaneously perceived by the listener – “[t]hey are simply transfers of electronic files containing digital copies from an on-line server to a local hard drive.” The same would be true for ebooks downloaded from Amazon to the Kindle – they are simple transfers of electronic files containing digital copies from an on-line server to the local Kindle hard drive and thus would not constitute a performance. Moreover, an audio rendering of a downloaded ebook is one further step removed from a downloaded song in that the musical work must be downloaded and played back; the ebook must be downloaded, TTS system

⁵² 17 U.S.C. § 106(5) (2011).

⁵³ 17 U.S.C. § 101 (2011).

⁵⁴ *United States v. American Soc. of Composers, Authors*, 627 F.3d 64, 73 (2d Cir. 2010).

signaled to run, and then the TTS system creates a phonetic rendering of the text. Thus, digital downloads of ebooks, even played through a TTS system, are not performances.

To perform a work “publically” means “(1) to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”⁵⁵ Clearly, a TTS system rendering an ebook into phonetic text book to a blind or print-disabled person in the comfort of the home does not violate prong 1, nor would it be violative if the TTS system rendered phonetic text for a few family members or friends of the person. As to prong 2, the Second Circuit explicitly rejected that a digital download constitutes a transmission to the public.⁵⁶ Where a copy is transmitted to a single subscriber, and only one subscriber can receive the transmission, the performance is not public and therefore not in violation of prong 2.⁵⁷ Kindle users can only download the individual copies that they have been authorized to receive, which are nonetheless transmissions, but which are authorized copies of authorized works. Therefore, a TTS rendering of an ebook into phonetic text is neither public nor is it a performance in violation of the copyright holders’ public performance right.

c. Derivative Work Right

If the user circumvents DRM in order to run a TTS system, would the phonetic rendering of the written text constitute infringement of the derivative work right? The answer is unclear. The Copyright Act grants the copyright holder the exclusive right to do and to authorize

⁵⁵ 17 U.S.C. § 101.

⁵⁶ *American Soc. of Composers*, 627 F.3d at 73.

⁵⁷ *See id.*

preparation of derivative works based upon the copyrighted literary work.⁵⁸ A “derivative work” is a work based upon “one or more preexisting works such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording . . . or any other form in which a work may be *recast, transformed, or adapted*.”⁵⁹ Thus, the Act seeks to protect original works that are “recast, transformed, or adapted” into another medium, mode, language, or revised version while still representing the “original work of authorship.”⁶⁰

Without case law exactly on point, it is hard to say exactly how a court would hold on the derivative work issue with regard to the TTS system “recasting, transforming, or adapting” the original work. On the one hand, despite the automaticity of the TTS system, a Kindle user can choose whether to have the TTS feature read in a male or female voice and the speed at which the voice reads.⁶¹ The variable voice and speed arguably add some elements of artistic creativity lacking in the original ebook such that use of the TTS system transforms the original work and infringes a rights holder’s derivative work right.

On the other hand, if the only way a blind or print-disabled person can access a literary work is through another person reading to her, or in this case, a software program rendering the written text into phonetic text, then there would be no transformation of the original, i.e., it would be nothing more than trading one mode of understanding for another. Additionally, the automaticity of a TTS system makes the rendering of phonetic text fundamentally different from a recorded audiobook. The technology simply translates text from a written to phonetic medium, the underlying work having been properly licensed to Amazon from its publishers.⁶² Thus, the

⁵⁸ 17 U.S.C. § 106(2).

⁵⁹ 17 U.S.C. § 101.

⁶⁰ *Castle Rock*, 150 F.3d at 143 n.9 (“derivative works that are subject to the author’s copyright transform an original work into a new mode of presentation”)

⁶¹ AMAZON, <http://www.amazon.com/Wireless-Reading-Display-Globally-Generation/dp/B0015TG12Q> (last visited Feb. 26, 2012).

⁶² See Francis, *supra* note 37, at 426.

phonetic text would be substantially similar to the original written text, which would then return the analysis to infringement of the reproduction right above (see Section V(a)).

Distinct from the reproduction right, the Copyright Act is silent as to whether fixation is required to infringe the derivative work right of the original.⁶³ The majority view is that an unlicensed work need not be fixed in order to infringe the derivative work right of the original.⁶⁴ If this is the case, the fact that the TTS system stores phonetic text in transient RAM memory would not militate against a finding of derivative work infringement. But some courts have grafted a quasi-fixation requirement onto the analysis of whether a subsequent work infringes the derivative work right of the original.⁶⁵ The Ninth Circuit has held that a work infringing the derivative work right must exist in “some concrete or permanent form.”⁶⁶ Depending on the circuit that a disabled user is hauled into, she could be deemed an infringer of the derivative work right. This is impermissible. While such uncertainty plagues copyright law regarding fixation in RAM, the Copyright Office should use the triennial review as an opportunity to protect good faith disabled users, who but for their vision impairment, would have access to the lawfully licensed written text.

In the end, it matters less which flavor of § 106 infringement technically occurs so long as it is possible that a blind or print-disabled user could be considered an infringer merely because she gained access to a literary work through phonetic text. It seems that the Copyright Owners are also less concerned with the flavor of the § 106 right that is technically infringed; their concern is with the protection of their interest in the audiobook market, i.e., that freely allowing blind or print-disabled users to circumvent TTS DRM will undercut audiobook sales.

⁶³ See 17 U.S.C. § 103 (2011).

⁶⁴ *Williams Elecs., Inc. v. Artic Int'l Inc.*, 685 F.2d 870 (2d Cir. 1982).

⁶⁵ See Francis, *supra* note 37, at 427.

⁶⁶ *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 967-69 (9th Cir. 1992).

However, we believe that giving disabled users access to ebooks has not, nor will it, harm audiobook sales. The Audio Publishers Association (“APA”) has released industry data which reveal the vitality of the audiobook market. The total number of audiobooks being published has doubled from 3,073 units in 2007 to 6,200 units in 2010.⁶⁷ Audiobook downloads also continued on a growth trend representing 36 percent of dollar volume (up from 29 percent in 2009 to 2011) and 52 percent of unit sales (up from 28 percent in 2009 to 2011).⁶⁸ And measuring over 5 years, from 2005 to 2010, audiobook downloading has grown 300 percent by dollar volume.⁶⁹ On March 2, 2009, Amazon moved from enabling TTS on all of its ebooks to only enabling TTS on ebooks where rights holders gave permission.⁷⁰ This was done due to the Authors’ Guild concern that audiobook sales would take a downturn if TTS were freely enabled on all ebooks.⁷¹ Yet the APA statistics show that the audiobook market has been unhampered in its growth despite the fact that many rights holders give Amazon permission to enable TTS.

Moreover, it is notable that the largest ebook retailer, Amazon, has freely enabled TTS on its Kindle devices (where the copyright owners have given permission to do so). Amazon owns two subsidiaries in the professionally narrated audiobook market, Audible and Brilliance.⁷² Judging by Amazon’s initial enabling of TTS on all ebooks purchased for Kindle, one of the biggest players in the ereader and ebook market is not worried that TTS systems will create legitimate market replacements for professionally narrated audiobooks. Even with advances in

⁶⁷ AUDIO PUBLISHERS ASSOCIATION, *Industry Data*, <http://www.audiopub.org/resources-industry-data.asp> (last visited Feb. 26, 2012).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ The Author’s Guild, *Amazon Reverses Stance on Computer-Generated Audio for the Kindle 2*, <http://www.authorsguild.org/advocacy/articles/amazon-reversal-on-text-to-speech.html> (last visited Feb. 26, 2012).

⁷¹ *Id.*

⁷² See AMAZON, www.amazon.com/kindle, for its Audible titles for Kindle (last visited Feb. 26, 2012). Amazon purchased Brilliance audiobooks in 2007 to expand its range of audiobooks on CD. See Dawn Kawamoto, *Amazon Acquires Brilliance Audio*, CNET (May 23, 2007, 7:52 a.m.), http://news.cnet.com/Amazon-acquires-Brilliance-Audio/2110-1030_3-6185975.html.

TTS technology, “no automated voice, no matter how indistinguishable from a human’s, will ever replace the famous actors that are often hired to dictate audiobooks.”⁷³

Copyright law has become a form of property protection, but that purpose is arguably unfounded in the U.S. Constitution. Copyright law was intended “[t]o promote the Progress of Science and useful Arts . . .”⁷⁴ Therefore the burden should shift back to the Copyright Owners to show actual harm to their property, in the form of harm to the audiobook market, before denying accessibility to disabled users of ebooks on the basis of copyright law. The Copyright Office’s rules should reflect an emphasis on providing access to the Arts, and this can be done with an expansion of the current exemption, or alternatively, renewing the exemption as currently written. Moreover, case law has not been established on the question of whether a phonetic rendering of a literary work (where permission has been denied by the ebook’s copyright owner) constitutes copyright infringement. Thus, in order to protect the blind and print-disabled from being deemed infringers where the law has yet to clarify itself, we ask for an expansion of the current exemption as drafted in Section VI.

V. Per a Fair Use Theory, 37 C.F.R. § 201.40(b)(6) Should be Drafted to Pre-emptively Shield Disabled Users from Liability

Even if TTS is a derivative work or otherwise infringes copyright, enabling TTS on a single copy of an ebook is an example of a noninfringing fair use under 17 U.S.C. § 107.⁷⁵ Making a single copy of a work in a format that a blind or print-disabled person can use is a classic example of fair use. In addition, the proposed exemption falls within fair use applying

⁷³ Tim Conneally, *Is Text-to-Speech a Threat to Audiobooks?*, TECH GEAR NEWS, Feb. 13, 2009, <http://betanews.com/2009/02/13/is-text-to-speech-on-kindle-2-a-threat-to-audiobooks>.

⁷⁴ U.S. CONST. art I, § 8, cl. 8.

⁷⁵ “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107 (2011).

the four factors outlined in § 107: 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used; and 4) the effect of the use on the market for the work.⁷⁶

Making a single accessible copy of a work for a blind or print-disabled user is classic fair use.⁷⁷ Both the U.S. House and the U.S. Senate, in the legislative history of the 1976 Copyright Act, describe making an accessible copy as fair use. The House said:

Another special instance illustrating the application of the fair use doctrine pertains to the making of copies or phonorecords of works in the special forms needed for the use of blind persons. . . . the making of a single copy or phonorecord by an individual as a free service for a blind persons would properly be considered a fair use under section 107.⁷⁸

The Senate report, using very similar language, also defines making copies in formats that the blind can access as fair use. “[T]he making of a single copy or phonorecord by an individual as a free service for a blind person would properly be considered a fair use under section 107.”⁷⁹

This legislative history of the Copyright Act shows that Congress did contemplate whether fair use would cover the instance when a publisher makes a work that is inaccessible to blind users.⁸⁰ However, even absent the strong presumption in the legislative history that making works accessible is fair use, an analysis of the four factors in § 107 shows that the proposed exemption falls within fair use.

⁷⁶ 17 U.S.C. § 107.

⁷⁷ “Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n. 40 (1984).

⁷⁸ H.R. REP. NO. 94-1476, at 73 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5686-87 (hereinafter 1976 House Report).

⁷⁹ S. REP. NO. 94-473, at 80 (1975) (hereinafter Senate Report).

⁸⁰ See Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 67 (1995) (describing how fair use covers making a Braille copy where a book is inaccessible in a publisher’s version).

a. The Purpose and Character of the Use

The proposed exemption's purpose is to create accessible works where there currently are none, which is a use that serves the public interest. While accessibility is not enumerated in the preamble to § 107, this "listing was not intended to be exhaustive . . . or to single out any particular use as presumptively a 'fair' use."⁸¹ A use that serves the public interest fits the character of fair use.⁸² The exemption's purpose of increasing blind or print-disabled people's access to literary works is not a commercial use. A noncommercial use of a work is more likely to be a fair use than a commercial use.⁸³ The exemption is being sought by two nonprofits, the ACB and the AFB, and they seek this exemption to improve the accessibility to ebooks, not to generate profit.⁸⁴

In addition, the creation of a TTS or other accessible version of a book creates a single copy for personal use. The creation of a single copy for personal use is more likely to fall under fair use because the copy is being created for one user's personal enjoyment, not for mass distribution.⁸⁵ As described above in section III(b), a TTS version only exists while the blind person is listening to it, and it is unclear whether this version is even fixed in a way that warrants copyright protection.

⁸¹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

⁸² *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992) ("Public benefit need not be direct or tangible, but may arise because the challenged use serves a public interest."); *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33, 38 (S.D. Tex. 1978) (fire marshal's use of copyrighted maps to create a map of fire zones in his county benefitted the public and was therefore fair use); *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1375 (2d Cir. 1993) ("We have been more solicitous of the fair use defense in works, which . . . aspired to serve broader public purposes.").

⁸³ See 4 MELVILLE D. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[1] (Matthew Bender 2011) (hereinafter Nimmer on Copyright); *Harper & Row*, 471 U.S. at 569 (finding republishing excerpt's of Gerald Ford's memoirs a commercial use and weighing that in finding no fair use); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (where the purpose of the work was primarily parody, the fact that the use was commercial did not preclude a finding of fair use).

⁸⁴ See *Joint Comments of the ACB and AFB*, *supra* note 7.

⁸⁵ See *Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 780 F. Supp. 1283, 1293 (N.D. Cal. 1991) *aff'd*, 964 F.2d 965 (9th Cir. 1992) (holding a family's at-home use of a "Game Genie" that altered Nintendo video games was fair use); *Sony*, 464 U.S. at 449 (holding that a VCR's copying of a television program was a user's personal "time-shifting" and was fair use).

Especially given the legislative history of the Copyright Act and the strong presumption that making an accessible work is fair use,⁸⁶ this factor favors the exemption.

b. Nature of the Copyrighted Work

Because this exemption applies to all published books and does not target a particular class of literary work, it is difficult to perform a global analysis of this factor. While the use of informational works weigh toward finding fair use,⁸⁷ the use of creative works weighs against a finding of fair use.⁸⁸ While some of the ebooks to which the proposed exemption would apply are bound to be informational, it is equally likely that some will be creative works.

The ebooks at issue are all published works, because the exemption seeks to allow blind users to circumvent the DRM on *already existing* ebooks. This factor will weigh greater on an unpublished work than a published work, because the author has the right to control the work's first publication.⁸⁹ All of the books that fall under the proposed exemption have already been published — making the books accessible does not take away from the author's choice of when and where to first publish.

This factor is at worst neutral in that some of the copyright works will be creative works, which weighs against a finding of fair use. However, some of them will also be informational works, and next to none of them will be unpublished. Both of those qualities weigh in favor of a finding of fair use.

⁸⁶ 1976 House Report, *supra* note 78, Senate Report, *supra* note 79, *Sony*, 464 U.S. at 455.

⁸⁷ “Under this factor, the more creative a work, the more protection it should be accorded from copying; correlatively, the more informational or functional the plaintiff's work, the broader should be the scope of the fair use defense.” *Nimmer on Copyright*, *supra* note 81, § 13.05[3]. “In general, fair use is more likely to be found in factual works than in fictional works.” *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

⁸⁸ *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629, 635 (S.D. Cal. 1993) (“[w]hen the nature of the copyrighted works is creative, as opposed to informational, use of those works is less likely to be deemed fair”);

⁸⁹ *See Wright v. Warner Books, Inc.*, 953 F.2d 731, 737 (2d Cir. 1991) (“the scope of fair use is narrower with respect to unpublished works because the author's right to control the first public appearance of his expression weighs against such use of the work before its release.”) (internal quotes omitted).

c. Amount and Substantiality of the Portion Used

Although a TTS or otherwise accessible version of an ebook does take the entire work, it renders that work in a format that does not supersede the original. When a work is copied in its entirety, this factor weighs against a finding of fair use.⁹⁰ However, using a work in its entirety is not fatal to a finding of fair use.⁹¹ As described above in Section III(b), TTS renders the text in a monotone, robotic audio version.⁹² In the case of text to Braille, the format is one that only a blind person can access.

More important than the amount of the portion used is whether it supersedes the original work. If a work replaces the original work in the marketplace, then that weighs against a finding of fair use.⁹³ Conversely, if a work takes the entire copyrighted work but uses it in a way that does not supersede the original work, the use can be fair use.⁹⁴ TTS does not supersede either the original ebook or the audiobook version. The current state of TTS does not compare to an audiobook in accuracy or quality as described in Section III(b) and does not supersede that work as described further in Section V(d) with respect to the fourth factor, the effect on the market. TTB and other technologies, such as read-aloud menus and super-enlarged type, are designed to provide access to the blind or print-disabled, and do not replace an audiobook or the printed ebook for a sighted person. This factor is not dispositive in determining if accessibility technologies are fair use, even though the exemption does take the entire work.

⁹⁰ See, e.g., *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 931 (2d Cir.1994) (defendant's copying of journal articles was not fair use in part because it copied the entire article).

⁹¹ See *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000) (holding that taking an entire photograph was necessary because using less than the entire photo would have been useless); *Campbell*, 510 U.S. at 588-89 (holding it necessary to take the "heart" of a song in order to craft an effective parody).

⁹² See *Kindle Demonstration Video*, *supra* note 38.

⁹³ *Harper & Row*, 471 U.S. at 566.

⁹⁴ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164 (9th Cir. 2007) (holding that Amazon's use of thumbnails, even though taking the entire photo, was fair use because its use did not supersede the demand for the entire photo at full size).

d. Effect on the Market for the Copyrighted Work

The effect on the market is “the single most important element of fair use.”⁹⁵ In analyzing this factor, courts strike a balance between the benefit to the public of the use if permitted, and the copyright owner’s gain if the use is not permitted.⁹⁶ The less adverse the effect to the copyright holder, the less the public benefit that needs to be shown.⁹⁷

The relevant market for this exemption is the current market for audiobooks. While not explicitly stated, the Copyright Owners’ underlying concern seems to be with the vitality of their audiobook market, i.e., that freely allowing disabled users to circumvent TTS DRM will undercut audiobook sales. However, giving disabled users access to ebooks is unlikely to harm audiobook sales, see Section IV(c) above.

A TTS version of a book is also no match for a professionally narrated audiobook. The current TTS systems are robotic and often inaccurate.⁹⁸ Publishers have not created TTS or otherwise accessible versions of their books in a widespread fashion. Indeed, although the population of blind and print-disabled people is growing, the current niche for those who need accessible ebooks is small. This exemption covers a small market that publishers are unlikely to exploit (i.e. create accessible versions of books) themselves. As such, it will not harm the existing market for audiobooks.

The proposed exemption has great benefit to the disabled public, and will not cause great harm to the owners’ primary market of printed books or to the market for audiobooks. The fourth factor favors granting the exemption.

⁹⁵ *Harper & Row*, 471 U.S. at 566.

⁹⁶ *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

⁹⁷ *Id.*

⁹⁸ Kindle Demonstration Video, *supra* note 38.

VI. Our Proposed Language Balances the Concerns of Copyright Owners and Simultaneously Addresses the Needs of the Blind and Print-Disabled

We request that the Register recommend our proposed language because it attempts to balance the concerns of the blind and print-disabled with those of the Copyright Owners. In the alternative, we ask that the Register recommend retaining the current exemption.

Our proposed language attempts to balance the concerns of the blind and print-disabled as put forth by the AFB and the ACB and those of the Copyright Owners. Our proposal is more narrowly tailored than that suggested in the ACB and AFB's Comment. As the Copyright Owners suggest, "the marketplace is progressively improving access for disabled persons, not lessening it."⁹⁹ However, the marketplace has not equalized in terms of its ability to provide access. As discussed above, not all titles are available in accessible formats, and where there are accessible formats, there are barriers to access. In essence then, we are asking for a codification of fair use as it pertains to literary works published in electronic format. Therefore we propose the following language:

Literary works, distributed electronically, that contain technological measures that control access to such works, when circumvention is accomplished to facilitate the rendering of specialized formats, when the purpose of circumvention is for the purpose of improving the ability of blind or other persons with print disabilities, who have lawful access to such works, to perceive such works.

We acknowledge, as do the Copyright Owners, that the Librarian does not have authority in this proceeding to expand the scope of activities that may lawfully be undertaken by authorized entities under 17 U.S.C. § 121. Our proposed language is limited to blind and print-disabled users and their ability to circumvent access controls on literary works in order to improve the their own access.

⁹⁹ *Copyright Owners Joint Comments* at 17.

The triennial review process of the DMCA would allow the expanded exemption to be reviewed again and when accessibility has increased, i.e., when more literary works are available as ebooks and more publishers have enabled TTS on a variety of ereader platforms, this exemption could be scaled back. Alternatively, we ask that the exemption, as it is currently written, be again renewed until the next triennial review. “[T]he Joint Creators and Copyright Owners do not object in principle to the existence of the current exemption.”¹⁰⁰ Even the current state of the marketplace would be in jeopardy without the renewal of the current exemption. The technology Bookshare and other organizations use to create current versions of ebooks exists because their volunteer contributors, many of whom are also users, do not fear infringement due to the current exemption.¹⁰¹ Although the Copyright Owners assert that the current exemption is not being used, they do not show any evidence that it is not. As the Librarian of Congress noted in the final 2010 rulemaking, designating the present class of literary works to be exempted:

[E]ven where books are published electronically for the general public, the digital format used or licensed may be employed in a way that is incompatible with Braille readers and other assistive technologies on which blind and print-disabled persons rely. In the long run, this incompatibility may lead to delays, cost challenges and standards issues that may off-set the long-awaited benefits of digital media.¹⁰²

The conditions for accessibility have not changed appreciably since 2010, despite the rise in ereader popularity. Although there may be an accessible version of an ebook available, that version may be either difficult to find or may be in a proprietary format, such as iBooks, that requires a blind or print-disabled person to purchase expensive equipment. Should the Copyright Office maintain the current exemption, we would suggest the creation and maintenance of a

¹⁰⁰ *Id.* at 18.

¹⁰¹ Telephone interview with Gregg Vanderheiden, Ph.D., Professor, College of Engineering, University of Wisconsin-Madison (Feb. 24, 2012) (notes on file with Janna Fischer).

¹⁰² Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,839 (July 27, 2010) (to be codified at 37 C.F.R. pt. 201).

registry of accessible ebooks that could be made available to blind and print-disabled people so that they can find the accessible version without visiting every ebook creator and accessibility organization separately. The Copyright Owners cite only the “hundreds of thousands” of titles available in Apple’s iBookstore in support of their proposition that accessible ebooks are readily available.¹⁰³ The current state of the market is that blind and print-disabled users have to consult three separate organizations as well as vendors in order to find the (perhaps) lone accessible version. This hunt for a version that may not even exist is an unacceptable burden on the disabled.

Should accessibility improve and the landscape substantially change by the 2015 triennial review, the Copyright Office could revisit this exemption for literary works.

VII. Conclusion

Granting the proposed exemption would increase the availability of copyrighted literary works in formats accessible to the blind and print-disabled. We therefore respectfully ask that the Register recommend and the Librarian grant the proposed exemption for the class, or in the alternative retain the existing exemption.

¹⁰³ *Copyright Owners Joint Comments* at 18.

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APPENDIX A



Bookshare Bookshare Wish List

Added by [Reuben Firmin](#), last edited by [Anne Volanakis](#) on Feb 23, 2012

Click the links below to go to each section.

1. FICTION

2. NONFICTION

1. FICTION

Updated 02/23/2012

- * If you're requesting a book specifically needed for school, or for a class that results in a degree or certificate, go to the front of the line by sending an email to: schoolbookrequest@bookshare.org.
- * If you'd like to have a book added to the collection that is **not** for a class or course that leads to a degree or certificate, please send your request to: wishlist@bookshare.org

If you also post it the Volunteer Discussion List someone there may pick it up even sooner but simply posting to the Discussion List no longer results in adding the book to the Wish List.

If you select a book to work on from the Wish List please announce that immediately to the Volunteer Discussion List if you are on it and to: booksbeingsscanned@bookshare.org

A New Leash on Death	Susan Conant
Anne of the Windy Poplars	L.M. Montgomery
Asparagus Dreams	Jessica Piers
Batman Forever	
Bronxwood	Coe Booth
Brute Strength	Susan Conant
Chihuahua of the Baskervilles	Esri Allbritten
Chronicles of Elantra: Cast in Chaos	Michelle Sagara
Consider the Lillies (Hannah of Fort Bridger series #2)	Al Lacy
Courageous	Stephen and Alex Kendrick
Courting Darkness	Yasmine Galenorn
Dalakis: Stefan's Salvation	N.J. Walters
Dark Angels: Darkness Rising	Keri Arthur

Dark Swan: Shadow Heir	Richelle Mead
Dead and Doggone	Susan Conant
Endless Chase	N.J. Walters
Enshadowed	Kelly Creagh
Entice	Carrie Jones
Eternal Brothers	N.J. Walters
Facing the Giants	Stephen and Alex Kendrick
Faerie Rings: The Book of Forests	Diane DeKelb-Rittenhouse
Fallen Shadow	Dianne Sylvan
Fateful Trilogy: Fateful	Cheri Schmidt
Fateful Trilogy: Forever	Cheri Schmidt
Fateful Trilogy: Fractured	Cheri Schmidt
Feathered Dragon: Forgotten Realms Maztica Trilogy (Book 3)	Douglas Niles
Flywheel	Stephen and Alex Kendrick
Gaits of Heaven	Susan Conant
Harvest Hunter	Yasmine Galenorn
Infinite Days	Rebecca Maizel
Ironhelm: Maztica Trilogy (Book 1)	Douglas Niles
James Bond #2	
Jessica Rules the Dark Side	Beth Fantaskey
Kiss of Death	Rachel Caine
Legend	Marie Lu
Lethal Silence	Daleen Berry
Lola and the Boy Next Door	Stephanie Perkins
Magic Graves	Ilona Andrews and Jeaniene Frost
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2. NONFICTION

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