

Short Comment Regarding a Proposed Section 1201 Exemption

Item 1. Commenter Information

My name is John Edwin Miller. I am a US Library of Congress Certified Braille Transcriber and the Founder/Director of the (very) small IRS 501c3 Non-Profit 121AuthEnt.org, Inc. that was structured to meet the requirements of an 'Authorized Entity' under Section 121 of the US Copyright Act

Item 2. Proposed Class Addressed

Proposed Class 9: Literary Works Distributed Electronically – Assistive Technologies

“This proposed class would allow circumvention of access controls on lawfully made and acquired literary works distributed electronically for purposes of accessibility for persons who are print disabled. This exemption has been requested for literary works distributed electronically, including e-books, digital textbooks, and PDF articles.”

Item 3. Statement Regarding Proposed Exemption

I am first replying to the Initial Comment as submitted by the AFB, ACB, LCA, and TLPC at:

http://copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_AFBetal_Class09.pdf

From that submission at their Page 11:

This year, the Second Circuit affirmed that conversion of inaccessible copyrighted works into accessible digital formats for use by people who are blind, visually impaired, or print disabled is a fair use in *Authors Guild, Inc. v. HathiTrust*. As the *HathiTrust* court held, **“the doctrine of fair use allows [the] provi[sion of] full digital access to copyrighted works to [the] print-disabled.”** (my bold)

That is not what the 2nd Circuit ruling said. The exact words of the ruling as quoted and modified above are:

Weighing the factors together, we conclude that the doctrine of fair use allows *the Libraries* to provide full digital access to copyrighted works to *their print - disabled patrons*. (my italics)

There is nothing in the 2nd Circuit's ruling to indicate that their actual assessment of 'fair use' applies to anyone other than the eligible patrons of the HathiTrust Consortium Member Libraries and the Libraries themselves presuming that the standards and requirements of the HathiTrust Members as currently drafted are maintained and enforced.

The following was the Conclusion of the 2nd Circuit ruling:

CONCLUSION

The judgment of the district court is AFFIRMED, in part, insofar as the district court concluded that that ... the doctrine of "fair use" allows defendants - appellees to create a full - text searchable database of copyrighted works and to provide those works in formats accessible to those with disabilities;

The following is from the HathiTrust website at www.HathiTrust.org/print/106 --

Lawful uses of works are provided only under the following conditions:

- Access to persons who have print disabilities:
 - Users must be members of a partner institution in a country where laws permit access to users who have print disabilities.
 - Users must be authenticated into HathiTrust.

- Users must be certified by the partner institution as having a print disability or as being a proxy for a person who has a print disability

The following form must be executed and submitted on behalf of the print-disabled patron by the designated proxy:

HathiTrust Print Disabilities Access: Service Description and Requirements

Through a designated Proxy, Eligible Patrons at HathiTrust Supporting Institutions can receive special access to in-copyright materials in HathiTrust.

The materials must be held currently, or have been held previously, by the Supporting Institution's library, as indicated through print holdings information submitted to HathiTrust. Further terms and conditions of access are detailed below.

Definitions

Eligible Patron: an affiliated user at a Supporting Institution who has a print disability for which access to digital copies of library books is a reasonable and appropriate accommodation.

Print disability: a disability – such as a visual impairment, learning disability physical disability, or other disability – that impedes a person's ability to access print in the standard way.

Proxy: a representative designated by a HathiTrust Supporting Institution who accesses in-copyright content on behalf of an Eligible Patron.

From:

<https://docs.google.com/document/d/1eU8n0lfBFdyxNhtDWTCqzJt0ucnA9karp-tyiQDuawA/edit>

So while AFB and others participating in their S. 1201 submission seem to have inferred that the 2nd Circuit decision applies in a wholesale manner to any person with a print disability, anywhere, and

to anyone who might reproduce & distribute an accessible rendition of any copyrighted material, regardless of the source of such material, on their behalf, that is not what the 2nd Circuit *Authors Guild v HathiTrust* ruling actually said. Indeed the only reason the AFB et al were maybe able to come to such an inferred conclusion based solely upon this ruling was by modifying the actual words of the ruling itself to suit that end.

As per my statement regarding the proposed Class 9 exemption, I am not opposed to granting such exemption.

Thank you.