



## Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

### Item A. Commenter Information

#### **American Council of the Blind**

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The American Council of the Blind (ACB) is a national grassroots consumer organization representing Americans who are blind and visually impaired. With 70 affiliates, ACB strives to increase the independence, security, equality of opportunity, and to improve quality of life for all blind and visually impaired people.

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The American Foundation for the Blind (AFB) works to create a world of no limits for people who are blind or visually impaired by mobilizing leaders, advancing understanding, and championing impactful policies and practices using research and data.

#### **National Federation of the Blind**

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Since 1940, the National Federation of the Blind has advocated for equality of opportunity for the nation's blind, and as part of that mission, the Federation has vigorously stood for equal access to information through its leadership in many ways including leading efforts to secure passage of the Chafee Amendment to the Copyright Act and adoption of the Marrakesh Treaty and its intervention as a party in the HathiTrust case.

**Privacy Act Advisory Statement:** Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

## **Association for Education and Rehabilitation of the Blind and Visually Impaired (AER)**

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The Association for Education and Rehabilitation of the Blind and Visually Impaired (AER) strives to support and advocate for AER members who represent all major professional disciplines serving children, working-age adults and older people living with vision loss. Through direct member services, professional development, publications, networking, leadership development, accreditation, and public education, AER is the leading national and international voice of the professional vision loss community.

### **Library Copyright Alliance**

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association (ALA), the Association of College and Research Libraries (ACRL), and the Association of Research Libraries (ARL)—that collectively represent over 100,000 libraries in the United States. Libraries provide services to visually impaired people, both inside and outside of educational settings, in particular by converting works into formats accessible to the print disabled.

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Bookshare is an ebook library that makes reading easier. People with dyslexia, blindness, cerebral palsy, and other reading barriers can read in ways that work for them with ebooks in audio, audio + highlighted text, braille, and other customizable formats.

**HathiTrust**

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HathiTrust's Digital Library contains over 17 million books digitized from academic libraries. Through its Accessible Text Request Service, print disabled users in higher education institutions in the US and in Marrakesh Treaty nations may obtain DRM-free digital access to the text of any item in this collection, consistent with Section 121 of the Copyright Act.

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**Item B. Proposed Class Addressed:  
Proposed Class 8: Literary Works—Accessibility**

The Copyright Office initiated the eighth triennial rulemaking to consider exemptions from the anticircumvention provisions of the Digital Millennium Copyright Act (DMCA) on June 22, 2020 by issuing a Notice of Inquiry and Request for Petitions.<sup>1</sup> In response, the above-signed petitioners filed a petition to renew the current exemption for the use of assistive technologies with literary works distributed electronically by people with print disabilities on July 22, 2020<sup>2</sup> and then a petition to modify the exemption to comport with the Marrakesh Treaty Implementation Act on September 8, 2020.<sup>3</sup> On October 15, 2020, the Copyright Office issued a Notice of Proposed Rulemaking (NPRM) for this proceeding.<sup>4</sup> In the NPRM, the Office announced that it intended to renew the existing exemption<sup>5</sup> and sought comment on the proposed changes to the exemption.<sup>6</sup>

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<sup>1</sup> Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 85 Fed. Reg. 37,399 (Jun. 22, 2020). <https://www.govinfo.gov/content/pkg/FR-2020-06-22/pdf/2020-12911.pdf>.

<sup>2</sup> Renewal Petition of ACB, et al. (July 22, 2020), <https://www.copyright.gov/1201/2021/petitions/renewal/Renewal%20Pet.%20-%20Assistive%20Technologies%20-%20ACB%20et%20al.pdf>

<sup>3</sup> Modification Petition of ACB, et al. (Sept. 8, 2020), <https://www.copyright.gov/1201/2021/petitions/proposed/New%20Pet.%20-%20American%20Council%20of%20the%20Blind%20et%20al.pdf>.

<sup>4</sup> Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 85 Fed. Reg. 65,293 (Oct. 15, 2020) (“2020 NPRM”) <https://www.govinfo.gov/content/pkg/FR-2020-10-15/pdf/2020-22893.pdf> .

<sup>5</sup> *Id.* at 65,298.

<sup>6</sup> *Id.* at 65,306.

### Item C. Overview

The Copyright Office should recommend, and the Librarian should grant, an update to the wording and scope of the e-book accessibility exemption to track changes made by the Marrakesh Treaty Implementation Act (“MTIA”).<sup>7</sup> The MTIA made changes to the statutory scheme governing certain accessibility uses of literary works, and the exemption must be modified to reflect these changes.

Historically, the e-book accessibility exemption for authorized entities has incorporated both the wording and, in part of the exemption, the scope of the Chafee Amendment, codified at 17 U.S.C. § 121. The current regulatory language applies to uses of:

[L]iterary works, distributed electronically, that are protected by technological measures that either prevent the enabling of read-aloud functionality or interfere with screen readers or other applications or assistive technologies:

(i) When a copy of such a work is lawfully obtained by a blind or other person with a disability, as such a person is defined in 17 U.S.C. § 121; provided, however, that the rights owner is remunerated, as appropriate, for the price of the mainstream copy of the work as made available to the general public through customary channels, or;

(ii) When such work is a nondramatic literary work, lawfully obtained and used by an authorized entity pursuant to 17 U.S.C. § 121.<sup>8</sup>

The overall exemption is divided into two discrete exemptions for permissible circumvention: the **Personal Use Exemption** (Rule 201.40(b)(3)(i)) and the **Authorized Entities Exemption** (Rule 201.40(b)(3)(ii)). Under the Personal Use Exemption, people with disabilities covered by the Chafee Amendment may personally circumvent technological protection measures to remediate a copy of a literary work that they have lawfully obtained and remunerated the rightsholder for. The Authorized Entities Exemption allows authorized entities to circumvent technological protection measures to reproduce and distribute literary works to people with disabilities consistent with the terms of the Chafee Amendment.

In 2019, the United States deposited its instrument of ratification to join the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.<sup>9</sup> In joining the Treaty, the

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<sup>7</sup> Pub. L. No. 115-261, 132 Stat. 3667 (2018) (“MTIA”).

<sup>8</sup> 37 C.F.R. § 201.40(b)(3).

<sup>9</sup> U.S. Mission to International Organizations in Geneva, *U.S. Deposits Instrument of Ratification to the Marrakesh Treaty* (Feb. 8, 2019),

United States committed to updating its copyright laws and regulations to be consistent with the mandates of the Treaty, and in service of that commitment updated the Chafee Amendment with the Marrakesh Treaty Implementation Act (MTIA).<sup>10</sup> As a result, the Chafee Amendment underwent several changes<sup>11</sup> and a new companion section of law, 17 U.S.C. § 121A, was established to govern the import and export of accessible works.<sup>12</sup>

Article 7 of the Marrakesh Treaty requires all parties to “take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.”<sup>13</sup> To bring the U.S. into compliance with Article 7, the Library and Office must update the exemption to be consistent with the MTIA.

**Updating Pre-MTIA Chafee Terminology.** While many of the changes to the Chafee Amendment are already imported by reference into the existing exemption, there must be two straightforward changes to terms in the exemption terminology derived from the pre-MTIA version of the Chafee Amendment:

- **Expanding the Scope of Eligible Persons under the Personal Use Exemption.** First, the Personal Use Exemption must be updated to change the description of eligible users from “blind or other person with a disability” to “eligible person.” The MTIA expanded the scope of eligible beneficiaries of the Chafee Amendment by changing the term “blind or other persons with disabilities,” defined by reference to a separate definition in the Pratt-Smoot Act,<sup>14</sup> to cover any “eligible person,” defined in a detailed tripartite test that includes people who are blind, people who are visually impaired, people with perceptual or reading disabilities, and

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<https://geneva.usmission.gov/2019/02/08/u-s-deposits-instruments-of-ratification-to-the-marrakesh-treaty/>; see also WIPO, *United States of America Joins WIPO’s Marrakesh Treaty as 50th Member In Major Advance for the Global Blind Community* (Feb. 8, 2019), [https://www.wipo.int/pressroom/en/articles/2019/article\\_0002.html](https://www.wipo.int/pressroom/en/articles/2019/article_0002.html).

<sup>10</sup> See generally MTIA.

<sup>11</sup> MTIA § 2(a)(1).

<sup>12</sup> MTIA § 2(a)(2).

<sup>13</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled art. 7 (June 27, 2013), <https://www.wipo.int/treaties/en/ip/marrakesh/>.

<sup>14</sup> 17 U.S.C. § 121(d)(2) (version effective Dec. 3, 2004 to October 8, 2018) (citing 2 U.S.C. 135a).

people with physical disabilities that affect reading.<sup>15</sup> The Personal Use Exemption must be expanded accordingly.

- **Expanding the Scope of Covered Copyrighted Works Under the Authorized Entity Exemption.** Second, the Authorized Entity Exemption must be updated to change the description of eligible works from “nondramatic literary work[s]” to all “literary work[s] and previously published musical work[s] that have been fixed in the form of text or notation.” The MTIA expanded the scope of eligible works under the Chafee Amendment from only nondramatic literary works<sup>16</sup> to all literary works, and added eligibility for sheet music, tablature, and other musical works fixed in text or notation.”<sup>17</sup> The Authorized Entity Exemption must be updated accordingly.<sup>18</sup>

**Clarifying the Interplay Between Section 1201 and Section 121A.** In adopting Section 121A, Congress did not speak to the interplay, if any, between the new import/export provisions and Section 1201. In our view, the import and export of accessible copies of works consistent with Section 121A is sufficiently distinct and attenuated from any circumvention activity that it does not implicate Section 1201(a)(1)’s prohibition on circumvention—or, in the case of imports, similar laws in other countries. This is because Section 121A covers works that have already been remediated into accessible formats, and so any necessary circumvention entailed in the remediation would already be covered by the existing exemption and its proposed changes.

However, if the Library or the Office do not share this view, they must clarify the interplay between Section 1201 and Section 121A. Specifically, they must update the exemption to make clear that whatever circumvention is necessary for authorized entities to engage in noninfringing export under Section 121A(a)<sup>19</sup> and for authorized entities and eligible persons to engage in noninfringing import under Section 121A(b)<sup>20</sup> does not violate the anticircumvention provisions of Section 1201(a)(1).<sup>21</sup> To do so, the Library and the Office should add a new provision to subsection (ii) of the overarching e-book accessibility exemption—the **Import/Export Exemption**—that allows circumvention of literary works where:

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<sup>15</sup> See 17 U.S.C. § 121(a), (d)(3) (amended by MTIA § 2(a)(1)(A)(v) & (D)(v)).

<sup>16</sup> See 17 U.S.C. § 121(a) (version effective Dec. 3, 2004 to October 8, 2018).

<sup>17</sup> See 17 U.S.C. § 121(a) (amended by MTIA § 2(a)(1)(A)(ii)-(iii)).

<sup>18</sup> These changes also require several minor conforming changes, including to the reference to “Literary works” in the overarching language of 37 C.F.R. § 201.40(b)(3), described *infra*, Item C.

<sup>19</sup> 17 U.S.C. § 121A(a).

<sup>20</sup> 17 U.S.C. § 121A(b).

<sup>21</sup> 17 U.S.C. § 1201(a)(1).



An authorized entity, acting pursuant to 17 U.S.C. § 121A(a), exports copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation in accessible formats; or

An authorized entity or an eligible person, or someone acting on behalf of an eligible person, acting pursuant to 17 U.S.C. § 121A(b), imports copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation in accessible formats.

**Replacing Ableist Terminology.** Finally, the Library and the Office should replace the reference to “the price of the *mainstream* copy of the work” in the remuneration clause of the Personal Use Exemption with a more inclusive phrase such as “market price of an *inaccessible* copy.” The conception of an inaccessible copy of a work as a “mainstream” copy is an ableist framing that implies accessible format copies are not “mainstream.” While this is not a substantive change to the exemption, the Library and the Office should take the opportunity to make clear to the publishing industry, readers with print disabilities, and the public that accessible formats *should* be mainstream.

The final exemption, as proposed, with common language refactored into the umbrella language would read:

[L]iterary works or previously published musical works that have been fixed in the form of text or notation, distributed electronically, that are protected by technological measures that either prevent the enabling of read-aloud functionality or interfere with screen readers or other applications or assistive technologies:

(i) When a copy or phonorecord of such a work is lawfully obtained by an eligible person, as such a person is defined in 17 U.S.C. § 121; provided, however, that the rights owner is remunerated, as appropriate, for the market price of an inaccessible copy of the work as made available to the general public through customary channels;

(ii) When such a work is lawfully obtained and used by an authorized entity pursuant to 17 U.S.C. § 121; [optionally] or

(iii) When a copy or phonorecord of such a work is exported by an authorized entity pursuant to 17 U.S.C. § 121A(a) or is imported by an authorized entity or an eligible person, or someone acting on behalf of an eligible person, pursuant to 17 U.S.C. § 121A(b).

In 2018, NTIA recommended considering adopting a “more structured” format for each individual exemption setting out the classes of works, the groups of beneficiaries, and the types of circumvention permitted<sup>22</sup>. According to NTIA, this approach would likely improve readability and might make it easier to manage requests to expand or modify existing exemptions in future rulemaking cycles.<sup>23</sup> Under this potential new framing of the exemptions, our proposed modifications would result in the following language:

*Class:* [L]iterary works or previously published musical works that have been fixed in the form of text or notation, distributed electronically

*Uses:*

- Personal Use: Enabling read-aloud functionality or screen readers or other applications or assistive technologies
- Authorized Entity: Use by an authorized entity pursuant to 17 U.S.C. § 121
- [optionally] Export: Exportation by an authorized entity pursuant to 17 U.S.C. § 121A(a)
- [optionally] Import: Importation by an authorized entity or an eligible person, or someone acting on behalf of an eligible person, pursuant to 17 U.S.C. § 121A(b).

*Limitations:*

- For Personal Use: the rights owner must be remunerated, as appropriate, for the market price of an inaccessible copy of the work as made available to the general public through customary channels.

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<sup>22</sup> Recommendations of the National Telecommunications and Information Administration to the Register of Copyrights at 4 (“2018 NTIA Recommendation”), [https://www.ntia.doc.gov/files/ntia/publications/ntia\\_dmca\\_consultation\\_09252018.pdf](https://www.ntia.doc.gov/files/ntia/publications/ntia_dmca_consultation_09252018.pdf).

<sup>23</sup> *Id.*

#### Item D. Technological Protection Measure(s) and Method(s) of Circumvention

In the 2018 Recommendation’s discussion of the continuing need for the exemption, the Acting Register acknowledged that technological protection measures (TPMs) “interfere with the use of assistive technologies such as screen readers and refreshable braille displays.”<sup>24</sup> Such interference persists today, restricting access to digital e-book files both by adding protections against unauthorized copying, and by forcing readers to use only particular devices or applications to access and use these files. The Register has effectively affirmed the ongoing problems posed by TPMs in this context by confirming her intention to recommend the renewal of the existing exemption.<sup>25</sup>

E-books purchased from Apple Books, Amazon’s Kindle Store, Barnes & Noble, and the Kobo store all can contain restrictive TPMs (such as proprietary encrypted file formats) with the goals of controlling access to these digital files.<sup>26</sup> By adding these protection measures to e-book files, publishers and authors can significantly limit the accessibility of the file. TPMs such as these “can hinder interoperability between platforms, and prevent many assistive technologies from working,” and can even render the contents of an e-book file “completely inaccessible.”<sup>27</sup> Even when a file has been provided in an apparently accessible format, the use of TPMs can still interfere with the functionality of assistive technology by affirmatively disabling the “text-to-speech” capabilities of the file.<sup>28</sup>

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<sup>24</sup> Recommendation of the Acting Register of Copyrights at 22 (Oct. 2018) (“2018 Recommendation”), [https://cdn.loc.gov/copyright/1201/2018/2018\\_Section\\_1201\\_Acting\\_Registers\\_Recommendation.pdf](https://cdn.loc.gov/copyright/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf).

<sup>25</sup> 2020 NPRM, 85 Fed. Reg. at 65,289.

<sup>26</sup> See Apple, *Copyright and Digital Rights Management (DRM)*, <https://itunespartner.apple.com/books/articles/copyright-and-digital-rights-management-drm-2735> (last visited Dec. 13, 2020); Amazon, *Kindle Direct Publishing User Guide*, Topic 10 [https://kdp.amazon.com/en\\_US/help/topic/G202187860](https://kdp.amazon.com/en_US/help/topic/G202187860) (last visited Dec. 13, 2020); Barnes & Noble, *About DRM*, [https://help.barnesandnoble.com/app/answers/detail/a\\_id/683/~/about-drm](https://help.barnesandnoble.com/app/answers/detail/a_id/683/~/about-drm) (last visited Dec. 13, 2020); Kobo, *What is Digital Rights Management*, <https://help.kobo.com/hc/en-us/articles/360017814074-Add-eBooks-with-Adobe-Digital-Editions> (last visited Dec. 13, 2020).

<sup>27</sup> Sarah Hilderley, *Accessible Publishing Best Practice Guidelines for Publishers*, [https://www.accessiblebooksconsortium.org/publishing/en/accessible\\_best\\_practice\\_guidelines\\_for\\_publishers.html](https://www.accessiblebooksconsortium.org/publishing/en/accessible_best_practice_guidelines_for_publishers.html) (last visited Dec. 13, 2020).

<sup>28</sup> *Id.*

TPMs can also be used to lock an e-book file into a particular ecosystem of devices or applications. For example, e-books purchased from the Apple Books store can only be read on Apple products (e.g., Apple iPads, iPhones, and Mac computers).<sup>29</sup> This kind of restriction remains harmful to accessibility because, as NTIA has explained, “[r]equiring visually impaired Americans to invest hundreds of dollars in an additional device (or even multiple additional devices), particularly when an already-owned device is technically capable of rendering literary works accessible, is not a reasonable alternative to circumvention.”<sup>30</sup> Therefore, if a fully accessible version of an e-book is only available on a platform not owned by the prospective user who is blind, visually impaired, or print disabled, then that e-book is still inaccessible.

TPMs are also used for sheet music. For example, Musicnotes, a leading provider of sheet music for piano, guitar, voice, woodwinds, brass, and strings, requires downloads to be accessed in Musicnotes’ proprietary applications for mobile and desktop operating systems.<sup>31</sup> At least some of these applications appear to have significant accessibility problems.<sup>32</sup> Moreover, debate about the merits of a standardized format such as MusicXML and/or BMML (Braille MusicXML) is ongoing,<sup>33</sup> and the adoption of such a format may be further complicated by the fact that publishers often release files in formats that can inhibit the creation of braille copies. In the process of creating braille music, for example, the format of the file on which the braille music is based can have a significant impact on how effective the conversion process will be overall.<sup>34</sup> The ability to manipulate the original input file to best assist in the remediation of sheet music into an accessible format can not only speed up the process of remediation itself, but can increase the quality of the accessible material significantly.<sup>35</sup>

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<sup>29</sup> See Apple, *Read books and more with Apple Books*, <https://support.apple.com/en-us/HT201478> (last visited Dec. 13, 2020).

<sup>30</sup> NTIA Letter to the Register of Copyrights, (Sept. 21, 2012), [http://copyright.gov/1201/2012/2012\\_NTIA\\_Letter.pdf](http://copyright.gov/1201/2012/2012_NTIA_Letter.pdf).

<sup>31</sup> Musicnotes, *About Us*, <https://www.musicnotes.com/about/>.

<sup>32</sup> For example, the Musicnotes application for the Mac does not appear to properly interface with Apple’s VoiceOver technology, so no content is read aloud when a piece of sheet music is loaded.

<sup>33</sup> See generally The Daisy Consortium, *Music Braille—Latest Developments*, <https://daisy.org/activities/projects/music-braille/latest-developments/> (within Music Braille Production in 2018 §§ 1-2, [https://dl.daisy.org/projects/DAISY\\_Music\\_Braille\\_Research\\_Report\\_Phase2-FINAL.docx](https://dl.daisy.org/projects/DAISY_Music_Braille_Research_Report_Phase2-FINAL.docx) (Microsoft Word .docx)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

### **Item E. Asserted Adverse Effects on Noninfringing Uses**

The NPRM encourages commenters to focus on the following elements to demonstrate that proposed modifications to existing exemptions satisfy the requirements for the exemption to be granted under Section 1201:

1. The proposed class includes at least some works protected by copyright;
2. Users are adversely affected in their ability to make noninfringing uses, and users are likely to be adversely affected in their ability to make such noninfringing uses during the next three years;
3. The statutory prohibition on circumventing access controls is the cause of the adverse effects;
4. The uses at issue are noninfringing under Title 17; and
5. Section 1201(a)(1)(C)'s five statutory factors.<sup>36</sup>

#### **1. The proposed class includes works protected by copyright.**

The proposed exemption would cover all literary works and previously published musical works that have been fixed in the form of text or notation.<sup>37</sup> Both literary works and musical works are expressly recognized as categories of copyrightable subject matter under 17 U.S.C. § 102(a),<sup>38</sup> and as such the proposed class necessarily includes protected works. The Acting Register also affirmed this conclusion with respect to nondramatic literary works in 2018,<sup>39</sup> and the Register did so again by announcing her intent to renew the exemption in the 2020 NPRM.<sup>40</sup>

#### **2. The statutory prohibition on circumventing access controls prevents the remediation of literary works into accessible formats and leaves the United States out of compliance with the Marrakesh Treaty.**

Without expanding the bounds of the existing exception to mirror the provisions of Section 121 as amended by the MTIA, people with print disabilities will be faced with a significant adverse effect: they will continue to be denied the human rights guaranteed to them under the Marrakesh Treaty.

Circumventing TPMs is often the only means available to people who are blind, visually impaired, or print disabled to access e-books, e-textbooks, and other digitally distributed literary works. Absent Section 1201's prohibition of circumvention of TPMs,<sup>41</sup> eligible persons and entities would be allowed access to

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<sup>36</sup> 2020 NPRM, 85 Fed. Reg. at 65,294.

<sup>37</sup> See discussion *supra*, Item C.

<sup>38</sup> 17 U.S.C. § 102(a)(1) & (2).

<sup>39</sup> 2018 Recommendation at 22.

<sup>40</sup> 2020 NPRM, 85 Fed. Reg. at 65,289.

<sup>41</sup> 17 U.S.C. § 1201(a)(1)(A).

noninfringing accessible versions of these copyrighted works. Under this prohibition, eligible persons and entities cannot engage in the sort of circumvention required to interact with these works in an accessible format. The prohibition of circumvention given in Section 1201 is the cause of these adverse effects. The Office explicitly acknowledged these adverse effects in the 2020 NPRM, noting that “[t]he petitions demonstrated the continuing need and justification for the exemption, stating that individuals who are blind, visually impaired, or print disabled are significantly disadvantaged with respect to obtaining accessible e-book content because TPMs interfere with the use of assistive technologies.”<sup>42</sup>

The Marrakesh Treaty also directly addresses the issue of TPM circumvention. Specifically, Article 7 requires all parties to “take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.”<sup>43</sup> In joining the Marrakesh Treaty, the United States committed to updating its copyright laws and regulations to be consistent with the mandates of the Treaty.<sup>44</sup>

In service of that commitment, the United States adopted the MTIA.<sup>45</sup> The MTIA made three significant changes relevant to the exemption which are not currently reflected in the exemption itself.<sup>46</sup> Each change is a positive expansion of the rights available to eligible persons and authorized entities, and the mismatch between the provisions of the MTIA and the current exemption directly causes adverse effects in the absence of an update to the exemption. The provisions of the MTIA:

- Meaningfully expand the classes of disabilities covered by the Chafee Amendment and change how eligibility is ascertained;
- Broaden the scope of works which may be provided to eligible persons by authorized entities; and
- Make significant changes to how accessible copies of relevant works may be imported and/or exported by authorized entities and eligible persons.

The adverse effects of the disparity between the MTIA’s changes and the existing exemption in each of these areas are discussed in turn below.

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<sup>42</sup> See 2020 NPRM, 85 Fed. Reg. at 65,298.

<sup>43</sup> Marrakesh Treaty art. 7.

<sup>44</sup> See Marrakesh Treaty art. 16.

<sup>45</sup> See generally MTIA.

<sup>46</sup> See discussion *supra*, Item C.

- i. **Because the MTIA’s changes to the classes of disabilities covered and the process by which persons are certified as eligible are not reflected in the Personal Use Exemption, eligible persons will be denied access to works to which they are legally entitled.**

The current language of the Personal Use Exemption specifies that it applies to copies of works “lawfully obtained by a blind or other person with a disability, as such a person is defined in 17 U.S.C § 121.”<sup>47</sup> Chafee previously provided that “a blind or other person with a disability” referred to “individuals who are eligible or who may qualify in accordance with the Act entitled ‘An Act to provide books for the adult blind’ approved March 3, 1931 to receive books and other publications produced in specialized formats.”<sup>48</sup> Before its language was amended, this 1931 Act, also known as the Pratt-Smoot Act, provided for the distribution of accessible works to “blind and to other physically handicapped readers certified by competent authority as unable to read normal printed material as a result of physical limitations.”<sup>49</sup>

Following the updates under the MTIA, Section 121 no longer uses the term “blind or other person with a disability” and instead uses the term “eligible persons” to describe those who are covered under the statute.<sup>50</sup> As a result, the current exemption points to a definition that no longer exists in the current law.

There are two consequences of this change. First, broader classes of disabilities have been substituted for the limiting previous standard of “blind or other physically handicapped readers . . . unable to read normal printed material as a result of physical limitations.”<sup>51</sup> In addition to covering people who are blind,<sup>52</sup> Section 121 now covers visual impairments or perceptual or reading disabilities,<sup>53</sup> as well as physical disabilities that affect the ability to manipulate a book or focus or move the eyes.<sup>54</sup>

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<sup>47</sup> 37 C.F.R. § 201.40(b)(3)(i).

<sup>48</sup> 17 U.S.C. § 121(d)(2) (version effective Dec. 3, 2004 to October 8, 2018) (citing 2 U.S.C. 135a).

<sup>49</sup> 2 U.S.C. § 135a (version effective July 29, 2016 to December 19, 2019).

<sup>50</sup> See 17 U.S.C. § 121(a) & (d)(3) (amended by MTIA § 2(a)(1)(A)(v) & (D)(v)). The corresponding definition of “eligible person” in the Pratt-Smoot Act has been updated to point to the new definition in the post-MTIA version of Chafee. See 2 U.S.C. § 135a(g)(1) (amended by Pub. L. 116-94 § 1403(a), 113 Stat. 3206, (2019)).

<sup>51</sup> See 2 U.S.C. § 135a (version effective July 29, 2016 to December 19, 2019).

<sup>52</sup> 17 U.S.C. § 121(d)(3)(A).

<sup>53</sup> 17 U.S.C. § 121(d)(3)(B)

<sup>54</sup> 17 U.S.C. § 121(d)(3)(C).

Second, the former requirement under Pratt-Smoot that the would-be recipients of accessible materials needed to acquire authoritative certification that they are unable to read “normal” printed material<sup>55</sup> is no longer incorporated by reference into Section 121.<sup>56</sup> Subsequent legislation updated the text of Pratt-Smoot to instead use the definition of “eligible persons” now given under Section 121.<sup>57</sup> Under this new standard given by Section 121, people with print disabilities are no longer required to have their status “certified by competent authority as unable to read normal printed material as a result of physical limitation,” as was required under the pre-MTIA interaction between the Chafee Amendment and the Pratt-Smoot Act.<sup>58</sup>

In other words, people with print disabilities are no longer required to receive certification of their disability from a “competent authority” because there is now no certification requirement at all.<sup>59</sup> The new Section 121 standard of “eligible persons” is therefore more expansive, allowing self-certification in which people are given leeway to determine for themselves whether they need the accessible materials provided for in the statute.<sup>60</sup>

Neither the removal of the burdensome certification requirement nor Section 121’s updated scheme for who may make use of accessible copies of literary works is reflected in the language of the current exemption. This disparity between the current exemption and the updated language of Section 121 effectively denies access to accessible copies of eligible works to those whose disabilities are now recognized under the new statutory language, as well as to those who may have been deterred from seeking accessible materials by the burden of the certification requirement. Without bringing the exemption in line with the more expansive standards and processes provided by the MTIA, eligible—in some cases, *newly* eligible—people with print disabilities will be denied the legal access to accessible materials to which they are entitled.

**ii. The MTIA’s change to the scope of eligible works is not reflected in the Authorized Entity Exemption.**

Similarly, Section 1201(a)(1)’s prohibition on circumvention now stands as an impediment to access for people with print disabilities to previously unavailable

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<sup>55</sup> 2 U.S.C. § 135a (version effective July 29, 2016 to December 19, 2019).

<sup>56</sup> *See* 17 U.S.C. § 121(d)(3).

<sup>57</sup> *See* 2 U.S.C. § 135a(g)(1) (amended by Pub. L. 116-94 § 1403(a)).

<sup>58</sup> *See* 17 U.S.C. § 121(d)(2) (version effective Dec. 3, 2004 to October 8, 2018) (citing 2 U.S.C. 135a); 2 U.S.C. § 135a (version effective July 29, 2016 to December 19, 2019).

<sup>59</sup> *See* 17 U.S.C. § 121(d)(3).

<sup>60</sup> *See id.*



copyrighted works such as stage plays, screenplays, and notated musical works, which are now within the scope of works specified in Section 121. Under the changes made by the MTIA, the scope of eligible works covered by Section 121 has been meaningfully expanded from “nondramatic literary works” to include all “literary works and previously published musical works that have been fixed in the form of text or notation.”<sup>61</sup>

The anti-circumvention provisions of Section 1201 necessitate that the Authorized Entity Exemption be revised to provide eligible persons access to these new areas of permitted works. Without this revision, authorized entities that rely on circumvention will be unable to engage in the circumvention necessary to make these works accessible consistent with U.S. commitments under the Marrakesh Treaty.

**iii. Importing and exporting previously circumvented and remediated works under Section 121A arguably does not implicate Section 1201, but if the Office disagrees it should adopt an Import/Export Exemption.**

The MTIA expanded the ways in which eligible persons and authorized entities may reproduce and distribute relevant works in accessible formats with the creation of 17 U.S.C. § 121A.<sup>62</sup> With the enactment of the cross-border provisions in Section 121A, works in accessible formats may be imported and exported to and from countries that are parties to the Marrakesh Treaty.<sup>63</sup> Under Section 121A, such activity is deemed to be noninfringing provided certain standards are followed by the entities in question.<sup>64</sup>

Under Section 121A, works likely must be remediated into accessible formats prior to import or export, as the statute permits the exchange of works in “accessible formats.”<sup>65</sup> Accordingly, the actual process of circumvention and remediation permitted by the exemption appears to be too distinct and attenuated from the processes described in Section 121A to implicate Section 1201(a)(1). Therefore, it likely is unnecessary to amend the language of the exemption to include mention of Section 121A.

However, if the Library or the Office believes that exercising the import and export rights expressed in Section 121A somehow implicates the provisions of Section 1201, the Office should add a new provision to the overarching e-book accessibility exemption to clarify this position. Such a provision should specify that

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<sup>61</sup> See 17 U.S.C. § 121(a) (amended by MTIA § 2(a)(1)(A)(ii)-(iii)).

<sup>62</sup> 17 U.S.C. § 121A.

<sup>63</sup> 17 U.S.C. §§ 121A(a) (export) & (b) (import).

<sup>64</sup> 17 U.S.C. § 1201A(c).

<sup>65</sup> See *id.*

whatever circumvention is necessary for authorized entities to engage in noninfringing export under Section 121A(a)<sup>66</sup> and for authorized entities and eligible persons to engage in noninfringing import under Section 121A(b)<sup>67</sup> does not violate the anticircumvention provisions of Section 1201(a)(1).<sup>68</sup>

If this provision is deemed necessary, the Office should add a new subsection to the overarching e-book accessibility exemption—an Import/Export Exemption.<sup>69</sup> Adding this new exemption subsection would allow the circumvention of protection measures on literary works where an authorized entity is exporting eligible copies of works (pursuant to 121A(a)), or an authorized entity or eligible person is importing eligible copies of works (pursuant to Section 121A(b)).

The Library’s and Office’s clarification on the interplay between Section 1201 and Section 121A and, if necessary the adoption of the Import/Export Exemption, will support the ability of those using Section 121A to ensure that they are acquiring, copying, distributing, and using accessible works without unexpectedly conflicting with Section 1201.

**iv. The current language of the exemption is discriminatory.**

The Office should also recommend the replacement of the phrase “mainstream copy” in 37 C.F.R. § 201.40(b)(3)(i)<sup>70</sup> with more inclusive language, such as “inaccessible copy.” The term “mainstream copy” reflects a troubling, ableist framing that reinforces a damaging and offensive conception of people with print disabilities by casting books in formats that are accessible to them as not “mainstream.”

That an exemption from copyright law is required for people with print disabilities to legally access accessible literary material that is readily available to people without print disabilities is a tacit recognition that people with disabilities are routinely treated as second-class citizens by the publishers of books. If the text of the exemption itself reinforces the ableist notion that people with print disabilities are outside the “mainstream,” the exemption will perpetuate harm even as it helps.

Updating the language of the exemption by removing this discriminatory language is needed. The use of a term such as “inaccessible copy” or another fitting expression instead of the discriminatory phrase “mainstream copy” would bring the language of the exemption in line with the progressive, inclusive spirit of the exemption itself.

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<sup>66</sup> See 17 U.S.C. § 121A(a).

<sup>67</sup> See 17 U.S.C. § 121A(b).

<sup>68</sup> See 17 U.S.C. § 1201(a)(1).

<sup>69</sup> See discussion *supra*, Item C.

<sup>70</sup> 37 C.F.R. § 201.40(b)(3)(i).

### 3. The uses entailed in the proposed modifications are noninfringing.

Congress made clear in the 1976 Copyright Act that reproducing inaccessible literary works for use by people who are blind, visually impaired, or print disabled is a noninfringing use of those works.<sup>71</sup> In passing the Chafee Amendment, Congress explicitly exempted reproduction of copyrighted works for use by people who are blind, visually impaired, or print disabled.<sup>72</sup> The Chafee Amendment reaffirmed Congress's commitment to providing equal access to people who are blind, visually impaired, or print disabled as described in the Americans with Disabilities Act. Even without the Chafee Amendment, reproducing inaccessible literary works in accessible formats for use by people who are blind, visually impaired, or print disabled is a noninfringing or fair use of those works.

#### i. Expanding the scope of eligible users in the Personal Use Exemption is an uncontroversial fair use.

Updating the definition of eligible users for the Personal Use Exemption to reflect the post-MTIA terminology in the Chafee Amendment is an uncontroversial noninfringing use. Congress' expansion of the definition indicates its intention for those rightly included eligible persons to gain equal access to accessible works without infringing on the rights of the copyright holder.

The legislative history of the 1976 Copyright Act makes clear that converting all inaccessible literary works for use by people who are blind, visually impaired, or print disabled is a quintessential example of fair use.<sup>73</sup> Indeed, as the Supreme Court recognized in *Sony*, “[m]aking a copy of a copyrighted work for the convenience of a blind person [was] expressly identified ... as an example of fair use” by both chambers during the passage of the 1976 Copyright Act.<sup>74</sup>

In 2014, 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*.<sup>75</sup> 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.”<sup>76</sup>

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<sup>71</sup> H.R. Rep. No. 94-1476, at 73 (1976), reprinted in U.S.C.C.A.N 5659, 5686-87; S. Rep. No. 94-473, at 80 (1975).

<sup>72</sup> See 17 U.S.C. § 121(a).

<sup>73</sup> H.R. Rep. No. 94-1476, at 73 (1976); S. Rep. No. 94-473, at 80 (1975).

<sup>74</sup> *Sony v. Universal City Studios*, 464 U.S. 417, 455 n.40 (1984).

<sup>75</sup> *Authors Guild v. HathiTrust*, 755 F.3d 87, 101-03 (2d Cir. 2014).

<sup>76</sup> *Id.* at 103.

The Register affirmed the applicability of this analysis in concluding that the existing exemption was noninfringing in 2015.<sup>77</sup> Specifically, the Register noted that dating back to the 2003 triennial review, there had existed “a compelling case that making e-books accessible to persons who are blind, visually impaired or print disabled is a noninfringing [fair] use.”<sup>78</sup> The Office affirmed this analysis by recommending the exemption for renewal in 2018 and again in the 2020 NPRM.<sup>79</sup>

As was the case for granting the exemption for “people who are blind, visually impaired, or print disabled” in the previous triennial rulemakings, expanding the exemption to include all eligible persons is also a fair use of the copyrighted works. The inclusion of providing accessible copies to all persons with qualified disabilities within the fair use doctrine fits squarely within the treatment of accessibility by Congress and the courts as noninfringing. This analysis holds when considering each of the factors in turn.

**Purpose and Character.** The first factor of the fair use analysis focuses on the purpose and character of the new use.<sup>80</sup> The first factor favors uses that “serve broader public purposes.”<sup>81</sup> Including all eligible persons as defined in Section 121 into the Personal Use Exemption serves a broad public interest because it would “assure equality of opportunity [and] full participation . . . for [people with print disabilities].”<sup>82</sup> Ensuring that people with disabilities can make books accessible is an unquestionably valid purpose under the first factor.<sup>83</sup>

The Supreme Court made clear that providing access to books for people who are blind, visually impaired, or print disabled is a fair use under factor one in *Sony*, noting that “[m]aking 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, with no suggestion that anything more than a purpose to entertain to inform need motivate the copying.”<sup>84</sup> The *HathiTrust* court also pointed out that because publishers fail to make accessible copies of their works available in the traditional

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<sup>77</sup> Recommendation of the Register of Copyrights at 135 (Oct. 8, 2015) (2015 Recommendation), <https://www.copyright.gov/1201/2015/registers-recommendation.pdf>.

<sup>78</sup> *Id.* at 135 & n.852 (internal citations omitted).

<sup>79</sup> 2018 Recommendation at 22; 2020 NPRM, 85 Fed. Reg. at 65,298.

<sup>80</sup> 17 U.S.C. § 107(1).

<sup>81</sup> *Twin Peaks v. Publications Int’l*, 996 F.2d 1366, 1375 (2d Cir. 1993).

<sup>82</sup> *HathiTrust*, 755 F.3d at 102 (citing 42 U.S.C. § 12101(7)).

<sup>83</sup> *See id.*

<sup>84</sup> *Sony*, 464 U.S. at 455 n.40 (1984); *see also HathiTrust*, 755 F.3d at 102.

market, “a finding of fair use [is supported] in the unique circumstances presented by print-disabled readers.”<sup>85</sup>

Finally, Congress’s continuing “commitment to ameliorating the hardships faced by the blind and the print disabled” supports a finding of fair use under factor one.<sup>86</sup> The inclusion of the broadened definition of eligible persons into the Personal Use Exemption is consistent with the *HathiTrust* court’s and congressional intent. The court highlighted the declaration of Congress in the Americans with Disabilities Act to buttress its point. Congress declared that our “Nation’s proper goals regarding individuals with disabilities are to ensure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”<sup>87</sup> The *HathiTrust* court also noted that the “Chafee Amendment illustrated Congress’s intent that copyright law make appropriate accommodations for the blind and print disabled.”<sup>88</sup> Expanding the scope of eligible persons falls squarely in line with the *HathiTrust* court’s reasoning.

**Nature of the Work.** The second fair use factor asks courts to examine the nature of the copyrighted work.<sup>89</sup> The proposed expansion of eligible persons does not change the mixed nature of the works included, and the second factor does therefore does not preclude a finding of fair use,<sup>90</sup> as implicitly affirmed by the Office’s analysis by recommending the exemption for renewal in 2018 and again in the 2020 NPRM.<sup>91</sup>

**Amount and Substantiality.** The amount and substantiality of the portion necessarily used in providing access of literary works to all eligible persons does not weigh against fair use. The Office reaffirmed this analysis by recommending the exemption for renewal in the 2018 Register’s Recommendation and in the 2020 NPRM.<sup>92</sup> Although making an e-book accessible requires a full conversion of the original copyrighted work, using a work in its entirety does not weigh against fair use.<sup>93</sup> Where use of the entire underlying work is necessary to secure access for

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<sup>85</sup> *HathiTrust*, 755 F.3d at 102.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> 17 U.S.C. § 107(2).

<sup>90</sup> *See HathiTrust*, 755 F.3d at 102.

<sup>91</sup> 2018 Recommendation at 22; 2020 NPRM, 85 Fed. Reg. at 65,298.

<sup>92</sup> *Id.*

<sup>93</sup> *See Nunez v. Caribbean Int’l News*, 235 F.3d 18, 24 (1st Cir. 2000) (holding that using an entire photograph was necessary because any less would have defeated the new use); *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (holding that an effective parody can necessitate taking the “heart” of the original work).

people who are blind, visually impaired, or print disabled, the third factor does not weigh against a finding of fair use.<sup>94</sup> The inclusion of additional eligible persons does not alter the analysis of fair use for this factor.<sup>95</sup>

**Effect on the Market.** The effect of including all eligible persons on the potential market or value weighs in favor of fair use. User and authorized entity-created accessible copies of e-books do not negatively affect the market or value of copyrighted works. The House Report on the 1976 Copyright Act noted that accessible versions, “such as copies in Braille and phonorecords of oral readings (talking books), are not usually made by the publishers for commercial distribution.”<sup>96</sup> Although progress is being made, the market failures recognized by Congress nearly forty years ago largely continue today.

As the *HathiTrust* court noted in 2014, “[i]t is undisputed that the present-day market for books accessible to the handicapped is so insignificant that ‘it is common practice in the publishing industry for authors to forgo royalties that are generated through the sale of books manufactured in specialized formats for the blind.’”<sup>97</sup> The industry’s failure to provide accessible e-books signaled to the court that preserving the ability to convert books into accessible versions that can be consumed and enjoyed by people who are blind, visually impaired, or print disabled weighed the fourth factor conclusively in favor of fair use.<sup>98</sup>

Moreover, conversion of an inaccessible copyrighted work into an accessible, usable version likely has a positive impact on the market for e-books. Eligible people with print disabilities not currently included in the “people who are blind, visually impaired, or print disabled” definition are actively disincentivized from purchasing e-books in a market where they are not allowed to convert those books into an accessible and useable format. All copyrighted literary works are currently available to people without visual disabilities in the form of inaccessible copies. Allowing all eligible persons to convert literary e-books into accessible and useable formats will increase market demand for all e-books among this community. Finally, a broadening of the Personal Use Exemption would do nothing to affect the requirement that publishers must be remunerated prior to any circumvention.<sup>99</sup>

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<sup>94</sup> *HathiTrust*, 755 F. 3d at 103.

<sup>95</sup> Additionally, the existing exemption already contemplates making full books accessible. See 37 C.F.R. § 201.40(b)(3).

<sup>96</sup> H.R. Rep. No. 94-1476, at 73 (1976); S. Rep. No. 94-473, at 80 (1975).

<sup>97</sup> *HathiTrust*, 755 F.3d at 102.

<sup>98</sup> *Id.*

<sup>99</sup> See 37 C.F.R. § 201.40(b)(3)(i).

**ii. Expanding the scope of eligible literary works under the Authorized Entity Exemption is an inherently noninfringing use under the post-MTIA Chafee Amendment.**

Expanding the scope of works covered under the Authorized Entity Exemption to include “literary work[s] and previously published musical work[s] that have been fixed in the form of text or notation” leaves the permissible uses noninfringing because the proposed expansion is directly tied to the language of the Chafee Amendment. The post-MTIA version of the Chafee Amendment declares specifically that “it is not an infringement of copyright for an authorized entity to reproduce or to distribute in the United States copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation if such copies or phonorecords are reproduced or distributed in accessible formats exclusively for use by eligible persons.”<sup>100</sup> Because the proposed expansion would simply allow the use of such works “pursuant to 17 U.S.C. § 121,” the uses allowed are definitionally within the four corners of the Chafee Amendment and are thus inherently noninfringing.<sup>101</sup>

**iii. Uses under the Import/Export Exemption would be inherently noninfringing under Section 121A.**

Adding in the Import/Export Exemption, if necessary,<sup>102</sup> would result in noninfringing uses because the allowed uses would be directly tied to the language of Section 121A. Section 121A(a) and (b) respectively deem appropriate exportation and importation of accessible-format works as “not an infringement of copyright.”<sup>103</sup> The proposed exemption would simply allow authorized entities to export accessible-format copies of works pursuant to Section 121A(a) and authorized entities, eligible persons, and people acting on behalf of eligible persons to import such works pursuant to 17 U.S.C. § 121A(b). Thus, the uses allowed are definitionally within the four corners of Section 121A and are thus inherently noninfringing.

**iv. Replacing “mainstream copy” with “inaccessible copy” in the Personal Use Exemption does not affect the underlying, noninfringing use.**

There are no infringement issues presented with the proposed change from “mainstream copy” to “inaccessible copy” because altering this language will not change the scope or nature of the permissible uses under the exemption. The Office’s recommendation of the existing exemption for renewal in 2018 and 2020 effectively reaffirmed this analysis.<sup>104</sup>

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<sup>100</sup> 17 U.S.C. § 121(a).

<sup>101</sup> *See id.*

<sup>102</sup> *See discussion supra*, Item B.

<sup>103</sup> 17 U.S.C. § 121A(a) & (b).

<sup>104</sup> 2018 Recommendation at 22; 2020 NPRM, 85 Fed. Reg. at 65,298.

**4. Section 1201’s statutory factors are in favor of granting the proposed exemption.**

Under Section 1201(a)(1)(C), the Librarian of Congress considers five factors in whether to grant an exemption:

- i. The availability for use of copyrighted works;
- ii. The availability for use of works for nonprofit archival, preservation, and educational purposes;
- iii. The impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
- iv. The effect of circumvention of technological measures on the market for or value of copyrighted works; and
- v. Such other factors as the Librarian considers appropriate.<sup>105</sup>

In determining the weight of each factor in 2015, the Register found that that all factors were favorable towards the exemption and recommended to permit circumvention of TPMs on e-books to allow the use of assistive technologies.<sup>106</sup> Because the exemption was renewed without any opposition in 2018<sup>107</sup> and will be recommended for renewal in 2020,<sup>108</sup> these conclusions still hold.

**i. Granting the exemption will increase the availability of copyrighted works for people who are blind, visually impaired, or print disabled.**

The main aim of the Marrakesh Treaty is to end the global book famine—the dire shortage of accessible-format copies of books worldwide.<sup>109</sup> Therefore, the proposed exemption will make many e-books accessible for people who are blind, visually impaired, or print disabled.

The *HathiTrust* court noted that the number of accessible e-books currently available is a minimal percentage of the total amount of books worldwide.<sup>110</sup> In fact, less than 10 percent of all publications produced every year were available in

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<sup>105</sup> 17 U.S.C. § 1201(a)(1)(C).

<sup>106</sup> 2015 Recommendation at 135.

<sup>107</sup> 2018 Recommendation at 22.

<sup>108</sup> 2020 NPRM, 85 Fed. Reg. at 65,298.

<sup>109</sup> See generally WIPO, *The Marrakesh Treaty—Helping to end the global book famine* (2016),

[https://www.wipo.int/edocs/pubdocs/en/wipo pub marrakesh overview.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_overview.pdf).

<sup>110</sup> *HathiTrust*, 755 F.3d at 103.



accessible formats as of 2018.<sup>111</sup> According to the World Blind Union, there are around 253 million people globally who are visually impaired and need works in accessible formats.<sup>112</sup>

Although there have been positive changes in the e-book marketplace since the exemption was first adopted in 2003, a significant proportion of e-books remain unavailable in accessible formats.<sup>113</sup> These dynamics persist despite the existence of free platforms designed to provide access to accessible books. For instance, the World Intellectual Property Organization and its member states have sought to make books more accessible through the Accessible Book Consortium.<sup>114</sup> The Consortium's goal is to increase the number of books worldwide in accessible formats and to make them available to people who are blind, have low vision, or are otherwise print disabled.<sup>115</sup> Yet even the ABC includes only 635,000 titles, spread across 80 languages in accessible formats.<sup>116</sup>

Other accessible book services, including Bookshare, HathiTrust, and the Internet Archive also provide books in accessible formats, but their collections remain incomplete.<sup>117</sup> As of 2019, the Internet Archive allowed organizations working with people with disabilities to access the digital files of approximately 1.8 million books (about 900,000 of which are otherwise unavailable).<sup>118</sup> Bookshare's library has approximately 940,000 titles, including books for school, careers, and

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<sup>111</sup> Catherine Jewell, *The Accessible Books Consortium: what it means for publishers*, WIPO Magazine (February 2018), [https://www.wipo.int/wipo\\_magazine/en/2018/01/article\\_0001.html](https://www.wipo.int/wipo_magazine/en/2018/01/article_0001.html).

<sup>112</sup> World Blind Union, <https://worldblindunion.org> (last visited Dec. 13, 2020).

<sup>113</sup> By way of example, we highlight more than two dozen titles not available with text-to-speech enabled on Amazon's Kindle service *infra*, Item F.1.

<sup>114</sup> Accessible Books Consortium, *ABC Global Books Service*, <https://www.accessiblebooksconsortium.org/globalbooks/en/> (last visited Dec. 13, 2020)

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Laura C. Wood et al., *Libraries: Take AIM!* (2017), <https://dl.tufts.edu/concern/pdfs/fn1079946>.

<sup>118</sup> John Gonzalez, *Internet Archive helps make books accessible for students with disabilities*, Internet Archive Blogs (Feb. 16, 2019), <http://blog.archive.org/2019/02/16/internet-archive-helps-make-books-accessible-for-students-with-disabilities/>. The Internet Archive currently reports approximately 1.9 million titles in accessible formats. Internet Archive, *Books for People with Print Disabilities*, <https://archive.org/details/printdisabled> (last visited Dec. 13, 2020).

reading pleasure, as well as titles in over 34 languages.<sup>119</sup> Although these services provide access to a large number of works, many millions of books remain unavailable in accessible formats.<sup>120</sup>

Previously published musical works that have been fixed in the form of text or notation also remain in limited availability. The ABC Global Book Service includes approximately 635,000 titles in different accessible formats, but only 7000 music scores (partitions) in braille.<sup>121</sup> The Library of Congress has 8.1 million pieces of sheet music available,<sup>122</sup> demonstrating that the vast majority of sheet music is not made available by publishers in accessible formats.

Before the adoption of the Marrakesh Treaty the issue of accessible music notation had not been addressed broadly. After the ratification of the treaty, Bookshare noted that “[its] copyright exception has not enabled us to support music in the past, but with the ratification of the Marrakesh Treaty, Bookshare will be able to support publisher’s flows, volunteer-or local library uploads for music scores, plus distribution rights to qualified members.”<sup>123</sup>

The creation of accessible formats of music sheets is still complicated for a number of reasons: files are not always in a useful format, there is debate about the merits of a standardized format such as MusicXML and/or BMML (Braille MusicXML), and online conversion tools often do not deliver “sufficiently professional results.”<sup>124</sup> Regardless, it is critical for the Library and the Office to ensure, consistent with U.S. obligations under the Marrakesh Treaty, that technological protection measures do not serve as a barrier for ongoing innovation in ensuring that music becomes accessible. Accordingly, granting the proposed modifications will serve the first factor.

**ii. Granting the exemption will increase the availability of e-books for educational purposes.**

Another of the Marrakesh Treaty’s key goals was to ensure equal educational opportunities for people who are blind, visually impaired, or print disabled. The Treaty’s preamble highlights the significance of the enjoyment of the right to

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<sup>119</sup> Bookshare, *Who we Are*, <https://www.bookshare.org/cms/about>.

<sup>120</sup> One 2017 estimate put the total number of books published at nearly 130 million. Leonid Taycher, *Books of the world, stand up and be counted! All 129,864,880 of you.*, <http://booksearch.blogspot.com/2010/08/books-of-world-stand-up-and-be-counted.html>.

<sup>121</sup> *ABC Global Books Service*, *supra* note 114.

<sup>122</sup> Library of Congress, *Fascinating Facts*, <https://www.loc.gov/about/fascinating-facts/> (last visited Dec. 13, 2020).

<sup>123</sup> *Music Braille Production in 2018*, *supra* note 33 at 28.

<sup>124</sup> *Id.* at 3

education for persons with visual impairments or other print disabilities.<sup>125</sup> Thus, the educational benefit of this exemption for students who are blind, visually impaired, or print disabled favors granting the proposed modifications.

Students with disabilities face particular difficulties in finding and using accessible class materials in a meaningful way and within acceptable time periods. TPMs continue to limit libraries' capacity to make materials accessible in a timely fashion.<sup>126</sup> The ability to circumvent TPMs on digital textbooks and other academic materials ensures that students who are blind, visually impaired, or print disabled are afforded equal access to education technologies.

Moreover, the outbreak of the coronavirus pandemic brings more challenges for people with disabilities. While the COVID-19 pandemic threatens all members of society, persons with disabilities are disproportionately impacted due to attitudinal, environmental and institutional barriers that are reproduced in the COVID-19 response.<sup>127</sup> In consideration of all the challenges that people with disabilities face during the pandemic, guidelines from the United Nations Human Rights Office of the High Commissioner recommend that all member states develop accessible and adapted materials for students with disabilities to support remote learning.<sup>128</sup> The proposed modifications to the exemption will help overcome obstacles to accessible education during the pandemic, and thus the second factor weighs in factor of granting them.

**iii. Granting the proposed exemption will enable greater research, commentary, criticism, reporting, and teaching of copyrighted works**

The Marrakesh Treaty was architected in part to emphasize how challenges to people who are blind, visually impaired, or print disabled are “prejudicial to the complete development of persons with visual impairments or other print disabilities, which limit their freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds on an equal basis with others, including through all forms of communication of their choice, their enjoyment of the right to education, and the opportunity to conduct research.”<sup>129</sup> Accessibility of copyrighted works for people with disabilities is an essential and valuable asset for

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<sup>125</sup> See Marrakesh Treaty Preamble.

<sup>126</sup> Long Form Comment of ACB, et al. at 20 (Feb. 2015) (2015 Comments), <https://cdn.loc.gov/copyright/1201/2015/comments-020615/InitialComments LongForm AFBetal Class09.pdf>.

<sup>127</sup> United Nations Human Rights Office of the High Commissioner, *Covid-19 and the rights of persons with disabilities: Guidance* (April 19, 2020), <https://www.ohchr.org/Documents/Issues/Disability/COVID-19 and The Rights of Persons with Disabilities.pdf>

<sup>128</sup> *Id.* at 6.

<sup>129</sup> Marrakesh Treaty Preamble.

criticism, commentary, news reporting, teaching, scholarship, and research. People with disabilities cannot participate fully in society, participate in public debate, or share ideas without access to books. The proposed modifications will help address this dynamic, and thus the third factor weighs in favor of granting them.

**iv. The proposed exemption will not negatively impact the market for or value of copyrighted works.**

In the nearly two decades that this exemption has been in place, there is no evidence of any harm to the e-book market or to the value of copyrighted works. In 2015, the Register noted that there is no evidence that it would undermine the value of or market for e-books, as that market had grown substantially in recent years despite the existence of earlier exemptions.<sup>130</sup> Similarly, there were no objections from creators and copyright owners during the 2015 review of the full exemption<sup>131</sup> or to the streamlined renewal requests in 2018<sup>132</sup> or 2020.<sup>133</sup>

There is little argument that owners of copyrighted works are negatively impacted by this exemption; in fact, copyright holders often support the increased accessibility for people who are blind, visually impaired, and print disabled.<sup>134</sup> As discussed above,<sup>135</sup> the dynamics surrounding access to books mean that modest proposed expansions to the exemption are unlikely to result in any significant impact on the market for or the value of books.

**v. Disability law counsels in favor of recommending the exemption.**

Finally, the Register should recommend the proposed expansions to the exemption because numerous disability laws and policies are concerned with the accessibility of e-books. These include the Americans with Disabilities Act of 1990 (ADA)<sup>136</sup> and Section 504 of the Rehabilitation Act of 1973.<sup>137</sup> As the Office considers the specific exemption for disability services to remediate video, it should consider that Educational Institution Units (EIUs) often must remediate books for their students as well.<sup>138</sup> Accordingly, by facilitating greater access to literary and musical works, the proposed modifications will assist educational institutions in complying with their obligations under federal disability law.

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<sup>130</sup> 2015 Recommendation at 136.

<sup>131</sup> *Id.* at 137.

<sup>132</sup> 2018 Recommendation at 22

<sup>133</sup> 2020 NPRM, 85 Fed. Reg. at 65,298.

<sup>134</sup> *See* 2015 Comments at 23.

<sup>135</sup> *See* discussion *supra*, Item E.3.i.

<sup>136</sup> 42 U.S.C. § 12101.

<sup>137</sup> 29 U.S.C. § 794(a).

<sup>138</sup> *See* 2020 NPRM, 58 Fed. Reg. at 65,298, 65,303.

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For the foregoing reasons, the Office should recommend, and the Librarian should grant the proposed exemption.

### Item F. Documentary Evidence

#### 1. Examples of Books with TTS Disabled on Amazon’s Kindle Store.

*Methodology:* From September through October 2020, we checked Amazon’s Kindle store for example e-books with text-to-speech (TTS) functionality disabled. Among others, we looked at books that had previously won the Hugo Award, books from Nobel Laureates, and books from the Goodreads 2019 top-20 fiction list. We found the following books had text-to-speech disabled. Though text-to-speech functionality appears to have been made available for at least some of the books since our original review, our findings demonstrate that books are routinely provided without TTS availability.

Year	Title	List
2019	Ask Again, Yes	Goodreads 2019 Best Fiction
2019	The Bookish Life of Nina Hill	Goodreads 2019 Best Fiction
2019	Find Me	Goodreads 2019 Best Fiction
2019	Fleishman Is In Trouble	Goodreads 2019 Best Fiction
2019	The Gifted School	Goodreads 2019 Best Fiction
2019	Girl, Woman, Other	Goodreads 2019 Best Fiction
2019	Lanny	Goodreads 2019 Best Fiction
2019	The Most Fun We Ever Had	Goodreads 2019 Best Fiction
2019	Normal People	Goodreads 2019 Best Fiction
2019	Olive, Again	Goodreads 2019 Best Fiction
2019	On Earth We’re Briefly Gorgeous	Goodreads 2019 Best Fiction
2019	The Overdue Life of Amy Byler	Goodreads 2019 Best Fiction
2019	Queenie	Goodreads 2019 Best Fiction
2019	The Reckless Oath We Made	Goodreads 2019 Best Fiction
2019	Red at the Bone	Goodreads 2019 Best Fiction
2019	The Testaments	Goodreads 2019 Best Fiction
2019	When All Is Said	Goodreads 2019 Best Fiction
2019	Where the Forest Meets the Stars	Goodreads 2019 Best Fiction
1983	Foundation’s Edge	Hugo Award for Best Fiction
1971	Ringworld	Hugo Award for Best Fiction
1968	Lord of Light	Hugo Award for Best Fiction

1967	The Moon is Harsh Mistress	Hugo Award for Best Fiction
1984	The Poetry of Jaroslav Seifert	Written by Nobel Laureate
1982	One hundred years of Solitude	Written by Nobel Laureate
1967	The President	Written by Nobel Laureate
1966	And the Crooked Shall be Made Straight	Written by Nobel Laureate
1966	Collected poem by Nell Sachs	Written by Nobel Laureate
1934	One, None and a Hundred Thousand	Written by Nobel Laureate