

Comments submitted by the University of Guam CEDDERS in response to the

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

April 28, 2009

Summary:

The University of Guam Center for Excellence in Developmental Disabilities Education, Research and Service (Guam CEDDERS) is one of 67 nationally designated centers funded by the Administration on Developmental Disabilities, U.S. Department of Health and Human Services. Guam CEDDERS provides training, technical assistance, services, supports, research and dissemination of information on best practices in supporting individuals with disabilities and their families. Through Federal grants, local and regional contracts, Guam CEDDERS's resources have grown significantly since its inception 16 years ago. In partnership with individuals with disabilities and their families, agencies, organizations, and service providers, Guam CEDDERS creates pathways that enhance, improve, and support the quality of life of individuals with developmental disabilities and their families.

As the designated State Assistive Technology Project for the past 13 years, Guam CEDDERS has been instrumental in establishing the Guam System for Assistive Technology Center as a resource and demonstration center for Guam to access and acquire assistive technology devices and services, as well as a resource center for neighboring Pacific entities. In 2007, Guam CEDDERS was awarded a grant by the U.S. Department of Education, Office of Special Education Programs (OSEP) to organize and administer the Pacific Consortium for Instructional Materials Accessibility Project (CIMAP).

CIMAP consists of the

- outlying areas (20 USCS §1401)
 1. Guam,
 2. Commonwealth of the Northern Mariana Islands (CNMI), and
 3. American Samoa
- and the freely associated states (FAS) (20 USCS §1409)
 1. Federated States of Micronesia (FSM),
 2. Republic of the Marshall Islands (RMI), and
 3. Republic of Palau.

The mission of CIMAP is to implement the National Instructional Materials Accessibility Standard (NIMAS) which is mandated under the Individuals with Disabilities Education Act (IDEA). [20 USCS §1412(a)(23)] The purpose of NIMAS is to provide instructional materials to blind persons or other persons with print disabilities. Implementing NIMAS requires concomitant compliance with United States Copyright law, specifically 17 USCS §121, the Chafee Amendment.

The Chafee Amendment provides in pertinent part that:

"... it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies of a previously published, nondramatic literary work if such copies are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities."

CIMAP members, in their Part B-IDEA applications, opted to coordinate with National Instructional Materials Accessibility Center (NIMAC) [20 USCS §1474(e)] and to become members in bookshare.org, both Authorized Entities under Chafee, to provide NIMAS and other materials formatted for students with print disabilities. Bookshare.org has also been funded by OSEP to provide accessible materials (including Braille and talking books) for students with print disabilities.

An advisory opinion dated June 12, 2008 (attached as Exhibit A), from the Library of Congress¹ concluded that:

“. . . U.S. copyright law does not apply in the FAS. Therefore, the FAS is required to acquire copyright permission from rights holders in works received by the FAS pursuant to copyright exemptions under U.S. copyright law, e.g. the Chafee Amendment.”

Thus, the individual FAS entities and/or bookshare.org have had to obtain piecemeal permission from the publishers regarding specific publications in order to provide to eligible FAS students materials in accessible formats. Furthermore, the FAS have been denied access to materials from NIMAC.

The circumstances, under which the FAS must operate in order to comply with the letter of the Chafee Amendment, belie the spirit of both Chafee Amendment and IDEA. It is CIMAP's position that

- the Chafee Amendment should apply to the FAS when implementing IDEA, specifically NIMAS, and
- the FAS should have access to NIMAC.

Possible Actions:

1. Amend IDEA

There is language in IDEA that makes reference to the Chafee Amendment and the definition of blind and print disabilities as used in the Chafee Amendment. The definitions in **20 U.S.C.A. § 1474(e)(3)** include:

(A) Blind or other persons with print disabilities

The term “blind or other persons with print disabilities” means children served under this Act and who may qualify in accordance with the Act entitled “An Act to provide books for the adult blind”, approved March 3, 1931 ([2 U.S.C. 135a](#); 46

¹ The following information is from the National Library Service for the Blind and Physically Handicapped (NLS) fact sheet - www.loc.gov/nls/reference/factsheets/copyright.html:

Where should questions concerning the Chafee amendment be directed?

Questions originating from the media should be directed to the Library of Congress Public Affairs Office at (202) 707-2905. Contact the Library of Congress Copyright Office Public Information Office at (202) 707-3000 for other general questions.

Stat. 1487)² to receive books and other publications produced in specialized formats.

(C) Print instructional materials

The term "print instructional materials" means printed textbooks and related printed core materials that are written and published primarily for use in elementary school and secondary school instruction and are required by a State educational agency or local educational agency for use by students in the classroom.

(D) Specialized formats

The term "specialized formats" has the meaning given the term in [section 121\(d\)\(3\) of Title 17](#).³

Although IDEA references and adopts specific parts of the Chafee Amendment, it does not include any reference to section 121(a) of Title 17 which is the copyright exception:

- (a) Notwithstanding the provisions of [section 106](#), it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.

Therefore, the essential copyright exception is not incorporated into the NIMAS provisions of IDEA.

2. Amend the Chafee Amendment to include a provision including application to the FAS for the purposes of implementing NIMAS. This may be necessary to allow the FAS access to NIMAC and the National Library Service for the Blind and Physically Handicapped (NLS).

Comments Submitted By:

4/28/09

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² In section 121(d)(2), the Chafee Amendment adopted the Library of Congress regulations (36 CFR 701.6(b)(1)) related to the Act to Provide Books for the Adult Blind (approved March 3, 1931, 2 U.S.C. 135a) provide that "blind persons or other persons with print disabilities."

³ (d) For purposes of this section, the term--

(3) "print instructional materials" has the meaning given under section 674(e)(3)(C) of the Individuals with Disabilities Education Act

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To: David Carson
From: Neil Conley
Re: Chafee Amendment Research for Marcelene Santos
Date: June 12, 2008

MEMORANDUM

Issues Researched: Are the Freely Associated States (“FAS”) “foreign” for purposes of the Chafee Amendment? In other words, must the FAS acquire copyright permission from rights holders in works received by the FAS from the National Library Service (“NLS”) because U.S. copyright law does not cover the FAS?

Recommended Answer: Yes. The FAS must acquire copyright permission from rights holders in works received by the FAS from the National Library Service (“NLS”) because an exemption under U.S. copyright law is applicable only within the United States and not in the FAS, which are, essentially, independent, self-governing foreign territories with their own governments and constitutions.

Findings:

Background:

The Federated States of Micronesia, the Republic of the Marshall Islands, and Palau (and the Northern Mariana Islands) once constituted the Trust Territory of the Pacific Islands. *See* 48 USCS prec § 1681 (2008). This Trust was set up pursuant to a Joint Resolution authorizing the President to approve the trusteeship agreement for Pacific Islands. *See* 80 P.L. 204 (1947). The Resolution, passed in 1947 stated,

. . . the United States submitted to the Security Council of the United Nations for its approval in accordance with article 83 of the Charter of the United Nations a proposed trusteeship agreement for the Pacific islands formerly mandated to Japan under which the United States would be prepared to administer those islands under trusteeship in accordance with the Charter of the United Nations . . .

*Id.*¹ These Trust Territories were later terminated and replaced with Compacts of Free Association, creating Freely Associated States. The trusteeship with the Republic of the Marshall Islands was terminated on October 21, 1986; the trusteeship with the Federated States of Micronesia and the Commonwealth of the Northern Mariana Islands on November 3, 1986; and the trusteeship with the Republic of Palau on October 1, 1994. *See* 48 USCS prec § 1681 (2008).

1. For a more detailed history of the Trust Territory of the Pacific Islands, see *John v. United States*, 77 Fed. Cl. 788 (Fed. Cl. 2007).

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In 1986, the United States Congress, passed a Joint Resolution to approve “The Compact of Free Association” by which Micronesia and the Marshall Islands became independent states, i.e. independent of the United States, in most respects. *See* 99 P.L. 239 (1986). A similar resolution was passed for Palau. *See* 99 P.L. 658 (1986). Both Compacts provide that the three territories are now recognized as self-governing, with their own constitutions. *See* Title One: Government Relations, Article I: Self Government, Section 111, 99 P.L. 239 and 658.² Although these Compacts are not legislation passed by two-thirds of the Senate, they have the effect of law. *See Robinson v. Harbert Int'l, Inc.*, 743 F. Supp. 797, 801 (N.D. Ala. 1989) (explaining the Executive’s powers in conducting foreign relations with sovereign entities).

The Chafee Amendment, passed in 1996, amended the Copyright Act by adding section 121, “Limitations on exclusive rights: Reproduction for blind or other people with disabilities.”³ The Chafee Amendment “allows authorized entities to reproduce or distribute copies or phonorecords of previously published nondramatic literary works in specialized formats exclusively for use by blind or other persons with disabilities.”⁴ This amendment affected the National Library Service program. *Id.* The NLS administers the free national library program of reading materials for visually handicapped adults.⁵

In 2004, Congress passed the Individuals with Disabilities Improvement Act of 2004, which, under section 610 (108 P.L. 446; codified in 20 U.S.C.S. § 1409), amended

2. The Court of Federal Claims noted that the President of the United States proclaimed that the United States had fulfilled its obligations under the Trusteeship Agreement and that the Republic of the Marshall Islands was self-governing and no longer subject to the Trusteeship. *Id.* at 804. The court further noted,

In keeping with its decision that the RMI [Republic of the Marshall Islands] was a sovereign self-governing state, on April 22, 1987, the President's nomination of the United States diplomatic representative to the Marshall Islands was announced; on May 4, 1987, the Government of the RMI was notified formally that the general relations between the two governments would be governed by international law, as reflected in the Vienna Convention on Diplomatic Relations and that the RMI representatives would be accorded status commensurate with the heads of diplomatic missions, as this expression is used in the Convention. On June 3, 1987, the United States Senate gave its consent to appointment of the President's nominee.

Id.

3. *See* Loc.gov, NLS Factsheets, <http://www.loc.gov/nls/reference/factsheets/copyright.html> (last visited June 12, 2008). The Chafee Amendment, H.R. 3754, became effective on September 16, 1996. *Id.*

4. *Id.*

5. *Id.*

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the Act to include the Freely Associated States (“FAS”) of Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. *Id.* Section 1409 states,

The Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau shall continue to be eligible for competitive grants administered by the Secretary under this title [20 USCS §§ 1400 et seq.] to the extent that such grants continue to be available to States and local educational agencies under this title [20 USCS §§ 1400 et seq.].

The FAS are recipients of United States Department of Education (“USDOE”) for special education.⁶ To receive these monies, FAS must adopt and implement the National Instructional Materials Accessibility Standard (“NIMAS”).⁷ NIMAS refers to structured source files, created by educational curriculum publishers, from which textbook and core materials are created for students with special educational needs.⁸ The FAS are part of the Pacific Consortium for Instructional Materials Accessibility Project (“CIMAP”)⁹ organized pursuant to an Office of Special Education Programs (“OSEP”)¹⁰ grant to the Centers for Excellence in Developmental Disabilities Education, Research and Service (“CEDDERS”)¹¹ at the University of Guam.¹²

The FAS have coordinated with the National Instructional Materials Center (“NIMAC”)¹³ and Bookshare.org, both authorized entities under the Chafee Amendment,

6. Email from Marcelene Santos, legal consultant for CEDDARS and CIMAP (May 21, 2008, 9:46:41 a.m. EST) (on file with author).

7. NIMAS refers to a collection of consistent and valid XML-based source files created by K-12 curriculum publishers. From these well-structured source files, accessible, student-ready alternate-format versions of textbooks and core materials (e.g., braille, e-text, Digital Talking Book, etc.) can subsequently be created and distributed to qualified students with disabilities. NIMAS files are not student-ready versions. IDEA 2004, P.L. 108-446, establishes the NIMAS as a national standard and requires states and local districts to adopt the NIMAS for providing textbooks and instructional materials to students who are blind or print-disabled. Nasta.org, http://www.nasta.org/presentations2/6_NIMAS_NIMAC_Glossary.doc (last visited June 12, 2008); *see also* <http://nimas.cast.org/>.

8. *Id.*

9. *See* <http://nimas.cast.org/downloads/Jan2008/council/3JDPacific.CIMAP1.08.ppt#259,4>, Overall Project Outcome for a description of CIMAP.

10. *See* Ed.gov, <http://www.ed.gov/about/offices/list/osers/osep/index.html> (last visited June 12, 2008).

11. *See* Guamceddars.org, <http://www.guamcedders.org/main/index.php?pg=links> (describing what CEDDARS is and what it does) (last visited June 12, 2008).

12. Santos Email, *supra* note 6.

13. “The National Instructional Materials Access Center (NIMAC) is a central national repository established at the American Printing House for the Blind (APH) to store and to

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to provide NIMAS and other materials formatted for students with disabilities.¹⁴ Marcelene Santos claims that the FAS, pursuant to the Individuals with Disabilities Education Act (“IDEA”)¹⁵ and the Chafee Amendment, are eligible to receive copyright exempt materials specially formatted by authorized entities for reading challenged persons.¹⁶

Issue:

The Chafee Amendment, i.e. section 121 of the U.S. Copyright Act, does not apply extraterritorially. It is an “undisputed axiom that United States copyright law has no extraterritorial application.”¹⁷ Therefore, the Chafee Amendment and its exemption to copyright protection would not apply in a territory outside of the United States and its territories. The Ninth Circuit in *Subafilms*, for example, held that an activity occurring outside of the United States is not an infringement of U.S. copyright law, even though the activity, if committed within the United States, would constitute infringement.¹⁸ It would seem to follow, therefore, that an exemption under U.S. Copyright Law would not apply outside of the United States.

The question, therefore, is whether the FAS is “foreign,” i.e. a sovereign that is independent of the United States and its laws. The answer is “Yes.” I base this answer on the Compacts of Free Association, which gave the FAS their autonomy from the United States. The key provision in these Compacts, for purposes of the present issue, is section 171, which provides:

maintain NIMAS file sets. It features an automated system for allowing publishers to deposit NIMAS-conformant files within the repository. Files are checked to confirm that they are valid NIMAS-conformant files and then cataloged in a web-based database. Those who have been authorized for access have user identifications and passwords. These authorized users may search the NIMAC database and directly download the file(s) they need to convert into accessible instructional materials for those students who are in elementary and secondary schools and have qualifying disabilities.” Nasta.org, http://www.nasta.org/presentations2/6_NIMAS_NIMAC_Glossary.doc; *see also* NIMAC.us, <http://www.nimac.us/> (providing more information on NIMAC).

14. Santos Email, *supra* note 6.

15. “Recently reauthorized as the Individuals with Disabilities Education Improvement Act in 2004, IDEA is a federal law governing the rights of children with disabilities to receive a free and appropriate public education (FAPE) in what is termed a least restrictive environment (LRE).” Nasta.org, http://www.nasta.org/presentations2/6_NIMAS_NIMAC_Glossary.doc; *see also* <http://www.ed.gov/policy/speced/guid/idea/idea2004.html>

16. *See* Santos Email, *supra* note 6.

17. *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1093 (9th Cir. 1994).

18. *Id.*

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Section 171. Except as provided in this Compact or its related agreements, *the application of the laws of the United States to the Trust Territory of the Pacific Islands by virtue of the Trusteeship Agreement ceases with respect to the Marshall Islands and the Federated States of Micronesia as of the effective date of this Compact.*¹⁹

The U.S. government, pursuant to various provisions in the Compacts, retained some control in these territories over land and communications. However, as one court noted,

To be sure, the Compact of Free Association provides for the continued application of *some* U.S. laws in the Marshall Islands. Section 171 admits of that fact; only those laws that are mentioned specifically in some agreement between the U.S. and RMI, however, will continue in effect in the Marshall Islands. Plaintiffs' hopeful conclusion that U.S. law therefore continues to apply generally in the Marshall Islands simply does not follow.

Robinson, 743 F. Supp. at 801. In addition, although the Compacts allow the United States to exert some control over the FAS, “[t]he fact that the U.S. will continue to influence the islands does not mean that U.S. law will continue to apply generally.” *Id.*

In addition, a reading of section 171 of both Compacts makes clear that U.S. law, which includes U.S. copyright law, does not apply to the FAS, unless the Compacts provided otherwise.²⁰ There was no mention in the Compacts of U.S. copyright law applying to the FAS. In addition, there does not seem to be any subsequent legislation, i.e. IDEA or the Chafee Amendment, specifically making U.S. copyright law applicable in the FAS.

Finally, there has been some case law on this subject. The Northern District Court of Alabama held that the Fair Labor Standards Act did not apply to the Kwajalein Atoll, which is part of the Republic of the Marshall Islands (“RMI”) because the RMI is a

19. 99 P.L. 239, at Title One, Article VII: General Legal Provisions, Section 171. (emphasis added). Public Law 99-658, section 171 of Title One, contains the exact same wording, but for Palau.

20. The *Robinson* court noted,

The Compact carefully defines the United States-Republic of the Marshall Islands relationship. Section 171 ceases the application of U.S. laws to the Marshall Islands unless the Compact or related agreements provide for their application. Plaintiffs have failed to cite any portion of the Compact or a subsequent enactment which would indicate that the FLSA is to apply on Kwajalein Atoll.

Robinson, 743 F. Supp. at 800.

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now a fully independent and sovereign nation. *Robinson*, 743 F. Supp. at 799-800. The following excerpt from the case is helpful.

The Compact of Free Association removed the U.S.' jurisdiction over the Marshall Islands, except as provided for in the Compact. The RMI is now a fully independent and sovereign nation. *Temengil v. Trust Territory of Pacific Islands*, 881 F.2d 647, 650 (9th Cir. 1989). "Free association" status affords "full internal self-government: United States sovereignty [does] not apply. . ." *Matter of Bowoon Sangsa Co., Ltd.*, 720 F.2d 595, 600 (9th Cir. 1983). "Free association" is both a temporary and transitional sovereign status of recent origin, dating back to a United Nations General Assembly Resolution of 1960. *Id.* The resolution makes clear that the degree of "outside interference" [**6] or "consultations" is limited by democratic constitutional principles and "the terms of the free association agreed upon." G.A.Res. 1541, 15 U.N. G.A.O.R. Supp. (No. 21) at 29-30, U.N. Doc. A/4684 (1960). "United States laws apply [to a freely associated State such as the RMI] only by mutual agreement." *Bowoon Sangsa*, 720 F.2d at 600.

Id.

Based upon the foregoing information, I would recommend that U.S. copyright law does not apply in the FAS. Therefore, the FAS is required to acquire copyright permission from rights holders in works received by the FAS pursuant to copyright exemptions under U.S. copyright law, e.g. the Chafee Amendment.