



**BEFORE THE COPYRIGHT OFFICE
LIBRARY OF CONGRESS**

**EXEMPTION TO THE PROHIBITION OF CIRCUMVENTION OF
COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL
TECHNOLOGIES**

DOCKET NO. RM 2011-7

**Joint Comments of the American Council of the Blind
and the American Foundation for the Blind**

Class: Literary Works

Summary: The American Council of the Blind (ACB) and the American Foundation for the Blind (AFB) propose the establishment of a DMCA exemption for the class of works defined as "literary." Specifically, we urge the Librarian of Congress to establish an exemption for any literary work distributed electronically that:

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

We propose this exemption because currently deployed anti-copy technology can interfere with the fair use intended by Congress for this class of works. Without an exemption, people who are blind or otherwise have print disabilities are at risk for significant legal sanctions simply for finding a way to read material they have otherwise legally obtained. While we acknowledge the legitimate interests of authors and publishers in robust copyright protections, we dare not allow such protections to be used to discriminate against people with disabilities.

When a book's read-aloud potential is disabled, the reader who needs to interact with the book audibly is denied access. When screen reader software or other applications are barred from accessing a book's content, the user with disabilities cannot read the book. Even if one were to concede, which we do not, that invoking the read-aloud function for a given book results in a legally-protectable performance of the work, and even if one were to concede, which we do not, that the rendering by software of electronic material into alternative formats for people who are blind or have print disabilities always generates a copy within the meaning of current law, such uses by people with disabilities and the organizations who serve them must be both allowed and encouraged.

The Need for the Exemption

The American Council of the Blind (ACB) is a national membership organization whose purpose is to work toward independence, security, equality of opportunity, and improved quality of life for all blind and visually impaired people. Founded in 1961,

ACB's members work through more than 70 state and special-interest affiliates to improve the well-being of all blind and visually impaired people by: serving as a representative national organization; elevating the social, economic and cultural levels of blind people; improving educational and rehabilitation facilities and opportunities; cooperating with the public and private institutions and organizations concerned with blind services; encouraging and assisting all people with severely impaired vision to develop their abilities and conducting a public education program to promote greater understanding of blindness and the capabilities of people who are blind.

The American Foundation for the Blind (AFB) is the leading national nonprofit to which Helen Keller devoted more than four decades of her extraordinary life. AFB fulfills its mission to expand possibilities for people with vision loss of all ages through professional and consumer publications, technology evaluation and development, public education, research, and public policy formulation and implementation. As a publisher of conventional and electronic media and a holder of copyrights, AFB stands firmly committed to protecting copyrighted works. AFB is equally committed to the advancement of the right of people with vision loss to have full and fair access to information of all kinds.

Our commitment to the right to information accessibility compels us to urge the Librarian of Congress to establish the exemption we advocate herein. Such an exemption is critical to ensure that non-infringing, fair use of materials will not be thwarted by technological measures to control access which either inadvertently or intentionally deny access by people who are blind or visually impaired or otherwise have print disabilities.

We specifically call upon the Librarian to establish an exemption for any literary work distributed electronically that:

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

The exemption we propose is of critical importance to the lives of people who are blind or visually impaired. Information in digital formats provides the opportunity for people who are blind or visually impaired to have access to and use of information at the same time and in the same manner as all users of that information. Regrettably, technological measures to control access to copyrighted works have been developed and deployed in ways that prevent access to and fair use of e-books by people who are blind or visually impaired. The Librarian recognized this basic reality in previous related rule making proceedings initiated in 2002 and 2005.

However, the exemption previously established as a result of those proceedings perpetuated a fundamental inequity, namely that users who circumvented protection controls to access a given book would nevertheless be liable for copyright infringement if

another edition of the e-book could be accessed by the user. This approach enshrined a kind of “separate but equal” policy permitting publishers to potentially charge users with disabilities more than readers without disabilities to read the same content or to force users with disabilities to make do with potentially inferior editions of a given book. This is why we urge the Librarian to establish the exemption we propose herein.

Even though the Librarian declined to continue the previous exemption in 2010, copy protection measures continue to be implemented in ways that bar access by people who are blind or visually impaired. Given the lack of appreciable change in behavior by the publishing industry to better ensure fair and consistent access to copyrighted electronic and other works, we urge the Librarian to establish the exemption we propose herein to guarantee that people who are blind or visually impaired are not excluded from the digital revolution. Congress clearly intended that fair use provisions not be sacrificed in efforts to secure digital content.

Publishers and the technology industry have simply designed anti-copy technologies with apparently precious little effort to preserve fair use by people with print disabilities. Instead of working toward accessibility, many providers seem inclined to seek market dominance by closely linking published titles to particular technologies from particular vendors. This is not, we believe, an approach likely to preserve fair use. The truth is that well known current technologies can both protect works from piracy and allow for fair use, such as “Public Key Incryption (PKI)” technologies. Unfortunately, the digital publishing industry’s record in maintaining fair use access for people who are blind or visually impaired has not demonstrated a commitment to access.

It is inappropriate for publishers and technology companies to seek shelter against circumvention when the technology in widespread use undermines the clear legislative goal of the DMCA – and the entire copyright regime – to facilitate fair use access by people who are blind or visually impaired. We ask the Librarian, therefore, to establish the exemption we propose herein for all literary digital content until such time as no security measures or other access controls are deployed in the market which prevent or otherwise interfere with the use of the material by an individual with print disabilities. Until fair use access for people who are blind or visually impaired is universally recognized and implemented by the publishing industry, the exemption we propose herein will remain relevant.

We note that in the most recent proceeding resulting in discontinuation of the exemption in place at that time, the Copyright Office scolded advocates for failing to produce sufficient evidence of widespread discrimination on the part of authors and publishers. The apparent posture taken by the Copyright Office was that shielding people with disabilities from severe legal penalties for simply finding a way to read an e-book they legally obtained would only be in order if discrimination is rampant. We want to be on record that it is the experience of people who are blind or visually impaired that the shutting out of people with print disabilities from full and fair access is indeed a rampant problem, but this is not our burden of proof.

Granting an exemption is not conditioned by law on the ability of advocates to demonstrate that some arbitrary percentage of the publishing industry violates the fair use

rights of people with disabilities. Rather, the exemption we propose herein must be granted to ensure that even an isolated instance where an individual user with print disabilities cannot read the material without first circumventing access controls does not expose the user to severe penalties. In previous proceedings, advocates presented the Copyright Office with a handful of examples of e-books inaccessible to people who are blind or visually impaired. In the most recent proceeding, the Copyright Office seemed to suggest that advocates ought to have presented dozens or even hundreds of such examples even though such an array of examples would represent decimal dust in comparison to the total number of available e-book titles. While the exemption we propose herein is needed even if it only benefits a single user during the three-year term of the exemption, we know that the vast universe of inaccessible titles will make the exemption we propose of critical value to many.

Experience of Consumers

Despite an increase in the read aloud features of some e-book readers, DRM continues to prevent people who are blind or visually impaired from having full access to e-books. For an e-book to be accessible to people with vision loss, it must have full screen reader functionality, or permit such functionality, and include the option of interoperating with a braille display. An accessible e-book would allow a reader with vision loss to control text-to-speech functionality such that the reader can navigate a book paragraph-by-paragraph, sentence-by-sentence, word-by-word, and learn the spelling of words.

Notably, in clarifying the Americans with Disabilities Act in relation to the right of students with vision loss to receive equal access to books, the U.S. Department of Education stated, “educational institutions cannot require the use of electronic book readers in a classroom setting if the readers are not fully accessible.”¹ Consequently, only e-books that are “fully accessible” provide equal access to books for readers who are blind or visually impaired.

Of the current major e-book distributors (Barnes & Noble’s Nook store, Amazon’s Kindle store, and Apple’s iBookstore)² Apple’s iBooks application is the only mainstream e-book reader that is accessible to individuals who are blind or visually impaired. Apple’s full-featured screen reader includes word-by-word navigation and braille support.³ By contrast, all of Barnes & Noble’s Nook reader programs are completely inaccessible to blind users.⁴ Although Amazon offers text-to-speech features for its Kindle books, those features are so limited that the Kindle has been described as an inaccessible product with accessibility enhancements.⁵ The Kindle for PC with Accessibility Plug-in lacks the navigational feature to read word-by-word or read the spelling of words.⁶ These are important features of e-reader technologies; indeed, a text-to-speech feature that does not allow readers to learn the spelling of words or use a braille display will not meet the “fully accessible” standard defined by the U.S. Department of

¹ U.S. Dept. of Education, Office for Civil Rights. Dear Colleague Letter, May 26, 2011, at 1.

² Rudiger Wischenbart, The Global Ebook Market: Current Conditions and Future Projections, Publisher’s Weekly, October 10, 2011, at 4.

³ Wesley Majerus, Access to Electronic Books, a Comparative Review, Braille Monitor, May 2011.

⁴ Id.

⁵ Id.

⁶ Darren Burton, Kindle for PC with Accessibility Plugin, AccessWorld, May 2011.

Education. Students and professionals need to be able to determine the spelling of a word in a technical book, or even the occasional unfamiliar word or name in a novel. In addition, an e-book that does not support output to a braille display completely denies access to more than a million deaf-blind readers.⁷ An e-reader that includes text-to-speech functionality but lacks character-by-character navigation and braille output cannot be considered fully accessible.

The use of digital rights management or “DRM,” an access control technology that prevents copying and use of e-books across platforms is ubiquitous throughout the e-book market.⁸ Without the right to circumvent DRM and render e-books in accessible formats, people who are blind and visually impaired cannot have full access to an enormous percentage of the millions of e-book titles available to sighted consumers.

Published reports indicate that Barnes & Noble offers 2 million e-book titles, Amazon offers 950,000 e-book titles, and Apple offers 200,000 e-book titles.⁹ Nearly all 2 million Nook titles have DRM, including public domain titles.¹⁰ Amazon has chosen not to place DRM on its public domain titles in the Popular Classics Collection¹¹, but that still leaves the lion’s share of Amazon’s Kindle collection inaccessible to blind readers. If one assumes that the Kindle store carries all the titles in the iBookstore, and the Nook

⁷ Who We Serve, Helen Keller National Center for Deaf-Blind Youth and Adults, <http://www.hknc.org/AboutUsWHOWESERVE.htm>.

⁸ Wischenbart, supra, at 36.

⁹ Id at 5.

¹⁰ B&N Claims it Must DRM Public Domain Books to Protect the Copyright on Them, TechDirt (July 30, 2009, 10:38am), <http://www.techdirt.com/articles/20090730/0257115712.shtml>.

¹¹ The Popular Classics section of the Kindle store presented 15,991 results. Kindle Store: Kindle Popular Classics, <http://www.amazon.com/s/?node=2245146011> (last visited on Nov. 25, 2011).

store carries all the titles in the Kindle store, then the Nook and Kindle stores combined may carry approximately 1.8 million inaccessible e-book titles after subtracting the 200,000 accessible e-books in the iBookstore.¹²

Regardless of the actual numbers, even if a small percentage of the Nook and Kindle stores were protected by DRM, that would still leave tens if not hundreds of thousands of titles inaccessible to people who are blind or visually impaired.

Requiring blind Americans to limit their reading options to the most accessible of the current mainstream e-book readers by using Apple's iBooks application would both restrict readers to Apple's smaller e-book collection and require that they use the iPad, iPod Touch, or iPhone.¹³ Where Amazon and Barnes & Noble both offer free e-book applications that consumers can download onto their smartphones and computers, customers of Apple's iBookstore must purchase an Apple device (i.e., an iPad, iPhone, or iPod Touch) to read their e-books. The cost of purchasing Apple hardware merely to read an accessible version of an e-book represents a substantial adverse effect caused by the DMCA's anti-circumvention provision. For example, although Darcie Chan's bestselling novel The Mill River Recluse is available in an accessible version from the iBookstore and inaccessible versions from the Kindle and Nook stores, requiring blind readers to purchase the sole accessible version of Chan's book would financially burden those who do not own Apple devices.¹⁴

¹² These three bookstores are not likely to carry the exact same titles, so the actual number of inaccessible e-book titles is likely far greater than 1.8 million.

¹³ Majerus, supra.

¹⁴ Chan's novel is not available at Bookshare.org or the National Library Service for the Blind and Physically Handicapped. Bookshare, <http://www.bookshare.org/> (last

The Fair Use Rationale for the Proposed Exemption

Historically, alternative methods of reading lawfully-acquired works are, in fact, the precise kind of non-infringing uses long permitted to allow access by people who are blind or visually impaired to the science and useful arts specified in the U.S. Constitution. To allow the legal lock-up of content would deprive people who are blind or visually impaired of a major constitutional goal of copyright: “to foster the growth of learning and culture for the public welfare.” H. Rep. No. 2222, 60th Cong., 2d Sess. (1909).

Indeed, Congress has historically recognized that the broad class of copyrighted works should, with respect to fair use, be accessible to and usable by people who are blind or visually impaired. The legislative history of the Copyright Act of 1976 states that:

Another special instance illustrating the application of the fair use doctrine pertains to the making of copies or phonorecords of works in the special forms needed for the use of blind persons. These special forms, such as copies in Braille and phonorecords of oral reading (talking books), are not usually made by the publishers for commercial distribution. While making multiple copies or phonorecords of work for general circulation requires the permission of the copyright owner, a problem addressed in section 710 of the bill, the making of a single copy or phonorecord by an individual as a free service for a blind person would properly be considered a fair use under section 107.
H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976).

Further, in the Supreme Court case of *Sony Corporation of America v. Universal City Studios*, 464 U.S. 714 (1984) the Court stated that:

Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying. *Id.* at 456 n.40.

visited Nov. 25, 2011); National Library Service for the Blind and Physically Handicapped, <http://www.loc.gov/nls/> (last visited Nov. 25, 2011).

The Copyright Act imposes other specific limitations on the exclusive rights of copyright owners to ensure access for individuals who are blind or visually impaired. Section 110(8) excludes performances specifically designed for and directed to people who are blind or visually impaired using particular facilities; Section 121 (the Chaffee amendment) allows authorized entities to reproduce copyrighted materials and convert these materials to accessible formats for use by people who are blind or visually impaired as well as people with other print disabilities.

Access to the information contained in digitized literary works is ever more critical to citizenship, education and overall participation in society. The Librarian must ensure that the DMCA's "Circumvention of Copyright Protection Systems" provisions do not undermine the nation's historic commitment to fair use rights that enable such participation by people who are blind or visually impaired. Unless the Librarian establishes the exemption we propose herein, severe sanctions await readers who are blind or visually impaired, or anyone else, who devises means to circumvent copy protection measures to allow access by people with print disabilities. The Librarian can simply not allow this to occur.

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