



**BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE
INTERNET**

**HEARING ON COPYRIGHT, EDUCATION, AND VISUALLY IMPAIRED
PEOPLE**

STATEMENT OF THE LIBRARY COPYRIGHT ALLIANCE

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel. An estimated 200 million Americans use these libraries more than two billion times each year.

Most educational institutions in this country have libraries. Libraries in educational institutions spend approximately \$4 billion a year acquiring books, films, sounds recordings, and other materials. These libraries directly support classroom activities by providing instructors with materials they use in the classroom, as well as resources for students to use in class assignments. In many institutions of higher education, libraries also operate electronic reserves systems of the type at issue in Georgia State University case, *Cambridge University Press v. Patton*. Additionally, libraries assist instructors in developing and acquiring materials that are used in courses. For example, libraries often supply images, videos, charts, and text incorporated in Massive Open Online Courses (MOOCs).

Libraries also provide services to visually impaired people, both inside and outside of educational settings. In particular, libraries convert works into formats accessible to the print disabled.

This statement first discusses the exceptions to the Copyright Act that enable libraries to support educational institutions, including sections 110(1), 110(2), and 107. The statement concludes that revision of these provisions is unnecessary, in part because of the emergence of open educational resources. The statement next addresses the provisions of the Act that allow libraries to provide accessible format copies to the print disabled, including print disabled students: the Chafee Amendment (section 121) and the fair use doctrine.

I. EDUCATION

A. Section 110(1)

One of the most effective and educationally valuable exceptions in the Copyright Act is 17 U.S.C. § 110(1), which permits “the performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction....” Only 84 words long, this provision allows an instructor to show a film or a student to read a poem aloud in a classroom. Thousands of instructors at every level of education use this provision in classrooms across the country every day. The operative clause of the provision, quoted above, is only 32 words long, and does not require a law degree to understand. The provision cannot be abused, because it applies only to lawfully made copies.

B. TEACH Act

In stark contrast to the simplicity of section 110(1) is the complexity of section 110(2), the Technology, Education, and Copyright Harmonization (TEACH) Act. At 940 words—more than ten times as long as section 110(1)—with numerous paragraphs and sub-paragraphs,¹ the TEACH Act is intended to permit the performance or display of works in the distance education context. The TEACH Act was the result of extensive negotiations among the rights holders, the education community, and the libraries.

The TEACH Act includes the following requirements:

- i) the performance must not be of “a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks....”;
- ii) the performance must be of “reasonable and limited portions;”
- iii) the performance must be made by, at the direction of, or under the actual supervision of an instructor as an “integral part of a class session....;”
- iv) the transmitting institution must apply technological measures that reasonably prevent retention of the work by recipients for longer than the class session and unauthorized dissemination by recipients to others.

These requirements are unclear and difficult for educational institutions to apply. How is an instructor to determine whether a work is primarily produced or marketed for use in mediated instructional activities via digital networks? How long is a “reasonable

¹ Part of the TEACH Act appears in an unnumbered paragraph at the end of section 110, and another appears at section 112(f).

² The Congressional Research Service report on the TEACH Act indicates that the

and limited portion” of a film?² What is an “integral part of a class session” if there are no defined class sessions? Likewise, if there are no defined class sessions, how long may the student retain the work? Additionally, does the TEACH Act’s amendment of section 112, which permits an educational institution to retain a copy of a work on its server for the purpose of transmitting the work under section 110(2), allow the institution to retain the copy on its server between semesters? Because of the TEACH Act’s complexity and uncertain application, most educational institutions that engage in distance education rely on fair use under section 107 rather than section 110(2).

C. Fair Use

Fair use already has been the subject of a hearing in the course of the Subcommittee’s copyright review. The statement submitted for the record of that hearing by LCA touched on some of the ways libraries employ fair use to support education.³ Additionally, James Neal, Vice President for Information Services and University Librarian at Columbia University, testified in detail concerning the role of fair use in preservation and the use of orphan works.⁴ Here, we will discuss how courts applied fair use in two recent cases brought against universities.

² The Congressional Research Service report on the TEACH Act indicates that the exhibition of an entire film may possibly constitute a reasonable and limited portion “if the film’s entire viewing is exceedingly relevant toward achieving an educational goal.” Congressional Research Service, *Copyright Exceptions for Distance Education: 17 U.S.C. § 110(2), the Technology, Education, and Copyright Harmonization Act of 2002*, Order Code RL33516 (July 6, 2006) at 4, available at http://assets.opencrs.com/rpts/RL33516_20060706.pdf. However, the report adds that the likelihood of an entire film portrayal being reasonable and limited “may be rare.”

³ <http://www.librarycopyrightalliance.org/bm~doc/stfairusepsarev.pdf>.

⁴ <http://www.librarycopyrightalliance.org/bm~doc/testimony-jim-neal-2apr2014.pdf>.

1. Georgia State University Electronic Reserves Case

Just last month, on October 17, 2014, the Eleventh Circuit issued its long awaited decision in the GSU e-reserves case.⁵ Much has already been written about the case,⁶ and it is the subject of testimony of witnesses at this hearing. We wish, however, to make just a few salient points concerning the decision.

- The Eleventh Circuit affirmed the flexible application of fair use to e-reserves, rejecting bright lines. In doing so, the court endorsed the application of fair use on a case-by-case basis and opposed the mechanical application of the four factors.
- While reversing and remanding the case back to the district court, the Eleventh Circuit did not rule that GSU exceeded fair use in its e-reserve system. Instead, the Eleventh Circuit found the district court's application of the four fair use factors to be flawed and gave guidance as to how these factors should be applied. Following the Eleventh Circuit's guidance, the district court may well reach the same conclusion with respect to fair use regarding most or all the excerpts at issue.
- The Eleventh Circuit rejected the publishers' efforts to undermine e-reserve services. In doing so, the court disagreed with the major principles advanced by the publishers, such as using the Classroom Copying Guidelines as the basis for fair use. Rejecting four other publisher principles, the Eleventh Circuit determined

⁵ The publishers have petitioned for rehearing en banc. GSU has petitioned for rehearing to correct technical errors in the decision.

⁶ See, e.g., Kevin Smith, *GSU appeal ruling—the more I read, the better it seems* (Oct. 19, 2014), <http://blogs.library.duke.edu/scholcomm/2014/10/19/gsu-appeal-ruling-read-better-seems/>; Krista Cox, *In Georgia State University E-Reserves Case, Eleventh Circuit Endorses Flexible Approach to Fair Use*, ARL POLICY NOTES (Oct. 20, 2014), <http://policynotes.arl.org/post/100512024587/in-georgia-state-university-e-reserves-case-eleventh>.

that: fair use decisions must be done on a case-by-case basis; the first fair use factor favors fair use for “verbatim” copying for a non-profit educational use; previous course pack cases were not precedent in the GSU case; and it was appropriate for the lower court to consider the availability of a license for a specific use in considering market harm.

- In other words, the Eleventh Circuit largely affirmed the district court’s analysis for the first (purpose of the use) and fourth (market effect) fair use factors. The Eleventh Circuit found that the district court should have been more nuanced in its consideration of the second (nature of work used) and third (the amount used) factors, as well as in how all four factors should be weighed.
- While the court found that GSU’s uses were non-transformative because the works at issue were scholarly monographs created for the higher education market, the inclusion of other kinds of works in e-reserves could very well constitute transformative use. Whether a given work is being repurposed or recontextualized in a transformative manner must be determined on a case-by-case basis.
- Because the Eleventh Circuit rejected the publishers’ efforts to undermine e-reserve services, there is no reason for educational institutions to suspend their e-reserve services. Nonetheless, institutions inside and outside the Eleventh Circuit may wish to evaluate and ultimately fine-tune their services to align with the Eleventh Circuit’s guidance with respect to the mechanical application of the fair use factors.

- Using open access materials (and publishing in open access journals) can, over time, solve some of the issues in the GSU case. Scholars and researchers should be encouraged to publish in open access journals in support of the mission of higher education to create, share, disseminate and preserve knowledge.

2. The UCLA Streaming Case

The subcommittee likely is less familiar with a November 2012 decision by a federal district court in California dismissing copyright claims brought against the University of California, Los Angeles (UCLA) on the basis of fair use, among other defenses. UCLA purchased DVDs of BBC performances of Shakespeare plays. Rather than require students enrolled in theatre classes to go to the media lab to view the assigned performances, UCLA uploaded the DVDs onto a server, and then allowed the students to stream the plays to their computers. The plays' U.S. distributor, Ambrose Video Publishing, as well as a trade association of film distributors, Association for Information Media and Equipment, sued UCLA administrators and staff on multiple counts.

In October 2011, the court granted UCLA's motion to dismiss the complaint. The court held that many (but not all) of the defendants were immune from damages liability under the sovereign immunity doctrine. The court found that the copies UCLA made when it uploaded the performances onto its server were a fair use because they were necessary to effectuate its public performance license from the distributor. The court further ruled that AIME, the trade association, did not have standing to sue. Finally, the court found that UCLA did not violate the Digital Millennium Copyright Act when it uploaded the performances because it had the right to access the performances. The court,

however, dismissed the complaint without prejudice, which allowed the plaintiffs to file an amended complaint.

The district court in November 2012 dismissed the amended complaint on largely the same grounds as its October 2011 decision. Interestingly, in applying the doctrine of qualified immunity (which shields public officers from liability for civil damages when their conduct does not violate “clearly established...rights of which a reasonable person should have known”), the court found that there was at least a reasonable argument that streaming films for educational purposes is protected by fair use.⁷ The plaintiffs decided not to appeal.

3. Open Access and Open Educational Resources

In its discussion of the fourth fair use factor, the GSU court noted that it was primarily concerned with the effect of GSU’s copying on the plaintiff publishers’ incentive to publish. The Eleventh Circuit agreed with the district court that the publishers had not shown that GSU’s unpaid copying would materially impair the publishers’ incentive to publish. As the Subcommittee considers the impact of copyright exceptions on the educational and scholarly publishing market, it should be aware of the dramatic changes in the structure of that market precipitated by the Internet. The statement LCA submitted for the record of the Subcommittee’s July 2013 hearing on the impact of copyright on innovation discussed the diminishing role of copyright in

⁷ Section 110(1) might also permit streaming of films to students enrolled in a course. To be sure, on its face, section 110(1) would appear not to apply to streaming from a course website because the streaming literally is not occurring “in the course of face-to-face teaching activities ... in a classroom or similar place devoted to instruction....” However, a court could interpret the phrases “face-to-face teaching activities” and “similar place devoted to instruction” in a more flexible manner. Courseware allows the creation of a “virtual classroom” where a teacher can interact with students, and students can interact with each other.

incentivizing scholarly communications.⁸ The statement stressed that the Internet has changed the economics of the scholarly communications market, leading to an explosion in the number of open access publishers. Under the open access model, the articles and monographs hosted on the Internet are available to the public at no charge. The open access publisher covers its costs by charging the author a fee for publishing the article or by receiving funding from another source, such as a granting agency or the institution that hosts the publication.

The Internet also is transforming another segment of the educational publishing market: the textbook industry.⁹ Although the \$14 billion textbook market represents only 1% of overall education spending,¹⁰ the changes brought by the Internet could result in significant improvements in the quality of education as well as cost savings.

The textbook industry is divided into two sectors of roughly equal size: K-12 and higher education. Three publishers, Pearson, Houghton Mifflin Harcourt, and McGraw-Hill Education, control close to half of the K-12 market.¹¹ Pearson, McGraw-Hill Education, Cengage, and Wiley dominate the higher education market.¹²

According to Morgan Stanley Research,¹³ the price of textbooks has risen more than 800% over the past 30 years, a rate faster than medical services (575%), new home

⁸ <http://www.librarycopyrightalliance.org/bm~doc/LCA-House-Copyright-Innovation-24-July-2013.pdf>.

⁹ This discussion is based on Jonathan Band, *The Changing Textbook Industry*, DISRUPTIVE COMPETITION PROJECT (Nov. 21, 2013), <http://www.projectdisco.org/competition/112113-the-changing-textbook-industry/>.

¹⁰ <http://www.whitehouse.gov/administration/eop/cea/factsheets-reports/educational-technology>.

¹¹ Educational Marketer, Simba Information, July 15, 2013, <http://home.simbainformation.com/>.

¹² Simba Information, 2010, <http://home.simbainformation.com/>.

¹³ <http://www.morganstanley.com/institutional/research/>.

prices (325%), and the consumer price index (250%). The average college student spends more than \$900 a year on textbooks.¹⁴ Not surprisingly, textbook publishers have been highly profitable.¹⁵ In 2012, McGraw-Hill's profit margin was 25%; Wiley's was 15%; and Pearson's was 10%. Moreover, the profit margin of firms in the publishing sector increased on average by 2.5% between 2003 and 2012.

The Internet, however, has begun to disrupt this market by allowing the emergence of new competitors to the entrenched textbook publishers. These competitors take many different approaches. Some are for-profit businesses, such as Boundless, which provides low cost alternatives to standard college textbooks. While the average price of an assigned textbook is \$175, Boundless sells an online textbook covering the same subject matter for \$20. The search feature of the Boundless textbook allows the student to find the information that matches the content of the textbook pages assigned by the professor. Flat World Knowledge offers over 100 online textbooks, which professors can customize for their courses. Students purchase an individual textbook for \$20, or a "Study Pass" to the entire catalogue for a higher flat fee. Bookboon employs an advertising model to make 1000 textbooks available for free download.

Arguably even more transformational is the Open Educational Resources (OER)¹⁶ approach. OERs are released under an open license that permits their free use and repurposing. OERs include open textbooks as well as other materials that support access

¹⁴ David Wiley, et al., *Dramatically Bringing Down the Cost of Education with OER*, CENTER FOR AMERICAN PROGRESS (Feb. 7, 2012), <http://www.americanprogress.org/issues/labor/news/2012/02/07/11167/dramatically-bringing-down-the-cost-of-education-with-oer/>.

¹⁵ Jonathan Band, *New Study: The Profitability of Copyright Intensive Industries*, INFOJUSTICE (June 17, 2013), <http://infojustice.org/archives/29916>.

¹⁶ SPARC, *Open Education*, <http://sparc.arl.org/issues/oer>.

to knowledge such as lesson plans, full courses, and tests. OERs usually are funded by government agencies or foundations, such as the Bill & Melinda Gates Foundation and the William & Flora Hewlett Foundation. In 2009, for instance, Congress included in the American Recovery and Reinvestment Act \$2 billion for grants for community colleges to develop educational and career training materials that would be released under a Creative Common CC-BY license.¹⁷

The impetus for the development of open textbooks is the belief that they are less expensive for students (in higher education) and school districts (in K-12) than textbooks developed by commercial publishers. Moreover, open textbooks can easily be customized and updated by instructors, enabling them to provide a more current and appropriate learning experience for their students.

One of the leading providers of open textbooks in higher education is OpenStax College, operated by Rice University and funded by numerous foundations. OpenStax provides free access to peer-reviewed textbooks, which professors can customize for their courses.

In 2012, California Governor Jerry Brown signed legislation¹⁸ that would fund the creation by California universities of 50 open textbooks targeted to introductory courses. A California Digital Open Source Library would be created to host the textbooks, and the California Open Education Resources Council would oversee the book approval process.

¹⁷ Jarret Cummings, *U.S. Dept. of Ed. Reaffirms OER Support, Highlights Competency-Based Assessment*, EDUCAUSE, <http://www.educause.edu/blogs/jcummings/us-dept-ed-reaffirms-oer-support-highlights-competency-based-assessment>.

¹⁸ Meredith Schwartz, *Update: CA Creates Free Digital Textbook Library*, LIBRARY JOURNAL (Oct. 3, 2012), <http://lj.libraryjournal.com/2012/10/legislation/ca-creates-free-digital-textbook-library/> - .

Student would be able to download the books for free, or purchase physical copies for \$20.

California has also launched an open textbook program for K-12 students, with the objective of ultimately eliminating the state's \$400 million annual textbook budget. Utah, Florida, Maine and Washington State have begun similar initiatives. Utah is focusing on textbooks in math, language arts and science. The books will be available for free online and for \$5 per physical copy. The Utah Office of Education decided to create open textbooks for use statewide following a two-year pilot program conducted by the Brigham Young University-Public School Partnership and funded by the William and Flora Hewlett Foundation. The textbooks used during the pilot program were based on OER materials developed by the non-profit CK-12 Foundation.

The movement towards open online education also presents potential competition for commercial publishers. MOOCs offered by platforms such as Coursera or edX typically provide the students with all course materials, thereby replacing textbooks.

The Affordable College Textbook Act,¹⁹ introduced by Senators Durbin and Franken on November 14, 2013, would accelerate the development and adoption of open textbooks. The legislation would authorize the Secretary of Education to make grants to institutions of higher education "to support pilot programs that expand the use of open textbooks in order to achieve savings for students." The bill sets forth several findings, including that "Federal investment in expanding the use of open educational resources

¹⁹ Affordable College Textbook Act, S. 1704, 113th Cong. (2013), *available at* <http://creativecommons.org/wp-content/uploads/2013/11/affordable-college-textbook-act.pdf>.

could significantly lower college textbook costs and reduce financial barriers to higher education, while making efficient use of taxpayer funds.”

At the United Nations Open Government Partnership meeting in September 2014, President Obama announced a new commitment to “promote educational resources to help teachers and students everywhere.”²⁰ The National Action Plan in support of the Open Government Partnership contains a section dedicated to promoting open education.

The Plan states:

Open education is the open sharing of digital learning materials, tools, and practices that ensures free access to and legal adoption of learning resources. There is a growing body of evidence that the use of open education resources improves the quality of teaching and learning, including by accelerating student comprehension and by fostering more opportunities for affordable cross-border and cross-cultural educational experiences. The United States is committed to open education....²¹

In the plan, the Administration committed to: raising open education awareness by hosting a workshop on the challenges and opportunities in open education; conducting three pilot programs overseas that use OER to support learning in formal and informal contexts; and launching an online skills academy to help students prepare for in-demand careers.

Publishers might argue that government funding for the creation of open textbooks constitutes interference in the free market. This argument overlooks the fact that the government is the buyer in the textbook market. In K-12, school districts—government entities—purchase textbooks directly. In higher education, the government

²⁰ Creative Commons USA, *President Obama Commits to Promote Open Education Resources* (Sept. 26, 2014), <http://us.creativecommons.org/archives/977>.

²¹ White House, *Open Government Partnership: Announcing New Open Government Initiatives* (2014), http://www.whitehouse.gov/sites/default/files/microsites/ostp/new_nap_commitments_report_092314.pdf.

subsidizes the purchase of textbooks through support for financial aid. Because the government already is the buyer, it is completely consistent with free market principles for the government to seek the best product at the lowest possible cost.

Textbooks publishers are well aware of the expanded competition presented by the Internet, and have begun to adjust their business model from the supply of educational materials to the provision of education services. As *Politico* explains,

the corporate behemoth known as Pearson pounced on the testing craze set off by No Child Left Behind. Pearson didn't just provide schools with tests, it offered entire standardized testing systems. It sold the tools to grade tests and the programs for analyzing test performance.²²

Politico further explains how Pearson manages to capture educational testing business.

Pearson wielded enormous influence in Texas politics. "Its contract with the state for the years 2010 to 2015 was worth close to half a billion dollars," wrote the *Texas Observer* in 2011. "Pearson pays six lobbyists to advocate for the company's legislative agenda at the Texas Capitol—often successfully. This legislative session, lawmakers cut an unprecedented \$5 billion from public education. ... Despite the cuts, Pearson's funding streams remain largely intact."²³

4. No Need For Legislation

In his testimony before the Subcommittee concerning preservation and orphan works, University Librarian at Columbia University James Neal stated that the library community did not seek legislation updating the library exceptions in 17 U.S.C. §108 or limiting remedies for the use of orphan works. Neal explained that developments in fair use jurisprudence, when combined with section 108, provided libraries with sufficient latitude to perform their mission. He further explained that any negotiations concerning

²² Bob Herbert, *The Plot Against Public Education*, POLITICO (Oct. 6, 2014), http://www.politico.com/magazine/story/2014/10/the-plot-against-public-education-111630_Page3.html - ixzz3IJ6Lmepv.

²³ *Id.*

section 108 or orphan works would be highly contentious and unlikely to produce useful results for libraries.

LCA has the same view with respect to educational uses of copyrighted works. Section 110(1) is highly effective in its present state. Section 110(2) is less so, but fair use enables educational institutions to employ new technologies to fulfill their mission, as the UCLA decision demonstrates. The GSU decision provides educational institutions with clear guidance on how to provide e-reserves lawfully. Furthermore, the Eleventh Circuit found that “despite the recent focus on transformativeness under the first factor, use for teaching purposes by a nonprofit educational institution such as Defendants’ favors a finding of fair use under the first factor, despite the nontransformative nature of the use.” This finding obviously will be extremely helpful to educational institutions outside of the e-reserve context. Accordingly, LCA sees no need for amendments to the Copyright Act’s exceptions relating to educational institutions.²⁴

II. VISUALLY IMPAIRED INDIVIDUALS

Two provisions in the Copyright Act enable libraries to provide services to visually impaired persons: the Chafee Amendment, 17 U.S.C. § 121; and fair use, 17 U.S.C. § 107.

A. The Chafee Amendment

The Chafee Amendment provides that “it is not infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously

²⁴ Many of the amendments we have supported concerning other aspect of the Copyright Act, *e.g.*, copyright term, <http://www.librarycopyrightalliance.org/bm~doc/statement-house-copyright-term-14jul2014.pdf>, remedies, <http://www.librarycopyrightalliance.org/bm~doc/statement-remedies-hearing-23jul2014.pdf>, and section 1201, <http://www.librarycopyrightalliance.org/bm~doc/lca-statement-chapter12-title17-final-16sep2014.pdf>, would benefit educational institutions.

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.” While not as complex as the TEACH Act, the Chafee Amendment is subject to conflicting interpretations. An authorized entity is defined as “a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities.” LCA believes that all libraries that serve print disabled people have “a primary mission to provide specialized services” to the print disabled -- a reading supported by the plain language of the statute. Nonetheless, some publishers argue that only entities that exclusively serve the print disabled meet the statutory definition of an authorized entity. Under this interpretation, the Library of Congress would not qualify.

There also is debate about the types of disabilities covered by the Chafee Amendment. The phrase “blind or other persons with disabilities” defines individuals eligible for services under 2 U.S.C. § 135a, which in turn refers to regulations issued by the Librarian of Congress. People with print disabilities beyond visual impairment, e.g., physical disabilities that prevent them from holding a book, are covered, but there is disagreement about other disabilities, such as dyslexia not caused by a brain disorder.

Additionally, there also is disagreement over the scope of the term “specialized formats.” Some argue that it means formats that are capable of being used exclusively by the blind or other persons with disabilities. We believe that this is an implausibly restrictive interpretation. All formats are capable of use by people without disabilities. Braille, for example, was invented to allow written communications at night during the

Napoleonic Wars. Instead, the term should be understood to mean a copy in a format that can be used by the blind and other persons with disabilities where that copy is used only by the people with these disabilities.

Notwithstanding these ambiguities, the Chafee Amendment has enabled libraries and disabilities services offices in educational institutions to provide accessible format copies to people with print disabilities. The principal shortcoming of the Chafee Amendment is that it does not allow libraries to make audiovisual works accessible to the hearing impaired. Thus, the Chafee Amendment does not permit a library to make a captioned copy of a film for a hearing disabled student.

B. Fair Use

The limitations and ambiguities of the Chafee Amendment have largely been rendered largely moot by the Second Circuit's decision in *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014). The court found that fair use permitted a consortium of libraries to create a database of millions of text and image files of books for the purpose of providing access to disabled people. With respect to the first fair use factor, the Second Circuit rejected the district court's finding that creation of accessible format works is transformative. The Second Circuit equated the creation of an accessible format with a derivative work, but noted that even absent a finding of transformative use, a defendant may still satisfy the first factor. The Second Circuit noted that the Supreme Court in *Sony Corp. of Am. V. Universal City Studios, Inc.*, 464 U.S. 417 (1984), relying on a House Committee Report on the 1976 Copyright Act, identified the copying of a copyrighted work for the convenience of a blind person as an example of fair use. Furthermore, the Second Circuit observed that Congress had accorded the print disabled special protection

through the Americans with Disabilities Act and the Chafee Amendment, and a fair use finding here was consistent with that status.

While the court found that the second factor weighed against fair use, it noted that such a finding is not determinative in the fair use analysis.

Turning to the third factor, the court found it reasonable for HathiTrust to retain text and image copies to facilitate access to the print disabled. It noted that the text copies are necessary to enable text-to-speech capabilities, but that the image copies are also of value for disabled patrons.

Finally, the court found that the fourth factor weighed in favor of a finding of fair use, noting that the market for accessible format works is insignificant and that publishers generally do not make their books available in specialized formats. Evaluating the four factors together, the Second Circuit found that providing access to the print disabled constituted fair use.

The court did not define the universe of the disabled entitled to full-text access, but the discussion of image files indicates that it goes well beyond the blind. The court stated that “[m]any legally blind patrons are capable of viewing these images if they are sufficiently magnified or if the color contrasts are increase.” *Id.* The court then added that “other disabled patrons, whose physical impairments prevent them from turning pages or holding books, may also be able to use assistive devices to view all of the content contained in the image files for a book.” *Id.* The reasoning of *HathiTrust* indicates that fair use would permit providing accessible formats to people with other disabilities, for example, a captioned film to people with hearing disabilities. The decision also suggests that once a library or disability services office at an educational institution makes an

accessible format copy for one student, it can retain a digital file of the work to facilitate providing accessible copies of the work to other students with disabilities at that institution or other institutions.

In short, the *HathiTrust* decision provides libraries with a solid basis for making and distributing accessible format copies.

C. The Marrakesh Treaty

On June 27, 2013, a Diplomatic Conference of the World Intellectual Property Organization (WIPO) held in Marrakesh, Morocco adopted the “Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.”²⁵ The Treaty is intended to promote the making and distribution of copies of books and other published materials in formats accessible to people with print disabilities. The Treaty would achieve this objective by obligating signatory countries (referred to as Contracting Parties) to adopt exceptions in their copyright laws that permit the making of copies in accessible formats, as well as the distribution of those copies both domestically and internationally.

The U.S. delegation played a critical role in the negotiation of the Treaty. The United States signed the Treaty and we understand that the Administration is now in the process of determining what, if any, changes to U.S. law would be needed to allow ratification. We believe that Title 17 of the United States Code complies fully with the Treaty’s requirements, and thus that the United States could ratify the Treaty without

²⁵ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 28, 2013 [hereinafter Marrakesh Treaty], *available at* http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf.

making any changes to domestic law—as the U.S delegation asserted throughout the negotiations.²⁶

As discussed above, the relevant exceptions for the print disabled appear in the Chafee Amendment, 17 U.S.C. § 121, and the fair use doctrine, 17 U.S.C. § 107. These provisions must be mapped against the obligations set forth in Articles 4(1), 5(1), 6, and 7 of the Treaty. Because many of the Treaty’s provisions were based on the Chafee amendment, the Chafee Amendment largely meets the Treaty’s requirements. In the few places Chafee falls short, fair use more than fills the gap.

Article 4(1) obligates a Contracting Party to provide an exception to the rights of reproduction and distribution to facilitate the domestic availability of works in accessible format copies for beneficiary persons. The Chafee Amendment permits authorized entities “to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work ... in specialized formats exclusively for use by blind or other persons with disabilities.”²⁷ The definitions of “accessible format copy” in the Treaty and “specialized formats” in the Chafee Amendment are substantially the same, although the Treaty’s definition is clearer. The Chafee Amendment appears narrower than Article 4(1) in one respect: unlike the Treaty, Chafee excludes dramatic literary works (*e.g.*, the script of a play), unlike the Treaty. However, under Section 107, a court likely would consider the making of an accessible format copy of a play as a fair use.²⁸ Additionally, fair use

²⁶ This discussion is based on Jonathan Band, *A User Guide to the Marrakesh Treaty* (Oct. 10, 2013), available at <http://www.librarycopyrightalliance.org/bm~doc/user-guide-marrakesh-treaty-1013final.pdf>.

²⁷ 17 U.S.C. § 121(a) (2011).

²⁸ See Jonathan Band, *The Impact of Substantial Compliance with Copyright Exceptions on Fair Use*, 59 J. Copyright Soc’y U.S.A. 453, 461-62 (2012); Association of Research Libraries, *Code of Best Practices in Fair Use for Academic and Research Libraries* 21-22

would bridge any minor differences between the definition of “beneficiary person” under the Treaty and “blind or other persons with disabilities” under Chafee.²⁹

The Chafee Amendment also does not go as far as Article 4(2), which mandates an exception directly for beneficiary persons, as well as one for authorized entities that serve them. However, it seems clear that the fair use doctrine would apply in the situation where a beneficiary person in the United States, or his or her caregiver, wished to create an accessible copy of a text for personal use. Moreover, under the Treaty, it is literally the case that a Contracting Party need not comply with Article 4(2); Article 4(2) simply outlines one way of complying with the Article 4(1) obligation.

Article 5(1) obligates a Contracting Party to permit an authorized entity to export an accessible format copy to an authorized entity or a beneficiary person in another Contracting Party. The U.S. Copyright Act only prohibits the export of *infringing* copies. 17 U.S.C. § 602(a)(2). Because the accessible format copies being exported by the authorized entity would be made pursuant to the Chafee amendment or fair use, they would not be infringing. Section 602(a)(2), accordingly, would not block their export. Moreover, the export right is a species of the distribution right, and therefore the Chafee Amendment exception to the distribution right would also apply to the export right.

(2012), available at <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>.

²⁹ As discussed above, because “other persons with disabilities” under the Chafee Amendment includes persons with reading disabilities that result from an organic dysfunction, some have tried to limit the applicability of Chafee by claiming that certain reading disabilities do not result from an organic dysfunction. To the extent these assertions are biologically correct with respect to the causation of these disabilities, fair use would permit the distribution of accessible format copies to people with these “non-organic” reading disabilities.

Importation, addressed by Article 6, is treated under 17 U.S.C. § 602(a) as another form of distribution in U.S. law. The Chafee Amendment's exception to the distribution right thus would provide an authorized entity with an exception to the importation right. To the extent the Chafee Amendment did not apply (for example, if the work at issue was a script of a play), fair use or the first sale doctrine, as interpreted by *Kirtsaeng v. John Wiley & Sons, Inc.*, would permit the importation by an authorized entity.³⁰ Additionally, fair use, first sale, and the personal use exception to the importation right, 17 U.S.C. § 602(a)(3)(B), would permit the direct importation by a beneficiary person. In short, the U.S. Copyright Act easily meets the obligations of Article 6.

Article 7 provides that when a Contracting Party prohibits the circumvention of technological protection measures, it must take appropriate measures to ensure that this legal protection does not prevent beneficiary persons from enjoying the exceptions provided for in the Treaty. The Digital Millennium Copyright Act, 17 U.S.C. § 1201, prohibits the circumvention of technological protection measures, thereby triggering this obligation. Under section 1201(a)(1)(C), the Librarian of Congress may provide a three year exemption to the section 1201(a)(1)(A) prohibition on the circumvention of a technological measure that effectively controls access to a work. In four consecutive rulemakings, the Librarian has granted exemptions to the print disabled for the circumvention of software that disabled the text to speech function on screen readers. The most recent exemption, granted in 2012, meets the requirements of Article 7.³¹

³⁰ The Supreme Court in *Kirtsaeng v. John Wiley & Sons, Inc.*, 131 S. Ct. 1351 (2013), ruled that the first sale doctrine permitted the unauthorized importation of noninfringing copies.

³¹ This exemption permits circumvention to gain access to: "Literary works, distributed electronically, that are protected by technological measures which either prevent the

Even though the United States could ratify the Treaty without amending Title 17, the Treaty still has the potential to provide substantial benefits to the print disabled in the United States. This is because the Treaty should result in more Contracting Parties adopting exceptions permitting authorized entities to make accessible format copies and to export them to other Contracting Parties, including the United States. This will be particularly helpful to the print disabled in the United States that are interested in reading foreign language books.

LCA would be happy to answer any questions the Subcommittee may have concerning the matters discussed in this statement.

November 18, 2014

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, 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.” Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260, 65,262 (Oct. 26, 2012) (to be codified at 37 C.F.R. pt. 201). LCA has just filed a petition with the Copyright Office to renew this exemption.