

Before the
U.S. Copyright Office, Library of Congress
Washington, DC

In the Matter of
Exemption to Prohibition on)
Circumvention of Copyright)
Protection Systems for Access) Docket No. 2014-07
Control Technologies)

Petition for Exemption
Ebook Accessibility for People who are Blind, Visually Impaired, or Print Disabled
of
American Foundation for the Blind (AFB)
American Council of the Blind (ACB)
Samuelson-Glushko Technology Law & Policy Clinic (TLPC)

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The American Foundation for the Blind (AFB) continues the efforts of its founder, Helen Keller, by working to remove barriers, create solutions, and expand possibilities for people with vision loss. The American Council of the Blind (ACB) works with industries, governments, and other non-profit organizations in order to develop and maintain policies and systems that best provide equal opportunities for people who are blind. The student attorneys at the Samuelson-Glushko Technology & Policy Law Clinic (TLPC) at Colorado Law advocate for the public interest in important public policy and legal matters with technological dimensions.

**2. *Brief Overview of Proposed Exemption:*
Ebook Accessibility for People who are Blind, Visually Impaired, or Print Disabled**

We seek renewal of the exemption previously granted by the Librarian of Congress in the 2012 triennial review, which allows people who are blind, visually impaired, or print disabled, as well as the authorized entities that serve them, to circumvent technological protection measures (“TPMs”) that prevent or interfere with the use of assistive technologies with electronically distributed literary works (“ebooks”).¹ Specifically, the previously granted exemption covers:

Literary works, distributed electronically, that are protected by technological measures which either prevent the enabling of read-aloud functionality or interfere with screen readers or other applications or assistive technologies in the following instances: (i) [w]hen a copy of such 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) [w]hen such work is a nondramatic literary work, lawfully obtained and used by an authorized entity pursuant to 17 U.S.C. 121.²

We seek renewal of the exemption using the same language as the last exemption. Renewal would continue to help people who are blind, visually impaired, or print disabled access the same educational, cultural, and political works embodied in ebooks that seeing people access without restriction every day.

**3. *Copyrighted Works Sought to be Accessed:*
Lawfully Obtained Electronically Distributed Literary Works**

The exemption covers literary works, as defined in Section 102(1) of the Copyright Act, distributed electronically, including ebooks, digital textbooks, and PDF articles.³ A person who is blind, visually impaired, or print disabled may lawfully obtain such works through open markets, such as Amazon’s Kindle store, a public library program, or an author’s website, or through authorized entities entitled under the Chafee Amendment, 17 U.S.C. § 121, to provide accessible copies of lawfully obtained literary works for people who are blind, visually impaired, or print disabled. The exemption is limited to works for which the rights owner has received payment or which are covered under the provisions of the Chafee Amendment.

¹ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260-01, 65,262 (Oct. 26, 2012).

² 37 C.F.R. § 201.40(b)(1).

³ See 17 U.S.C. § 102(1).

4. Technological Protection Measures: Digital Rights Management Technologies in Ebooks that Disable or Interfere with Assistive Technologies

There are two primary categories of TPMs which prevent or interfere with the use of assistive technologies for people who are blind, visually impaired, or print disabled: anti-copying encryptions and “trusted player” encryptions.

Anti-copying encryptions are designed to prevent unauthorized copying, printing, or sharing of the ebook. Examples include Adobe Content Server 4 Encryption used on ePub files and the Topaz encryption used on Kindle books.⁴ These anti-copying encryptions often will view text-to-speech programs, digital Braille displays, or other assistive technologies as security threats, and block their access to the digitally formatted text, making them inoperable.⁵

The second type is a “trusted player” encryption that ties the purchased ebook to a particular ebook reader. One example is Apple’s “Fairplay” encryption.⁶ This type of TPM creates problems because accessibility capabilities vary widely across platforms. If a fully accessible version of an ebook is only available on a platform not owned by the prospective user who is blind, visually impaired, or print disabled, then it is still inaccessible. As the National Telecommunications and Information Administration noted in the 2012 triennial review, “[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.”⁷

5. Noninfringing Uses: Reproduction and Distribution of Electronic Literary Works in Specialized Formats for Use by People who are Blind, Visually Impaired, and Print Disabled

Reproduction and distribution of specialized, accessible versions of literary works has long been recognized as a noninfringing use by Congress and the courts. Congress has, in general, repeatedly affirmed the importance of access to society, culture, and information for people with disabilities. Under the Americans with Disabilities Act, Congress aspired “to assure equality of opportunity [and] full participation” for people with disabilities.⁸ Congress has worked to fulfill this aspiration by requiring accessible programs, communications, and textbooks.⁹

⁴Adobe Content Server 4, <http://www.adobe.com/sea/products/contentserver/> (last visited Nov. 2, 2014).

⁵ George Kerscher & Jim Fruchterman, *The Soundproof Book: Exploration of Rights Conflict and Access to Commercial EBooks for People with Disabilities*, 7 First Monday 6 (2002).

⁶ iBooks Store publishing overview, <http://support.apple.com/kb/PH2808> (last visited October 28, 2014).

⁷ Letter from Lawrence E. Strickling, Assistant Secretary, NTIA, to Maria Pallante, Register of Copyrights 5 (Sept. 21, 2012), http://copyright.gov/1201/2012/2012_NTIA_Letter.pdf.

⁸ 42 U.S.C. § 12101(a)(7).

⁹ *E.g.*, Rehabilitation Act of 1973, 29 U.S.C. § 794; Twenty-First Century Communications and Video Accessibility Act, Pub. L. No. 111-260, 124 Stat. 2751 (codified as amended in scattered

Congress has further recognized the importance of accessing literary works, and has enacted legislation to enable and protect such access within the framework of copyright law itself.¹⁰ When passing the 1976 Copyright Act, the House and Senate Committees on the Judiciary expressly identified providing copies and phonorecords for use by people who are blind as an exemplary application of fair use doctrine.¹¹ In enacting the Chafee Amendment in 1997, Congress explicitly determined that 106 infringement does not occur when reproducing or distributing a work to persons with print disabilities.¹²

Courts have confirmed this limitation and international legal systems are doing the same. In *Sony v. Universal City Studios*, the Supreme Court noted 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.”¹³ More recently, the Second Circuit ruled in *Authors Guild v. HathiTrust* that the legislative and case history clearly showed that the purpose and character of creating specialized, accessible versions of electronic literary works fell within fair use requirements.¹⁴ In the Marrakesh Treaty, the World Intellectual Property Organization mandates Contracting Parties to “take appropriate measures” to ensure that people who are blind, visually impaired, or print disabled are not prevented from enjoying the treaty’s benefits by laws preventing the circumvention of TPMs.¹⁵

6. Adverse Effects:

Restricted Access to Literary Works for the Under-Served Population of People who are Blind, Visually Impaired, or Print Disabled

Digital literary works provide a tremendous opportunity for people who are blind, visually impaired, or print disabled to access the social, educational, economic, and participatory value provided by literary works. This opportunity can only be realized if the ability to circumvent TPMs that prevent accessibility features from working is permitted. Without this permission people who are blind, visually impaired, or print disabled will be left behind.

Audiobooks provide some access to literary works, but their availability has been and remains woefully limited. For example, Audible.com, a leading audiobook provider, has only on the order of 150,000 available audiobooks—compared to over 2 million ebooks available for sale on Amazon.com.¹⁶ Indeed, earlier this year, Amazon.com introduced a new service called

sections of 47 U.S.C.); National Instructional Materials Accessibility Standard, 71 Fed. Reg 41,084-01 (2006).

¹⁰ *E.g.*, 17 U.S.C. § 121.

¹¹ H.R. Rep. 94-1476, p. 73-74 (1976); S. Rep. No. 94-473, p. 66-67 (1975).

¹² 17 U.S.C. § 121.

¹³ *Sony v. Universal City Studios*, 464 U.S. 417, 455 n.40 (1984).

¹⁴ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 101-103 (2d Cir. 2014).

¹⁵ Marrakesh Treaty art. 7, June 27, 2013, World Intellectual Property Organization, *available at* http://www.wipo.int/treaties/en/text.jsp?file_id=301016#art7.

¹⁶ Quora, *How Many ebooks Are Available on Amazon*, <http://www.quora.com/How-many-ebooks-are-available-on-Amazon> (last visited Nov. 2, 2014).

“Kindle Unlimited,” which it claimed allows subscribers to rent more than 600,000 ebooks for a low fee.¹⁷

With new books increasingly being released in both digital and print formats, people who are blind, visually impaired, or print disabled are more able to access the latest literary works without waiting for a specially adapted version to be published—or provided by an authorized entity. An ebook with adaptive technology allows the greatest and freest access to literary works. However, an ebook whose TPM inhibits that technology may be completely inaccessible to people who are blind, visually impaired, or print disabled.

People who are blind, visually impaired, or print disabled also face financial harm when they purchase an ebook that they cannot actually access. Often, a person will discover that an ebook is inaccessible only after purchasing it. In the Kindle and Nook stores, book searches cannot be filtered by whether they are encumbered with TPM, and it is not always apparent from the product page if a book will be compatible with adaptive technology. “Trusted player” TPM can compound the problem when an ebook has already been purchased, but not for a device owned by the prospective user who is blind, visually impaired, or print disabled.

There is little argument that owners of copyrighted literary works are negatively impacted by this exemption. When considering the market effects of making books electronically accessible to print-disabled persons, the *HathiTrust* court noted that “[i]t is undisputed that the present-day market for books accessible to [people with disabilities] is so insignificant” that authors routinely forgo royalties on specially formatted books, and that accessible books constitute “a minute percentage of the world's books.”¹⁸ Renewing this exemption will improve access to books for people whom publishers are simply not serving.

Finally, content creators largely support the creation of accessible versions of literary works for people who are blind, visually impaired, or print disabled, and appear to agree in principle to this exemption. During the 2012 exemption process, there were few written objections, and no one appeared at the hearing to oppose the exemption.¹⁹ This exemption is so uncontroversial that, “enabling accessibility for disabled users” is used by the Copyright Office as an example in the template provided for this proceeding.²⁰ At the recent House Committee on the Judiciary Hearing, a content creator representative agreed that “we all share the frustration expressed by [AFB] about the need to return repeatedly and use extensive resources to seek an exemption—to renew an exemption—where no one is opposing the exemption.”²¹

¹⁷ *Amazon.com Announces Second Quarter Sales up 23% to \$19.34 Billion*, Amazon.com Press Releases (Jul. 24, 2014), <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1951181>.

¹⁸ *HathiTrust*, 755 F.3d at 103.

¹⁹ *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Section 1201 Hearing Agenda (June 5, 2012), <http://www.copyright.gov/1201/hearings/2012/agenda/>.

²⁰ Template Form, at 4, http://copyright.gov/1201/2014/1201_petition_template.docx.

²¹ Comments by Christian Genetski, Senior VP and General Counsel, Entertainment Software Association, Hearing on Chapter 12 of Title 17 at M 59:00, <http://judiciary.house.gov/index.cfm/2014/9/hearing-chapter-12-of-title-17>.