



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

### Item A. Commenter Information

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

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

*Represented by:*

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#### **American Foundation for the Blind**

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

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

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

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

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

## **Library Copyright Alliance**

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

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## **Benetech/Bookshare**

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

## **HathiTrust**

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

## **Perkins Braille & Talking Book Library**

A Division of the Perkins School for the Blind  
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Perkins Library circulates more than a half million accessible books, newspapers and publications in braille, large print and digital audio formats annually to thousands of registered patrons in New England and beyond.

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

The above-signed petitioners respectfully reply to the comment made in response to Proposed Class 8: Literary Works—Accessibility.

**Item C. Overview**

The record strongly supports renewing the e-book accessibility exemption. Our initial long form comment presented factual and legal arguments demonstrating the need for renewing the e-book accessibility exemption.<sup>1</sup> These arguments remain undisputed. Additionally, only one other commenter, the Joint Copyright Holders, weighed in on the proposed exemption, and “do[es] not oppose” renewal of the e-book accessibility exemption or the proposed modifications.<sup>2</sup>

In further support, this reply comment provides additional information on the inadequacy of “text-to-speech” (TTS) e-book functionality as a catch-all solution to inaccessible digital copies of literary works. This comment also addresses the concerns raised around proposed modifications’ inclusion of the term “phonorecord” raised by the Joint Copyright Holders.<sup>3</sup>

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

As we noted in our previous comment, the use of technological protection measures (TPMs) on e-books presents significant obstacles to accessibility.<sup>4</sup> In 2018, the Acting Register acknowledged that TPMs “interfere with the use of assistive technologies such as screen readers and refreshable braille displays.”<sup>5</sup> TPMs such as these “can hinder interoperability between platforms, and prevent many assistive technologies from working,” and can even render the contents of an

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<sup>1</sup> See generally ACB, *et al.*, Class 8 Long Comment at 14 (Dec. 14, 2021) (“Long Comment”),

[https://www.copyright.gov/1201/2021/comments/Class%2008 InitialComments Accessibility%20Petitioners%20II.pdf](https://www.copyright.gov/1201/2021/comments/Class%2008%20InitialComments%20Accessibility%20Petitioners%20II.pdf).

<sup>2</sup> MPA, *et al.*, Class 8 Opposition Comment at 1 (Feb. 9, 2021) (“Joint Copyright Holders Comment”),

[https://www.copyright.gov/1201/2021/comments/opposition/Class 8 Opp'n Joint%20Creators%20and%20Copyright%20Owners.pdf](https://www.copyright.gov/1201/2021/comments/opposition/Class%208%20Opp'n%20Joint%20Creators%20and%20Copyright%20Owners.pdf).

<sup>3</sup> Joint Copyright Holders Comment at 2.

<sup>4</sup> Long Comment at 11.

<sup>5</sup> Recommendation of the Acting Register of Copyrights at 22 (Oct. 2018) (“2018 Recommendation”),

[https://cdn.loc.gov/copyright/1201/2018/2018 Section 1201 Acting Registers R ecommendation.pdf](https://cdn.loc.gov/copyright/1201/2018/2018%20Section%201201%20Acting%20Registers%20Recommendation.pdf).

e-book file “completely inaccessible.”<sup>6</sup> TPMs can also be used to lock an e-book file into a particular ecosystem of devices or applications.

Such interference persists today, restricting access to digital e-book files both by adding protections against unauthorized copying, and by forcing readers to use only particular devices or applications to access and use these files.

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

#### **1. The record supporting the exemption is undisputed.**

Historically, the e-book accessibility exemption has incorporated both the wording and, in part of the exemption, the scope of the Chafee Amendment, codified at 17 U.S.C. § 121. Under the exemption, people with disabilities covered by the Chafee Amendment may personally circumvent technological protection measures to remediate a copy of a literary work that they have lawfully obtained.<sup>7</sup> The exemption further allows authorized entities to circumvent technological protection measures to reproduce and distribute literary works to people with disabilities consistent with the terms of the Chafee Amendment.<sup>8</sup>

When the United States joined the Marrakesh Treaty, the Chafee Amendment was updated by the Marrakesh Treaty Implementation Act (MTIA).<sup>9</sup> As a result, the Chafee Amendment underwent several changes<sup>10</sup> and a new companion section of law, 17 U.S.C. § 121A, was established to govern the import and export of accessible works.<sup>11</sup>

To comply with the United States’ obligations under the Marrakesh Treaty, the exemption must be updated by expanding the scope of eligible persons under the Personal Use Exemption<sup>12</sup>, and by expanding the scope of covered copyrighted works under the Authorized Entity Exemption.<sup>13</sup>

These required updates (and the adverse effects that flow from the current lack of these changes) are supported by the record, including by the Joint Copyright Holders, which note that “[t]o the extent the proposed changes are consistent with

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<sup>6</sup> Sarah Hilderley, *Accessible Publishing Best Practice Guidelines for Publishers*, [https://www.accessiblebooksconsortium.org/publishing/en/accessible\\_best\\_practice\\_guidelines\\_for\\_publishers.html](https://www.accessiblebooksconsortium.org/publishing/en/accessible_best_practice_guidelines_for_publishers.html) (last visited Dec. 13, 2020).

<sup>7</sup> 37 C.F.R. § 201.40(b)(3)(i).

<sup>8</sup> *Id.* § 201.40(b)(3)(ii).

<sup>9</sup> *See generally* Marrakesh Treaty Implementation Act, Pub. L. No. 115-261, 132 Stat. 3667 (2018) (“MTIA”).

<sup>10</sup> *Id.* § 2(a)(1).

<sup>11</sup> *Id.* § 2(a)(2).

<sup>12</sup> Long Comment at 15.

<sup>13</sup> *Id.* at 16.

the amendments in Sections 121 and 121A – including the specific limitations and requirements therein—we do not oppose them in light of the U.S.’s accession to the Marrakesh Treaty.”<sup>14</sup>

Further, no objections were raised against our reading of, or alternative request for the Office’s clarification on, the interplay between Section 1201 and Section 121A.<sup>15</sup> In our view, the import and export of accessible copies of works consistent with Section 121A is sufficiently distinct and attenuated from any circumvention activity that it does not implicate Section 1201(a)(1)’s prohibition on circumvention—or, in the case of imports, similar laws in other countries. This is because Section 121A covers works that have already been remediated into accessible formats, and so any necessary circumvention entailed in the remediation would already be covered by the existing exemption and its proposed changes. However, if the Library or the Office do not share this view, they should clarify the interplay between Section 1201 and Section 121A.

Our request for the replacement of ableist terminology in the Personal Use Exemption was likewise undisputed.<sup>16</sup> The Library and the Office should replace the reference to “the price of the *mainstream* copy of the work” in the remuneration clause of the exemption<sup>17</sup> with a more inclusive phrase such as “market price of an *inaccessible* copy.” While this is not a substantive change to the exemption, the Library and the Office should take the opportunity to make clear to the publishing industry, readers with print disabilities, and the public that accessible formats *should* be mainstream.

The lack of opposition to the proposed modifications underscores the need for the proposed exemption. The purpose of the exemption is to enable people with print disabilities to read e-books in a way that is most effective for them.<sup>18</sup> As noted in our initial comment, while TTS capabilities are being rolled out in Amazon Kindle’s e-book library, they do not appear to have been enabled for the full library of available titles.<sup>19</sup>

Moreover, TTS alone is insufficient to achieve the purposes of equal experience or access. TTS is limited in its manipulability and therefore does not achieve the goal of providing an equitable reading experience. More specifically, a person without a print disability can easily go back and forth between pages and chapters. She can highlight a word or sentence without losing her place in the e-book.

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<sup>14</sup> Joint Copyright Holders Comment at 2.

<sup>15</sup> Long Comment at 16.

<sup>16</sup> *Id.* at 17.

<sup>17</sup> 37 C.F.R. § 201.40(b)(3)(i).

<sup>18</sup> Long Comment at 11.

<sup>19</sup> *Id.* at 28.

However, when using the native TTS tools on Amazon Kindle and Apple Books, TTS only allows its users to start reading at a specific point in a book and does not allow the reader to move back and forward or highlight parts of an e-book while using accessible controls. Moreover, if the user stops the TTS for any reason and then clicks “start speaking,” the Kindle and other native TTS software does not continue speaking from the last known location. Rather, it will begin reading from the first word on the page. This experience does not and cannot alone offer a reading experience similar to that of a person without a print disability.<sup>20</sup>

Some accessibility tool and software providers seek to bridge this gap by offering a significantly better and more flexible experience for users. These feature-rich tools underscore just how insufficient plain TTS features alone can be for people who are blind, visually impaired, or print disabled. Companies like Kurzweil Education, which offers an array of accessibility software, provide tools offering a significant jump in capabilities and manipulability in comparison the native TTS tools in applications like Amazon Kindle or Apple Books.

For example, Kurzweil 3000 provides its users the ability to highlight specific parts of the e-book without a user losing her place in the text.<sup>21</sup> It offers “one-click access” to a variety of dictionaries, vocabulary study guides, and can mark an important place within a text, all while using the accessible features.<sup>22</sup>

However, a user of Kurzweil is unable to purchase a book through the Amazon Kindle store and then read that text on her Kurzweil program due to the TPMs Amazon places on its e-books.<sup>23</sup> Additionally, unlike the native TTS applications provided by Amazon and Apple, tools like Kurzweil provide users with the ability to easily navigate between chapters and pages while using accessible features and keyboard shortcuts.

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<sup>20</sup> These observations are based on our own use of both the Amazon Kindle and Apple Books platforms.

<sup>21</sup> Kurzweil 3000 Features, KURZWEIL, <https://www.kurzweiledu.com/k3000-firefly/features.html>.

<sup>22</sup> *Id.*

<sup>23</sup> Kurzweil Education Customer Support 1.15. General Information: Kindle format is not supported, <http://support.cambiumtech.com/index.php?pg=kb.page&id=1747> (last visited Mar. 10, 2020).

## 2. The proposed inclusion of the term “phonorecords” tracks the Marrakesh Treaty and the MTIA.

Finally, the Joint Copyright Holders “seek clarification that the ‘phonorecords’ referenced in the petition ... cover only audiobooks and do not cover the circumvention of sound recordings of performances of musical works”.<sup>24</sup>

The inclusion of the term “phonorecords” in the proposed exemption is simply intended to reflect the intent of the Marrakesh Treaty, the corresponding updates to 17 U.S.C. § 121, and the MTIA’s addition of 17 U.S.C. § 121A. The Marrakesh Treaty defines works as “literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media.”<sup>25</sup> Moreover, the Treaty underlines that the definition of “works” also includes works in audio form, such as audiobooks.<sup>26</sup>

In turn, the language of Section 121(a) applies to “copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation.”<sup>27</sup> In addition, section 121A addresses the importing and exporting of “copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation.”<sup>28</sup> It is our understanding that the inclusion of the term “phonorecords” in these statutory sections primarily aims to clarify that audiobooks and similar aural renderings of covered literary works and musical notation can be remediated into accessible formats and distributed under Section 121, and that these accessible format versions can be imported and exported under Section 121A.

Hence, the proposed exemption attempts to follow the given language by including the statutory term “cop[y] or phonorecor[d]” in the relevant provisions of its text:<sup>29</sup>

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

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<sup>24</sup> Joint Copyright Holders Comment at 2.

<sup>25</sup> Marrakesh Treaty art. 2.

<sup>26</sup> *Id.* at footnote 1.

<sup>27</sup> 17 U.S.C. § 121(a).

<sup>28</sup> 17 U.S.C. § 121A(a) & (b).

<sup>29</sup> Long Comment at 9.



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

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

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

Accordingly, the proposed exemption sweeps no further than the scope of permissible activity under the Marrakesh Treaty and the post-MTIA versions of Sections 121 and 121A, and the Office should recommend it as proposed.