



February 20, 2003

David O. Carson
General Counsel
Copyright Office
LM-403
James Madison Memorial Building
101 Independence Avenue, SE
Washington, D.C. 20559-6000

**Re: Docket No. RM 2002-4
Reply Comments of the Association of American Publishers**

These Reply Comments are submitted on behalf of the Association of American Publishers (“AAP”) in the above-referenced proceeding pursuant to the Notice of Inquiry concerning Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 67 Fed. Reg. 63578 (October 15, 2002). They are intended to supplement the arguments and positions stated in the Joint Reply Comments that were submitted in this proceeding by Steven J. Metalitz on behalf of AAP and various other identified organizations representing copyright industries, owners and creators.

As the principal national trade association of the U.S. book publishing industry, AAP represents some 300 member companies and organizations that include most of the major commercial book and journal publishers in the United States, as well as many small and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books and journals in every field of human interest. In addition to publishing print materials, many AAP members are active in the emerging market for e-books, while also producing computer programs, databases, Web sites and a variety of multimedia works for use in online and other digital formats.

Although the Joint Reply Comments state the views of AAP in addressing numerous Comments submitted in this proceeding, AAP separately submits these Reply Comments to more fully develop the factual and legal contexts in which the Librarian of Congress will determine whether certain proposed classes of

copyrighted works ought to be designated as exempt from the prohibition in Section 1201(a)(1) of Title 17 of the United States Code against circumventing technological measures that effectively control access to a copyrighted work.

In particular, these Reply Comments are submitted to provide the Librarian with additional information regarding the nascent e-book marketplace and the Copyright Act's treatment of accessibility issues for persons who have visual impairments or other print disabilities, so that these matters can be properly considered in assessing the merits of certain Comments that, with minor distinctions in characterization, generally propose to exempt "works in e-book formats" as classes of works that are, respectively, (1) restricted in use to a particular device, a limited number of devices, or devices with particular access or playback technologies, or (2) restricted in terms of accessibility by persons with visual or other print disabilities.

Proposed Class: Works in formats that are linked to a particular device, accessible only on a limited number of devices, or accessible only on devices with particular access or playback technologies.

Comment #11(3): Electronic Printed Media ("e-books")

Comment #13: Electronic books.

Comment #20(1): Literary works restricted by access controls that tether the work to a specific device or platform, thereby preventing a lawful possessor from using the work on an unsupported system in a non-infringing way. Example: e-books.

Summary of Argument:

In addition to the persuasive arguments presented in the Joint Reply Comments for rejecting these exempt class proposals, the proposals should be rejected because their adoption by the Librarian in this rulemaking would constitute unnecessary regulatory interference with competitive practices and industry standardization efforts in the nascent e-book market through the imposition of government technology mandates that have no underlying justification in the Digital Millennium Copyright Act ("DMCA") or any other provision of copyright law. If the ability of users to access copyrighted works on multiple devices or technological platforms can properly be characterized as a "consumer expectation," it is one that should be met through evolving business models of competing e-book publishers and technology vendors in an environment governed by market forces and private sector initiatives, rather than by intrusive government fiats that distort the "first sale" and "fair use" doctrines.

Argument:

The Joint Reply Comments submitted on behalf of AAP and various other organizations representing copyright industries, owners and creators provide several persuasive reasons for rejecting these exempt class proposals, including the historical absence of any legal requirement for copyright owners to enable access to their products from a multiplicity of platforms; the Librarian's previous rejection of similar proposals on the grounds that "there is no unqualified right to access a work on a particular machine or device of the user's choosing;" the reaffirmation of the latter proposition by the courts in recent DMCA cases; the "use-facilitating" nature of such restrictions as a "but-for" enabler of e-book offerings in the marketplace; and, the failure of the proponents to offer anything more than "preferred or optimal format" arguments and mere speculation in attempting to satisfy their evidentiary burden of demonstrating that, as a result of such restrictions, the prohibition against circumventing access controls has, or is likely to have, a substantial adverse impact on non-infringing uses of the works at issue.

Accordingly, AAP takes this opportunity in its separate Reply Comments to address a few specific points about e-books and the "first sale" and "fair use" doctrines. In addition, AAP takes this opportunity to document more specifically how the e-book market, albeit still in its fledgling stage, is evolving through competition among publishers and technology vendors, as well as through coordinated standardization efforts by industry organizations, to address platform-shifting and other such "consumer expectations" as affirmative matters of competitive choice, rather than as anticompetitive "rights" mandated by government.

It is indisputable that, as product offerings to the public, e-books differ significantly from traditional print books, even when they may in fact present the same copyrighted literary work for the public's use. The chief differences, of course, lie in capabilities for use of the work that are facilitated by the technology of e-books, but not by the technology of traditional print books, even with respect to identical literary works embodied in each. Indeed, the use capabilities that are available with e-books but not with traditional print books are at the heart of current copyright policy debates regarding the applicability of the "first sale" and "fair use" doctrines. Paradoxically, so-called "consumer expectations" that are otherwise ready and eager to embrace the enhanced functionality of e-books are apparently unwilling to do so if it means that they may also have to embrace some changes in the familiar copyright "use" rules they have become accustomed to applying in their use of traditional print books.

But why should this be so? If the enhanced functionality of an e-book constitutes added value beyond what is available to the consumer in a traditional print book, is it unreasonable for the consumer to have to accept that the cost of obtaining such added value may include a change in the way the familiar copyright “use” rules will apply to the e-book from the way they apply to the traditional print book? Or, perhaps, is it unreasonable for the consumer to expect to enjoy additional, new uses of the literary work beyond what could be facilitated by the traditional print book without having to change any of the copyright “use” rules to accommodate certain “risk” attributes of the same e-book technology that facilitates the new, added-value uses?

With respect to the “first sale” doctrine, it seems clearly unreasonable for consumers to expect that this particular copyright “use” rule will apply to e-books in precisely the same way that it has applied to traditional print books. As the Register of Copyrights made clear just two years ago, responding to calls for a “digital first sale” doctrine in a report to Congress that was mandated by Section 104 of the DMCA:

“Asserting that a digital first sale doctrine would have beneficial effects is not the same as arguing that it would further the purposes of the existing first sale doctrine, since there is no sound basis for asserting that those effects are related to the purpose of the first sale doctrine...

“Requiring that transmissions of digital files be treated just the same as the sale of tangible copies artificially forces authors and publishers into a distribution model based on outright sale of copies of the work. The sale model was dictated by the technological necessity of manufacturing and parting company with physical copies in order to exploit the work – neither of which apply [sic] to online distribution. If the sale model continues to be the dominant method of distribution, it should be the choice of the market, not due to legislative fiat...

“Straight-jacketing copyright owners into a distribution model that developed around a different technology at a different time is a formula for stifling innovative, market-driven approaches to meeting consumer demand for digital content. If, as has been asserted, the current terms by which copyright owners offer their products are unacceptable to consumers, consumers will stop buying them under those terms and competitors will step into the breach.”

Just as the “first sale” doctrine is inapplicable to digital transmissions of copyrighted works due to the intangible nature of works distributed by that process and the impropriety of asserting the doctrine as a justification for making additional copies of the copyrighted work, it is also inapplicable to the intangible digital version of the literary work that must be transmitted for platform-shifting of e-books. For this reason, “first sale” claims should be rejected as a basis for justifying proposals to designate “e-books” as a particular class of works that is exempt from the Section 1201(a)(1) anticircumvention prohibition.

With respect to the “fair use” doctrine, it may or may not be similarly unreasonable for consumers to expect that this rule for certain uses of copyrighted works will apply to e-books in precisely the same way that it has applied to traditional print books. However, the “fair use” issues are more complicated than the “first sale” issue because the former involves a multi-faceted, situational rule which requires that its applicability must be determined on a case-by-case basis and is dependent upon the particular facts and circumstances involved in the use of a copyrighted work in a particular instance.

While it is clear that “fair use” is among the non-infringing uses that are subject to this proceeding’s mandate to determine whether the Section 1201(a)(1) prohibition against circumventing access controls is adversely affecting users of particular classes of works in their ability to make non-infringing uses of such works, it is also clear that this proceeding’s mandate does not invite the Librarian to engage in the frolic of attempting to define what uses constitute “fair use” with respect to e-books. In any event, such an endeavor would not aid the proponents of classes of works that are proposed to be exempt from the anticircumvention prohibition on “fair use” grounds for the reasons stated in Section VI of the Joint Reply Comments, including those that constituted the bases for the Librarian’s rejection of virtually identical proposals in the initial Section 1201(a)(1)(C) rulemaking proceeding three years ago. See 65 Fed. Reg. 64556, 64571-64572 (October 27, 2000).

To the extent that many “consumer expectations” regarding e-books are dubiously clothed in the garments of the “first sale” and “fair use” doctrines, it is worth considering how the e-book market is evolving to address many of those “expectations” as matters of marketplace choice and competition, rather than limits on copyright protection.

As recently as December 2001, the e-book market was viewed as frantic roller coaster of overprediction and underachievement. Effusive millennial forecasts, claiming that the e-book business would swell to \$5 billion and account for as much as 10% of the book publishing market within five years, quickly gave way to

a body count of e-book-related ventures that became early casualties of unfulfilled hype and poor market penetration. The closing of Random House's AtRandom e-book imprint and AOL Time Warner's iPublish.com unit, within two months of each other and less than two years after both entities were established, climaxed a year-long shakeout of early entrants featuring bankruptcies, shut-downs, and layoffs in a variety of related ventures. The market for e-books simply had not developed as predicted and hoped for, with consumers remaining detached in the face of technical hardware problems, proprietary software restrictions, and limited availability of desired texts.

But in July of last year, the nonprofit Open eBook Forum ("OeBF"), perhaps the premiere e-book industry trade and standards organization, released the results of an industry-wide analysis of sales growth and new product innovation that seemed to indicate a startling rebound for e-books. "The initial hype that surrounded the early days of e-books has overshadowed the steady growth of a burgeoning industry," reported the Forum's Executive Director Nicholas Bogaty. Statistics from the survey included the following:

"Growth in Customer Base:

- Random House, Inc.'s eBook revenues doubled year-over-year in 2001 and during the latest quarter ending in March, revenues were the highest since the company began selling eBooks in 1998
- HarperCollins' eBook imprint, PerfectBound, has sold more eBooks in the first five months of 2002 than in all of 2001
- Average monthly downloads of Adobe Acrobat eBook Reader have increased by approximately 70% from 2001 to 2002
- Simon & Schuster has seen double-digit growth in eBook sales from the first half of 2001 to the first half of 2002
- Over 5 million copies of Microsoft Reader have been distributed for use on desktop, notebook and Pocket PC systems
- Palm Digital Media reports that nearly 180,000 eBooks were sold in 2001, a more than 40% increase from 2000
- In 2002, McGraw-Hill Professional eBook sales are up 55% over the same period last year

New Technology Development/Consumer Product Offerings:

- Random House, Inc. has coordinated with its composers and other print partners to standardize eBook production and create print and eBook formats simultaneously.
- Adobe is providing new automated library lending functionality that allows patrons to checkout an eBook and check it back in.
- Overdrive puts the number of publishers and independents offering a commercial eBook library at 450.
- HarperCollins' PerfectBound is offering exclusive "eBook extras" on its frontlist titles.
- The forthcoming tablet PC from Microsoft is being positioned as a perfect platform for reading.
- 23 AOL Time Warner Book Group's New York Times bestsellers for 2001 are available as eBooks.

eBooks in Publishers' Marketing Efforts:

- All eight of Random House Inc.'s trade divisions are supporting digital editions and have a commitment to publish lead titles simultaneously in eBook and print.
- HarperCollins' PerfectBound promotions have increased the sales of individual titles as much as 5-10 times by offering older titles by an author for free in electronic form as a means to promote that author's latest title.
- Simon & Schuster is publishing the complete Hemingway collection of 23 books electronically in August 2002.
- In a recent survey of librarians, 41% of respondents indicated intent to offer Adobe PDF eBooks to their patrons.”

What happened to produce such a turnaround? Had the industry suddenly got wise (or caved in) and resolved problems with exclusive proprietary formats, overly restrictive Digital Rights Management (“DRM”) applications, platform-shifting, and other consumer concerns? Had the Government intervened to amend copyright

law and impose other mandates to satisfy “consumer expectations” regarding e-books?

No and no. What happened was that a variety of industry participants and their partners got serious about spurring investment, competition and standardization in the e-book marketplace. And their early successes seem to have restored their original optimism regarding the market for e-books and encouraged them to continue their efforts today.

Check out e-book sections on web sites of major publishers such as Harper Collins (<http://us.perfectbound.com>), Random House (www.randomhouse.com/ebooks) and Simon & Schuster (<http://store.simonsaysshop.com>), and you’ll find a wealth of competing consumer services including FAQs about e-books, comparisons of the leading e-book Devices & Software, free downloads of the leading e-book readers and software, a host of links to e-book retailers and other resources, and, of course, a growing variety of free or purchasable e-books for downloading into any of the leading e-book reading regimes. Each of these sites will link you to sites where Adobe, Microsoft, Palm Digital Media, and Gemstar readers and software will be explained in detail and available for downloading. Similarly, visit sites such as Electronic Book Web (<http://12.108.175.91/ebookweb/>), Open An eBook (www.openanebook.org), eBookYes.com (www.ebookyes.com), or powells.com (www.powells.com/ebookstore) and you’ll find more of the same, including detailed comparisons of the capabilities of competing Adobe, Gemstar, Microsoft and Palm readers, new e-book releases and reviews, e-book newsletters, and FAQs.

You should also look at the e-book offerings at netLibrary (www.netLibrary.com), ebrary (www.ebrary.com), and questia (www.questia.com) – commercial online library services whose tens of thousands of electronic texts could not be offered to the public through their current distinct business models without the security protections provided by various DRM technologies and the legal protections afforded to their DRM technologies by the anticircumvention provisions of the DMCA.

In addition to online commercial libraries, public libraries are also making great strides as test-beds in which many consumers are having their first experiences with e-books. One new initiative, a circulation system for e-book borrowing from public libraries, surfaced in December when Palm Digital launched a new version of its software to accommodate e-book checkouts from libraries. The Cleveland Public Library, through an agreement with digital media company OverDrive Inc., is expected in March of this year to become the first institution to start lending best-sellers electronically in all three major formats – Palm, Microsoft and Adobe

– for use on nearly every type of device: PC, notebook computer, Palm handheld, Pocket PC, and Tablet PC.

On the standards front, OeBF, with a membership that includes technology leaders like Microsoft, Adobe and OverDrive, as well as leading publishing companies such as Random House, Simon & Schuster, AOL Time Warner, McGraw-Hill, HarperCollins, Scholastic and Harcourt, and stakeholder organizations such as AAP, the Library of Congress, the American Foundation for the Blind, and the Maryland State Department of Education, has helped lead the way.

As OeBF continues to refine and improve its ground-breaking Open eBook Publication Structure (an open, non-proprietary, XML-based specification for the content, structure and presentation of e-books), AAP and some of its members are currently participating alongside DRM vendors in the OeBF Rights and Rules Working Group to standardize both the terms used to describe DRM product features to consumers and a common computer-readable language for specifying rights and other information. Publishers hope to create the standards and a rights expression language to be used by DRM vendors throughout the e-book industry.

Publishers are not creating a set of usage rights; rather, they are working with representatives from the library community, legal community, and technology community to establish a rights grammar and a rights data dictionary that work with a standard rights expression language. In addition, they expect standards will achieve consistency of basic usage features among different e-book products to avoid consumer confusion. The standards would also support a wide range of business models to allow each individual publisher to meet its consumers' particular needs.

Features that the AAP/OeBF group has agreed upon as high priority include the ability of the publisher to enable consumer needs and preferences, among other things:

- Printing of the work, in whole or in part
- Creating copies of the work
- Reading of the same e-book on multiple devices and platforms, including handhelds
- Lending of content, including library lending functionality
- Accessibility for blind and print-disabled persons
- Donating e-books
- Backup copies
- Highlighting text and making annotations

- "Exporting" of text (e.g., for placing an excerpt of a book into a school research paper)
- "Importing" of text
- Ability of consumers to set up user-friendly personal libraries of digital content
- User control over the size, location, and orientation of graphics

In the meantime, AAP and the American Library Association are preparing to jointly release a White Paper entitled *"What Consumers Want in Digital Rights Management (DRM): Making Content as Widely Available as Possible In Ways that Satisfy Consumer Preference,"* which is intended to identify features that publishers, librarians, academics, and others have cited as important for e-book DRM vendors to take into account as they work to develop more user-friendly DRM products. The current draft, which can be cited as Draft Version 3.0, February 7, 2003, includes the following:

“The publisher members of AAP’s Enabling Technologies Committee believe that currently available DRM systems are falling short of consumer preferences in a number of areas ... [A]reas for improvement include:

- Compatibility with Macs (especially important for the K-12 market)
- The ability to move e-books from one device to another
- Transferability to other users (e.g., lending and donating), consistent, of course, with publishers' needs to protect the security of their works and intellectual property rights
- Consistency of successful downloading of e-books
- Format interoperability
- Support for publishers who want to make portions (but not all) of an e-book copyable and/or printable
- Ease of conversion of documents from the OEB file format into a format usable under the applicable DRM system; also the ability of DRM systems to accept and protect OEB files directly
- Accessibility for blind and print-disabled persons
- Ability of consumers to set up user-friendly personal libraries of digital content
- Consistency of basic usage features among different e-book products.”

According to an article in last month’s issue of BookTech Magazine (www.bookttechmag.com/cgi-bin/iq/276966398308688.bsp), a recent consumer survey sponsored by OeBF found that 70% of readers are ready to buy e-books if

they can read them on any computer, and 62% of consumers would borrow e-books from the library.

With so much private sector activity directed at addressing consumer concerns and needs regarding e-books, there is no justification for the Government to interfere with the marketplace through the adoption of exemptions in this rulemaking that would be tantamount to imposing government technology mandates on ebooks.

Proposed Class: Works in e-book formats sought to be accessed by disabled persons.

Initial Round Submissions:

Comment #9: Literary and Educational text protected by e-book software.

Comment #13: Electronic books (literary works).

Comment #26: Literary works

Comment #33(3): Literary works, including eBooks, which are protected by technological measures that fail to permit access, via a “screen reader” or similar text-to-speech or text-to-braille device, by an otherwise authorized person with a visual or print disability.

Summary of Argument:

In addition to the persuasive arguments presented in the Joint Reply Comments for rejecting these exempt class proposals, the proposals should be rejected because their adoption by the Librarian would be wholly inconsistent with the way Congress explicitly determined to accommodate the use of copyrighted works by persons who are blind or otherwise have print disabilities – an accommodation that continues to produce an expanding array of alternative sources for such persons to acquire copies of books in accessible formats.

Argument:

The Joint Reply Comments submitted on behalf of AAP and various other organizations representing copyright industries, owners and creators provide several persuasive reasons for rejecting these exempt class proposals, including that the capability to enable the use of Text To Speech (TTS) software on the underlying copyrighted material in an e-book already exists for many e-books; the e-book format is generally used to supplement print editions, rather than to supplant them; and, the use of access controls on e-books has increased the availability of these texts to broad segments of the public, including persons with print disabilities. They properly conclude that the proponents of these exemptions

utterly fail to demonstrate how (if at all) the relative inaccessibility of textual materials for persons with print disabilities can be attributed to the prohibition on circumvention of access controls.

AAP has a long record of accomplishment in its cooperative efforts to meet the special needs of individuals who are blind or have other disabilities that make it difficult or impossible for them to read print materials. Working with Congress, State legislatures, educational agencies, and a variety of advocacy groups for individuals with print disabilities, AAP has been a key partner in (among others):

- Drafting and securing the 1996 enactment of the so-called Chafee Amendment (17 U.S.C. 121), the landmark revision of U.S. copyright law that makes certain authorized entities exempt from the rights of copyright owners with respect to reproducing or distributing copies of a broad range of previously published literary works in specialized formats exclusively for use by blind or other persons with disabilities.
- Providing the electronic files needed by State educational agencies to facilitate the conversion of textbooks and other print instructional materials into accessible specialized formats for timely use by elementary and secondary school students and teachers, as well as (more recently) for use in postsecondary education.
- Assisting Benetech, a nonprofit assistive technology organization, in the development of its “Bookshare” website, which makes a variety of legally “scanned” books available to qualified online subscribers for downloading in specialized (DAISY and digital Braille) formats suitable for use by individuals with visual or other print disabilities.
- Working with Recording for the Blind & Dyslexic to develop the components of intellectual property protection and rights management policies in connection with its release of the new AudioPlus books.
- Drafting and obtaining House and Senate introduction of the “Instructional Materials Accessibility Act” (IMAA) – proposed federal legislation designed to help streamline the ordering and current State and local authority-driven processes for facilitating the conversion of textbooks and other print instructional materials into accessible specialized formats in order to ensure more timely availability of those materials for use by elementary and secondary school students.

These efforts have not been undertaken by AAP with the goal of enhancing revenue opportunities for its members; in fact, publishers typically are not compensated either for the actual costs of producing the electronic files used for conversion of print materials into specialized formats, or for the individual copies of their works that are reproduced and distributed in specialized formats. Rather, these efforts are driven by a combination of pragmatic and altruistic considerations that largely ignore the financial costs – and the absence of direct financial benefits – to publishers while significantly contributing to implementation of the public policies embodied in federal laws such as the Individuals with Disabilities Education Act, the Rehabilitation Act, and the Americans with Disabilities Act.

But the issue of “accessibility” in the context of the above-referenced federal disabilities laws should be understood as having a very different meaning than the issue of “access” in the context of the anticircumvention prohibition in Section 1201(a)(1) of the DMCA. While “access” in the latter context generally refers only to a person’s ability to obtain a sufficient level of contact with or proximity to a copy of copyrighted work for that person to be able to make some “use” of it (in the copyright sense of the term “use”), “accessibility” in the former context describes both a specific need and goal of persons with disabilities to overcome those disabilities in order to make the same or comparable use of something as could a person without those disabilities. And while copyright law confers no legal right of “access” to anyone with respect to a particular copy of a copyrighted work, or to a copy of such work in a preferred or optimal format, the federal disabilities laws do convey certain “accessibility” rights on persons with certain disabilities (e.g., with respect to any program or activity that receives federal financial assistance).

In the copyright context, Congress enacted the Chafee Amendment to the Copyright Act (17 U.S.C. Section 121) to address the “accessibility” needs of persons who are blind or have other print disabilities. Specifically, Congress sought to facilitate the “accessibility” of certain otherwise inaccessible copyrighted literary works for such persons by making certain “authorized entities” exempt from the rights of copyright owners with respect to their reproduction or distribution of copies of such works in certain “specialized formats exclusively for use” by persons with such disabilities.

In less than a decade since it was enacted, the Chafee Amendment has become the legal foundation for meeting the “accessibility” needs of persons who are blind or have other print disabilities in a variety of venues with respect to copyrighted works. It has, for example,

- eliminated the need for the National Library Service for the Blind to depend upon the cooperation of authors and publishers in granting NLS permission to reproduce their copyrighted works in special formats;
- provided additional legal support for the work of the American Printing House for the Blind as the official supplier of educational materials for blind elementary and secondary school students in the U.S. in specialized formats that include Braille, audiocassette talking books, and software;
- opened potential new vistas for the work of Recording for the Blind & Dyslexic which, while still producing recorded titles with permission of the publisher or copyright holder, is now advancing beyond its taped audio books for educational and reference materials to digitally recorded textbooks available on CDs;
- more recently, provided the legal impetus for the establishment of Bookshare.org, an online subscription service for scanned books that can be downloaded in formats for use with common Braille or synthetic voice reading devices, including the NISO/DAISY 3 XML-based format for the next generation of digital talking books and the BRF Grade II standard digital Braille format which may be used to produce hard-copy Braille, read with a refreshable Braille display, or be back translated to standard computer text for use with a speech device; and
- served as the basis for thousands of State Educational Agencies and Local Educational Agencies to arrange for the conversion of textbooks and other core instructional materials into specialized formats needed by elementary and secondary school students throughout the country.

Although there is some overlap in what is provided by these and other entities serving the accessibility needs of persons with visual impairment or other print disabilities, the continually expanding number of alternative sources making books and other textual materials available in specialized formats is, in large part, a testament to the success of the Chafee Amendment.

But, for purposes of this rulemaking proceeding, it is important to note the limitations of the Chafee Amendment as well as its successes in facilitating accessibility, for such limitations were the deliberate result of Congressional determination to balance the rights of copyright owners with the needs of persons with print disabilities. While the Chafee Amendment authorizes certain entities to reproduce or distribute certain literary works in specially formatted copies without permission from or payment to the copyright owner, nothing in the Chafee

Amendment requires the publisher of a copyrighted literary work to ensure that the published format meets the accessibility needs of persons with print disabilities. This is as true with respect to e-books as it is with respect to traditional print books.

The significance of this limitation in the current proceeding should be evident. Because Congress provided other means of ensuring accessibility of certain copyrighted works for persons with visual impairments or other print disabilities, it should be clear that Congress would not intend the assertion of such accessibility needs to serve as a justification for exempting from the anticircumvention prohibition of Section 1201(a)(1) a class of “works in e-book formats sought to be accessed by disabled persons.” Whatever other non-infringing uses of e-books may be said to be adversely affected by the prohibition against circumventing access controls, it should be clear that that the “access” at issue under Section 1201(a)(1) is not the “accessibility” that is at issue with respect to persons with print disabilities and which has been explicitly addressed by Congress through the Chafee Amendment.

As a practical matter, the proponents of this exempt class of works have failed to make their case for a number of other reasons based on the evidentiary standards of this rulemaking proceeding. For one thing, it is doubtful that they have met the requirements for proposing an exempt “class of works” because their “class” is not based on categories of authorship so much as it is characterized by reference to “the intended use or users of the work” – an unacceptable measure for an exempt “class.” Moreover, because of the availability of an increasing number of alternative sources for obtaining literary works in specialized formats for persons with print disabilities, the proposals asserting the need for the above-referenced exempt class of works cannot meet their evidentiary burden of demonstrating that the prohibition against circumventing access controls to enable the text-to-speech or other audio capability of an e-book has substantially limited access to such works in accessible formats. Particularly in light of the fact that at least some e-book readers (e.g., Adobe and Microsoft) have made their text-to-speech applications “self-voicing” as an accommodation to persons who are blind or have print disabilities, and not all publishers of e-books have been shown to routinely disable the audio output, the evidence of an expanding array of alternative sources to meet these “accessibility” needs clearly qualifies as a mitigating factor against whatever *de minimis* or isolated evidence of non-accessibility can be shown to be occurring in the marketplace today.

Conclusion

As previously noted in these Reply Comments, the market for e-books is still nascent, and has tremendous opportunities for the expansion of current competition and consumer choice. In addition, industry efforts to provide standardization where it is needed are advancing with substantial success on a global basis. With so much private sector activity directed at competitively and cooperatively addressing consumer concerns and needs regarding e-books, there simply is no justification for the Government to interfere with that marketplace through the adoption of exemptions in this rulemaking that would be tantamount to imposing government technology mandates on e-books.

Respectfully Submitted,

Allan Adler
Vice President for Legal and Government Affairs
Association of American Publishers