

**Statement of Allan Robert Adler
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Before

**The Subcommittee on Courts, Intellectual Property & Internet
Of
The Committee on the Judiciary
U.S. House of Representatives**

Regarding

Copyright Issues in Education and for the Visually-Impaired

November 19, 2014

Mr. Chairman, Ranking Member Nadler and Members of the Subcommittee:

On behalf of the Association of American Publishers (“AAP”), the national trade association for America’s book and journal publishers,¹ I want to thank you for this opportunity to present testimony at today’s hearing on “Copyright Issues in Education and for the Visually-Impaired.”

For educational publishers, the most important copyright issue is need for greater clarity and predictability in the application of fair use to the use of copyrighted works for educational purposes – especially in higher education. Better understanding of fair use is also vital for faculty, students, academic libraries, and non-profit institutions of higher education, which all depend on the content created by authors and publishers to achieve their own objectives.

We live in a world of dramatically expanding choices for online and other digitally-based learning solutions facilitated through licensing options, including affordable and pedagogically-advanced interactive multimedia content for customized use by students. These new digital learning platforms and digitally-available materials are helping colleges and universities meet the increasingly challenging tasks of helping students to stay in school, become more fully engaged in learning, and significantly improving student outcomes and graduation rates.

At AAP we believe that the increasing use of digital materials carries great benefits for those who teach and those who learn in higher education. But confusion about the scope and application of fair use has been sowed by “the new jurisprudence” of courts that have strayed from the statutory language and Supreme Court precedent to justify practices that apply fair use differently to digital materials than to print. That development threatens to undermine the incentive to invest in creative content that has been the foundation of copyright for centuries.

Moreover, students in higher education who are blind, visually-impaired or otherwise unable to use printed curriculum materials can also benefit substantially from rapidly-expanding uses of content in digital formats. However, students with print disabilities must be able to navigate the related information technologies and devices used to make digital materials available to students and instructors.

AAP and its members are expanding a long history of transitional accomplishments in collaboration with governments, disabilities advocates, technology developers and higher education communities to provide students and instructors with commercially-available accessible materials that will eliminate further dependence on copyright exceptions and other regulatory measures.

¹ For further information about AAP and its members, see website at www.publishers.org/.

The “New Jurisprudence” of Fair Use

In the Subcommittee hearing earlier this year on “The Scope of Fair Use,” two invited copyright experts from academia agreed that fair use has recently been expanding under a “new jurisprudence” which gives the principle of “transformative use” a far broader application and more dispositive role in fair use analysis than previously accorded by the courts.²

However, the two experts sharply disagreed on whether this new jurisprudence is a sound development and a correct reading of fair use doctrine as codified by Congress and interpreted by the Supreme Court.³

After the hearing, AAP submitted a Statement for the Hearing Record in which it agreed with the testimony of one of the copyright experts that this “new jurisprudence” is often internally conflicting and confusing, inconsistent with Congressional intent and Supreme Court precedent, and threatens to overwhelm authors and publishers in their exercise of the exclusive rights of copyright that provide incentives for their continued investment in the creation and distribution of works of original expression.⁴

Indeed, the hallmark of this “new jurisprudence” seems to be a determined effort to sidestep the objective statutory fair use criteria in favor of an inquiry into an ever-broadening concept of “transformativeness” and highly-subjective notions of certain uses broadly being “in the public interest” or providing “significant public benefits.”⁵

The AAP statement noted that the copyright experts’ testimony did not address this legal and policy dispute regarding “the scope of fair use” in the specific context of the use of copyrighted works for educational purposes. However, the experts’ disagreement about the propriety of this expansion of fair use has been playing out on thousands of campuses across our country as well as in pending litigation of critical importance to academic publishers and publishers of works used for academic purposes, faculty and students, academic libraries, and non-profit institutions of higher education.

² *See The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary, 113th CONG., 2d Sess. 8 and 14 (2014)* [hereinafter *Hearings*] (Statements of Professor Peter Jaszi and June Besek, respectively), available online with along with archived testimony and video of the hearing at <http://judiciary.house.gov/index.cfm/hearings?ID=8E18A9AA-1AA4-4D7C-8EBF-0284862EC44B>.

³ *Hearings, supra* note 2.

⁴ *Hearings, supra* note 2, at 104

⁵ *See, e.g., Hearings, supra* note 2, at 8 (Jaszi Statement) (“contributing significantly to cultural progress and innovation in the information society”) and 15 (Besek Statement) (“for a socially beneficial cause”)

Main Points for Consideration by the Subcommittee

AAP welcomes the opportunity to present to the Subcommittee today the following key points regarding current issues over what constitutes fair use for educational purposes:

First – There is no general or *per se* exception for use of copyrighted material for educational purposes or by non-profit educational institutions under the U.S. Copyright Act, and such uses are not “presumptively” fair use.

In nearly two decades of hearings and discussion before enacting Section 107 to codify judicial precedents for determining fair use, Congress repeatedly rejected such general exception policies and, instead, required a case-by-case fair use analysis applying the statutory criteria to the particular facts and circumstances of the use at issue.⁶ Although the preamble to Section 107 states, in relevant part, that “the fair use of a copyrighted work... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright,” the referenced specific “purposes” were intended to serve only as examples that *potentially* qualify as fair uses depending in each instance on an analysis applying the statutory criteria to the particular facts and circumstances at issue.⁷

Moreover, when Congress amended the first statutory criterion – “the purpose and character of the use” – to explicitly state that this factor includes the consideration of “whether such use is of a commercial nature or is for non-profit educational purposes,” the amendment was “an express recognition” that “the commercial or non-profit character of an activity, *while not conclusive with respect to fair use*, can and should be weighed along with other factors in fair use decisions.”⁸ As a result, the Supreme Court has repeatedly confirmed that “the mere fact

⁶ See 17 U.S.C. 107 (“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”)

⁷ See S.REP.No. 94-473, p.62 (1975) (“Whether a use referred in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors.”) See also, e.g., *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 561 (1985) (“This listing was not intended to be exhaustive..., or to single out any particular use as presumptively a ‘fair’ use. The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.”)

⁸ See H.REP.NO. 94-1476, p.66 (1976) (emphasis added), cited in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449 n.32 (1984).

that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”⁹

Second – Notwithstanding clear Congressional intent and Supreme Court precedent, court rulings in pending copyright infringement litigation by academic publishers against Georgia State University (“GSU”) have exhibited troubling hallmarks of the “new jurisprudence.”

The GSU litigation¹⁰ concerns the university’s claim that its notable changeover from providing students with *licensed* paper “course packs” of portions of copyrighted works for curriculum reading to providing *unlicensed* digital versions of the same kind of materials for the same purpose is protected fair use. Rulings by the trial court and in the majority appellate opinion from a three-judge panel of the Eleventh Circuit U.S. Court of Appeals include applications of both the key copyright principle of “media neutrality” and the statutory criteria for fair use analysis that are seriously flawed.

The district court focused on a work-by-work fair use analysis that generally ignored the broad, systematic impact of GSU’s digital “e-reserves” program and the relevance of precedents established by court decisions in two paper “course pack” cases involving copy shops.¹¹ After the trial, the district court ruled that GSU’s policy caused only five instances of infringement out of nearly fifty representative examples of the unlicensed uses of substantial portions of the publishers’ works that it analyzed for fair use. Although it granted declaratory and injunctive relief to the publishers, the court nevertheless oddly found that the defendants were the prevailing party and awarded the defendants costs and attorneys’ fees.

The Eleventh Circuit panel that considered the publishers’ appeal reversed and remanded the district court’s judgment and vacated its orders, based significantly on finding that the district court’s fair use analysis was “in part erroneous” in “giving equal weight” to each of the four fair use factors and in treating them as “a simple mathematical formula” with “an arithmetic approach” that “mechanically” added up the factors to reach fair use determinations.

One member of the appellate panel wrote a striking concurring opinion¹² that agreed with the judgment of the majority appellate opinion, but pointed out that the district court’s error “was broader and more serious than the majority’s analysis concludes.” In explaining the reasons for

⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584-85 (1994) (explaining further that “the commercial or nonprofit educational character of [the new] work is ‘not conclusive,’ but rather a fact to be ‘weighed along with other[s] in fair use decisions.’”)

¹⁰ See *Cambridge University Press et al. v. Becker et al.*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), *reversed and remanded sub. nom Cambridge University Press et al. v. Patton et al.*, No. 12-14676 & 12-15147 (11th Cir., October 17, 2014), *petitions for rehearing and rehearing en banc filed* (11th Cir., November 7, 2014)..

¹¹ See *Princeton Univ. Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) (*en banc*) and *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F.Supp.1522 (S.D.N.Y.1991) (hereinafter “the Course Pack Cases”).

¹² See *Patton*, *supra*, slip op. at 113 *et seq.*

his disagreement with the appellate majority, Judge Vinson urged “the critical need to see the ‘big picture’ when attempting to determine what constitutes fair use of copyrighted work.”

The majority appellate opinion properly rejected numerous other aspects of the district court’s rulings – including its second factor (i.e., “nature of the work”) determination that weighed in favor of fair use in every instance on grounds that “the books involved in this case are properly classified as informational in nature,” and its third factor (i.e., “amount and substantiality of the portion used in relation to the copyrighted work as a whole”) determination that favored fair use based on its pronouncement of a prohibited “rule of thumb” that would routinely find fair use if no more than 10% of a work, or one chapter with respect to any book of ten or more chapters, were used.

However, these rulings are counterbalanced by significant flaws in the majority appellate opinion, which were addressed in Judge Vinson’s special concurring opinion as well as in the publishers’ recently-filed petition seeking a rehearing of their appeal by all of the Eleventh Circuit appellate judges:

Application of the Principle of Media Neutrality

The well-settled principle of “media neutrality” in copyright law is not, as the majority appellate opinion holds, only about the “copyrightability” of works in the sense of whether they qualify for copyright protection when transferred from one medium to another. That view is at odds with the Eleventh Circuit’s own *en banc* precedent in the *National Geographic* case¹³ and misses the point of the Supreme Court’s reference to the principle in the *Tasini* case,¹⁴ which was cited by the *en banc* decision as controlling precedent.

Although neither of those cases concerned fair use, both considered the issue of infringement under a Copyright Act provision which permits for publishers to reproduce and distribute contributions to a collective work without permission from the authors of those contributions when issuing a revision of the collective work. In that context, as in the GSU case, the media neutrality principle meant that the change from one medium to another does not affect the question of the legality of the non-permissioned reproduction and distribution of the copyrighted works at issue.

This error in the majority appellate opinion is important because, as Judge Vinson noted, the GSU case is about “a university-wide practice” of substituting unlicensed digital course packs for licensed paper course packs “primarily to save money.” GSU had always paid permission fees to use copyrighted works in a paper format but refused to do so when it used the same or similar copyrighted works in a digital format for the same purpose. That undisputed fact violates the

¹³ See *Greenberg v. National Geographic Society*, 533 F.3d 1244 (11th Cir.) (*en banc*), *cert. denied*, 555 U.S. 1070 (2008).

¹⁴ See *New York Times Co. v. Tasini*, 533 U.S. 483, 502 (2001) (noting that “the transfer of a work from one medium to another generally does not alter its character for copyright purposes.”)

principle of media neutrality and, in Judge Vinson’s view, is “strong, if not conclusive, evidence” that the underlying use was not fair use.

Fair Use Consideration of the User’s “Non-profit” Status and the Use’s “Educational Purpose”

This issue is addressed at length later in this statement, but it is worth briefly noting Judge Vinson’s criticism of the majority appellate opinion’s analysis of the first fair use factor (i.e., “nature and purpose of the use”). The majority – notwithstanding its awareness of the district court’s finding that the copying at issue produced non-transformative, “mirror-image” *verbatim* copies of substantial portions of the publishers’ works – concluded that the first factor analysis weighed in favor of fair use based primarily on the fact that GSU is a not-for-profit university using the copyrighted material for educational purposes.

In reaching that conclusion, the majority noted that, in the Course Pack Cases, “the first factor weighed against a finding of fair use when the [same] non-transformative, educational use in question was performed by a for-profit copy shop.” But the majority limited the application of this fair use precedent based on the fact that the copying in those cases was by commercial print shops *for* a non-profit university while the issue in the GSU case was about copying *by* a non-profit university. Thus, for the majority, the non-profit status of GSU in this case tipped the scales in its first factor analysis from weighing against to weighing in favor of fair use.

However, as Judge Vinson noted, this conclusion ignores the general principle that – as was acknowledged earlier in the majority appellate opinion – fair use analysis should focus primarily on the use, not on the user. “The use at issue in this case and in the Course Pack Cases (specifically, non-transformative, extensive, and *verbatim* copying of copyrighted protected works for the inclusion in university ‘course packs’ – a commercial substitution) and the effect on the market for those protected works,” Judge Vinson concluded, is exactly the same.”¹⁵

The extraordinary weight given to the non-profit status of GSU reflects a troubling trend of deeming any use that provides “significant public benefits” a fair use. Despite the majority opinion’s recognition that “care must be taken not to allow too much educational use, lest we undermine the goals of copyright by enervating the incentive for authors to create the works upon which students and teachers depend,” it raised the non-profit status of GSU to a level of primacy that not only neutralized the non-transformative character of the use at issue, but completely tipped the scales in favor of fair use under the first factor because it found that “the use provides a broader public benefit—furthering the education of students at a public university.”¹⁶

¹⁵ See *Patton, supra*, slip op. at 121 n.7 (Vinson, concurring specially).

¹⁶ Compare with the Supreme Court’s observation that merely increasing public access to a copyrighted work does not advance the goal of copyright because “[a]ny copyright infringer may claim to benefit the public” in this manner. *Harper & Row, supra*, 471 U.S. at 569.

Application of the Fourth Fair Use Factor Regarding “Potential Market Harm” From the Use

The Supreme Court has made clear that a use which is “transformative” – rather than merely a substitute for the original – “is not absolutely necessary” for a finding of fair use,¹⁷ but generally weighs in favor of a finding of fair use.¹⁷ Moreover, it has held that a non-transformative use comprising “mere duplication” that “supersede[s] the objects’... of the original and serves as a market replacement for it” makes cognizable market harm likely.¹⁸

The fourth statutory factor for fair use analysis under Section 107 requires consideration of “the effect of the use upon the potential market for or value of the copyrighted work,” which the Supreme Court has explained does not require evidence of *actual* market harm.¹⁹ “To negate fair use,” the Court has held, “one need only show that if the challenged use ‘should become widespread, it would adversely affect the potential market for the copyrighted work.’” The Court has also ruled that “the potential market” includes “those that creators of original works would in general develop or license others to develop.”²⁰

The majority appellate opinion found that GSU’s non-transformative, *verbatim* copying creates a “significant,”²¹ “great,”²² “serious,”²³ and “severe”²⁴ risk of market substitution for the publishers’ works, and that the publishers’ permissions programs are “well-established”²⁵ and constitute “a workable market through which universities like GSU may purchase licenses to use excerpts” of their works.²⁶ At the same time, however, it did not follow the implications of these findings in its fourth factor “potential market harm” analysis, where it concluded – without citing any supporting authority – that, absent evidence that a license is readily available for use of the material at issue in the format of the user’s choice, it could be presumed that the

¹⁷ See *Campbell, supra*, 510 U.S. at 579

¹⁸ See *Campbell, supra*, 510 U.S. at 591.

¹⁹ See, e.g., *Sony, supra*, 464 U.S. at 451 (“Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists.”)

²⁰ See *Campbell, supra*, 510 U.S. at 592

²¹ See *Patton, supra*, slip op. at 74.

²² *Id.* at 93.

²³ *Id.* at 107.

²⁴ *Id.* at 111.

²⁵ *Id.* at 9.

²⁶ *Id.* at 94.

publisher “likely anticipated that there would be little to no demand... and thus saw the value of that market as *de minimis* or zero,” effectively negating any possibility of market harm.²⁷

Drawing such an unfounded inference and presumption literally reads the word “potential” out of the “market harm” factor in Section 107 of the Copyright Act. It thus threatens to minimize the importance of evidence of publishers’ investments to consider, plan or even facilitate entry into new markets meaningless for purposes of any fair use analysis, and threatens to eliminate key incentives for making such investments.

Third – The court rulings in the GSU litigation treated the economic implications of GSU’s changeover from *licensed* paper “course packs” to *unlicensed* digital copies of the same kind of materials used for the same purpose in a manner that distorted the fair use analysis and failed to take into account certain facts about the reasonable impact that licensing would have on GSU and other non-profit institutions of higher education.

In its fair use analysis of the first statutory factor regarding the “purpose and character of the use,” the majority opinion of the Eleventh Circuit panel noted that, while GSU’s use of the publishers’ copyrighted works “in the teaching of university courses is clearly for educational purposes,” nevertheless, “it is not entirely clear that use by a nonprofit entity for educational purposes is always a ‘nonprofit’ use as contemplated by” the language of Section 107(1).²⁸ The majority then cited case law finding such a use to be “commercial,” wherein “the ‘profit’ took the form of an indirect economic benefit or a nonmonetary, professional benefit.”²⁹

However, with respect to GSU, the majority concluded that GSU’s use of the publishers’ works “does not provide GSU with a noneconomic but measurable professional benefit, such as enhanced reputation” chiefly on the basis of the fact that “countless university libraries across the country” have electronic reserves systems through which such works are made available to students. Consequently, the majority found, such systems “are not unique to GSU” and “the presence of such a system at GSU would hardly serve as a special draw to students or enhance GSU’s reputation such as it might were it a unique advantage offered only at GSU.”³⁰

“Even if Defendants’ use profits GSU in some sense,” the majority continued, “we are not convinced that this type of benefit is indicative of ‘commercial’ use” because there was no evidence that Defendants “capture significant revenues as a direct consequence of copying Plaintiffs’ works” while, at the same time, “the use provides a broader public benefit – furthering the education of students at a public university.”³¹

²⁷ *Id.* at 99.

²⁸ *See Patton*, *supra*, slip. op. at 68.

²⁹ *Id.*

³⁰ *Id.* at 71 and n.23

³¹ *Id.* at 72

While such a carefully limited and technical legal analysis might be expected from a court, Congress has the need to consider this issue from a public policy perspective based on the consideration of a broader picture that would rationally lead to a different conclusion. While it would be a serious mistake to think of higher education simply in commercial terms, it would be an even more serious mistake to ignore how the commercial aspects of higher education should inform the fair use policy analysis at issue.

For years, well-known business publications have offered annual “college rankings” that reflect the fierce competition among students to obtain entry to the best schools and the even more fierce competition among colleges to recruit the best students and faculty.³²

In addition to highlighting degree programs, course options and faculty reputations, competing colleges emphasize the various services, activities and facilities they provide which, in addition to tuition, require students to comparatively consider the separate fees charged on those bases as key competitive financial considerations in choosing among colleges.³³

In addition to tuition, colleges today – whether “non-profit” or “for-profit” institutions – are commonly levying a growing variety of separate fees on students in widely-ranging amounts and commonly-themed categories that cover diverse matters, including:

- *Recreation/Athletic Fees*: ranging from \$8 - \$568
(Student rec centers, intramural sports, athletic teams)
- *Facilities/Building Fees*: ranging from \$3 - \$190
(Building renovations, construction, upgrades and improvements)
- *Student Activities*: ranging from \$3 - \$40
(Clubs, cultural programming, diversity initiatives, campus entertainment)
- *College Media/Collegiate Readership*: ranging from \$2 - \$132
(Campus media, i.e., newspaper, radio, TV; access to newspapers on campus)
- *Scholarships/Financial Aid*: above/below \$263 (many don’t list specific price)
(Athletic/merit/need scholarships, other financial aid)

³² See, e.g., *U.S. News & World Report*, <http://colleges.usnews.rankingsandreviews.com/best-colleges>; *Forbes*, <http://colleges.usnews.rankingsandreviews.com/best-colleges>; *Barron’s Profiles of American Colleges*, <http://www.barronspac.com/>; *The Princeton Review*, <http://www.princetonreview.com/college-rankings.aspx>; *Kiplinger*, <http://www.kiplinger.com/fronts/special-report/college-rankings/index.html>;

³³ See, e.g., *College Data*, http://www.collegedata.com/cs/content/content_payarticle_tmpl.jhtml?articleId=10064; *Scholarships.com*, <https://www.scholarships.com/resources/campus-life/college-costs/tuition-and-fees/>.

Such fees are imposed by public and private colleges and universities, as well as by community colleges, under numerous different rubrics that sometimes cover unusual matters such as child care, legal services, clean energy technologies or “green initiatives,” “sustainability,” or “money management.” Multiple fees for similar or related activities (e.g., Athletics, Athletics Facilities Capitol Projects, Recreation, and Sports) may all be separately listed by the same institution.³⁴

Sometimes what might otherwise be enumerated as individual fees separately listed for specific services, activities or facilities are hidden in substantial “General” or “University” fees, and – however they may be designated – fees imposed on all students may directly benefit only the segment of the student population that actually uses the services, activities or facilities for which they are assessed (e.g., recreation/sports, arts and cultural programming, student media or scholarship/financial aid).

“Library Fees” are commonly-imposed, sometimes as individually-listed fees that may range from \$10 to more than \$200 and sometimes indicated as covered by “General” fees with no specific amount disclosed. Explanations of what is covered by such fees range broadly to include major improvements and renovations, such as expansion of study rooms and more workspace; advanced technology and related services; enhanced special collections; areas for collaborative learning/instruction; student services; acquisition of publications and electronic resources; service upgrades; transition toward electronic media and digitization; increased library hours; and, research assistance.

On its web site,³⁵ GSU lists the following “Mandatory Student Fees,” along with explanations of their use (paraphrased below) and the percentages they represent of the \$660.00 total of all such fees for fiscal year 2013:

- *Athletic Fee* -- \$263.00 – 40%
Varsity intercollegiate athletics, athletic scholarships, free access to athletic events
- *Recreation Bond* -- \$53.00 – 8%
Pays back cost to construct Student Recreation Center
- *Recreation Programming* -- \$20.50 – 3%
Allows Department to offer services for little or no cost to students

³⁴ The general discussion above regarding separate fees imposed by institutions of higher education was informed by visiting and reviewing the web sites of many such institutions, including some within states represented by Subcommittee members. Source documentation for any particular fees described will be submitted to the Subcommittee for the record upon request.

³⁵ See <http://deanofstudents.gsu.edu/mandatory-student-fees/>

- *Student Activity Fee* -- \$40.00 – 6%
Allocated to over 150 student organizations for direct student services, including presentations, workshops, student media, and diversity programs
- *Campus Programming* - \$31.50
Campus-wide programming initiatives promoting leadership development and multicultural competence
- *Student Center Fee* -- \$36.00 – 5%
Supports operation and long-term repair and replacement of the Student Center and the University Center, including the annual bond payment for construction of the former
- *Health Fee* - \$35.00 – 5%
Funds the Health Clinic for ongoing medical consultations, prescriptions and urgent sick visits; Student Health Promotion; and Psychiatric Services in the GSU Counseling & Testing Center by doctors and interns from Emory University Hospital
- *Transportation Fee* -- \$46.00 – 7%
Helps fund shuttle service operations from Turner Field to campus, leasing of over 1,000 parking spaces at Turner Field, and discount n purchase of monthly MARTA Breezecards
- *Technology Fee* -- \$85.00 – 13%
Providing access to computers, software, databases, networks and other services
- *International Education Fee* - \$15 – 2%
Supports Study Abroad scholarships and compliance with the federally-mandated Student and Exchange Visitor Information System (SEVIS)
- *Library Fee* - \$35.00 – 5%
Instituted in 2004 for major improvements and renovations

Whatever potential applicants to GSU may think of the number and amount of separate fees that are imposed on enrolling students, there can be little doubt that the services, activities and facilities for which they are assessed are viewed by GSU as important elements in its efforts to distinguish itself from other competing institutions. On GSU’s official web site, half-way down the opening screen, visitors are immediately drawn to review a rotating set of carefully selected quotes about GSU from the various annual college rankings under the conspicuous heading “What Others Say About Georgia State University – Reputation, Recognition and Rankings.”³⁶

³⁶ See <http://www.gsu.edu/>.

Notably, the online “Financial Planning Worksheet,” provided by GSU Student Accounts and last updated in May 2013,³⁷ states:

“Books are not a direct cost charged to your student account. The Financial Aid office uses a standard \$500 estimated cost for the fall and spring semesters, so you should budget at least that amount to spend on books. The actual cost of your books will be determined by your class schedule.”

This statement, however, is at least partially incorrect as the GSU litigation has now made clear that it is not the “class schedule” which determines the “actual costs” of the books and other curriculum materials needed by students but rather GSU’s “e-reserves” policy and practice of providing students in many courses with most or all of their curriculum reading materials in digital format without charge.

Given the “cost recovery” nature of many of the separate fees assessed to enrolling students, GSU’s ability to provide curriculum materials to students without charge must be logically viewed as due, in substantial part, to the fact that GSU does not pay permissions fees to the rights holders of the copyrighted works that constitute most of such materials and, therefore, has no specific acquisition costs to recover in providing the materials free to its students. Its willingness to do so – contrary to the narrow reasoning of the majority appellate opinion – also must be logically viewed as part of GSU’s effort to strongly compete with other colleges for student enrollments and, therefore, providing economic and reputational benefits to GSU.

As previously noted, the majority appellate opinion saw the fact that “countless university libraries across the country” have electronic reserves systems as a basis for concluding that “the presence of such a system at GSU would hardly serve as a special draw to students or enhance GSU’s reputation such as it might were it a unique advantage offered only at GSU.” However, by reasoning in that manner, the judges who wrote that majority opinion failed to consider that, given the fierce competition among colleges to attract the best students, it is precisely because “countless university libraries across the country” have such systems that GSU cannot risk the competitive disadvantage of not having such systems and would be interested in securing the competitive advantage of having such systems but not charging students a fee for their use.

Recognizing the competitive relevance of its “e-reserves” systems puts the issue of whether GSU realized a “profit” in the form of “an indirect economic benefit” or a “noneconomic but measurable professional benefit, such as enhanced reputation” in a much clearer light.

It is also important to note that the permission fees that the publishers in the litigation are seeking from GSU for licensed use of their works in its “e-reserves” program would not impose an economic hardship on GSU and would hardly stand out among the other separate fees that GSU imposes on its students for various services, activities and facilities if it chose to assess one specifically for the curriculum materials made available through the “e-reserves” systems.

³⁷ See “Financial Planning Tool” at http://sfs.gsu.edu/?DB_OEM_ID=12700

On the other hand, the amount at issue per student would likely be considered sufficiently reasonable to allow GSU to continue to provide the curriculum materials to its students through its “e-reserves” program without cost to the students if it wanted to offer this service to them without a separate fee and continue to score points in its competition with other colleges to recruit and retain students.

The trial record in the GSU litigation contained evidence that the Academic Annual Copyright License (“AACL”), which is available through the Copyright Clearance Center (“CCC”) and permits an academic institution to pay a single annual fee to make unlimited print and digital copies – including for use in hard-copy and digital course packs – without the need to secure separate work-by-work permissions, covers a repertory of over 1.3 million works, including those of two of the three publishers whose works are at issue in the litigation. (The third publisher’s works, although not covered by the AACL at the time of trial, were shown to have been available for licensing on a per-use basis from the CCC for many years.)

The *annual cost* of such an AACL license for GSU’s 30,000 students was estimated at the time of trial to be about \$3.75 *per student*, hardly a “break the bank” proposition as comprising a tiny fraction of the total of separate fees charged to students and far less than other fees included in that total amount, including the \$35 per student Library Fee.

While fair use would no doubt continue to have its place in the use of portions of copyrighted works for educational purposes, the convenience and affordability of licensed use of such materials should be weighed by Congress in assessing why the “new jurisprudence” on fair use – represented in this context by some aspects of the court opinions in the GSU litigation – must not be left to continue developing without some corrective authoritative guidance to provide the additional clarity, consistency and predictability that it has failed to produce.

Fourth – Continuing uncertainty over the outcome of the GSU litigation demonstrates a critical need for guidance clarifying the application of fair use in higher education to be developed through other means besides the slow, expensive and haphazard process of piecemeal litigation in the federal courts.

None of the stakeholders in these issues, including AAP, are telling Congress that revising the statutory framework for “fair use” in Section 107 of the Copyright Act is a necessary or even advisable step toward reducing fair use uncertainty. However, AAP believes Congress should certainly consider initiating a non-legislative process that could produce useful results for that objective in a more timely, participatory, transparent and dynamic manner than legislation.

Specifically, Congress can direct the Copyright Office – as it has often done for other similarly thorny legal and policy issues of copyright³⁸ – to conduct a comprehensive study in which questions about the proper scope and analysis of fair use in higher education and other areas affected by the “new jurisprudence” can be carefully framed for broad public comment and discussion, with the goal of producing a report with recommendations that might range from legislative or regulatory proposals to suggestions for “best practices” or other forms of voluntary but authoritative practical guidance.

As explained in greater detail in AAP’s Statement for the Hearing Record on “The Scope of Fair Use,”³⁹ AAP urges inclusion of the following issues among those to be framed for such a study:

- The practical utility of specific “limitation or exception” provisions and their relationship to fair use – Congress has enacted numerous specific limitations and exceptions in the Copyright Act that are defined directly in relation to particular types of works, uses or users, and typically provide more clarity and predictability than does a patchwork quilt of fair use court decisions. *See, e.g.*, Section 108 (exceptions for certain library and archival uses) and Section 110 (exception for certain educational uses). All stakeholders would benefit from a clear understanding of what additional scope, if any, Congress may have left for a fair use claim to address uses that are implicated by such limitations or exceptions but fall outside of their specific terms.
- The scope and meaning of “transformative use” in fair use analysis – At the hearing on “The Scope of Fair Use,” testimony detailed how the concept of transformative use in fair use cases, which originally focused on “changes made to the work itself,” has been itself “transformed” in court decisions that have found transformative use where the work is unaltered but viewed as “repurposed” for a new use, thus being “uprooted from its original context of ‘new works’ to become applied to a much broader context of ‘new purposes.’”⁴⁰ Among other things, it would be useful to obtain confirmation that (1) fair use need not always be transformative; (2) a transformative use will not always be a fair use; (3) innovation is not always transformative; and, (4) use by a new audience or group of users is not the same as a new purpose and does not by itself make a use transformative.
- Distinguishing between transformative fair use and creation of derivative works – While not directly addressed in the GSU litigation, where the copying at issue was stipulated to be verbatim, “mirror-image” and non-transformative, how “transformative use” of a

³⁸ *See, e.g.*, links to “Active Policy Studies” on music licensing, the “making available” right, and orphan works at <http://copyright.gov/policy/>, and links to “Past Policy Studies” on matters such as resale royalty, small claims and mass digitization at <http://copyright.gov/policy/past-policy.html>.

³⁹ *Hearings, supra* note 2, at 104.

⁴⁰ *Hearings, supra* note 2 at 16-7 (Besek Statement) (emphasis in original)

work for fair use purposes differs from “transforming” an existing work in a manner that creates a “derivative work” is another matter that requires clarification.⁴¹ A concern here is that, with “transformativeness” increasingly asserted as a dispositive determination in fair use analyses, the fact that a derivative work, as defined in Section 101 of the Copyright Act, may be considered “transformed” could lead courts and others to somehow view the creation of derivative works as inherently fair use rather than ordinarily within the copyright owner’s exclusive right to make or authorize.⁴²

To the extent that Congress may believe voluntary “best practices” would provide appropriate guidance to users, copyright owners, and courts for fair use in higher education and elsewhere, it is likely that having the Copyright Office lead a transparent process in which all stakeholders would be invited to participate would give the process its best chance for achieving something useful for all stakeholders. “Best Practices” that are developed by only one set of stakeholders will most likely be viewed as an effort to legitimize a particular community’s own practices or, worse, as that community’s “wish list,” and will not be likely to find acceptance or adherence among other stakeholders with different interests.⁴³

⁴¹ *Hearings, supra* note 2 at 2-3 (Statement of Rep. Conyers, noting that transformative use also needs clarification as it has become “all-things-to-all-people.”). Indeed, the extant case law reflects different approaches taken and conflicting results reached by the courts in applying the transformative use doctrine. This judicial confusion continues to complicate what conflicting appellate court decisions (including some within the same circuit) have already made “a highly contentious topic” and a “splintered” area of law. *See, e.g., Seltzer v. Green Day, Inc.*, Nos. 11-56563 and 11-57160 (9th Cir. Aug. 7, 2013) (citing the dissents from numerous appellate decisions and attempting to clarify the distinction between transformative and non-transformative use by noting that the typical ‘non-transformative’ case... is one which makes no alteration to the expressive content or message of the original work...[whereas an] allegedly infringing work is typically viewed as transformative as long as new *expressive content or message* is apparent.” Despite this attempt at clarity, the court blurs its own distinction by citing two Ninth Circuit decisions in which the original work was not changed as an example of transformative use (*Arriba Soft*) in one instance and classic non-transformative use (*Monge*) in the other.) (emphasis in the original).

⁴² *See, e.g., Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F.Supp.2d 1236 (D. Colo. 2006) (“Non-transformative nature” of commercial film edits made for family viewing suitability purposes held to weigh against fair use defense, but also to rebut “derivative work” claim); *see also Patrick Cariou v. Richard Prince, et al.*, 714 F.3d 694 (2d Cir. 2013) (No. 13-261), *cert. denied* 571 U.S. ___ (2013) (Court’s “talismanic evocation” of the “transformative” character of secondary work/use “effectively obliterates” the derivative works right). *Compare, e.g., R. Anthony Reese, Transformativeness and The Derivative Work Right*, 31 COLUM. J.L. & ARTS 467 (2008) *with* Ashten Kimbrough, *Transformative Use v. Market Impact: Why the Fourth Fair Use Factor Should Not Be Supplanted By Transformative Use as the Most Important Element in a Fair Use Analysis*, 63 ALA. L. REV. 625 (2012).

⁴³ *See, e.g., Association of Research Libraries, Code of Best Practices in Fair Use for Academic and Research Libraries*, 8 (Jan. 2012), <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf> (condensing the fair use analysis down to two questions: (1) Did the use “transform” the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original? (2) Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?).

Conclusion

Why is this so important? A rapidly-developing technological revolution in the world of higher education content and services is well underway, in which large and small educational publishers are vigorously competing to offer faculty and students more choices among diverse, affordable and pedagogically-advanced interactive multimedia content for customized use by students through online and other digital learning platforms. The resulting systems innovatively facilitate teaching and study methods designed to assist faculty in the increasingly challenging tasks of encouraging students to stay in school, more fully engaging students in learning, and significantly improving student outcomes and graduation rates.

For publishers to have the incentives to continue to make substantial investments in innovative digital content, technologies and services, they must have confidence that they can exercise their exclusive rights as copyright owners to sell or license certain uses of their works in primary and secondary academic markets. But they will not have that confidence if their business models are threatened by assertions of fair use under a “new jurisprudence” that distorts key principles of “media neutrality” and “potential market harm,” while raising “non-profit” educational institutions and the use of copyrighted works for “educational purposes” to an unjustifiably privileged cost-free status that neither has ever been accorded by the law.

Without clarification of these issues, not only publishers, but students, faculty, libraries and non-profit educational institutions – indeed, the whole higher education ecosystem – will lose out on the opportunities presented by the digital revolution in learning solutions.

Copyright Issues for Blind, Visually-Impaired or Other Individuals with “Print Disabilities”

AAP and its member publishers have a long history of working with government agencies and legislatures, disabilities advocacy groups, technology developers and educational communities to try to make accessible versions of copyrighted works more readily available for individuals who are blind, visually impaired or have other disabilities that make them unable to read or otherwise use standard printed materials. Significant efforts are summarized below:

Chafee Amendment (17 U.S.C. Section 121) – In 1996, AAP worked with advocacy groups for blind and visually-impaired individuals to draft and enact legislation establishing an exemption under U.S. copyright law to permit certain “authorized entities” to reproduce and distribute copies of previously published, non-dramatic literary works in “specialized formats” exclusively for use by “blind or other individuals with disabilities,” without the need to obtain permission from the copyright owners of such works.

The Chafee Amendment has been of great assistance in the work of these non-profit and governmental entities, including State and local educational agencies and university disability

student services (DSS) offices (among others), in enabling them to convert certain literary works into accessible formats to meet the reading needs of persons with print disabilities.

State Accessibility Legislation – State legislatures periodically consider and enact a variety of legislative proposals to improve the timely availability of accessible instructional materials for students with print disabilities. Typically, these proposals involve statutory or regulatory requirements, usually implemented for K-12 grade levels through contractual provisions regarding the adoption or procurement of textbooks and other instructional materials, which obligate publishers to provide electronic files in one of several specified file formats for use as source files from which accessible versions of the instructional materials may be produced and provided to students who are qualified to obtain them.

State legislative processes, however, are not always readily accessible to the publishing community or responsive to its input, resulting in proposed accessibility legislation that publishers are unable to support because of practical problems with their provisions and concerns that the enactment of multiple new State laws further complicates a patchwork of diverse and often inconsistent State compliance requirements for publishers whose markets extend across State lines and national borders. Despite these drawbacks, AAP and its member publishers have a long record of good faith efforts to help State legislators develop workable initiatives to help meet the accessibility needs of students with print disabilities.

Bookshare, Inc. – AAP has helped Bookshare establish credibility within author and publisher communities as an “authorized entity” under the Chafee Amendment, and has encouraged publishers and authors to accept and support Bookshare’s policies and practices for “scanning” or acquiring digital files of print books that qualifying subscribers to the Bookshare library service can download in accessible DAISY and BRF digital formats. AAP’s support has reflected Bookshare’s sensitivity to the legitimate concerns of copyright owners, including its willingness to work with AAP on matters such as its Seven Point Digital Rights Management Plan and the terms of its legal agreements with qualifying members, volunteers and contributing publishers and authors.⁴⁴

IDEA Amendments of 2004 – AAP worked with disabilities advocacy groups to try to improve the timeliness of the provision of accessible textbooks and other core instructional materials to elementary and secondary school students with print disabilities. Problems thwarting timely provision included the need to contact the publisher of a particular work to obtain electronic files in different formats for each of their textbooks or other core instructional materials in order to comply with the individual requests for such files received from different States or different localities within a single State. The file formats widely used by publishers for ordinary publications were unsuitable for use in reproducing those materials in specialized formats for individuals with print disabilities, and the process of converting those files into formats more

⁴⁴ See <https://www.bookshare.org/cms/legal-information> (AAP cooperation and support) and <https://www.bookshare.org/cms/partners/publishers> (how publishers support and partner with Bookshare).

suitable to that purpose was costly and labor-intensive, requiring laborious “tagging” in order to structure the file to reflect the actual visual characteristics of the printed materials.

Delays also occurred in the handling process through which the electronic file provided by the publisher eventually reached the people who actually use the file to reproduce and distribute the embodied content in accessible specialized formats.

In response to these problems, AAP and the disabilities advocacy groups crafted the proposed “Instructional Materials Accessibility Act” which was designed to address the causes of these delays and inefficiencies by requiring that publishers’ electronic files be uniformly provided to a central national repository where they could be requested for use by State and local agencies in an XML-based format that would offer the capability for more flexible tagging to reproduce print materials in specialized formats with greater efficiency, quality and interoperability. Since their enactment as provisions of the Individuals with Disabilities Education Improvement Act of 2004, P.L.108-446, the legislation’s key “national file format” and “central national repository” features have been implemented as the National Instructional Materials Information Standard (“NIMAS”) and the National Instructional Materials Access Center (“NIMAC”) through federal appropriations to the American Printing House for the Blind.⁴⁵

AIM Commission – AAP efforts to address the accessibility needs of students with print disabilities at institutions of higher education have been no less determined or ongoing than its efforts to meet the needs of such students at the elementary and secondary school level.

However, these efforts have had to take into account key differences in both the nature of the instructional materials at issue and the manner in which these instructional materials are selected and acquired for use by students at these different levels of educational instruction. For elementary and secondary school students, textbooks and other core instructional materials for different subjects at different grade levels are generally selected by State or local education agencies according to a standardized curriculum, and the State or local educational agencies purchase these materials in bulk for students to use on loan but then return to school officials after the academic term so they can be redistributed for use by students at the same class level during the next academic term.

At colleges and universities, however, instructional materials are selected by individual faculty for each section of a course in much greater variety than is found at the elementary and secondary school level. They typically differ from section to section within the same course, and have to be purchased or otherwise acquired by individual students in each course section. Such materials are purchased by students with the expectation that they will either keep the materials as their own property or seek to recoup part of the purchase costs by selling the materials to other students or to a bookstore at the close of the academic term.

⁴⁵ See <http://www.nimac.us/>.

In pursuit of solutions, AAP supported enactment in the Higher Education Opportunity Act of 2008 of provisions creating the Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities (“AIM Commission”), charged with making recommendations to Congress after “conducting a comprehensive study to assess the barriers and systemic issues that may affect, and technical solutions available that may improve, the timely delivery and quality of accessible instructional materials for postsecondary students with print disabilities.” AAP representatives participated in the Commission’s work and endorsed its Report and recommendations.⁴⁶

AccessText Network – While working with Congress, AAP and its higher education member publishers continued to seek opportunities to work with institutions of higher education, disabilities advocacy groups and technology experts to devise ways to make it quicker and easier for college and university students with print disabilities to obtain the accessible textbooks and other instructional materials they need. Initially, these efforts produced the Publisher Look-Up Service, a website interface providing a place where DSS offices could search for electronic text and permissions contacts at higher education publishing companies.

Subsequently, AAP announced a major leap forward in the form of its agreement with the Alternative Media Access Center (an initiative of the Georgia Board of Regents and the University of Georgia, now housed at the Georgia Institute of Technology) to develop and launch a comprehensive, national online system which would expand the timely delivery of print materials to campus-based DSS offices by many more publishers, and streamline the permission process for scanning copies of print textbooks when publisher files are unavailable.

Funded through donations by AAP member higher education publishers, the AccessText Network was established without legislation or taxpayer dollars, and has leveraged an online database to enable publishers and institutions of higher education to effectively combine and share their resources and expertise to ensure that those institutions can more easily obtain information about publishers’ course materials, request electronic text files and use more efficient acquisition and distribution channels.⁴⁷

WIPO Marrakesh Treaty – AAP worked with the U.S. Government and disabilities advocacy groups over the five-year period it took for the UN’s World Intellectual Property Organization (“WIPO”) to adopt the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. AAP worked both in Geneva and Marrakesh to ensure that the provisions of the intensely-negotiated final text of the Treaty remained focused on the twin objectives of (1) promoting enactment of limitations and exceptions for print disabilities in national copyright laws and (2) facilitating the cross-border exchange of accessible format copies of copyrighted textual works through Authorized Entities, and were consistent with the established framework of international copyright treaties

⁴⁶ See links to the AIM Commission Report at <http://www2.ed.gov/about/bdscomm/list/aim/publications.html>.

⁴⁷ See <http://accesstext.org/>.

and agreements. AAP was the only non-government organization, aside from three advocacy groups for the blind, explicitly thanked for its assistance in the formal closing statement of the United States delegation.⁴⁸ AAP expects to support Senate ratification of the Treaty when it comes before the U.S. Senate.⁴⁹

TEACH Act – A leading recommendation of the previously-discussed AIM Commission was that “Congress should authorize the Access Board to establish guidelines for accessible instructional materials that will be used by government, in the private sector and in postsecondary academic settings.” Last year, AAP worked jointly with the National Federation of the Blind (“NFB”) to craft and secure the bipartisan introduction of the proposed “Technology, Equality and Accessibility in College and Higher Education (“TEACH”) Act to obtain Congressional authorization and funding to support the U.S. Access Board’s development of accessibility standards for postsecondary education instructional systems used by students with print disabilities, as recommended by the AIM Commission. Initially introduced in the House (H.R.3505) by Rep. Tom Petri (R-WI), where the bill now has 52 co-sponsors, including 32 Democrats and 20 Republicans, the TEACH Act was subsequently introduced in the U.S. Senate (S.2060) with bipartisan co-sponsorship from Sens. Elizabeth Warren (D-MA) and Orrin Hatch (R-UT). It now has five cosponsors, including 3 Democrats and 2 Republicans.⁵⁰

EPUB 3* Implementation Project – This AAP-led initiative was developed in a partnership with retailers, digital content distributors, device makers, reading systems providers, assistive technology experts and standards organizations, with the support and engagement of leading advocates for people with disabilities. Its goal is to accelerate the across-the-board adoption of the EPUB 3 format in the consumer market by identifying and implementing what stakeholders consider to be the core set of baseline features critical to the format’s acceptance. Among these features are greater interactivity for users, multimedia-enhanced content, and expanded accessibility for people who are blind or have other print disabilities.⁵¹

In a separate effort, the **EDUPUB Initiative** is now pursuing the goal of advancing EPUB 3 for K-20 educational materials. Pearson Education, as one of the leaders of this initiative, is sharing one of its own specifications for generating EPUB files for the education market specifically (known as an “EPUB 3 Profile,” in other words, a particular implementation of EPUB 3 for educational markets), which the EDUPUB participants can use toward developing EDUPUB’s open-source EPUB 3 profile for the industry. The overall stated goal of the EDUPUB initiative is “to advance the effective adoption and use of e-textbooks and other digital learning materials

⁴⁸ See <http://geneva.usmission.gov/2013/06/27/wipo-marrakesh/>.

⁴⁹ See the full text of the WIPO Marrakesh Treaty at http://www.wipo.int/treaties/en/text.jsp?file_id=301016.

⁵⁰ See <https://www.govtrack.us/congress/bills/113/hr3505>.

⁵¹ See <http://publishers.org/epub3implementationproject/>.

by improving interoperability, accessibility, and baseline capabilities via broad adoption of enabling technical standards.”⁵²

Conclusion

The efforts summarized above are indicative of a significant, chronological evolution in improving accessibility based on technological developments, primarily in digital technologies and applications. Prior to and in early stages of the digital age, accessibility for hard-copy printed materials generally required the use of a publisher’s production files for the laborious, individual conversion of its works in commercial formats into accessible versions used with assistive technology. The inability to produce inherently accessible versions of commercial works for the market meant that, as a practical matter, consumer markets for accessible materials were non-existent and a dependence on regulatory approaches generally shaped efforts to ensure and expand the availability of accessible versions of copyrighted works.

Today, however, great strides are being made in technological developments that facilitate accessibility, and the shared goal of publishers, advocacy groups and, most importantly, individuals with print disabilities – to have ordinary consumer markets serve the extraordinary needs of accessibility – is steadily, if still too slowly, advancing toward fruition.

In the continuing transitional environment, it is important to ensure that still-needed regulatory measures do not diminish incentives for the investments that publishers are making to reach the point where individuals with print disabilities, like other consumers who do not have such disabilities, can acquire in the marketplace all manner of published works, covering the full spectrum of human interests, and enjoy them without having to demonstrate any special qualifications or depend upon special privileges for their availability.

AAP urges Congress and the Obama Administration to keep in mind both this shared goal and the progress being made toward its achievement as they review the current and future efficacy of the Chafee Amendment in achieving accessibility ends within the U.S. and, at the same time, consider whether the Chafee Amendment or any other U.S. law requires any revision in order to ensure U.S. compliance with the provisions of the WIPO Marrakesh Treaty for purposes of undertaking Senate ratification of that international agreement.

Basing key provisions of the WIPO Marrakesh Treaty on key concepts of the eighteen years-old Chafee Amendment made sense in terms of relying on an established legal framework that has proven to be fairly workable within the U.S. to achieve similar improvements in the availability of accessible versions of copyrighted works within foreign nations and across national borders. However, such reliance means that, even before it secures a sufficient number of ratifications by WIPO Member States to become effective, the “going forward” suitability of the overall approach of the WIPO Marrakesh Treaty to broadening international availability of accessible

⁵² See <http://www.bookbusinessmag.com/blog/edupub-getting-it-together-digital-education> and www.imsglobal.org/edupub/WhatisEdupubBelfantiGylling.pdf.

versions of commercially-produced works may be questioned in the same way that the Chafee Amendment itself is considered by many to be in need of updating.

Statutory provisions in the Chafee Amendment that define what kinds of copyrighted works are subject to its provisions, what kind of organizations may qualify as an “authorized entity,” what types of “audio” or “digital text” constitute permissible “specialized formats,” and what are the eligibility criteria for the beneficiary class of “blind or other persons with disabilities” are the most likely subjects for consideration as other voices join the AIM Commission in urging review of the scope, effectiveness and function of the Chafee Amendment.

In any such review, however, a critical issue for publishers will be whether a “commercially available” exception to the exemptions for non-permissioned reproduction and distribution in the Chafee Amendment is necessary to address the changing accessibility landscape as it advances further toward marketplace solutions.

The key economic premise underlying enactment of the Chafee Amendment in 1996, as noted in contemporaneous Congressional testimony by the Register of Copyrights (which was cited in Senator Chafee’s floor remarks), was that “blind and physically handicapped readers” did not constitute a “viable commercial market” for publishers. Under those circumstances, it simply was assumed that publishers were not likely to publish for that defined market and thus would not experience economic harm if the law allowed a select group of governmental agencies and non-profit organizations to serve that specifically-defined population by reproducing and distributing copies of copyrighted works in “specialized formats” requiring special playback equipment not generally available to or used by the general public.⁵³

The validity of that premise, however, has diminished over time and continues to diminish as publishers’ adoption of ebook formats and online digital platforms for making their copyrighted works available through downloads, streaming and online display has brought about realistic capabilities for producing copies of works for the marketplace in accessible formats. AAP’s EPUB3* Implementation Project and parallel efforts like the EDUPUB Initiative will significantly advance accessibility in the marketplace as publishers work with retailers, digital content distributors, device makers, reading systems providers, assistive technology experts and standards organizations to standardize EPUB3 as the global distribution format for ebooks.

By identifying and implementing what stakeholders consider the core set of baseline features critical to the format’s acceptance, AAP member publishers and their partners will routinize features that provide greater interactivity for users, multimedia-enhanced content, and expanded accessibility for people who have print disabilities. Use of the HTML5 format with additional semantic tagging capabilities makes this a particularly promising approach to achieving marketplace accessibility.

⁵³ See 142 CONG.REC. S9066(daily ed. July29, 1996) (statement of Sen. John Chafee). See also Statement of Marybeth Peters before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, Nov. 15, 1995, available at <http://www.copyright.gov/docs/niitest.html>.

As these developments produce accessible offerings in the market, it will be appropriate to ensure that regulatory measures like the copyright exemptions in the Chafee Amendment do not apply to the works made available in that manner. While such measures may need to serve a continuing “safety net” function to ensure the availability of certain works in accessible formats before development of this market reaches its tipping point, any review of the Chafee Amendment for consideration of possible revisions – including for purposes of ratifying the WIPO Marrakesh Treaty – should carefully examine the need for an appropriate “commercially available” exception from current copyright exemptions.