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COPYRIGHT ISSUES IN EDUCATION AND FOR THE VISUALLY IMPAIRED

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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CONTENTS

NOVEMBER 19, 2014

Page

OPENING STATEMENTS

The Honorable Howard Coble, a Representative in Congress from the State of North Carolina, and Chairman, Subcommittee on Courts, Intellectual Property, and the Internet 1

The Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Ranking Member, Subcommittee on Courts, Intellectual Property, and the Internet 2

The Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary 3

WITNESSES

Jack Bernard, Associate General Counsel, University of Michigan
Oral Testimony 5
Prepared Statement 7

Allan Robert Adler, General Counsel, Association of American Publishers
Oral Testimony 13
Prepared Statement 15

Scott C. LaBarre, State President, Colorado National Federation for the Blind
Oral Testimony 39
Prepared Statement 40

Roy S. Kaufman, Managing Director, New Ventures, Copyright Clearance Center
Oral Testimony 44
Prepared Statement 46

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary 55

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable J. Randy Forbes, a Representative in Congress from the State of Virginia and Member, Committee on the Judiciary 71

Letter from Allan Robert Adler, General Counsel, Association of American Publishers 72

Letter from Blake E. Reid 78

Letter from Denise Marshall, Executive Director, The Council of Parent Attorneys and Advocates, Inc. (COPAA) 82

Prepared Statement of Sandra Aistars, Chief Executive Officer, Copyright Alliance 84

Prepared Statement of the Library Copyright Alliance (LCA) 92

Page

Prepared Statement of Cory Sandone, President, the Association of Medical Illustrators (AMI) 115

Prepared Statement of Andrew Shore, Executive Director, the Owners' Rights Initiative 122

Response to Questions for the Record from Roy S. Kaufman, Managing Director, New Ventures, Copyright Clearance Center 124

COPYRIGHT ISSUES IN EDUCATION AND FOR THE VISUALLY IMPAIRED

WEDNESDAY, NOVEMBER 19, 2014

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 3:30 p.m., in room 2141, Rayburn Office Building, the Honorable Howard Coble, (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Goodlatte, Marino, Chabot, Farenthold, Nadler, Conyers, Jeffries, and Jackson Lee.

Staff Present: (Majority) Joe Keeley, Subcommittee Chief Counsel; Olivia Lee, Clerk; (Minority) Jason Everett, Counsel; and Norberto Salinas, Counsel.

Mr. COBLE. Good afternoon, ladies and gentlemen. Thank you again for being here today.

I am an avid fan of schools and universities in our Nation, with a particular fondness, of course, to North Carolina schools. I have long taken pride as the co-chair of the Creative Rights Caucus that so many of the educational materials used around the world are created and published in America.

Like all copyright owners, publishers are adapting to the digital age with new forms of access to new types of works. Most of us in the room today carried our books to school, perhaps injuring backs in the process, with one particular teacher who assigned what seemed to be the heaviest books she could find.

Today, however, students' backs carry a much lighter load with iPads and laptops replacing printed books. This switch to e-books saved some backs and some books as well, since students do not need to buy textbooks if they don't want or need them.

E-books are at the heart of an important and recent copyright case at Georgia State University, and I am sure we will hear about this later this afternoon.

I am a Tar Heel fan more than a Panther fan, but I will overlook that for the moment, for purposes of convenience.

Finally, our Nation has long supported our visually impaired by creating laws to enable the conversion of copyrighted works and devoting Federal funding to projects such as the National Library Services at the Library of Congress. Two of our witnesses today, in

fact, have personal experience with visual impairments. I welcome their thoughts as well, as we will continue reviewing our Nation's copyright laws.

Again, welcome to all of you for being here. We are looking forward to the hearing.

And now I am pleased to recognize the distinguished gentleman from New York, the Ranking Member of the Subcommittee, Mr. Jerry Nadler.

Mr. NADLER. Thank you, Mr. Chairman, for holding this hearing on copyright issues related to education and accessibility.

As you know, the Copyright Act provides exceptions and limitations for education and for the benefit of blind and visually impaired people. Publishers produce a wide variety of educational materials for teachers and students, many of whom now access material through interactive online classes and multimedia formats.

One of the fastest trends in educational uses in technology is online learning. However, distance learning raises all sorts of questions about copyright protection. I would like to hear from the witnesses about whether or not they think the current eligibility requirements for the distance education copyright exception are effective.

As it stands now, the distance education exception is only available to accredited nonprofit institutions and only allows the performance of portions of these types of works without a license. The online learning environment is different from face-to-face learning, and publishers and authors believe these restrictions are important, as there is a greater risk of piracy in an online learning environment.

As we examine the online education marketplace, we need to take a look at the Technology, Education, and Copyright Harmonization Act, the TEACH Act. I wonder where they got that acronym. The TEACH Act is located in Section 110(2) of the Copyright Act. It was enacted 12 years ago to deal with the increase in online education.

I understand that many educators now say that the TEACH Act is extremely complex. I would like to hear from our witnesses about ways to make the TEACH Act more workable and, presumably, more simple.

The Copyright Act supports uses that will benefit the general public while balancing the rights of authors. The fair use doctrine applies to the creation of accessible format copies of copyrighted works and may also apply to educational uses.

I would like the witnesses to discuss fair use in educational activities as it relates to recent judicial decisions.

It is often difficult to predict how a court will rule when it comes to educational use, because fair use is fact-specific. It is also often difficult to provide reliable guidance to teachers and educators, and this has been a major criticism of fair use law. Teachers and educators want reliable guidance about what they are permitted to do in the learning environment.

We want to teach our students how to be doctors, scientists, innovators, and we want to discourage copyright infringement, so we have to get this right and find a proper balance between pro-

tecting copyright holders' rights and still ensuring fair use by students and teachers.

We should also examine the exception for certain performances and displays of copyrighted works in classrooms. Section 110(1) allows educators and students to screen films on topics that a class is studying and provides important benefits to the education community. The use must be only in nonprofit institutions and must be in person in the classroom.

In addition, the Copyright Act contains exceptions for blind and visually impaired persons. In particular, the Chafee amendment has helped provide access to copyrighted works, but the number of authorized entities that may create and distribute accessible works has been an issue of debate.

I look forward to hearing from the witnesses about whether or not the Chafee amendment ought to be read to include the disability services office of a university or the accessibility service of a public library system, as those in the visually impaired community have argued.

I thank Chairman Coble and Chairman Goodlatte for including these issues as part of the Subcommittee's review of the Copyright Act. I look forward to hearing from our witnesses, and I yield back the balance of my time.

Mr. COBLE. I thank the gentleman.

Mr. Goodlatte, the Chairman of the full Committee, would you like to have an opening statement, sir?

Mr. GOODLATTE. Yes, thank you, Mr. Chairman.

Our American education system depends upon the usage of a wide variety of copyrighted works, from CAD software that future engineers use to learn how to design and build our growing cities, to historical news clips used by teachers to explain important historical events. In recognition of the important role of education in our society, the fair use provisions of Title 17 specifically identify educational uses as being potentially considered fair use.

Copyright law has long recognized that relatively small uses of copyrighted works for education are likely to be considered a fair and, therefore, free use. In contrast, the use of an entire work may and often does require the copyright owner to be compensated for his or her work.

A large number of copyright owners have responded to the need to educate future scholars by offering educational pricing for full access to newspapers, magazines, and software. Their support of students is much appreciated by parents who pay the bills, as well as teachers who are, therefore, able to offer cutting-edge software in their courses.

Title 17 also includes several specific provisions related to distance learning, the utility of at least one of which has been called into question by educational institutions. However, copyright owners should and do have the expectation that whenever their works are used for educational use, distance learning or otherwise, these student versions of works do not escape the educational market and replace routine commercial sales of their products to businesses.

Although their means of access to copyrighted works may be different than others, the visually impaired community has the expec-

tation and the right to participate in our community and the copyrighted works created within it. Our Nation's laws have long recognized and encouraged conversion of copyrighted works into formats for the visually impaired. The National Library Service at the Library of Congress is but one example of this, and I welcome the head of NLS who is in the audience today.

The technology used to access copyrighted works for the visually impaired has changed with the digital revolution.

A witness from the American Federation for the Blind highlighted this fact at a prior hearing on Chapter 12. The digital revolution may require updates to copyright laws for all Americans.

As the final copyright review hearing of 2014, I want to thank the witnesses for making their time to be here this morning.

I want to particularly thank the Chairman of the Committee, Mr. Coble, who has done many, many, many years of work on intellectual property law and has guided this Committee for the last 2 years in a comprehensive review of our copyright laws that has been very thoroughgoing. And we hope to move forward on many of the ideas developed by the Chairman and others who have worked on this.

But since he will be departing the Congress, I want to particularly thank him for the contributions that he has made for a significant part of his life. And I think we should give him a round of applause. [Applause.]

Thank you, Mr. Chairman.

Mr. COBLE. Mr. Chairman, thank you for your generous words. I appreciate it. I will give you more time, if you like to have more time. [Laughter.]

I do thank you for that.

We have a very distinguished panel today. I will begin by swearing in our witnesses before introducing them.

If you would please rise, I will present the oath to you.

Do you swear that the testimony that you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Let the record reflect that the witnesses answered in the affirmative.

You may be seated.

Folks, you have heard me in the past. This is the last time I will be able to admonish you about our 5-minute rule. There is a panel before you with three colors. As long as the green is illuminated, you are on safe, thick ice. Once the green changes to amber, and then amber to red, the ice on which you are skating is thin. You will not be punished, however, if you don't comply. But if you can stay within the 5-minute rule, we would be appreciative.

Our first witness today is Mr. Jack Bernard, Associate General Counsel at the University of Michigan Law School. As the lead copyright writer for the university, Mr. Bernard's contributions create access for individuals with print disabilities. Mr. Bernard received his J.D. from the University of Michigan Law School and his master's in higher education from the University of Michigan.

Mr. Bernard, it is good to have you with us.

Our second witness is Mr. Allan Adler, General Counsel of the Association of American Publishers. In his position, Mr. Adler deals

with intellectual property and new technology issues in our Nation's book and journal publishing industries. He holds his J.D. from George Washington University School of Law and B.A. from the State University of New York at Binghamton, home of the Tri-Cities, I think.

Right, Mr. Adler?

Mr. ADLER. Yes, sir.

Mr. COBLE. Good to have you with us.

Our third witness is Mr. Scott LaBarre, Colorado State President of the National Federation for the Blind. In his position, Mr. LaBarre specializes in laws affecting individuals who are blind and disabled. In addition, he serves as President of the National Association of Blind Lawyers and sits as chair of the American Bar Association's Commission on Mental and Physical Disability Law. He received his J.D. from the University of Minnesota and B.A. from St. John's University.

Mr. LaBarre, it is good to have you with us as well.

Our fourth and final witness is Mr. Roy Kaufman, Managing Director of New Ventures at the Copyright Clearance Center. In his position, Mr. Kaufman is responsible for expanding service for disabilities at the CCC, both toward new markets and services. He has lectured extensively on the subjects of copyright licensing and law medium. Mr. Kaufman received his J.D. from Columbia School of Law and his bachelor's degree from Brandeis University.

It is good to have you with us, Mr. Kaufman.

I apologize for my raspy throat. I am coming down with the early stages of a bad cold. Bear with me.

Mr. Bernard, if you will, kick us off, and keep your eye on that ever-bright green to amber to red light as it illuminates.

Again, it is good to have all of you with us.

TESTIMONY OF JACK BERNARD, ASSOCIATE GENERAL COUNSEL, UNIVERSITY OF MICHIGAN

Mr. BERNARD. Thank you, Mr. Chairman and Members of the Committee. Good afternoon. I am so pleased to be here.

My name is Jack Bernard, and I am Associate General Counsel at the University of Michigan. I am here on behalf of higher education associations whose members teach the vast majority of college students, and on whose campuses the abundance of public research takes place.

We think about copyright every day, in the context of the academy because our own missions are so consonant with the central theme of copyright, which is to promote progress in order to advance learning. The teaching, research, scholarship that we do on our campuses walks hand-in-hand with the fundamental objectives of copyright, so it is never far from our minds to be thinking about copyright.

We also think regularly about the balance in copyright. That is, we want to maintain a robust, expressive environment consistent with the First Amendment, at the same time that we want to offer copyright holders some incentive to actually create works and to distribute those works for the purpose of progress. Those two things happen hand-in-hand, and we are mindful of those in the

academy. They are important to what we do every day, in terms of our teaching and scholarship and research.

We are also well-suited to think about these issues because we sit in a lot of the seats that copyright makes available. Postsecondary institutions and their constituents are copyright holders. They are authors and creators. They are also distributors and publishers. At the same time, they are users and consumers of copyrighted works.

As authors of works, as creators of works, every year, postsecondary institutions and their constituents create millions of copyrighted works for the purpose of advancing society. Whether we are just talking about drawings with pen on paper, or the latest in holography, or how we describe the new throat stent that allows infants to breathe who have weak esophaguses, we are making these kinds of contributions on a daily basis.

We are also distributing massively. We are not just distributing in the ways people ordinarily think, like speaking to students in the classroom or writing books or articles. We also have television stations and radio stations. We have satellites, and we have Internet nodes. We are trying our best to get the message out through the means that are there, but we are also mindful of the rights that are associated with messaging, and particularly around copyright.

Finally, we are robust consumers of copyrighted works. If you just look at the libraries of postsecondary institutions, they spend billions of dollars every year just on acquisitions. This doesn't include all the money postsecondary institutions spend on things like licensing software or licensing music or film. So this is a robust part of the engagement that happens on college campuses, interacting with copyrighted works.

Now postsecondary institutions feel that copyright is working pretty well. I mean, nothing is perfect, but it is working pretty well for us because it enables us to make the broad kind of research and scholarly uses that we typically make. We know that as technology moves forward, as there are new models of doing business, as there are new and innovative ways of putting forward ideas and also getting new information, that copyright will have to adjust. But those adjustments should not undermine the central pillars of copyright, which is a balance between the copyright holders' rights in Section 106, the public's limitation on those rights in Section 107, and the complementary sections of the copyright in Sections 108 through 122, which allow either more robust uses of the Copyright Act or of copyrighted works, or they make it easier for the public to make determinations.

For instance, in Section 108 of the Copyright Act, libraries can use Section 108 rather than going through a fair use analysis to make determinations about preserving works. If you want to think about expanding roles, look at Section 115, where a person at a university might make a recording of someone else's recording, and make their own recording of someone else's work, and use the mechanical license in that context.

Our feeling is that copyright is actually doing very well for us. It is critical that we maintain a flexible fair use, and that fair use allows us to know that we can adjust over time the uses that we

are making in order to provide these important, robust experiences on the college campus.

I will just conclude by saying, when we think about accessibility, we can't think of a circumstance in which the Copyright Act should ever prevent a university or college from making a reasonable accommodation for its students. So the central message here is that we think the Copyright Act is doing superb work overwhelmingly. While there are places to nudge, we would urge Congress not undermine the three pillars of copyright.

Thank you.

[The prepared statement of Mr. Bernard follows:]

Prepared Statement of Jack Bernard, Associate General Counsel, University of Michigan

STATEMENT OF HIGHER EDUCATION

Submitted on behalf of: Association of American Universities American Association of Community Colleges American Association of State Colleges and Universities American Council on Education Association of Public and Land-grant Universities National Association of Independent Colleges and Universities

SUBMITTED NOVEMBER 17, 2014

The higher education associations listed above collectively represent a broad range of higher education institutions in the United States, including public and private colleges and universities with comprehensive graduate and professional education programs. Our members educate a substantial majority of American college and university students and conduct most of the nation's basic research.

A Carefully Considered Bargain

In the United States, we are particularly thoughtful and deliberate when we turn our attention to copyright law, because it is so deeply connected to two of our most fundamental values: freedom of expression and promotion of progress. Copyright law provides a strong, effective incentive for authors, artists, musicians and others to produce creative works that enrich the lives of our nation's citizens and produce new knowledge about and understandings of the human condition and the world in which we live. Because the exercise of copyright rights also has the potential to curtail expression and innovation, however, we have crafted the provisions of our copyright law to strike the appropriate balance between the rights granted to copyright holders and the rights reserved for the public.

A Common Cause

Universities share a common mission with copyright—namely, to serve society by promoting the "Progress of Science and useful Arts" by encouraging and supporting the creation and dissemination of knowledge and creative works for the public's benefit. At the same time, universities have a distinctively robust relationship with copyright law. Universities and their constituents—faculty, students, and staff—are creators, distributers, and consumers of copyrighted material, a dynamic that has only become more complex in the digital era.

Our member colleges and universities, the federal government, industry, and philanthropic organizations spend billions of dollars annually to conduct research and scholarship for the benefit of society. Frequently, the copyrighted works that result from this research are made freely available to the public or are submitted to publishers, which conduct critical peer review and work with authors of accepted manuscripts to prepare articles for commercial distribution. Unsurprisingly, postsecondary institutions are among the nation's leading copyright consumers, as well. We reliably purchase and license billions of dollars of copyrighted works each year and our students, too, annually purchase billions of dollars of copyrighted works.

To provide a few additional examples of the intricate relationship that institutions of higher education have with copyright:

- University faculty—who are authors themselves—present and discuss copyrighted works in both analog and, increasingly, digital formats. For example, as a norm, faculty now teach using PowerPoint presentations and comparable applications and assign materials that are best accessible through digital means. In addition to using such presentations, faculty regularly exploit the

vast capacities of the Internet, often accessing research collections held by museums, libraries, and academic and research institutions worldwide in real time. In today's world, course management systems are at least as much a part of the collegiate classroom as the chalkboard.

- "Flipped classroom" experiences, which are a form of blended learning, are becoming increasingly common at American universities. In the flipped classroom, the professor or instructor presents her lectures, slides, notes, and other handouts asynchronously through a course management system *before* the students come to class. The instructor then can spend precious class time in a much more engaged interaction with students rather than lecturing to them. Classroom activity may be recorded, providing students with opportunities to revisit material covered in live classroom sessions and supplement the more interactive, discussion-based live classroom experience. These experiences also offer alternatives to students who, due to illness or other causes beyond their control, cannot attend the live classroom sessions.
- Faculty collaborate within and across institutions of higher education, domestically and internationally, on innovative projects that are difficult to situate within the traditional contours of intellectual property. For example, full-text searching and deep and broad data mining have opened up unprecedented opportunities for innovative scholarship in many different fields, including the biological and physical sciences, the humanities, social sciences, law, etc. Researchers from scores of postsecondary institutions across the world are working collaboratively and in parallel to explore the complexities of the human genome. Because access to the night sky and from certain vantage points are geographically bound, much astronomical research happens through networks of scholars. Similar synergistic efforts take place across disciplines such as medicine, volcanology, public health and infectious disease, environmental studies, journalism, public policy, physics, and archaeology, to name but a few.
- Students commonly need to access copyrighted content, including audio-visual content, as a central component of their educational experiences. Students also yearn to innovate; for example, imagine the student who wishes for her senior project to explain the role of children in 20th century literature by creating an audiovisual presentation, which might include music, performance, and images to illustrate themes and provide critical examples. The doctoral dissertations of today are increasingly dynamic, interactive tools for imparting knowledge.
- Universities also support a range of internal and affiliated enterprises that both generate and depend upon use of copyrighted works, including research libraries, archives, museums, and academic presses. Universities operate television and radio stations, satellites, cable networks, Internet nodes, and a host of other communication hubs that transmit and receive copyrighted communications. They have music studios, film and video production teams, animation labs, virtual reality labs, 3D printers, and art studios that foster every imaginable expressive medium.

Copyright supports the fundamental mission of colleges and universities to create and disseminate new knowledge and understanding through teaching, research, and scholarship. Copyright does this not only by providing incentives for the creation of new works through the grant of proprietary rights to copyright holders, but also—equally critically—by carefully limiting those rights in order to facilitate public access to, and use of, creative works.[1]

Maintain the Basic Structure *of Rights in the Copyright Act*

First, as an overarching matter, because many sectors of society, including the academy, rely on how the Copyright Act structures the balance of rights, the higher education associations believe that any endeavor to update, amend, or even tweak the Copyright Act should not disrupt the basic structure of rights. This structure has three connected pillars: a) the rights of copyright holders, b) fair use, and c)

[1] To be clear, as the higher education associations noted in their *amicus* brief in *Cambridge University Press v. Patton,* at 30, No. 12–14676 (11th Cir., Oct. 17, 2014), *available at* http://www.acenet.edu/news-room/Documents/GSU-AmicusBrief.pdf, academic works are typically created with the author's expectation that they will be widely disseminated and discussed for the purpose of scholarship. Academic authors do not look to the economic incentives of copyright protection to induce them to create. Even for such works, however, copyright remains an important means of protecting the integrity of academic works and ensuring appropriate attribution.

other limitations supporting additional public uses. This framework has been extraordinarily successful. Changes to the relationship among these grounding elements would destabilize the higher education ecosystem.

The first pillar, the rights of copyright holders, is currently spelled out in §§ 106 and 106A.[2] These valuable rights are subject to and limited by the rights and uses authorized for the public in §§ 107–122. This structure balances the constitutional speech and progress objectives of the public with the copyright holders' opportunities to make and to authorize important uses of their copyrighted works.

The public's fair use rights (§ 107), the second pillar of copyright's structure, stand out among the other limitations on a copyright holder's rights, because the flexibility built into fair use enables copyright to achieve its constitutional objectives. Courts can ensure that the public has sufficient uses so as not to transgress the First Amendment and, at the same time, enable copyright holders to receive their benefits in this bargain. Fair use allows the uncertainties that emerge from new uses, new technologies, or new business models to be addressed in a manner that achieves copyright's constitutional purpose.

The additional rights and uses (§§ 108–122) of the third pillar have a complementary relationship with fair use. Those that expand upon fair use (e.g., the compulsory license rights in § 115) enable the public to make important uses that would likely fall outside fair use. Others (e.g., reproduction rights for libraries and archives in § 108) enable the public to apply simpler metrics (than the sometimes unpredictable four-factor test of fair use) to make appropriate uses of copyrighted works. Through this pillar, Congress has been able to foster uses most beneficial to the public without hindering the flexibility necessary for fair use.

Although a changing world may indeed warrant new provisions or adjustments to the Act, these modifications should not disrupt the time-tested structure that carefully balances the copyright holder's rights with limitations that authorize rights and uses for the public.

Fair Use

The fair use provisions of § 107 permit the use of copyrighted works without permission or payment under certain circumstances. Fair use is a necessary means of 1) ensuring that copyright law does not obstruct the very learning that it should promote; 2) promoting the public interest; and 3) securing First Amendment rights. In fact, the very mission of American higher education—to expand and disseminate knowledge and understanding through education, research, and scholarship, and to foster public service—depends on the fair use right, notwithstanding the uncertainty that sometimes accompanies reliance on it.[3] Accordingly, the higher education associations listed above strongly support the continued viability of flexible fair use as a bedrock principle of U.S. copyright law.

As described above, the power to enact copyright law was included in the Constitution to enrich society by stimulating creative expression and thereby advancing public knowledge. The Supreme Court has consistently emphasized that the primary goal of copyright is to serve the public interest, not the author's private interest.[4] The Eleventh Circuit recently reaffirmed this fundamental principle in its decision in *Cambridge University Press et al. v. Patton* (otherwise known as "the Georgia State" case): "The fair use doctrine also critically limits the scope of the monopoly granted to authors under the Copyright Act in order to promote the public benefit copyright is intended to achieve."[5] Moreover, also in the Georgia State case, the Eleventh Circuit expressly recognized the specific importance and relevance of fair use in the education context, asserting that "Congress devoted extensive effort to ensure that fair use would allow for educational copying under the proper cir-

[2] These rights include the right to reproduce (i.e., make copies) of a work; create derivative works based on the work; distribute copies of the work; publicly display the work; perform the work; and, for sound recordings, to perform the work publicly by means of a digital audio transmission.

[3] As will be discussed below, other limitations on a copyright holder's rights that authorize educational uses in the copyright law—such as Section 110(2) (codified as the TEACH Act)—are so narrow and unwieldy that they must be used in conjunction with fair use in order to be of any real practical value to educators and scholars.

[4] "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *see also Sony Corp. of Am. v. University City Studios, Inc.,* 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.").

[5] *Cambridge University Press v. Patton*, at 18, No. 12–14676 (11th Cir., Oct. 17, 2014).

cumstances and was sufficiently determined to achieve this goal that it amended the text of the statute at the eleventh hour in order to expressly state it."[6]

In short, Section 107 statutorily shapes the boundaries of a copyright holder's rights as delineated in Section 106. It provides a pliable fair use standard that entails a case-specific analysis of whether particular uses of copyrighted works are outside the scope of what the copyright holder is entitled to prohibit.[7] This multi-factored approach ensures that public and private interests are appropriately balanced.

Higher education institutions rely on the elasticity that fair use offers. The availability of fair use enables the effective use of copyrighted works when licenses are not reasonably available or when they are not required, even when available. Universities have found, for example, that several major educational publishers refuse to license content for library reserves, and that some copyright holders simply fail to respond to requests to use copyrighted works. Other rights holders are quick to demand royalties or licenses for sentence-long quotations that are used in scholarly works. If fair use applies, the university may elect to use the work, but the perceived risk of an aggressive, misguided legal challenge nevertheless may cause the university to forego a legitimate use. Universities and their faculty—who are, again, themselves authors and distributers—recognize the important copyright rights granted to authors, publishers, and other copyright holders. Fair use must be available, however, if the mission of higher education is to be realized.

Colleges and universities utilize fair use to teach and research in innovative ways. Extensive use of online resources in education is perhaps the most salient development related to fair use since the enactment of the 1976 Act. Access to and dissemination of digital works for purposes of teaching, scholarship, and research are essential to the higher education process. Full-text searching has been called the most significant advance in search technology in the past five decades, for it allows scholars to perform searches in seconds that used to take days, months, or even years—if the search was possible at all.[8] "Text mining" is a powerful new form of statistical research made possible through application of fair use to digitized works.

Fair use, along with Section 121 ("Reproduction for blind or other people with disabilities"), also expands educational opportunities for people who have print disabilities. Digitization based on fair use is necessary to overcome disadvantages that students who have print disabilities historically have faced in research, scholarship, and instruction. For the first time, students and scholars who have disabilities are now able to access a universe of knowledge that, in its traditional form, they could not. Fair use also facilitates institutional compliance with federal nondiscrimination laws that require higher education institutions to provide reasonable accommodations to people who have disabilities. These statements find support in District Court Judge Baer's statement in *Authors Guild v. HathiTrust*, quoted approvingly by the Second Circuit, that he could not "imagine a definition of fair use that would not encompass the transformative uses made by the [universities' digitization project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the ADA."[9]

Finally, fair use complements the provisions of Section 108 ("Reproduction by libraries and archives") to assure the preservation of information for future generations. Libraries and archives are only allowed to distribute digital copies made under this provision to a very limited extent, however, and consequently must rely on Section 108 and Section 107 in concert in order to enable the accessibility of the digital copies to the public. Section 108(b) and 108(c) specifically authorize libraries and archives to make digital copies of unpublished works that are not otherwise commercially available, but such copies may only be made available to the public on the premises of the library or archive in possession of such copy. Section 108(e) allows libraries and archives to distribute such works in digital form, but only to

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[6] *Id.* at 27.

[7] 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 copyright work as a whole; and (4) the effect upon the potential market for or value of the copyrighted work.

[8] In *Authors Guild, Inc. v. HathiTrust*, 755 F. 3d 87 (2nd Cir. 2014), the Second Circuit held that digitizing and enabling full-text search is a transformative use and a fair use. The court cited cases from many circuits to support this holding, thereby diminishing a previously perceived circuit split.

[9] *Authors Guild, Inc. v. HathiTrust*, 755 F. 3d 87 (2nd Cir. 2014), *quoting* Authors Guild, Inc. v. HathiTrust, 902 F.Supp.2d 445, 460–64 (S.D.N.Y. 2012).

patrons who specifically request such a copy; and it does not explicitly permit libraries and archives to provide access by displaying or performing the work, so it does not specifically allow for computer display or performance. And, although Section 108(h) is more expansive in affording nonprofit educational institutions (which would include museums and other collections within such institutions) the right to "reproduce, distribute, display or perform" digital copies of works, such rights only apply to works in their last twenty years of term of copyright. What is more, none of the foregoing sections apply to the reproduction or distribution of music, pictorial, graphic or sculptural works.

TEACH Act

The TEACH Act, enacted in late 2002 and located in Section 110(2) of the Act, was intended to broaden educators' rights to perform and display works in the context of digital distance education. Section 110(2) is strictly limited in scope—for example, requiring that audiovisual and dramatic musical works be shown only as clips—particularly in comparison with the rights afforded to educators in face-to-face teaching settings in Section 110(1). The disparity between face-to-face and distance learning, however, has become far less relevant in the twelve years since the TEACH Act became law, as online education has rapidly flourished. Indeed, many educators find that the TEACH Act's complexity, combined with its array of limitations and conditions, render it essentially useless.

Nonetheless, with the continued growth of online education, a workable TEACH Act would benefit students and faculty engaged in online education. The higher education associations therefore respectfully propose that Congress and the Copyright Office consider updates and revisions to Section 110(2) to make the TEACH Act consonant with current and anticipated pedagogical practices by enabling a fuller exploitation of ever-evolving digital technology for educational purposes.

Orphan Works

The higher education community appreciates Congress's and the Copyright Office's ongoing attention to the challenges presented by orphan works—works protected by copyright, but whose copyright holders cannot be identified or located. Orphan works present a serious problem for institutions of higher education. Typically, these works are unavailable for sale, new or otherwise, and there is no reliable way—even with a good faith, diligent effort—to secure permission to use them. This situation generates uncertainty and raises the specter of copyright liability for colleges and universities (particularly smaller institutions that cannot afford regular legal counsel). Consequently, university libraries, museums, archives, and other public-service entities holding orphan works are deterred from using these works—some of which may be very significant—for education, research, and broad public benefit.

The higher education associations do not at this time endorse any present or past proposed regulatory or legislative mechanism to manage uses of orphan works. We do wish to caution, however, that any such orphan works program must effectively balance the interests of copyright holders whose works might be mistakenly identified as orphan works against the importance of enabling more vigorous uses of orphan works for the public. Further, any regulatory or legislative approach must avoid excessive regulatory burdens that make effective use of orphan works infeasible and must be sensitive to the requirements and capacities of universities and other non-profit institutions and permit appropriate tailoring for differing circumstances; for example, it should not specify procedures for educational and research uses that would be more appropriate for commercial entities.

The Digital Millennium Copyright Act (DMCA)

Section 1201

The higher education associations remain concerned that Section 1201 is adversely affecting, and will continue to adversely affect, the ability of the educational community to access copyrighted works for the purpose of engaging in lawful, noninfringing uses of those works and/or using uncopyrighted materials integrated in those works. Congress made clear that the Section 1201 rulemaking process was meant to temper the restrictive effects of Section 1201 by ensuring that access controls would not be used to impede users' rights to use the copyrighted works in lawful, noninfringing ways.

Yet contrary to Congressional intent, the DMCA's 1201 rulemaking provisions are not only unduly burdensome, but also require such unrealistically extreme evidence of harm that the procedure fails to provide any real relief to entities wishing to use such works in good faith. Furthermore, the cumulative effect of Section 1201's prohibition against circumvention of technological protection and the limited utility of the

rulemaking in practice nullifies the fair use of any technologically protected copyrighted works: fair use enables use without permission, but the Section 1201 anti-circumvention provisions prevent access to a work whose use would otherwise be fair.

We therefore respectfully urge the Copyright Office to recommend, and the Librarian to adopt, an expansion of "classes of works" falling within the scope of Section 1201 exempted works, in order to more closely and expediently effectuate the purpose of Section 1201 as expressed in the statute and legislative history. One such class of exempt works could be lawfully-acquired *"per se"* educational works, comprising, for instance, scientific and social science databases, academic monographs and treatises, law reports, and educational audiovisual works; a "user and environment" restriction could be placed on such a list to curtail any possible abuses. Another option might be to allow for presumptions in the triennial rulemaking process; that is, the fact that a class was previously designated could create a presumption that redesignation is appropriate.

Importance of Open Access Options

The higher education associations wish to take this opportunity to reiterate our goal of creating lawful, noninfringing new opportunities for expanded public access to scholarly publications. We share this aim with President Barack Obama's Administration, which articulated corresponding public access policies in the Office of Science and Technology Policy's February 2013 *Memorandum on Increasing Access to the Results of Federally Funded Scientific Research.*[10] Research universities have a mission to create and build upon new knowledge, broadly disseminate the results of their research, and preserve information for future generations.

Although peer-reviewed scientific and scholarly publications have served researchers and scholars well by making high-quality articles broadly available, the price of some journals has risen far beyond reasonable costs, placing a tremendous burden on research libraries and individual subscribers and restricting access to new knowledge. Digital technologies have enabled new ways to disseminate and preserve the results of research and scholarship. These technologies, coupled with enlightened public access policies such as those espoused by OSTP, can both reduce the cost and increase the dissemination of research and scholarship. It is imperative that publishers—commercial and non-profit academic publishers alike—accommodate their copyright policies to enable the benefits of digital publishing to be realized fully. Novel approaches to rights protection, such as the Creative Commons licenses that allow authors themselves to determine which protections, if any, they want to apply to their works, creatively advance the fundamental goals of copyright. The higher education associations caution that any updates or revisions to the copyright law should not erode or allow others to impinge upon these alternative approaches to constituting and organizing intellectual property dynamics.

The Constitutional purpose of copyright law is to promote learning and creative expression. The considered constellation of exclusive rights, balanced by fair use and carefully calibrated limitations on those rights, is integral to achieving this purpose. Without these checks and balances in the copyright law, educational, scholarship, and research opportunities would be lost, to the detriment of students, scholars, and researchers at America's higher education institutions and to the detriment of our nation, its economy, and the quality of life of our citizens. Higher education requires flexibility rather than too-narrow or overly-prescriptive exemptions for research, scholarship, and teaching. A loss of this flexibility would impede teaching, learning, research, and scholarship, the very "Progress of Science" the founders intended copyright to promote.

Mr. COBLE. Thank you, Mr. Bernard. Appreciate your testimony. Mr. Adler?

[10] *See* http://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp_public_access_memo_2013.pdf.

TESTIMONY OF ALLAN ROBERT ADLER, GENERAL COUNSEL, ASSOCIATION OF AMERICAN PUBLISHERS

Mr. ADLER. Thank you, Mr. Chairman. Thank you for the opportunity, along with Mr. Nadler and other Members of the Subcommittee, to testify today on behalf of AAP.

For publishers and students, teachers, libraries, and academic institutions of higher education, copyright and digital technologies are enabling a new world of online and other digital learning solutions that help colleges help students to stay in school, become more fully engaged in learning, and improve their outcomes and graduation rates.

College students with print disabilities also benefit from accessible digital content when they have accessible systems and devices to make it available.

But confusion with the scope and application of fair use, based on the new jurisprudence discussed in an earlier hearing, can diminish investments in the new creative content and services that have been copyright's foundation for centuries.

The hallmarks of this new jurisprudence include shortcutting the statutory fair use criteria with the bloated concept of transformativeness and subjective notions of what is in the public interest or offers significant public benefits. Disagreement about the propriety of this fair use expansion is playing out on thousands of campuses nationwide and featured in pending litigation by three academic publishers against Georgia State University.

My written statement explains our key points, which briefly are, first, there is no general or per se exception for use of copyrighted material for educational purposes or by nonprofit educational institutions under the Copyright Act, and such uses are not presumptively fair use.

The Supreme Court has confirmed that Congress resisted pressures from special interest groups to create presumptive categories of fair use, and it has held that the mere fact that a use is educational and not-for-profit does not insulate it from a finding of infringement.

Court rulings in the pending Georgia State litigation show troubling hallmarks of this new jurisprudence for fair use analysis. That litigation addresses Georgia State's fair use claim for the university's switch from licensed paper course packs for curriculum reading to unlicensed digital versions of the same materials for the same purpose.

The appellate court's analysis included these problems. First, copyright's principle of media neutrality means, as the concurring judge noted, that use of a copyright protected work that had previously required the payment of a permissions fee does not all of a sudden become fair use just because the same work is distributed via a hyperlink instead of a printing press. So if a paper course pack requires permission fees, the same content made available in a digital format also requires permission fees. But the majority opinion did not take this view, allowing paper and digital formats to be treated differently.

Also, despite the admittedly nontransformative verbatim copying of the works at issue, and Georgia State's cost savings from not paying permission fees in a fiercely competitive college market, the

majority opinion waived the nature and purpose of the use at issue in favor of fair use simply because it provides a broader public benefit furthering the education of students at a public university.

Although Congress requires evaluation of harm to potential markets under Section 107, the majority opinion endorsed a market harm analysis that looks only at harm to existing markets, significantly undermining the incentives for publishers to invest in exploring entry into relevant new markets.

Uncertainty over the Georgia State litigation outcome demonstrates a need for guidance at a national level to clarify fair use in education and other contexts. To our knowledge, no one, including AAP, is urging Congress to amend Section 107. But AAP urges Congress to direct the Copyright Office to initiate a study to help clarify fair use in a more participatory, transparent, and timely manner than is likely through legislation.

Conclusion: Publishers will continue to invest in innovative digital content, technologies, and services if they have confidence in the exercise of their exclusive rights. But they won't have that confidence if the new jurisprudence gives nonprofit educational institutions and educational purposes a privileged, cost-free status not found in the law.

Without clarification, not only publishers, but the entire ecosystem of higher education will miss opportunities in new digital learning solutions.

On accessibility, until recently, consumer markets for accessible materials were nonexistent. A copyright exemption called the Chafee amendment largely shaped efforts to ensure and expand the availability of accessible copies. But now technology is enabling ordinary consumer markets to serve the extraordinary needs of accessibility. It is important to ensure the copyright exemptions safety net doesn't diminish publisher investments that are fueling such progress.

Finally, AAP urges Congress and the administration to consider that progress as they review the efficacy of the Chafee amendment and the possible need to revise it for U.S. compliance with the WIPO Marrakesh Treaty upon Senate ratification.

Thank you.

[The prepared statement of Mr. Adler follows:]

Statement of Allan Robert Adler
General Counsel and Vice President for Government Affairs
Association of American Publishers

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.

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[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 litigation[10] 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 opinion[12] 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

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[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. at113 *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* case[13] 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]

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[15] See *Patton*, *supra*, slip op. at121 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 S69.

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, 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

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

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[18] See *Campbell*, *supra*, S10 U.S. at S91.

[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

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[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]

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[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)

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[32] See, *e.g.*, *U.S. News & World Report*, http://colleges.usnews.rankingsandreviews.com/best-colleges; *Forbes*, http://colleges.usnews.rankingsandreviews.com/best-colleges; *Barran's Prafiles 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 <u>not</u> having such systems <u>and</u> 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] <u>See</u> "Financial Planning Tool" at <u>http://sfs.gsu.edu/?DB_OEM_ID=12700</u>

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 copyright[38] – 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]

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[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.

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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.

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[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.

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[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.

Mr. COBLE. Thank you, Mr. Adler.
Mr. LaBarre?

TESTIMONY OF SCOTT C. LaBARRE, STATE PRESIDENT, COLORADO NATIONAL FEDERATION FOR THE BLIND

Mr. LABARRE. Thank you, Mr. Chairman, and Members of the Committee. It is, indeed, an honor and pleasure to testify before you today.

I am totally blind, Mr. Chairman. I have been so for over 36 years. Consequently, your light system will not do a lot for me, so when I am on that thin ice, please rescue me and interrupt me whenever you need to.

I come at this today from a slightly different perspective in two ways. Number one, I am not a copyright lawyer, although my participation as the National Federation of the Blind delegate to WIPO for the last several years has given me quite a schooling in copyright law. But my primary focus of practice is disability rights law, so that gives me one perspective.

The other perspective is as the ultimate consumer of some of the very topics we are talking about here. Being blind since the age of 10, I have had to access information in a different way, and that journey has been a difficult one. It has been a difficult one because it is fair to say that I have faced a dearth of information.

The vast majority of published works are not available in accessible formats. Consequently, a great deal needs to be done to make those formats accessible.

I cannot tell you how many times it would take weeks or months to get the same book that my sighted colleagues were using in a way that I could meaningfully use it. Quite frankly, many times during my education, I never got a copy of a particular book or work.

Now today's emerging technology, the revolution that we are all living, is something that we in the blindness community have, certainly, welcomed. But one of the main points I wish to make before this Committee today is that technology in and of itself is not the answer. And technology, as referenced by my good colleague Mr. Adler, is not opening up published works for the use of blind and low-vision Americans and other citizens of the world, because even though technology holds out a great deal of promise, if it is not accessible, if it is not usable by the systems that blind and low-vision people use, then the divide we face only grows wider. And despite the fact that a great deal of digital content has been in play for many, many years, we in the community still have very little access to that information.

So we believe our copyright system promotes the progress of science and the useful arts, as the Constitution says. To that, we say this means the Constitution provides a right to access information. And anything we do with our copyright system should bolster and strengthen access to information.

It is true that the Chafee amendment has provided some relief to those of us who are blind and low-vision. It has opened up more doors that had been previously closed. Nevertheless, we have access in the United States to only a few hundred thousand works in accessible formats, as compared to the millions of works that are

accessible to everybody else who happens not to be blind or low-vision.

So the copyright system needs to change the paradigm. We need to think about it in a little bit different way.

Traditionally, what we have believed is that the approach would be one of reasonable accommodation. This is an after-the-fact fix to something that is inaccessible. Reasonable accommodation being, for example, putting a book into Braille, hardcopy Braille, audio, or whatever.

But we in this technical revolution have the opportunity to make every single published work accessible from the beginning. That is the promise that technology holds, and that is what the copyright system needs to support.

Therefore, we are bringing to Congress, as you know, Congressman Coble, because you are a cosponsor, the new TEACH Act—Technology, Equality and Accessibility in College and Higher Education. This law calls for guidelines to be created so that colleges and universities offer their various instructional materials and other educational aspects in an accessible way.

Mr. MARINO [presiding]. Mr. LaBarre, this is Tom Marino. I am the Vice Chair. Mr. Coble stepped out, so I am sitting in the Chair.

Could you please wrap up here shortly?

Mr. LABARRE. Certainly.

Mr. MARINO. Thank you.

Mr. LABARRE. We, certainly, ask this Congress to support H.R. 3505, the TEACH Act. And we also believe that until we have a day when all works are born accessible, we do need exceptions and limitations to copyright. We strongly urge the United States Senate and, if it comes as an executive agreement, this House to ratify and adopt the Marrakesh Treaty.

Thank you.

[The prepared statement of Mr. LaBarre follows:]

Prepared Statement of Scott C. LaBarre, President, National Federation of the Blind of Colorado; President, National Association of Blind Lawyers; Counsel for National Federation of the Blind; and Attorney, LaBarre Law Offices

INTRODUCTION

Good afternoon Chairman Goodlatte, distinguished members of the committee and other witnesses. My name is Scott LaBarre, and I am here on behalf of the National Federation of the Blind (NFB). The NFB is the oldest and largest nationwide organization of blind people with over fifty-thousand members in fifty-two affiliates across the country; I am President of the National Federation of the Blind of Colorado, President of the National Association of Blind Lawyers, and legal counsel for the Federation. I am also here today as an attorney that specializes in disability rights law, the former Chair of the American Bar Association's Commission on Disability Rights, and a blind parent.

I appreciate the opportunity to speak about copyright issues that affect blind students in the education space. It is tremendously important for me to be here today because I want to make sure that nothing stands between blind students and their dreams. I know firsthand the barriers blind students face and even though I graduated law school in 1993, blind students today face essentially the same issues and it is high time that we take strong and bold action to eliminate barriers that are largely artificial and unnecessary. It is equally important for me to be here because it shows that Chairman Goodlatte and the committee are concerned about students with disabilities. We are grateful for your initiative in hosting this hearing and your willingness to collect our feedback.

I have been a leader in the organized blind movement for nearly thirty years, and I have never been more encouraged than I am right now. The possibilities of technology offer countless opportunities to improve access for blind students and make millions of texts available to blind people across the globe. But, I also have never been more worried than I am right now, as those possibilities are still pending. If they are missed, a new brand of discrimination will roll out that is more damaging than the print world ever was. My testimony will address policy recommendations for how Congress can proactively address this quandary.

I will discuss 1) The paradigm shift from the accommodations model to a focus on mainstream access; 2) The HathiTrust case and potential clarifications in copyright law to promote the use of accessible digital formats; 3) Changes to copyright law that compliment solutions for accessible instructional material in the TEACH Act; and 4) the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

A FOCUS ON MAINSTREAM ACCESS

Issue

The transformation of print text into digital formats has revolutionized the way we access the written word, and this transformation holds particularly profound promise for the blind. Blind students have long been relegated to an ad-hoc, after-the-fact accommodations model in higher education where titles, academic journals, and other educational resources are only made available after a time consuming and expensive conversion of those materials into Braille, large print or audio formats. This method is adequate in a print world, but the explosion of a new, digital world opens the door for blind students to bypass this model and have mainstream, instant access to all of the same content as their sighted peers. The opportunity to expand the circle of participation that stems from this explosion of information will only be harnessed if the conversion to digital text is promoted by lawmakers, and if the digitized copies are available in an accessible format.

Fortunately, there is a framework for success in these objectives. Copyright law promotes converting titles into accessible formats with the Chaffee Amendment and fair use provisions, and federal district and circuit courts have upheld the application of these exemptions to the creation of accessible digital formats for the blind in the landmark HathiTrust case. A few small clarifications from Congress could reinforce this decision and reduce future disputes. Similarly, the Americans with Disabilities Act requires institutions of higher education and libraries to provide equal access for students and patrons with disabilities, a task made significantly easier when mainstream content is available in accessible digital formats. Lawmakers could incentivize schools to move away from the accommodations model by offering technical criteria for accessible instructional material, thereby reducing litigation and stimulating the market. The upcoming Congress is likely to consider ratification of a "Books Across Borders" treaty, offering lawmakers an opportunity to encourage other countries to adopt policies similar to ours and allow blind people access to millions of titles in the international book market.

Policy Recommendation

The framework is there, but we will not achieve success without the right perspective. Often, when lawmakers are approached about bills that promote accessibility, the reaction seems to be that legislation is unnecessary because the entities in question are successfully deploying the accommodations model. Braille, large print and other specialized formats are indeed important and should not be devalued, but this model must be used in concert with a significant, purposeful drive towards mainstream access. Or, lawmakers assume that if entities are opposed to mainstream access that it must be inherently harmful to those entities. In reality, mainstream access benefits everyone. Data and common sense tells us that if we can remove the need to provide personal, specialized treatment to an entire population of users, we can reduce costs and expand the circle of participation simultaneously.

For people with disabilities that demand equality, a government that desires policies that systemically benefit everyone and a society that rejects "separate-but-equal" practices, mainstream access must be a fundamental goal. This approach is the undercurrent of my testimony and should be considered when examining or implementing the policy recommendations I make today.

HATHITRUST AND CLARIFICATIONS TO COPYRIGHT LAW

Issue

The Authors Guild has defiantly opposed efforts to make digital books accessible to the blind, forcing advocates to overcome this resistance through repeated complaints to federal agencies and litigation in federal courts.

The landmark decision in *The Authors Guild, Inc., et. al., v. HathiTrust, et. al. case* by the United States District Court for the Southern District of New York, 902 F. Supp.2d 445 (S.D.N.Y. 2012) and affirmed in important respects by the United States Court of Appeals for the Second Circuit, *755 F.3d 87 (2d Cir.2014),* supports the view that copyright law does indeed provide the framework to promote the conversion of print materials to accessible digital texts. The HathiTrust is a repository of accessible digitized content administered by the University of Michigan and Indiana University, a repository that allows blind students at the thirteen participating universities to access the millions of volumes of texts included in the repository. The Chafee Amendment allows for copies of texts to be made by an authorized entity that has a "primary mission to provide specialized services relating to adaptive reading or information access needs." In the HathiTrust case, United States District Court Judge Baer found that the digitization of the millions of texts by the university libraries was not a violation of copyright law because "The ADA requires that libraries of educational institutions have a primary mission to reproduce and distribute their collections to print-disabled individuals, making each library a potential 'authorized entity' under the Chafee Amendment."

The Second Circuit Court upheld this decision, and found that the copying done in the HathiTrust was also acceptable under the fair use provision. Fair use considers factors like whether the market is meeting necessary services on its own, the purpose and character of the use, including whether the use is for non-profit educational purposes, the nature of the copyrighted work, the effect of the use upon the potential market for or value of the copyrighted work, among other facts. What is unique about the application of fair use doctrine in the HathiTrust case is that, while the accessible formats are explicitly only available to blind and low vision students, the digitization as a whole was done in a mainstream fashion. The process was done to benefit all students, but with consideration for how to expand that benefit beyond the mainstream users so the blind students have the same level of access. The appellate court's ruling should encourage future universities to digitize works in a way that ultimately perpetuates a mainstream model of access.

Policy Recommendation

Regardless of whether the HathiTrust is characterized as an example of Chafee exemption or the fair use doctrine, it is a solid illustration of the framework provided by copyright law to promote and encourage the production of accessible digital books, particularly in a mainstream fashion. It is also a solid illustration of the direction Congress should take if it wants to reinforce this encouragement. Given the Author's Guilds' persistent opposition to making digital books accessible to the blind, some clarifications could reduce the amount of future disputes being similarly worked out by the courts. These clarifications could include an explicit statement that all educational institutions and libraries are "authorized entities" under Chaffee, or an added consideration for digitized works under fair use and Chafee.

ACCESSIBLE INSTRUCTIONAL MATERIALS AND THE TEACH ACT

Issue

One of the biggest issue facing students with disabilities and institutions of higher education is the lack of accessible instructional material. Although digitized libraries like in the HathiTrust case might improve access to digital books, instructional material now includes a broader range of content. In 2011, a congressionally authorized Commission called the Advisory Committee on Accessible Instructional Material by Students with Disabilities in Postsecondary Education (known as the AIM Commission) finished its examination of the status of accessible instructional material in postsecondary education and issued a report. The report found that "in addition to accessibility challenges posed by various types of digital content, students with disabilities often encounter barriers when attempting to use course management or courseware delivery systems, online course registration utilities, basic productivity software and library reference databases. While not all of these commonly installed software programs are inaccessible, many of them pay only marginal attention to accessibility."

Data from the AIM Commission report and another study conducted by Association of Research Libraries' joint task force on services to patrons with print disabilities found that lack of access to instructional material was a persistent problem for

students with print disabilities, and that the problem went beyond just delayed access to books. One study found that students with disabilities "have experienced a variety of challenges, including blocked access to educational opportunities and matriculation failure resulting from inaccessible learning materials and/or their delivery systems." Blind students should not be allowed to drop out of college because they were denied access to critical course material. How could any student succeed without access to the materials? What's worse is the fact that these types of technologies are the very technologies that should have ensured blind students' full participation.

It does not have to be this way. Titles II and III of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act require schools to provide equal access for students with disabilities. In 2010, the Departments of Justice and Education issued joint guidance to all institutions of higher education clarifying that the mandates applied to the use of technology. Despite explicit warning not to use inaccessible technology, the problem has persisted. In the years since this guidance was issued, more than a dozen colleges and universities have faced enforcement action or entered into settlement agreements over this matter.

A recurring theme in the data and settlements agreement is a profound lack of knowledge in colleges and universities about what accessibility looks like. Unlike physical access for facilities, the aforementioned mandates lack any specifics or technical criteria to facilitate their success. Institutions of higher education have no way of knowing whether a learning management system or web content is accessible, and have no direct path to compliance with the law. Without technical criteria that makes it easier to identify accessibility, schools will never have a streamlined demand to stimulate the market and a viable digital marketplace will never emerge. A market that does not include accessible materials will inevitably harm a higher education community that is attempting to deploy that technology and will surely harm blind students. Schools will continue resorting to the antiquated accommodations model, leaving blind students behind and increasing liability for lawsuits. This cycle must be stopped.

Policy Recommendation

One goal of copyright law is to make clear when copying is acceptable and when it is not, and the scenarios that are acceptable were designed to promote the copying of texts in order to make them accessible to people who are blind or have low vision. Similar goals need to be incorporated into non-discrimination mandates as they apply to institutions of higher education and their use of accessible instructional material. The Technology, Education and Accessibility in College and Higher Education Act (H.R. 3505/S. 2060) aims for these goals by authorizing the creation of voluntary accessibility guidelines for instructional material used in postsecondary education, and then incentivizing their use by offering a safe harbor from litigation to any school that only uses technology that conforms to those guidelines. The more schools that conform to the guidelines, the more the market will include accessible material.

The TEACH Act has bipartisan support in both chambers, support from the publishing industry, and endorsements from over twenty disability advocacy groups. However, revisions to copyright law can complement the TEACH Act and efforts to develop clarifying accessibility guidelines. The first recommendation of the AIM Commission report was the creation of accessibility guidelines, and the second was "Congress should review the scope, effectiveness and function of the Copyright Act as amended (Section 121, the Chafee Amendment) to determine whether it or any of its key component elements, as well as its implementation through applicable regulations, need to be updated to adequately address the needs of individuals with print disabilities, including those enrolled in postsecondary education."

This recommendation is rooted in the fact that technology is constantly evolving with types of material regularly converging into new, hybrid formats. A textbook and an assessment were once two different documents, but now digital textbooks often include assessments. A website and a group discussion were two different forums, but now learning management software brings web content and group discussions into one digital space. Similarly, the scope of students with print disabilities is evolving. The amount of students with learning disabilities is increasing, and inaccessible instructional material might create barriers for students that were once considered "mainstream" in the print-world, but now have limitations caused by the inaccessibility of the digital world. Copyright law must be updated to reflect the agnostic nature of technology and to compliment the goals of the accessibility guidelines created by the TEACH Act.

MARRAKESH TREATY

Issue

In 2013, I was the NFB's delegate to the Diplomatic Conference of the World Intellectual Property Organization, which took place in Marrakesh, Morocco. The conference concluded successfully with the adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The day the conference concluded, fifty-one countries signed the treaty, and the United States joined the rank in October of last year.

Unlike in the United States, over two-thirds of the world's countries do not have laws that allow copying of copyrighted works into accessible formats. In these countries, national law would consider copying a text into an accessible format (like Braille) without authorization of the rights holder a violation of copyright. Not only does this discourage digitization of works so that blind and other print disabled people can access the same titles as mainstream readers, this erects barriers to trade because the export or import of accessible format copies could trigger infringement liability. It is critical that these limitations be removed. Given the high cost of producing accessible format copies, the ability to share accessible format copies across borders would be particularly beneficial to the blind in all countries, including the United States. The treaty enables countries to import and export accessible copies of a given text rather than having to create their own, and enable those in other countries to acquire U.S. editions that are not now available in their home countries. This would also have a highly tangible benefit for the blind of the U.S. because we currently do not have access to accessible formats produced in other countries. This is particularly important in attempting to access accessible books in foreign languages. Additionally, access to English language books can be greatly improved because some sixty countries officially speak English and produce accessible formats that we cannot currently access.

The Marrakesh Treaty requires contracting parties to adopt copyright exemptions that are modeled after U.S. copyright law, including:1) the making of accessible format copies; 2) the domestic distribution of accessible format copies; 3) the export of accessible format copies; and 4) the import of accessible format copies.

Policy Recommendations

The State Department is currently developing the ratification package for this treaty, and I hope the package will be completed in time for the Senate to consider ratification during the next Congress. Because the Marrakesh treaty calls for contracting parties to adopt copyright exemptions that have already been adopted by the U.S., ratification should not require any amendments to copyright law. We urge our esteemed representatives in the House that are familiar with copyright law and invested in equality for students with disabilities to urge your Senate colleagues to give this treaty sincere consideration. Because the Obama Administration has not finalized its work on the Marrakesh Treaty, it is possible that it could come to this House in the form of an executive agreement. I urge the sound minds in this room that initiated this important hearing to review the Marrakesh treaty thoughtfully, recognize the benign effect it will have on U.S. law, and endorse the overwhelmingly positive effect it will have on blind people here and across the globe.

Thank you for your time and consideration, and I look forward to taking your questions.

Mr. MARINO. Thank you, sir.

Mr. Kaufman?

TESTIMONY OF ROY S. KAUFMAN, MANAGING DIRECTOR, NEW VENTURES, COPYRIGHT CLEARANCE CENTER

Mr. KAUFMAN. Mr. Marino and Members of the Subcommittee, thank you for the opportunity to appear today before you to discuss how voluntary market-based solutions can efficiently meet the needs of stakeholders in the educational environment.

My name is Roy Kaufman, and I am Managing Director of New Ventures at Copyright Clearance Center, a not-for-profit licensing hub founded by authors, publishers, and content users in response to issues that arose in connection with the 1976 Copyright Act.

CCC has been active since 1978, enabling efficient, lawful reuse of copyrighted materials. We represent more than 600 million rights primarily for text works under agreements with more than 12,000 rightsholders. These rightsholders range from individual authors to local and national newspapers, to universities, commercial and noncommercial publishers. In many cases, these works are created by academics and for academics.

Our users and rightsholders include residents of every U.S. State. We license more than 1,200 domestic academic institutions and more than 35,000 businesses globally. We are a net importer into the United States of revenues for reuse of published materials.

Our mission is to make copyright work for everyone. We develop products and services that smooth market friction and are voluntary, opt-in, market-driven, and nonexclusive.

I offer two examples in which market-based licensing solutions have helped bridge the gap between users and creators.

The first involves interlibrary loan. Interlibrary loan, or ILL in this context, means the practice of copying materials in possession of one library for delivery to another. It operates at the intersection of two limitations on the exclusive right of copyright holders, Sections 107 and 108.

However, even with these legal accommodations, ILL has proven to have serious limitations. Thus, 5 years ago, after completion of a pilot with the California State University system, the State University of New York, and Scientific Publishers, we launched a product that speeds delivery of digital articles, operates 24/7, 365 days, and is usually less expensive for the library than traditional ILL, all while providing compensation to the publishers.

We now have millions of articles available, and nearly 300 academic libraries have adopted it, with new institutions coming on board each week.

This is just one example of how users and publishers working together have been able to develop a better, faster, more cost-effective solution.

I now turn to electronic use of text-based works in the classroom. It has long been established that when print photocopies of copyrighted works are made for student use, copyright fees must generally be paid. In the late 1990's, classroom content began to migrate from print into online and digital formats. While this migration changed the manner in which students accessed content, academic institutions are continuing to use content to educate students through verbatim copying.

Throughout this shift, CCC has worked with academic libraries to help make academic digital copyright clearance more efficient. First, we offer transactional licenses for electronic works on a per-work basis. Later, we worked with publishers and more than 50 institutions of higher education to create a repertory or blanket-style license to cover print and electronic reuse by faculty, staff, students, and, indeed, distance learners, as has come up earlier.

As of today, 150 academic institutions have purchased this repertory license and more than 1,000 others have continued to clear print and digital uses on an as-needed, transactional basis.

However, one result of the migration to digital copying has been that some academic institutions are increasingly using it as an ex-

cuse to cease paying copyright holders. The GSU case, which was mentioned by Chairman Coble before, examines this.

That case is still pending in the courts. What is most relevant to my testimony is that at the time of the lawsuit, when GSU had 6,700 works in its electronic course system, it could have purchased a repertory license from CCC for an annual license fee of $3.75 a student. This license would have granted GSU friction-free permission to use millions of works in electronic reserves and in print and electronic course packs.

We know the license is appropriate for academic institutions such as GSU. We built it with them for them.

Fair use line-drawing is inevitably complex and uncertain. Making copyright work is not. Copyright works when creators and users, taking reasonable and differing conceptions of fair use boundaries into account, get together and build solutions.

With this in mind, CCC has created multiple, easy-to-use, reasonably priced license mechanisms.

We urge Congress, as it considers these issues, to recognize the potential for voluntary, opt-in, market-based solutions that further all constitutional purposes of copyright.

Thank you again for the opportunity to testify today. CCC looks forward to working with the Subcommittee as it continues to explore these important issues.

[The prepared statement of Mr. Kaufman follows:]

Prepared Statement of Roy S. Kaufman, Managing Director, New Ventures, Copyright Clearance Center, Inc.

Chairman Coble, Ranking Member Nadler, and Members of the Subcommittee:

Thank you for the opportunity to appear before you today to discuss copyright issues in education, and specifically about how voluntary market-based solutions can efficiently meet the needs of users, creators and other copyright holders. My name is Roy Kaufman, and I am Managing Director of New Ventures at Copyright Clearance Center, Inc. (CCC). CCC is a Massachusetts-based, not-for-profit licensing hub and rights aggregator, which was founded by authors, publishers and content users in response to issues that arose in the legislative process leading to the Copyright Act of 1976.[1]

INTRODUCTION

CCC has been a centralized licensing solutions provider since the effective date of the current Copyright Act, January 1, 1978, enabling efficient, lawful access to copyrighted materials. We represent more than 600,000,000 rights, primarily text works, under agreements with more than 12,000 rightsholders. These rightsholders range from individual authors and author estates, to literary agents, local newspapers, media companies, blogs, society publishers, universities, and large and small publishers of all kinds of text-based materials, many of whom in turn represent the interests of an even larger body of creators and employees. Additionally, we broker the rights of counterpart collective organizations from more than 30 other countries, who also represent millions of creators and publishers. We license reuse (such as emailing, online posting and photocopying) of copyrighted works to more than 1,200 US domestic academic institutions, and to more than 35,000 business organizations in the US and 180 other countries, covering millions of students, faculty, researchers and staff, as well as knowledge workers, managers and other employees.

CCC's mission is to "make copyright work for everyone." We accomplish this mission largely by developing products and services that smooth the inevitable market friction over the differences between compensable and non-compensable uses of copyrighted works, especially written works. All of our solutions are voluntary, opt-in, market-driven, and non-exclusive.

[1] *See, e.g.,* S. Rep. No. 94–473, 94th Cong., 1st Sess., at 70–71 (1975).

CCC, directly and through its partners, brings rights to use the copyrighted works of US creators to markets around the world, and is a net "importer" of revenues into the US for reuse of published materials. Our users and rightsholders include residents of every US state, and in the last ten years, we have distributed more than $1.4 billion in royalties. For each of the past five years, we have been named by eContent Magazine to its list of 100 companies that "matter most in the digital content industry."

We were formed to enable efficiency in copyright clearance for corporations, government organizations, and academic institutions, so as to avoid the need for those users to contact multiple publishers/authors to make payments for photocopies. Today, as in 1978, we provide for efficient "micro-licensing" under the supervision of a Board of Directors comprised of users, publishers and authors. Last year alone, we issued 750,000 individual licenses for the reuse of content, and through repertory (or "blanket") licensing, authorized many millions more digital and paper reuses.

While CCC represents rights of many types of creators into many different markets, CCC has been especially successful in offering products and services on behalf of rightsholders who create text-based works for educational, scientific and research markets. These works include journals and academic books created by professors, scientists, learned societies, commercial publishers, and university presses. In many cases, these works are created by academics, for academics. As such, we are uniquely aware from a market perspective of the tensions between the Constitutional purpose of copyright on the one hand (expressed in Article I as "promot[ion] of Science . . . , by securing for limited Times to Authors . . . the exclusive Right to their respective Writings. . . ."), and the language of Sections 107 and 108 of the Copyright Act. We are also aware of the power of market-based solutions to further all of the purposes of copyright and reconcile these tensions.

Our experience shows that voluntary market-based licensing solutions can go a long way towards solving many of the difficult challenges facing stakeholders with respect to copyright and educational reuse. In this regard, we offer two examples of ways in which market-based licensing solutions have accommodated the needs of users and creators, and bridged the gap between copyright exceptions and appropriate compensation for works of creative expression.

Example 1: Interlibrary Loan, Fair Use, Sections 107 & 108 and Developing a More Efficient Marketplace

First is an example of how licensing can provide a superior, more efficient and more cost-effective service to academic libraries with respect to the sharing of documents.

Interlibrary loan ("ILL") operates at the intersection of two limitations on the exclusive rights of copyright owners: Section 107 (Fair Use) and Section 108 (Reproduction by Libraries and Archives). Interlibrary loan is an old phrase that has been repurposed for a new use: in this context, it means not the delivery of physical objects owned by one academic library and shipped to another library, but the practice of copying (digitally or on paper) individual articles, chapters and excerpts from textual works in the possession of one library and then delivering the copies for use in other, unaffiliated libraries.[2] Belying its name, this form of interlibrary "loan" does not anticipate that the borrower will return the copy.

There are two ways in which libraries will typically engage in this form of interlibrary loan without the payment of a copyright fee. First, under Section 108 of the 1976 Copyright Act, "lending libraries" are allowed to deliver articles at the request of "borrowing libraries" without permission of the copyright holder, so long as the articles do not substitute for a "subscription to or purchase of such work." The Congressionally-formed National Commission on New Technological Uses (CONTU) developed guidelines that have come to be known as the "Rule of 5" to establish what constitutes a use that falls short of substituting for a "subscription to or purchase of" a journal.[3]

Under the "Rule of 5," the borrowing library tracks the copies it receives from other libraries of a given journal's articles and pays no copyright fee for borrowing

[2] The phrase interlibrary loan technically encompasses two very different types of activities; the lending of physical objects such as books for eventual return, and the delivery of copied materials. CCC's testimony only concerns the latter.

[3] See Final Report of the National Commission on New Technological Uses of Copyrighted Works ("CONTU") (1978). At the time of CONTU, unlike now, articles were typically sold in bundles known as subscriptions, and were not sold individually online, as there was no online. Today, most articles (as well as most journal subscriptions) are purchased in online formats and it is increasingly common for librarians to purchase individual articles in lieu of, or in addition to, subscribing to journals. This is especially true for corporate libraries, but also occurs with academic libraries.

up to five articles from the past five years of a journal. Libraries that determine for themselves that they have exceeded this limit typically pay a copyright fee through the publisher, through a document delivery provider, or through CCC. Second, some libraries take the position that a number of copies may be borrowed pursuant to fair use, usually for articles published more than five years ago (and therefore beyond the scope of the "Rule of 5"). Using these exceptions, virtually all libraries engage robustly in this form of ILL, as borrowers, lenders, or both. However, as has been documented by the library community, even with these legal accommodations, ILL has proven to have serious limitations.[4]

In 2009, representatives from the California State University System approached CCC to assist it in relation to its ILL practices. Although Cal State was spending in excess of $1 million annually to borrow articles though ILL, typical ILL deliveries took 5–10 days. As a result, by the time the materials arrived, the requestor no longer needed them in more than 50% of the cases, effectively doubling the costs for "useful" ILL.[5] Cal State approached CCC to see if we could fix the problem for the benefit of the university, its libraries and library patrons. Our response was that we thought we could and that, to do so, we needed to create a market-based solution with the cooperation of publishers of the materials most in demand at Cal State's ILL desks.

As a result of this outreach, CCC developed a pilot program with multiple libraries at Cal State, the State University of New York, and scientific publishers. The publishers set article prices designed to meet this new market, and CCC developed a technology solution that would enable an academic library to get a copy of an article within 5–10 minutes, rather than 5–10 days. The success of this pilot led to a service we call "Get It Now." Get It Now also enables the article to be sent in a digital format directly to the requesting student, researcher or faculty member. Get It Now does not supplant ILL or limit any user's rights under Sections 107 or 108, but instead complements them. There are times when a library may choose to wait the 5–10 days it may take to obtain a journal article via ILL borrowing. But, if the patron needs it in 5 or 10 minutes, Get It Now can provide a cost-effective, high-quality PDF of the article directly from the publisher, 24 hours a day, 7 days a week. And, in many cases, the total all-in cost is lower than that of ILL "borrowing."

CCC now has millions of articles available within this service from many of the world's leading commercial and non-commercial publishers, and nearly 300 academic libraries have adopted the Get It Now service, with new institutions coming on board each week. This is just one example of how users and publishers, working together, have been able to improve educational outcomes, improve use of materials, ease administrative burdens on institutions and still reward creators and publishers for the reuse of their materials though collaboration. Better, faster, more cost-effective.

Example 2: Electronic Use in the Classroom, and Easing Compliance in the Digital Migration

As mentioned above, CCC was created at the suggestion of Congress in order to help clear photocopy permissions. As the result of several important judicial precedents, it is well established that when print photocopies of copyrighted works are made for student use, copyright fees must generally be paid.[6] Historically, these print copies were bound and sold to students in what are known as "course packs." The courts cited in footnote 5 recognized that depriving copyright owners of revenues for reuse of materials in the markets for which the materials were created (academic and classroom use) would have a severe impact upon the ability of such publishers to continue to publish new works, to the detriment of the entire academic ecosystem.

In the late 1990s copies of individual items of content as well as course packs began to migrate online. Moreover, unlike printed course packs which were gen-

[4] For example, an Association of Research Libraries report concluded in 1992 that "[m]any patrons, dissatisfied with the limitations of our interlibrary loan services, avoid using them if possible." http://www.arl.org/storage/documents/publications/maximizing-access-dec94.pdf

[5] Although copyright fees are not paid for ILL, processing requests can be costly for borrowers and lenders. *See, e.g.*, website of the University of California, Santa Cruz ("Though we provide ILL services to eligible UCSC patrons at no charge, the cost of an interlibrary loan transaction can range from about $20 to $50."). http://library.ucsc.edu/services/borrowing/interlibrary-loan-faq (last visited on November 16, 2014)

[6] *See, e.g., Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) *(en banc)*; *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (1991); *see also American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994) (photocopying in a commercial setting). Obviously this rule has its own exceptions, including but not limited to matters such as reuse of public domain works.

erally prepared by on- and off-campus commercial copying operations, these online course packs were increasingly prepared for uploading and then posted by faculty or specific library staff. These digital course packs, electronic reserves and other online uses have changed how the students access content, but the content that they use (materials published largely for academic use), and the manner in which it is used (reading, studying, marking paper copies) have stayed largely the same. In short, this new generation of copying is consumed by the same market—academic institutions—and serves the same purpose; educating students.

In the earliest days of this shift, CCC was approached by academic libraries and asked to help make digital academic copyright clearance more efficient, as we had already done for printed course packs and for print and electronic reuse by businesses. We initially responded to this library demand by offering licenses for electronic reserves on a per-work or "transactional" basis. Then, as a result of more library requests, CCC—working with publishers and representatives from more than 50 institutions of higher education—created a repertory ("blanket-style") license to cover print and electronic reuse by students, faculty, staff, distance learners, and other affiliates of the institution. As electronic use has become more widespread and interchangeable with print, over 150 academic institutions have purchased this repertory license from CCC (and have paid license fees that CCC distributes to the rightsholders), and many more have continued to clear print and digital uses on an as-needed transactional basis.

However, one increasingly common and disturbing result of this migration to digital copying has been that some academic institutions, who routinely as a matter of business practice and copyright law cleared permission for reuses in print format, are no longer doing so for electronic reproductions. An ongoing litigation examines this phenomenon, pitting the concerns of academic publishers on the one hand against strongly argued positions of fair use.

In that case, Georgia State University (GSU), with more than 30,000 students, 100 fields of study, and 250 degree programs offered through eight colleges, abandoned its prior policy of seeking permission for reuse of copyrighted material for course packs and stopped paying publishers altogether for academic copying of academic materials in electronic formats, even for multiple chapters used over multiple years. The GSU case,[7] which was brought by three academic publishers, including two university presses, is still pending in the courts.

The Court of Appeals for the Eleventh Circuit recently unanimously overturned in its entirety a decision of the District Court for the Northern District of Georgia which was largely in favor of the university, and directed the District Court to reanalyze the facts of the case under a framework for fair use laid out by the Court of Appeals. The Court of Appeals decision was accompanied by a concurring opinion by one of the judges. As the concurring opinion makes clear, at stake in the GSU case is more than where to draw lines in case by case analysis, but rather the disturbing market harm caused by practices such as those at GSU.[8] If entire courses are offered using materials without compensation to creators, fewer works will be created. In this respect, the majority opinion agreed that GSU's practices risked "severe market harm" to academic publishers. [9]

While the final outcome of the case is unknown, what is most relevant to today's discussion is that, at the time of the lawsuit, GSU could have purchased a repertory license from CCC for an annual license fee of $3.75 per student. This license would have granted GSU friction-free permission to use millions of works in, among other things, electronic reserves, print and electronic course packs and other paper and digital formats, and would have authorized reuse by all of the university's administrators, faculty and students. We know the license is appropriate for the academic, research and administrative needs of academic institutions; we built it with them for them.

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[7] *Cambridge University Press v. Patton*, Nos. 12–14676 and 12–15147 (11th Cir., October 17, 2014), opinion at http://media.ca11.uscourts.gov/opinions/pub/files/201214676.pdf. CCC and the Association of American Publishers, recognizing the long-term negative effects on the market for scholarly works of the GSU policy, and after settlement discussions failed, provided financial support to the plaintiff publishers.

[8] "[T]his case arises out of a university-wide practice to substitute 'paper coursepacks' (the functional equivalent of textbooks) that contained *licensed* copyrighted works with 'digital coursepacks' that contained *unlicensed* copyrighted works. This was done for the vast majority of courses offered at GSU and, as will be seen, it was done primarily to save money." *Id.* at 116 (special concurrence of Judge Vinson) (quotation marks and emphasis in the original).

[9] "[B]ecause Defendants' unpaid copying was nontransformative and they used Plaintiffs' works for one of the purposes for which they are marketed, the threat of market substitution is severe." *Id.* at 111 (majority opinion); *see also id.* at 93, n.31 (majority opinion).

We note this, not to denigrate the role of fair use in the educational setting but, rather, to observe that fair use line-drawing is inevitably complex and uncertain. At least to the extent that fair use is to be determined on a case by case basis, fair use does not lend itself to bright-line rules regarding page and chapter counts. How much of the work was used qualitatively as well as quantitatively? What is the intended market for the work? What is the potential market harm?

Our experience indicates that there are other means of "making copyright work." These involve sitting down with creators and users, determining the rights needed, the rights available, and the fair pricing for the rights and uses, taking reasonable (and differing) conceptions of fair use boundary lines into account. With this in mind, CCC has created multiple, easy to use, reasonably priced license mechanisms meeting the needs of academic institutions. In all, more than 1,200 colleges and universities participate in one or more of these license programs. Our newest, aggregated license, which encompasses online uses of the type GSU has been engaging in, *costs less annually per student than one small pizza,* enables faculty to focus on the important business of teaching, and spares administrators, faculty, and librarians from needing copyright expertise in order to do their jobs. Market-based solutions require different options for different customers, and we have delivered those options in the past and will do so in the future.

CONCLUSION

Licensing does not supplant fair use and statutory limitations such as Section 108. Fair use will not and should not disappear merely because a copyright holder offers to license a use of its work, or because a user accepts such a license. For licensing to work, rightsholders need to offer value, which means in part providing licenses for rights that go beyond a reasonable notion of what is allowed pursuant to statutory exception. Increasingly, it also requires providing services that compliment copyright licenses, such as delivering content along with such licenses as CCC does with Get It Now.

We urge Congress, as it considers the consequential issues before it, to take account not only of the "first principles" of copyright law that should guide sound policy-making, but also to recognize the potential for voluntary, opt-in, market-based solutions of the type CCC has developed that meet the reasonable needs of users, while helping promote the creation of works of authorship that further the Constitutional purposes of copyright—the "promotion of Science and the useful Arts."

Thank you again for the opportunity to testify today. CCC looks forward to working with the Subcommittee as it continues to explore these important issues.

Mr. MARINO. Thank you, Mr. Kaufman.

As is my tradition, I hold my questioning until last and give my colleagues the opportunity to ask questions, since I am going to be here.

So therefore, the Chair recognizes the gentleman from Texas, Congressman Farenthold.

Mr. FARENTHOLD. Thank you very much.

I would like to start by asking Mr. Adler, it is my understanding that after the publishers first sued Georgia State, Georgia State adopted a new e-reserve policy that was very similar to the e-reserve policy that your organization had agreed to with Cornell and other universities. The publishers nonetheless continued to litigate against the new e-reserve policy, and this new policy was subject to the decision in the District Court in the 11th Circuit.

Why did the publishers continue to pursue Georgia State after it adopted its new policy? Shouldn't they have just declared victory once Georgia State adopted a policy that they were okay with?

Mr. ADLER. First of all, Mr. Farenthold, the policy that was adopted was not the same as the principles that we had worked out with Cornell and Marquette and Hofstra and Syracuse. It was a very different kind of policy.

Secondly, the policy was largely intended to try to moot the litigation based on the arguments made by Georgia State to the court that none of the infringing activities that we alleged to have occurred under the prior policy were actionable anymore, because they had simply acted to replace the policy.

As you know, that is not a very suitable way to go about in Federal court seeking redress of grievances. Basically, we felt that there had been violations of copyright law committed. They needed to be answered to the court, and simply can't be eliminated by changing the policy and saying that whatever happened before no longer matters.

Beyond that, the new policy that they have continues to operate in a way that even the majority of the appellate court that reversed and remanded the case back to the district court found was largely misusing a mathematical formula in a simple arithmetic way of determining whether in a particular instance a use of a publisher's works was fair use. As long as they continue to do that, the same types of problems that existed under the previous problem were going to continue.

Mr. FARENTHOLD. Okay, let me go to Mr. LaBarre. I might come back to you, Mr. Adler.

Mr. LaBarre, do you foresee technology solving this problem, as more and more books become available in e-book format? You are starting to see the e-book manufacturers provide accessibility functions like text to speech. You have the new Amazon tablet that is supposed to be pretty good with text to speech. Is a lot of this stuff going to eventually take care of itself?

Mr. LABARRE. Well, we hope so, in one regard. The problem is that a lot of the devices that are made, or the software that is used, is not compatible with the type of assistive technology that we use. I may have a laptop here that has on it something called JAWS for Windows. It is a screen-reading program. But if the underlying software or item cannot be read by JAWS, then that document is as inaccessible to me as it ever was.

So this is the point: Technology holds out the promise, but we need to put in place procedures and guidelines, and make it clear that when you build this technology, it can be accessed, because inherently, all digital information is a bunch of zeros and ones. It is neither print-friendly, Braille-friendly, audio-friendly. It is digital information.

As long as we construct a way to get at that information in a nonvisual manner, then what you are saying is, indeed, true. We will have access to many more books. And the potential exists that we can have access at the same time.

However, if we don't build the appropriate infrastructure and have the appropriate guidance from, for example, Congress, then we will not reach that day and not realize the promise that technology——

Mr. FARENTHOLD. Obviously, a little bit beyond the scope of the intellectual property issue, but I do think it is something that Congress could investigate, and it may take care of itself.

I wanted to get Mr. Adler's comment on that as well.

It is clearly in publishers' and authors' best interests to move away from paper books. It is cheaper to produce. You don't have overprints. You don't have warehousing. It is easier to update.

Is there a reluctance within your community to moving to digital? And do you think a move to digital solves this accessibility issue?

Mr. ADLER. No, sir. There is not a reluctance at all on the part of publishers to move to digital. I think the explosion of e-book trade has indicated that publishers, certainly, are interested in, and are engaging in, use of digital formats in order to distribute their works.

But there are two important things, also, that we have to consider. One is the fact that much of the marketplace doesn't want digital works. For that reason, there is still a healthy demand for works in printed format. It depends upon the type of work at issue, but there are people out there who are not interested in having a Kindle or any other device to read books. They just like to read books in paper form.

Mr. FARENTHOLD. The battery does not run out on my hardback books, so I understand that.

But I see my time has expired.

Mr. ADLER. If I could just finish, the other point is that, according to the U.S. Bureau of Labor Statistics and the Census Bureau, about three-quarters of the publishers in the United States are small businesses. These are businesses that may have as few as 10 employees, and they produce as few as two or maybe three works a year.

For many of them, they don't have the ability to invest in, or the sophistication to use, some of the production facilities that are required in order to produce works in the types of digital formats that do lend themselves greater to accessibility.

Mr. FARENTHOLD. I can't believe it is harder to publish something digitally than it is hardcopy. I am not buying that.

But I yield back.

Mr. MARINO. The Chair recognizes the gentleman from New York, the Ranking Member of the Subcommittee, Congressman Nadler.

Mr. NADLER. Thank you. I will start with asking Mr. Adler—he is missing only an "N" in front of his name to be in better shape. [Laughter.]

Mr. Adler, why do educational publishers consider it so important to improve clarity and predictability in the application of fair use to the use of copyright works for education purposes? What is the problem there?

Mr. ADLER. The chief issue with respect to Georgia State University, and this is why, with respect to Mr. Farenthold's question, Georgia's change of policy was not to adopt the type of policy that was adopted by the other schools he mentioned, because the other schools accepted the principle that it doesn't matter what form of media a work is formatted in for distribution and use. The issues of copyright apply the same way whether you are dealing with a work in digital or print format.

Georgia's policy continued with a practice that didn't accept that notion and continued to treat the fact that even though it had been

paying permission fees for paper course packs, it continued to deny that it had to pay fees for the same type of course——

Mr. NADLER. The required clarity is that the law applies in both cases?

Mr. ADLER. Yes, so the fact of the matter is that now so many publishers are producing material specifically for the academic market in digital forms using online platforms that have greater functionality and are more helpful to instructors in dealing with some of the problems of students today and higher education. We are concerned about this lack of willingness to accept the media neutrality premise.

Mr. NADLER. And you think the scope and applicability of fair use by the courts has strayed from the statutory language and the Supreme Court precedent?

Mr. ADLER. Yes, it has.

Mr. NADLER. And that should be straightened out by us or the Supreme Court?

Mr. ADLER. Yes, the Supreme Court announced the notion of the importance of transformativeness in fair use analysis in a case that involved parody, where what was involved was the creation of a new work with new original expression in commenting on a pre-existing work.

Many of the decisions in the area of transformativeness now no longer require that there be a new work produced or that even new original expression be applied to the pre-existing work. They simply decide that if there is a different purpose to which the work is being applied, and that purpose can be viewed as having social benefit, that constitutes fair use. That is a distortion of what the Supreme Court has said.

Mr. NADLER. Thank you.

Mr. Bernard, can you explain why the higher education associations strongly support the continued viability of flexible fair use as a bedrock principle?

Mr. BERNARD. Yes, thank you, Congressman.

So fair use enables postsecondary institutions to be able to make decisions at the time that the problem emerges, rather than waiting for Congress to create another limitation to make particular kinds of uses.

In order to do the kinds of work we do on our campuses, we actually need to be thinking about the students that we see today.

So, for instance, just to think about the questions that we have been asked and are now starting to answer about access for people who have print disabilities, were fair use not available to the University of Michigan and other libraries who participate in HathiTrust, we would not have taken that 100,000 or so works and turned it into 13 million works that scholars and students attending postsecondary institutions will have the opportunity to access, so they actually don't have to wait weeks upon weeks to be able to decide whether or not they want to even use the work that has been either converted or digitized. Now these works are immediately available.

It is fair use that enabled that. Our institutions make these kinds of judgments——

Mr. NADLER. It is flexible fair use that has enabled that.

Mr. BERNARD. It is. It is the opportunity to weigh those things. There is no question that copyright holders have rights.

I realize that that there is a meme out there that suggests that postsecondary institutions think that everything should be free. But this is not how we view things. We spend an extraordinary amount of money every year buying copyrighted works or licenses to those works because we think that is the right thing to do.

Mr. NADLER. I have one other question before the time runs out, because I see that yellow light is on.

Although Mr. Coble is not in the Chair, he would cut it off quickly, nonetheless.

Do you think the Section 110(1) classroom exception should be modified to include places other than traditional classrooms, for example, in a gym or library on school grounds?

Mr. BERNARD. I think that is, certainly, plausible, and something that we ought to be thinking about. I also think we ought to consider the classroom of today, which is an asynchronous classroom. The course management systems that——

Mr. NADLER. What do you mean by asynchronous?

Mr. BERNARD. What I mean is that aspects of the course experience that the student has with the faculty member doesn't happen right in front of the faculty member. The faculty member might say, "What I would like you all do is view this material or interact with this material and then come back and talk to me." It might even be that students actually leave the classroom or it might be that they do it at home.

We are starting to do these flipped classrooms where faculty members are doing their lectures in a digital format, including showing images, films, sound—those sorts of things. Students see that at home, along with doing their homework and reading, and then they come to class and they can actually interact with the faculty member in person.

Rather than having the faculty member just be the sage on the stage, the faculty member is actually able to answer questions, because the lecture has already happened. And this is the modern classroom.

Mr. NADLER. I like that phrase, "sage on the stage."

But let me ask just one more question, a general question. Are there other updates to Section 110(1) that you think are needed?

Mr. BERNARD. We use Section 110(1) robustly. We don't use Section 110(2) all that much. We end up relying on fair use, to your earlier question.

But Section 110(1), we haven't really had problems with it. We show what we need to in the context of the classroom. We, certainly, would like it to apply to asynchronous learning.

Mr. NADLER. Thank you.

I yield back.

Mr. MARINO. Thank you.

The Chair recognizes the gentleman from Michigan, the Ranking Member of the full Committee, Congressman Conyers.

Mr. CONYERS. Thank you, Chairman Marino.

I ask unanimous consent to put in my opening statement.

Mr. MARINO. Without objection.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers, Jr. for the Hearing on Copyright Issues in Education and for the Visually Impaired

Wednesday, November 19, 2014, at 3:00 p.m.
2141 Rayburn House Office Building

The exclusive rights protected by our Nation's copyright law are not without limit. The law recognizes certain exceptions for educational purposes and for the visually impaired.

As we examine these exceptions, there are several factors that we should consider.

To begin with, we must foster a deeper understanding of the fair use doctrine and urge the courts to apply the proper fair use analysis.

As I have stated before, I generally believe that fair use is working as intended.

Its flexibility strikes a balance by recognizing limited exceptions to the creator's property rights when in the public interest.

The current fair use law, while imperfect, has supplied guidance to copyright holders and those who want to use the copyrighted material as well as for the courts.

Yet, the recent Georgia State University case reveals that perhaps more guidance is needed about the proper scope and analysis of the fair use doctrine.

That case reminds us that fair use should not provide automatic protection for all educational uses.

Courts, in analyzing the issue of fair use, must consider *all* of the factors on a case-by-case basis.

Nevertheless, it may be beneficial for interested parties, including the judiciary, if either Congress or the Copyright Office issued clearer guidelines about the proper scope and analysis of fair use.

So, I am interested to hear from the witnesses as to whether they believe more guidance regarding the application of fair use would be helpful.

Second, the copyright law's exception for education must keep pace with technology.

The fair use exceptions for face-to-face teaching activities and for distance learning through the TEACH Act enable educators to incorporate copyrighted materials in their lesson plans and to reach students online.

In particular, online technology is making education *more* accessible to *more* students.

In light of ever-evolving digital technology improvements concerning content distribution, however, there are questions about the limits of these exceptions.

Accordingly, I would like to hear from the witnesses how Congress could make these exceptions more responsive to current technology, especially in regard to the TEACH Act.

Finally, with respect to the copyright law's exception for the visually impaired, there may be a similar need to update its provisions.

As many of you know, the United States last year signed the World Intellectual Property Organization Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

The Treaty facilitates the cross-border exchange of accessible format copies of copyrighted textual works.

As we wait for its ratification, consideration should be given as to whether the Chafee Amendment should be revised to ensure that our copyright law complies with its provisions.

To that end, I would like the witnesses to discuss what changes, if any, need to be made.

I close by noting that technological advances have facilitated accessibility for students and the blind and visually impaired.

But, more needs to be done.

I encourage the print community to continue to work together with the education community and disability advocates to provide more commercially-available accessible materials.

Mr. CONYERS. Thank you.

Let me turn to General Counsel Adler to ask this question. How has the Chafee amendment helped copyright issues for the blind or other individuals with print disabilities?

Mr. ADLER. The copyright exemption that is known as the Chafee amendment was necessary at a time which was largely pre-digital, when in order to be able to try to make printed works useful to people who have print disabilities, such as blindness or low-vision, you needed to convert those works in some manner so that they would be usable.

The Chafee exemption was designed to ensure that there was no unnecessary delay in obtaining permission from the copyright owner of the particular work in order for certain authorized entities who knew how to do those conversions to be able to go ahead and create accessible versions of those works.

Later on, digital technology has allowed for great strides to be made in making works inherently accessible, hopefully in the marketplace, so that you have only one version of a product that can be purchased by people with print disabilities, as well as consumers who don't have those print disabilities.

But the Chafee amendment has been very useful. It helped establish Bookshare, which is the largest online digital library of accessible works available for people with print disabilities. And AAP was very proud to work with Benetech in order to see that the launch of Bookshare was successful.

Mr. CONYERS. Thank you.

Counsel Jack Bernard, how would you assess how the current copyright regime works for educational institutions, such as universities?

Mr. BERNARD. Thank you, Congressman. The copyright regime is working pretty well for us. I mean, we do have the challenges of the flexible fair use standard that we like. We appreciate having the flexible fair use standard. It means we have to invest in it and work hard.

Copyright is working well for postsecondary institutions, because it creates opportunities for us not only to have access to works, but to provide access to works.

Higher education is changing dramatically right now in so many ways. The flexibility afforded by the Copyright Act, and specifically Section 107, enables us to analyze the kinds of new uses that we want to make.

Because the Copyright Act is structured so that there are Sections 108 through 122, Congress has the opportunity to authorize additional uses, so that we wouldn't have to go through that more difficult fair use analysis, as happened in Section 108. We, certainly, welcome those opportunities to expand the limitations on copyright holders' rights for the benefit of the public.

Mr. CONYERS. Thank you very much.

Mr. BERNARD. Thank you.

Mr. CONYERS. Could I ask State President LaBarre and Managing Director Kaufman if they have any additional comments that they would like to make in connection with our purposes of this hearing this afternoon?

Mr. LABARRE. Yes, Mr. Congressman, if I may, I want to respond a little to what Mr. Adler was saying.

Now, it is true that technology is changing how we access information, but it is not the cure-all. Consequently, Chafee needs to be as strong as ever, and we need to ratify Marrakesh.

What I mean by that is that this technology that I have in front of me that allows me to get access to digital works, if they are inherently accessible, which is still a minority of such works, is expensive. It costs thousands of dollars.

Consequently, there are blind and low-vision people who cannot use the technology and still need the hardcopy Braille, the audiobooks, and large print.

So regardless, if every book were somehow inherently digitally accessible today, there would still be a significant number of people who are blind and visually impaired who still would not have access.

And I wish we were at a time when even those digital works were largely, if not totally, accessible. But they are not, so we still have a long way to go.

Mr. CONYERS. Do you have anything you would like to add?

Mr. KAUFMAN. Yes, I will make it brief, given the time.

I would just like to say that within the educational environment, we have great opportunities and new ways to use digital content, especially for distance-learning, massive online open courses, and things like that, and that voluntary opt-in licensing is a really good way to match up the needs of the users, be they educational institutions or students, and rightsholders on the other side.

Thank you.

Mr. CONYERS. Thank you very much.

I thank all the witnesses.

I yield back my time.

Mr. MARINO. Thank you, sir.

The Chair recognizes the gentleman from New York, Congressman Jeffries.

Mr. JEFFRIES. I thank the Chair, and I thank the distinguished members of the panel for your presence here today, as well as for your presentations.

I think, as every Member of this Committee, I take seriously our responsibility to protect the intellectual property rights of the creative community of innovators, certainly a charge that finds its roots in the Constitution, Article 1, as we know it, authors and inventors.

But as we move forward with the 21st century innovation economy, and in the context of that innovation economy and its connectivity to the educational arena, I would be interested, perhaps beginning with Mr. Adler, how do we balance the changing classroom environment and the different ways in which learning may take place as a result of the digital revolution with that sacred constitutional charge that we have to make sure we are protecting intellectual property of authors, in this case?

Mr. ADLER. Thank you, Mr. Jeffries, for the question.

As I said, we are in the midst of a revolution in which educational publishers are basically now providing online learning solutions as well as customizable content that can be used online or

with a variety of different kinds of digital devices. Those materials, as I say, can be personalized for the needs of individual students and help them be able to better engage in their learning process and stay in school to achieve better outcomes.

During that process, I think it shouldn't be a problem for people to understand that, as in most aspects of use of copyrighted works in digital formats, licensing is going to be involved. The fact that licensing is now convenient, is affordable, as we argued in and demonstrated in the Georgia State litigation, it should be become part and parcel of the educational environment, which doesn't mean that there is an end to fair use in that environment. It simply means that as greater functionality is desired and the ability of these materials in digital formats to be used in more creative ways and available to more people through different channels, that licensing becomes a more important aspect of being sure that copyright is respected while these materials are being widely distributed and used in the higher education sector.

Mr. JEFFRIES. Now, I know the Georgia State case is still working its way through the court system, and I gather an application for the entire circuit to hear the case is currently pending. But what, if any, lessons can or should Congress or this panel draw from the issues litigated in that Georgia State case?

Mr. ADLER. Well, among other things, again, the importance of the copyright principle of media neutrality.

Congress has made it clear, the Supreme Court has made it clear, and I guess it has to be reaffirmed again, that the rights of copyright owners and the way in which those rights apply to uses of their works, doesn't change from one medium to another. So that in the digital environment, the same type of respect for copyright that was accorded to works in analogue formats must also be accorded in digital formats as well.

Besides that, the notion that on campuses all across the country people get to choose among diverse choices for the types of material they use, the medium in which they use them, how they access them, how they are delivered to them, gives them a great deal of freedom in order to shape their own agenda.

The publishers are not trying to tell teachers how to teach. They are simply trying to provide them options in terms of the tools that are available for them to decide what is the best way to get the best results with their students.

Mr. JEFFRIES. Mr. Bernard, could you weigh in?

Mr. BERNARD. Thank you, Congressman. I think there is an opportunity here for a note of caution along a couple lines that I want to think about with you.

That idea of a world in which everything is digital gives us wonderful opportunities, as Mr. Adler has described, tremendous opportunities that education avails itself of. But there is also the concern that we might actually start transgressing on what would be a fair use.

That is, in a world where everything is digital, it is possible to license a page, a paragraph, a sentence. And I think we would want to be very clear that we don't want to end up in a world where just because there is an extant license means that the public will not be able to make some uses to which it is entitled.

Fair use is there, in part, in order to protect our ability to make our First Amendment rights available. So it is critical that we think about that relationship.

In addition, another thing to be concerned about is, in the realm of a license regime, we start losing our ability to make first-sale uses. That is, the digital book you buy may not necessarily be something you can pass on.

Now, there have been efforts to move along these lines. But I think the digital collections people have, they may not be able to share. So the value of the work itself, the ability to promote the kind of colloquy and interaction that we have when we share works with other people, may disappear in a regime that is governed by licenses.

Mr. JEFFRIES. Thank you.

I yield back.

Mr. MARINO. Thank you. My Democratic colleague Dr. Chu was unable to attend today, but she asked if I would present a question to each of you actually, so we will start with Mr. Bernard and then we can go right down the line, should you choose to answer these questions.

Dr. Chu asked Mr. Kaufman, Mr. Bernard, Mr. Adler, and Mr. LaBarre, if you would like to address this also, you all address the GSU litigation in your testimony. Mr. Bernard noted that the 11th Circuit recognized that, "Congress devoted extensive effort to ensure the fair use would allow for educational copying under the proper circumstances." The publisher's lawsuit against GSU indicates that there is disagreement over what those proper circumstances are.

What do each of you think the value would be for the day-to-day educational needs of faculty and students if stakeholders could work with the Copyright Office to come up with safe harbors or some other mutually agreed guidance?

If you need me to repeat any of that, just let me know.

Mr. BERNARD. Okay, so thank you, Congressman. I think postsecondary institutions, higher education, is always looking for the opportunity to talk about how we might make things work well. I think the Georgia State case, in my view, is an unnecessary case. It is a case that could have been resolved through diplomacy.

I think it is that kind of diplomacy that is of critical importance. Yes, we are not always going to agree, but, overwhelmingly, we find a way to come to common ground, because it is not a good use of anyone's time to have these kinds of disputes that are very, very expensive.

I think the Copyright Office, certainly, can be helpful. I know that my university and others have partnered with the Copyright Office to talk about things like making works accessible to people who have print disabilities, orphaned works, so I think there is value in having an open discussion.

Mr. MARINO. Mr. Adler?

Mr. ADLER. Yes, Mr. Marino. As I said in our oral statement, we urge the Congress to direct the Copyright Office to engage in a study that would involve soliciting public comment, holding roundtables for public discussions, to help clarify how fair use operates in the educational setting as well as in other contexts. We

think that the Copyright Office, as the Government's expert on copyright, has repeatedly been tasked over the years by Congress to look into a number of different issues, to report to Congress with recommendations about how to address particular situations and problems.

There is no reason why the Copyright Office shouldn't be tasked to employ its expertise in the area of fair use. So we would strongly support a recommendation of that nature.

Mr. MARINO. Thank you.

Mr. LaBarre, please?

Mr. LABARRE. Yes. Certainly, in one context, fair use has been of great benefit to the blind and low-vision. The Supreme Court, in fact, has recognized that transforming materials into accessible formats is almost impliedly a fair use. So we, certainly, believe that Congress needs to reaffirm those principles, as it did in 1976 when adopting the current version of the copyright regime.

With respect to these other more global issues that are going on in terms of mainstream education, the comments I made earlier about getting access to that stream are relevant here. We would like to be on the same footing to debate some of these issues, but we are not even inside that room yet because we don't have access to materials on a broad basis.

Finally, with respect to the issue of safe harbors, I referenced in my testimony the TEACH Act, our new TEACH Act that is before this Congress. It would offer to educational institutions a safe harbor from litigation, if those institutions follow the guidelines that would be developed with respect to making material and published works accessible in the educational space.

The reason this is necessary is, although we have broad mandates from this Congress that the educational experience must be accessible to an individual with a disability and you must be able to participate on terms of equality, no one really knows how to do that. That is why it is critical that we develop these guidelines. And as part of that, in doing so, and if institutions comply with those guidelines, they would, in fact, have a safe harbor from litigation.

Mr. MARINO. Thank you, sir.

Mr. Kaufman?

Mr. KAUFMAN. Yes, the short answer to your question is yes. The longer answer is we would be very happy to work with the Copyright Office in looking into these issues. That is, in fact, how we fulfill our mission of making copyright work. We do this through working with stakeholders, users, creators, everyone who we can get into a room and try to work out these things to function and smooth out any ruffles.

So, yes. Thank you.

Mr. MARINO. Thank you. I am a big proponent of anyone having a dog in the fight be sitting at the table and taking part in the procedures like this.

I am going to convert now over to my questioning. The question you responded to was for Dr. Chu, and now I am going to take a couple moments and ask some of my questions.

I want to start with Mr. Bernard. I come from a prosecution background, so everything is very narrowly defined. We constantly

refer to the fair use, but some of us refer to flexibility or the flexible fair use.

Where do you draw that line? What is not flexible? What is flexible? Who is to make that determination without litigating?

Mr. BERNARD. It is important that we are able, as higher education, to engage in communication and speech. And every time a person is prevented from using an expressive work, this is an incursion into speech.

Now, it is an incursion into speech that has another constitutional benefit; that is, incentivizing people to promote progress. But the line there is a delicate line. It is a line that we work out a great deal with content holders and as content holders ourselves.

So I understand the Copyright Act is designed to have that pressure valve in it, so that courts and people sitting around the table can talk about how they might smooth over disagreements.

So the rigidity there is a challenge because we are at the confluence of the First Amendment and the progress clause. We want to be able to do both. It is a very delicate thing.

So I understand the attraction. I assure you that many people on our campuses would love bright lines for everything. But there are risks with bright lines, in this context.

And I would say, too, when we talk with the Copyright Office about these issues, it is important not to diminish that flexibility, because it is useful in the kinds of engagements we have.

And as I said before, we spend an extraordinary amount of money and energy as customers. My library is a customer of the Copyright Clearance Center. These relationships are important relationships, and just because there is a flexible fair use doesn't mean they won't happen.

Mr. MARINO. Thank you.

Mr. Adler, would you like to respond to that?

Mr. ADLER. Yes, we know that it has been very difficult for any agreement to be reached on any kind of quantitative standards for fair use. No one wants to have page counts or questions of whether chapters or other units of works constitute a fair use unit as such.

That has been a real difficulty ever since the codification of fair use, wherein Congress, actually, in its legislative history endorsed a compromise for classroom guidelines that attempted to go in that direction.

We understand that in the digital environment, the classroom guidelines clearly don't work well or satisfy the needs of education at any level.

But there are important principles that still remain to be applied. The Supreme Court has made it clear, for example, that in order to negate fair use, one need only show that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work.

There are 4,000 institutions of higher education in this country, and if they were all doing exactly what Georgia State has been doing, that would meet the definition of the Supreme Court's concern about alleged fair use becoming so widespread that it adversely impacts the incentives of rightsholders to continue creating works for that market.

Mr. MARINO. Thank you.

Mr. LaBarre?

Mr. LABARRE. Well, with respect to fair use, I want to reference the Second Circuit Court of Appeals' opinion in the Authors Guild v. HathiTrust case. This is a perfect demonstration of how fair use can open up doors to communities who haven't otherwise had an opportunity to access information. In that case, of course, the court deemed the University of Michigan's and other universities' development of the HathiTrust and making that available to persons who are blind and otherwise print-disabled, and deemed that that was indeed perfectly in keeping with Congress' intent in developing the fair use clause.

We need to reaffirm that and make sure that we find other similar uses, because in this case, as it is now applied, if you register with the University of Michigan, you can get access to millions of works in an accessible format that you did not have the ability to do previously.

Mr. MARINO. Thank you.

Mr. Kaufman, would you care to respond?

Mr. KAUFMAN. Yes, sure. What I like about your question is it is why I kind of like licensing.

So there are things everyone is going to look at and say that is fair use. And there are things that most people rationally look at and say that needs permission. And then there are some grounds in the middle where there is room for honest debate.

With a license, you can take away their need for honest debate, because you develop within the license flexibility, so that you are granting permission, particularly when you do a repertory license to cover all of these uses where you don't need to decide in each and every case is this fair use, is this on the line, does this require permission? You cover it all, and do it in expensively, and build the ambiguity, frankly, into the price.

Mr. MARINO. Bear in mind that space between the lines of fair use, every time it gets litigated, could become narrower and narrower.

Thank you.

Now it is my pleasure to have Congresswoman Jackson Lee from Texas ask questions.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Although we are in the waning hours of this Congress, I think this is a very important hearing and probably one that maybe requires some further study as to how we can respond.

As I look at the Georgia State case, I am wondering and reflecting upon what we did in yesteryear of copying and Xeroxing, and professors or people Xeroxing notes.

So I guess I would like to ask, on the Georgia State case, any thoughts, Mr. Kaufman, about a legislative response to that, based upon what the 11th Circuit did?

Mr. KAUFMAN. I think we need to see where the case ends up in the 11th Circuit. We, as an organization, were formed because of the Xerox machine, in large measure, and because of deliberations before the 1976 act. So we exist to license photocopies, in the earliest instance, and we have migrated online as an organization.

Whether legislative action is needed to get people to recognize the media neutrality concept and to continue to clear permissions

for digital uses to things that were clearly required in print, I am not sure yet.

Ms. JACKSON LEE. Do you think that there is a calling or higher need to balance the arguments you are making with the arguments of learning and teaching?

Mr. KAUFMAN. I think the arguments that I am making incorporate learning and teaching. In the Georgia State case, it would have cost $3.75 per student for a year to be able to copy millions and millions of works in print and digital format. As one of our customers once said, this actually enables us to make greater lawful use of the things that we are already buying.

So I think our license solution actually really was created for academic use and for institutional use within the academy. I think it works very well to do so, as long as people respect the law and avail themselves of the license.

Ms. JACKSON LEE. Let me go to Dr. Bernard and mention the importance of the flexibility of fair use.

Would educational institutions also benefit from specific guidance or more official best practices? And in your view, are professors and other instructors able to easily determine what educational uses are, in fact, fair on a practical and day-to-day basis?

Mr. BERNARD. So I would see higher education saying that it would be wonderful if Congress said in Section 123 of the Copyright Act, as yet to be enacted, that it would, certainly, be an acceptable use to make some percentage use for the purposes of teaching and learning. I think you could take an approach like that and say at the same time that this would in no way limit fair use in terms of going beyond that, like we do in other sections.

I should also add that there is no barrier. I know that there has been this idea of a barrier for postsecondary institutions to seek licenses. My institution secures almost $10 million in licenses for the kinds of works that the Copyright Clearance Center makes available. So this licensing model, the idea that there is this barrier over media, it doesn't graft onto my experience with what postsecondary institutions do. And that $10 million number is an annual number to gain access to these works for our students.

So this is something that is already working and doesn't require legislation. But if you wanted to create some kind of safe harbor, a reasonable safe harbor that didn't include fair use, I think higher education would welcome that opportunity.

Ms. JACKSON LEE. What you are telling us is that you already have a global access that you utilize, that your professors can draw down on, based upon the responsibility of the university, period, and then your professors are covered as they draw down on those materials to give access to the students.

Mr. BERNARD. Sure. Most institutions purchase licenses, and they don't necessarily all purchase the same licenses, and the licenses have gaps. They don't cover every work. So there is no question that there is need for organizations and ways to get access.

But abundantly, abundantly, we use licenses to get access to many, many millions of works each year, because our students need that access in order to promote progress, to be the next generation.

Ms. JACKSON LEE. And your professors adhere to—they understand and you educated them about it, and they understand how to access and use it in their teaching?

Mr. BERNARD. There is no question that we educate our faculty about it. But you know it is like herding cats at times. The faculty can be confused, make mistakes. But we work with those who do. All institutions run into circumstances where somebody has transgressed some line, and we work with them pretty assiduously.

Ms. JACKSON LEE. I would ask the gentleman for an additional minute.

Mr. MARINO. Without objection.

Ms. JACKSON LEE. Thank you very much.

I want to hear from—I will say a free-for-all from both Mr. LaBarre and Mr. Adler, please. I heard from Mr. Bernard and have not heard from Mr. LaBarre.

I want to specifically speak about the visually impaired and just give me, in this moment that I have, what can be the most important message that we get out of this hearing today as it relates to the visually impaired.

Mr. LaBarre, do you want to start?

Mr. LABARRE. Sure. Thank you very much.

I think the most important message is there isn't one solution. It isn't just Chafee. It isn't just Marrakesh. It isn't just the TEACH Act that we have before this Congress. And by the way, it isn't just licensing.

Our community has used licensing, for example, Bookshare uses some licenses with publishers to get material into accessible formats. None of these is the solution alone.

What I think this Congress needs to know and needs to endorse is we need all of these tools at our disposal to get rid of the great information gap that people who are blind or low-vision still face, despite the advances in technology, despite Chafee.

We in this country have access to something less than 5 percent of published works in accessible formats. So we need to use all the tools, and we need to make it clear that it is a high priority of this Nation to use these tools, so that someday, hopefully, we will, indeed, catch up.

Ms. JACKSON LEE. Yes?

Mr. ADLER. Ms. Jackson Lee, if I may respond to that, I am not sure why my friend Mr. LaBarre failed to mention this, but the TEACH Act that he so strongly advocates, is intended to have the access board, the Government's expert body on disabilities, basically provide guidelines to inform publishers and manufacturers of educational delivery systems for content, what constitutes accessible materials for those purposes.

That legislation was drafted jointly by the Association of American Publishers and the National Federation for the Blind. We have been working the Hill with the National Federation for the Blind, obtaining bipartisan support in both the House and Senate for that legislation.

One of the things that people need to understand is that for many publishers, and particularly those that I mentioned earlier, the small publishers, the ones who are really small businesses,

they don't necessarily know what is required to make a work accessible.

That is why this legislation is extremely important. If experts can produce guidelines that will give them a good idea of what qualities are involved to make a work in digital format accessible, that will greatly improve the availability of accessible works, as Mr. LaBarre says is very much needed.

Ms. JACKSON LEE. So in concluding, you are sensitive to Mr. LaBarre's point about accessibility and publishers through the TEACH Act.

Mr. ADLER. Absolutely. We are jointly working with them on that. We are also working with our publishers on adapting their production of their publications to an EPUB 3.0 type of format that lends itself to greater and more easily casting works in accessible formats.

We and other publishers are continuing along with those initiatives, so that the production of these works continues to have a better opportunity to add accessibility as one of the features of these works when they are brought to market.

Ms. JACKSON LEE. Mr. Chairman, thank you very much.

Mr. MARINO. You are welcome.

Ms. JACKSON LEE. I want to just thank you very much. I think this issue with the visually impaired is very important. I think this was a good discussion between, in particular, Mr. Adler and Mr. LaBarre.

Mr. MARINO. Agreed.

Ms. JACKSON LEE. Thank you.

Mr. MARINO. You are welcome.

Ms. JACKSON LEE. I yield back.

Mr. MARINO. This concludes today's hearing. I want to thank all the witnesses for attending. I also want to thank all the individuals who came to sit and listen to this testimony.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 4:54 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Congressman J. Randy Forbes (VA-04)
Statement for the Record
House Judiciary Committee
Subcommittee on Courts, Intellectual Property, and the Internet
Hearing on Copyright Issues in Education and for the Visually Impaired

November 19, 2014

Our Professional Military Education (PME) institutions play a vital role in preparing the U.S. armed forces to meet the complex challenges our nation faces. I agree with the Skelton Report on Military Education of 1989, which stated, "The importance of a competent, credible, and dedicated faculty to both the fabric and reputations of our PME institutions cannot be overstated … They must teach; they must be experts in their subject areas; and academically, they must be given the opportunity to develop further their expertise through research and writing."

However, the current copyright law prevents federal government authors, including the faculty of PME institutions, from publishing in many prestigious outlets, including civilian university presses, because they assign copyright for any government work. As the Congressional Research Services reported to the HASC Subcommittee on Oversight and Investigations on November 6, 2009, the current copyright law deters publication of academic papers produced by faculty at service academies and DOD professional schools. These restrictions undercut the ability of PME institutions to recruit faculty members. They deter promising young faculty members from joining PME institutions. They also undercut the ability of PME institutions to retain quality faculty members, who must publish their work with university presses to preserve their academic credentials and their reputation.

The current law also precludes PME faculty members from disseminating widely their research through well-known publishers with first-rate advertising and distribution networks and thus limits the ability of faculty members to reach elite audiences with arguments, insights and research findings crucial to the Services and critical to making sound U.S. national security policy.

I agree with the finding of the April 2010 HASC study, "Another Crossroads?" that "Allowing for at least a limited copyright would contribute to PME institutions' ability to attract quality civilian faculty." To remedy this, I believe we should consider amending Chapter 53 of Title 10, United States Code, or add a similar provision in Title 17 with the same effect, to give permanent authority to Department of Defense personnel who are faculty members at Department of Defense service academies and PME institutions to secure copyrights for scholarly works that they produce as part of their official duties in order to submit such works for publication, and other purposes.

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December 11, 2014

Honorable Howard Coble
Chairman
House Judiciary Subcommittee on Courts,
Intellectual Property and the Internet
U.S. House of Representatives
Washington, DC 20515

Honorable Blake Farenthold
Member
House Judiciary Subcommittee on Courts,
Intellectual Property and the Internet
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Coble and Rep. Farenthold:

As one of the panel witnesses who testified in the hearing on "Copyright Issues in Education and for the Visually Impaired" which was held on November 19 by the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet, I am submitting this letter to more fully respond to a question that was asked of me by Rep. Blake Farenthold, and requesting that it be made part of the hearing record.

Following the presentation of prepared statements by myself and the other witnesses on the panel, Rep. Farenthold asked my fellow witness, Scott LeBarre of the National Federation for the Blind, whether the problem that students and other individuals with "print disabilities" have in obtaining accessible versions of copyrighted works would be solved by technology "as more books become available in an ebook format." He then sought my opinion on the same issue, noting that it was in the publishing industry's best interest to move from paper to digital because of lower costs and asking if publishers were reluctant to "move to digital."

In my response, I explained that the explosive growth of the ebook market was evidence that publishers are not reluctant to embrace digital technology, but that there are still many consumers that prefer to read printed paper books and many U.S. book publishers that are small businesses which may not have the ability to fully invest in digital technologies.

To avoid any misunderstanding, however, I want to make clear for the hearing record that the most critical point to be acknowledged on this subject is that merely migrating textbooks or other assigned curriculum works to digital formats generally will not make those works accessible to students with print disabilities in the manner required for learning and comprehension purposes.

In basic terms, making an ebook version of a printed popular novel typically involves only the conversion of linear narrative text into a digital format. While such an ebook may be accessible through the "read aloud" functionality of the device through which the work is rendered, accessibility for curriculum materials used in postsecondary courses can be far more complicated and involve much more work to ensure. Such materials greatly vary in the nature of their contents, and they cannot be considered accessible to students with print disabilities unless the particular contents have been properly "tagged" to allow such students to readily discern and differentiate among structural attributes such as headings and paragraphs, and to recognize and comprehend the nature of illustrations and other images as well as unique forms and symbols used in subjects as diverse as chemistry, music, and foreign languages. And this is only the beginning of the list of challenges faced by publishers in providing accessible instructional materials to students with print disabilities in postsecondary education.

The challenges that are presented to publishers of these materials were recognized in the Report of the Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities ("the AIM Commission"), which was chartered by Congress in Section 772 of the Higher Education Opportunity Act of 2008, Public Law 110-315. Specifically, Congress directed the AIM Commission to conduct a comprehensive study and report to Congress with recommendations, including possible technical solutions, to address problems in the timely delivery and quality of accessible instructional materials for postsecondary students with print disabilities.

As noted in the written statement for the hearing record which I submitted to the Subcommittee as part of my testimony, AAP supported the establishment of the AIM Commission, participated in its work, and endorsed its Report to Congress with recommendations in December 2011.

The Report is online at http://www2.ed.gov/about/bdscomm/list/aim/publications.html, and it addresses a number of matters that were referenced in the written AAP statement and discussed during the Subcommittee hearing, including the exemption in Section 121 of the Copyright Act that is popularly known as "the Chafee Amendment."

In its comprehensive examination of problems relating to the creation, availability and use of accessible instructional materials for postsecondary students with print disabilities, the Report noted the following relative to my exchange with Rep. Farenthold about the challenges faced by publishers – especially small publishers – in producing accessible curriculum materials for students in postsecondary education:

"A medium that provides access for one student may be a barrier to another. For example, a student who is blind might prefer to receive course content in a digital text format that could be subsequently rendered in refreshable or embossed braille, audio, or as enlarged text, but a student who is deaf would likely prefer a visual format. In short, there is no one media type that meets the accessibility needs of all students." (p. 22).

"<u>However, the Commission also recognizes that fully accessible instructional materials cannot always be produced through regular publishing/development processes.</u> Some works, such as embossed braille or tactile graphics, require significant added production costs to achieve accessibility. Further, these works may only serve limited markets of users—for example, certain publications that serve braille or tactile graphics users. In the case of these high-cost and/or low-incidence works, the Commission thinks it is unlikely that the open market will provide a meaningful solution, even over time. The Commission expects that the users of these works will continue to require the support of the federal government, as well as the services of specialized organizations and authorized entities that currently operate on a not-for-profit basis under the Section 121 copyright exception and DR/S and other service organization. <u>All publishers will face challenges when contemplating the production of high-quality accessible formats for out-of-print works and works of interest only to very narrow niche markets. This will be a greater challenge for small publishers and university presses.</u>" (p.23) (emphasis added)

"Although the market has made strides in the development and delivery of accessible instructional materials, not every digital file and product that enters the marketplace is accessible to users with disabilities due to a number of factors. Many times these inaccessible products come from individuals or companies that did not intend to publish for postsecondary education, i.e., small- and medium-sized publishers without the capacity or funds to produce accessible media; faculty and other content experts with little accessibility awareness who produce open source materials; and producers of materials only in print formats." (p.41)

"Even when market models mature there will be instructional materials that, for the foreseeable future, will not be available through market channels. These include older titles, titles from small- and medium-sized publishers, titles from non-commercial publishers and instructor-created materials. It is also important to recognize those areas where market-based options can, at best, be only part of the total solution. Market-based solutions will take time to become fully established, but as authoring and product development tools are improved and publishing services vendors become more accessibility savvy, smaller publishers will be able to make their offerings accessible. Regardless of whether AIM are provided via market-based distribution or by some other means, the needs of low incidence student populations will continue to require and to deserve special attention." (p.49) (emphasis added)

"Instructional materials range from textbooks and traditional print-based sources to PowerPoint presentations, course packs, web pages, videos, animations, audio and e-texts, among others. These materials may be developed by commercial publishers other content producers or as open educational resources (OER) created by course instructors, foundations, U.S. government agencies, or other content developers. Increasingly, these products are created and distributed digitally and more frequently they incorporate multimedia and rich media interactivity. The incorporation of these media and dynamics in a single product (a feature-rich electronic book, for example) complicates accessibility issue..." (p. 52)

"Providing accessibility in multimedia digital materials may require text equivalents for images and video, audio equivalents for text, text equivalents for audio and other transformations that are technically feasible and often can be economical to implement as products are being designed and developed. As an afterthought, however, accessibility features are expensive, time-consuming and, in some cases, impossible to effect. A growing number of college textbook publishers and providers of other types of instructional software for the postsecondary market are increasingly aware of the need to create materialsthat can be used by students with disabilities, and a number of them are taking steps to adjust their content offerings accordingly. (p. 52-53) (emphasis added)

"The Commission recognizes that, in many instances, the rights holder for a specific instructional work may not have additional rights beyond print publication allowing them to authorize digital reproduction and distribution of an entire work without first obtaining permission from third-party rights holders— including, for the use of prefatory text, photographs, or other component parts used by the publishers under agreements from other publishers, producers, historical societies, authors, or photographers." (p. 60)

"The belief that building accessibility into a digital product will create a potentially unrecoverable incremental cost can be a deterrent for some publishers who are considering embracing the market model by creating accessible versions of some of their titles for the commercial marketplace. If a publisher deems an incremental cost likely to prove unrecoverable, content producers are understandably likely to shy away from incurring that cost." (p. 62)

"Not only does content need to be accessible, reading delivery systems also need to be accessible. The number and kinds of inaccessible platforms present a challenge because otherwise accessible content might be rendered inaccessible by a given software platform." (p. 61)

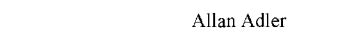
"A major inhibiting concern for the publishing community that produces AIM is the lack of a clear, authoritative definition of what constitutes a suitably accessible product or file in the postsecondary environment. Without an explicit, stable definition of formats and best practices governing AIM production, publishers are sometimes hesitant to incur the costs of making workflow changes that would enable them to produce more accessible products and files." (p. 62)

These last two excerpts from the AIM Commission Report highlight the importance of the proposed "Technology, Equality and Accessibility in College and Higher Education Act," or the "TEACH Act" (H.R.3505/S.2060), which was jointly crafted by AAP and the National Federation of the Blind ("NFB"). As explained in the written AAP statement, this legislation, which garnered more than 50 cosponsors in the House, would obtain Congressional authorization and funding to support the U.S. Access Board's development of accessibility guidelines for postsecondary electronic instructional materials, devices and systems used by students with print disabilities, as recommended by the AIM Commission. The guidelines will provide needed clarity in the marketplace to achieve consumer accessibility and non-discrimination objectives without erecting barriers to market entry or continued technological and commercial innovations in this area. We hope Members of the Committee will support our efforts to get this legislation reintroduced and enacted in the new Congress beginning next year.

The AIM Commission Report also discusses encouraging developments which, in the past three years since its release, have continued to show great promise in addressing the need for readily-available accessible instructional materials for postsecondary education. AAP's EPUB 3* Implementation Project, which is referenced in the written AAP testimony, is a specific example of how publishers, in 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, are continuing to pursue the most productive areas noted in the AIM Commission Report (see p. 66-67).

AAP welcomes the opportunity to discuss these matters further with interested Members of the Committee and their staff at their convenience.

Respectfully submitted,



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December 1, 2014

via e-mail

The Hon. Howard Coble, Chairman
c/o Joe Keeley, Chief Counsel
Subcommittee on Courts, Intellectual Property, and the Internet
United States House of Representatives

Re: Hearing: Copyright Issues in Education and for the Visually Disabled Submission for the Record

Dear Chairman Coble,

On behalf of the American Foundation for the Blind (AFB), the American Council of the Blind (ACB), Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), and the Hearing Loss Association of America (HLAA), thank you for your attention to the critical issues raised by the intersection of copyright and accessibility policy in the Subcommittee's November 19 hearing.[1] As authors, consumers, and users of copyrighted works, people who are blind, visually impaired, deaf, hard of hearing, deaf-blind, or print-disabled have a special interest in ensuring that the goals of copyright policy—primarily, to ensure a vibrant marketplace of creative works in America and worldwide—are balanced with the civil right of people with disabilities to access creative works on equal terms in accordance with Congress's vision in enacting the Americans with Disabilities Act, the Rehabilitation Act, the Telecommunications Act of 1996, the Twenty-First Century Communications and Video Accessibility Act, and other laws.

Accordingly, we offer our general support for the testimony submitted by Scott LaBarre on behalf of the National Federation of the Blind (NFB).[2] In particular, we agree that the Committee should focus on:

- Ensuring that copyright policy generally supports both personalized accommodations such as large-print, Braille, and other versions of copyrighted books *and* "mainstream" efforts to make copyrighted works universally accessible;[3]

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[1] *Copyright Issues in Education and for the Visually Impaired*, http://judiciary.house.gov/index.cfm/hearings?ID=AF01E71A-7482-4362-91F3-3840B3DAFE7F.

[2] *Testimony of Scott LaBarre* (Nov. 19, 2014) ("*LaBarre Testimony*"), http://judiciary.house.gov/_cache/files/91ef0aca-77ce-4a53-99ab-908b56b2c04a/labarre-nfb-education-testimony-111914.pdf.

[3] *Id.* at 3-4

- Enshrining the principles embodied in the *HathiTrust* case by clarifying that good-faith efforts to make works accessible is permissible under both the fair use doctrine and the Chafee Amendment to the Copyright Act;[4]
- Clarifying that institutions of higher education can make texts accessible to students in accordance with accessibility law without fear of incurring copyright liability;[5] and
- Ratifying the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.[6]

In addition, we urge the Subcommittee to explore exceptions and limitations to copyright law that facilitate accessibility beyond the context of ensuring that books are accessible to people who are blind, visually-impaired, or print-disabled. In particular, copyright issues have increasingly impeded the third-party creation of closed captions and video descriptions—critical efforts to make video programming accessible to the more than 54 million Americans with disabilities on equal terms.[7]

HathiTrust, the Supreme Court's holdings in *Sony* and the legislative history of the 1976 Copyright Act provide strong support for the proposition that making works accessible for people with disabilities is a non-infringing fair use.[8] Yet the potential for liability under copyright law has increasingly inhibited personal and institutional efforts to make works accessible, including through groundbreaking crowdsourcing systems that leverage the power of the Internet to make video programming accessible.[9] Copyright law has even been leveraged in attempts to derail Congress's own efforts to ensure accessibility, such the argument of video programming distributors to the Federal Communications

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[4] *Id.* at 5; *see Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

[5] *LaBarre Testimony* at 6.

[6] *Id.* at 8.

[7] *See generally* Blake E. Reid, *Third Party Captioning and Copyright* (Mar. 2014), http://g3ict.org/download/p/fileId_1008/productId_319; Mark Richert, *An Appropriate "Copyright of Way" for People with Disabilities: How Would You Describe It?* (Oct. 2013), http://afb.org/copyright; *HathiTrust* Amicus Brief of American Association of People with Disabilities, et al., *available at* http://instituteforpublicrepresentation.org/wp-content/uploads/2013/06/2013-06-04-Amicus-of-AAPD-et-al-Final.pdf

[8] *See HathiTrust*, 755 F.3d at 101-02 (citing *Sony v. Universal City Studios*, 464 U.S. 417, 455 n.40 (1984) ("Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying."); H.R. Rep. No. 94-1476, at 73 (1976)).

[9] *E.g.*, Reid at 3-4.

Commission that improving the quality of closed captions on Internet Protocol-delivered video in accordance with the principles of the Twenty-First Century Communications and Video Accessibility Act would violate copyright law.[10] As the Subcommittee is aware, the anti-circumvention measures in Section 1201 of the Digital Millennium Copyright Act magnify the potential for legal barriers to accessibility efforts when copyrighted works are encumbered with technological protection measures.[11] Finally, these problems are likely to recur, and with even greater consequences, as efforts to make Internet content accessible more broadly to people with cognitive and intellectual disabilities evolve.

While a full treatment of the panoply of accessibility and copyright issues that have arisen and will continue to arise in the coming months, years, and decades is beyond the scope of this filing, it is critical that the Subcommittee endeavor to develop a full record around the intersection of accessibility and copyright policy and ensure that the civil right of people with disabilities to participate in our democratic society in an information age is fully vindicated by copyright and disability laws. We stand ready to work with the Subcommittee to develop the contours of this intersection more fully.

* * *

Please don't hesitate to contact me if you have any questions regarding this submission.

Respectfully submitted,

/s/

Blake E. Reid

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303.492.0548

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[10] *See, e.g.*, *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, 26 FCC Rcd. 13,734, 13,745, ¶ 19 (Sept. 19, 2011), https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-138A1_Rcd.pdf.

[11] *See* Testimony of Mark Richert, Hearing on Chapter 12 of Title 17 (Sept. 17, 2014), http://judiciary.house.gov/_cache/files/c1d41f70-cb2b-4529-a85a-1e5620468971/09.17.14-testimony-afb.pdf; Blake E. Reid, *The Digital Millennium Copyright Act Is Even Worse Than You Think*, Slate (Mar. 2013), http://www.slate.com/articles/technology/future_tense/2013/03/dmca_copyright_reform_u_s_law_makes_digital_media_inaccessible.html.

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COPAA **The Council of Parent Attorneys and Advocates, Inc.**
Protecting the Civil and Legal Rights of Students with Disabilities and their Families

December 3, 2014

The Honorable Howard Coble
Chairman
House Subcommittee on Courts, Intellectual Property and the Internet
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Coble:

The Council of Parent Attorneys and Advocates, Inc. (COPAA) is writing to submit comments to the Congressional Record related to the subcommittee hearing held on November 19, 2014: *Copyright Issues in Education and for the Visually Impaired*. COPAA is an independent, nonprofit organization of parents, attorneys, advocates, and related professionals. Our members work nationwide to protect the civil rights and secure excellence in education on behalf of the 6.5 million school age children with disabilities including the young adults transitioning to post-secondary education. COPAA's mission is to serve as a national voice for special education rights and COPAA believes that every federal law should work together to help every individual with a disability, regardless of perceived severity, to achieve an independent, community-centered and quality life.

We write for three purposes: 1) to express support for comments made by Mr. Scott LaBarre regarding accessibility in the post-secondary setting including additional insight from our members (and their families) which represent both students with blindness as well as other print disabilities (e.g. dyslexia, visual processing disorders etc.); 2) to state that the standard for accessibility and a decision on fair use in this context is clearly articulated in the April 2014 Opinion by the Second Circuit in *Authors Guild, Inc. v. HathiTrust;* and, 3) encourage Congress to ratify the Marakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

With regard to accessibility in the post-secondary setting, COPAA fully agrees with testimony – both written and verbal – provided by Mr. LaBarre which reinforced the point that technology in and of itself is not the answer to access for people with disabilities. While technology does hold promise the mere fact that something is developed in a digital format does not ensure that it is accessible as required under the law to people with blindness and print disabilities. In fact, the current model of changing the format or retrofitting the file after it is developed to provide a reasonable accommodation to a person with a disability is an outdated model that must be addressed. As Mr. LaBarre stated before the subcommittee: "despite the fact that quite a great deal of digital content is in play, we [people with print disabilities] still have very little access to that information." COPAA agrees that if the original format in which e-books or other digital content is developed is not accessible, not only does the 'divide grow' but the rights afforded to people with disabilities under the Americans with Disabilities Act (ADA) as well as the Section 504 of the Rehabilitation Act of 1973 (Section 504) are in jeopardy on university and college campuses. We hope the subcommittee will continue this important dialogue and strive to promote further opportunities to rethink the copyright paradigm so that accessible digital content can be developed on the front end of the process, further reinforcing access and supporting ways for a market model to better thrive for people with disabilities on college campuses and elsewhere in society.

PO Box 6767, Towson MD 21285 Phone: (844)-426-7224 ***www.copaa.org*** **denise@copaa.org**

The Second Circuit has addressed the legal standard for provision of accessible version of copyrighted works in *Author's Guild, Inc. v. HathiTrust*. COPAA cannot emphasize strongly enough that access to the library collection is a fundamental component of the benefits offered by a higher education academic program. This is an important aspect of equal educational opportunity and comparable aids, benefits, and services under Section 504 and ADA. In fact, in June 2013 COPAA joined the Association of Higher Education and Disability (AHEAD) and several other organizations in filing an amicus brief in the United States Court of Appeals for the Second Circuit. The brief emphasized the policy reasons in federal law for affirming the district court decision that creation of digital copies of copyrighted works in nonprofit university libraries constituted fair use of the works under 17 U.S.C.S. § 107 since the use for scholarship and research was transformative with purposes of superior search capabilities rather than actual access to the copyrighted works, and facilitating access for print-disabled persons. In its opinion, the Court of Appeals for the Second Circuit in *Authors Guild, Inc. v. HathiTrust* held that the members of the HathiTrust Digital Library can "create a full-text searchable database of copyrighted works and provide those works in formats accessible to those with disabilities." Digitizing copyrighted works for the purpose of creating a full-text searchable database is not copyright infringement, because it is a "fair use" of those works that is protected by copyright law.

The June 2014 holding by the Second Circuit in *Authors Guild, Inc. v. HathiTrust* articulates in great detail why digitizing copyrighted works for the purpose of creating a full-text searchable database is not copyright infringement, because it is a "fair use" of those works that is protected by copyright law. Providing individuals with print disabilities full digital access to those copyrighted works — text and images — is also "fair use" under the Copyright Act and consistent with U.S. Supreme Court precedent. There is no reason to water down or revisit the findings by the Second Circuit in this case as the issue has been thoroughly litigated and decided.

Finally, COPAA is strongly in favor of the U.S. Congress ratifying the Marakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. We know the House does not weigh in directly on this; however, we urge you to share the importance of ratification with your colleagues in the Senate. The ADA and Section 504 express a national commitment to ensure that persons with disabilities can pursue on an equal basis "those opportunities for which our free society is justifiably famous" and no longer be consigned to second class citizenship. We thank you for your commitment to exploring how we make this an even better reality for individuals with disabilities across the United States.

We thank you for the opportunity to share our comments and look forward to your upholding the existing legal standard and assistance in assuring that continued dialogue on these important issues focuses on implementation and equal access.

Sincerely,

Denise Marshall
Executive Director

cc: The Honorable Jerry Nadler

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Statement For The Record of Sandra Aistars,
Chief Executive Officer, Copyright Alliance

Before The House Judiciary Committee
Subcommittee On Courts, Intellectual Property And The Internet

Copyright Issues in Education and
For the Visually Impaired

Nov. 19, 2014

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing artists, creators, and innovators across the spectrum of copyright disciplines, including membership organizations, associations, unions, companies and guilds, representing artists, creators and innovators, and thousands of individuals. We welcome this opportunity to submit testimony for the record of the hearing "Copyright Issues in Education and for the Visually Impaired." We do so to underscore the harm that results to authors and distributors of copyrighted works as well as to the public at large when such works are subject to unlicensed, widespread and systematic reproduction and distribution for non-transformative purposes, even in non-commercial contexts such as education.

This matter is currently at issue in the ongoing litigation between various publishers of educational materials and Georgia State University ("the Georgia State litigation"). [1] The Copyright Alliance submitted a brief as *amicus curiae* on this issue to the Eleventh Circuit. It is our belief that: (1) the courts must continue to apply

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[1] *See Cambridge University Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), *rev'd and remanded sub nom. Cambridge University Press v. Patton*, No. 12-14676 & 12-15147 (11th Cir. Oct. 17, 2014), *petitions for reh'g and reh'g en banc filed* (11th Cir. Nov. 7, 2014).

copyright law, including the fair use defense in a "media neutral" fashion to ensure a change from one reproduction and distribution method to another does not undermine the intent of the law; (2) when considering "potential market harm" from an unlicensed use, courts should consider harm to existing and developing licensing markets for the use; and (3) courts should not apply the fair use defense in an overly rigid and mechanical fashion or simplify it with bright-line rules because a failure to apply a nuanced analysis will have unintended consequences.[2] We summarize and reflect on arguments from that brief, as well as other views we have expressed in the context of the copyright review hearings here for the Subcommittee's consideration insofar as they are relevant to fair use in the educational and non-commercial context.

The Fair Use Defense is Intended to Promote, Not Hinder, Individual Creativity

The Copyright Alliance supports fair use, and is dedicated to ensuring that copyright law continues to incentivize the creation and distribution of creative works by providing robust copyright protections to authors as well as meaningful exceptions for fair use. When properly applied, fair use fosters creativity by enabling creators to use copyrighted works in ways that produce new cultural contributions that otherwise might not be possible. For example, fair use fosters creative and intellectual freedom, allowing individuals to produce transformative parodies or criticism of original works without requiring the authors of such transformative works to seek permission from the original copyright owners.[3] Fair

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[2] In the Georgia State litigation, we noted that the consequences of the district court's ruling would be particularly harmful to authors of illustrations, photographs, and individual chapters of collective works because the court's bright line rule allowing copying of up to a full chapter of a collective work could in many cases mean allowing the wholesale reproduction of an entire independently copyrightable contribution.

[3] *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) ("[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.").

use also fosters scholarly writing and research, permitting the use of short quotations of copyrighted works for purposes of comment.[4]

However, courts rightly and repeatedly have rejected attempts to use the fair use defense to permit the widespread, systematic reproduction and distribution of copyrighted works for non-transformative purposes, even where the use is for a non-profit or educational purpose.[5] The courts have emphasized that a non-profit educational use does not automatically trigger a holding of fair use, especially where the copyrighted material was used for the same purpose for which the copyright owner intended it to be used.[6]

This approach to fair use reflects the need for the defense to be balanced with the individual author's right to control whether and how her copyrighted work is reproduced and distributed. Robust copyright protections incentivize authors to create and disseminate new works, which expands the range of works available for use in educational settings. Just as importantly, robust copyright protections also provide "necessary incentives for scholarly publishers to create, invest in, and sustain the business models that make possible the dissemination of reliable, high-quality, standardized, networked, and accessible research that meets the differing expectations of readers in a wide-ranging variety of academic disciplines and fields

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[4] *See, e.g.*, *Sundeman v. Seajay Soc., Inc.*, 142 F.3d 194, 202-03 (4th Cir. 1998).

[5] *See, e.g. Marcus v. Rowley*, 695 F.2d 1171, 1177-78 (9th Cir. 1983) (rejecting fair use defense where a teacher copied and distributed excerpts from another teacher's copyrighted booklet); *Weissmann v. Freeman*, 868 F.2d 1313, 1326 (2d Cir. 1989) (rejecting fair use defense where professor copied and distributed his assistant's scientific paper for use in a review course); *Princeton Univ. Press v. Mich. Document Serv.*, 99 F.3d 1381 (6th Cir. 1996) (rejecting fair use defense where a copyshop reproduced and sold "course packs" containing unlicensed excerpts of copyrighted works).

[6] *See Marcus*, 695 F.2d at 1175 ("This court has often articulated the principle that a finding that the alleged infringers copied the material to use it for the same intrinsic purpose for which the copyright owner intended it to be used is strong indicia of no fair use."); *cf. Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 562 (1985) ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

of research."[7] Justice O'Connor understood this when she stated that copyright itself was intended to be the engine of free expression. "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create *and disseminate* ideas."[8]

I. Copyright Law And Fair Use Should Remain Rooted in Technology-Neutral Principles

The fair use doctrine is, and should remain, "technology neutral." The principle of technology neutrality recognizes that copyright law "must remain grounded in the premise that a difference in form is not the same as a difference in substance."[9] As the marketplace, including the marketplace for scholarly works, moves online, the underlying principles of copyright and fair use must remain firm. Prior to the digital revolution, Justice Stewart hinted at the importance of technological neutrality in discussing how to construe the Copyright Act, stating "[T]he ultimate aim is. . . to stimulate artistic creativity for the general public good. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."[10]

Simply put, the change from a paper medium to a digital medium does not affect the legality of an unauthorized use. Thus, where as in the Georgia State litigation, a "university-wide practice" of substituting licensed paper coursepacks for unlicensed digital coursepacks is instituted "primarily to save money," the fair use defense should not apply.

The principle of media neutrality is especially important today as new licensing mechanisms increasingly drive innovation in the digital economy. Users now have exponentially more options available, due to creative industries embracing newer licensing models, based on the availability of new technologies that offer consumers

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[7] Adam Mossoff, *How Copyright Drives Innovation in Scholarly Publishing*, GEO. MASON L. & ECON. RES. PAPER NO. 13-15, 13 (2013) (draft), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243264.
[8] *Harper & Row*, 471 U.S. at 558 (emphasis added).
[9] *Greenberg v. Nat'l Geographic Soc'y*, 533 F.3d 1244, 1257 (11th Cir. 2008).
[10] *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

access on more flexible terms. If courts ignore long-established fair use principles on the basis that digital formats should somehow be treated more leniently with respect to copyright infringement than analog or paper formats which have historically been licensed for reproduction and distribution in the educational context, the diminution of protection will disincentivize creativity and harm investment in developing new, more flexible means of distribution.

II. "Potential Market Harm" Includes Harm to Current And Developing Licensing Markets

In evaluating the fair use defense, and applying the fourth factor concerning harm to the market for the copyrighted work, courts must take into account the effect on the *potential* market, should a use become widespread. [11] If other universities were to forego paying license fees for the educational materials at issue in the Georgia State litigation, the effect on the publishing ecosystem would be drastic. The Sixth Circuit understood this when it refused to uphold a fair use defense for the unlicensed distribution of paper coursepacks.[12] In that case, the record showed that the plaintiff publishers were collecting permission fees of up to $500,000 a year. The court recognized that if copy-shops across the nation were to start acting as the defendants were in that particular case, the stream of revenue from licensing would shrivel, and the potential value of those scholarly works would diminish with it.[13] Now that a multitude of new licensing models and innovative business practices exist for disseminating works in ways that benefit the public, we should be careful not to undermine the further development of such services.

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[11] 17 U.S.C. § 107(4); *Campbell*, 510 U.S. at 590 ("It requires to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original") (quoting DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4]).
[12] *See Princeton Univ. Press*, 99 F. 3d at 1386-87.
[13] *See id.* at 1387.

Incorrectly applying the fair use defense in situations like the Georgia State litigation could have that result.

The Copyright Alliance does not take the position that legislative changes to fair use are necessarily required. However, in assessing how copyright is working in the educational context, Congress should keep in mind the considerable investments that go into producing the scholarly materials used by universities across the country. The creative efforts of authors of such works are self evident. Additionally, publishers also support and invest in ensuring works can reach their intended audiences. For instance, in 2009, almost 1.5 million articles in just the scientific, technical, and medical fields were published by over 2,000 different publishers.[14] Publishers such as Reed Elsevier and John Wiley & Sons have invested hundreds of millions of dollars in order to shift to digital publication of journals, as well as make accessible in digital formats articles previously published in print format.[15] It is therefore important to ensure that, even in an educational context, the fair use defense is not applied too broadly so as to allow schools simply to avoid obtaining a readily-available license. This is especially true in cases like the Georgia State litigation where the University could have access to over 1.3 million works for an annual cost of only $3.75 per student.[16]

Even if a license is not readily available for a given work in a given context, courts should not presume that there is no market value for the work in that form. Nor should courts require that on demand, multi-format licenses be available for every possible use. To do so would be particularly harmful to independent creators and small businesses who do not have the financial and technical resources to offer their works in every conceivable format or may have valid reasons for not making a

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[14] *See* Mossoff, *supra* note 7, at 17.
[15] *See id.* at 19.
[16] *Copyright Issues in Education and for the Visually Impaired: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of Allan Adler, General Counsel and VP of Gov't Affairs, Association of American Publishers).

work available at a given time or on a particular platform.[17] Copyright law has never required an author to provide access to works in the format best preferred by the requesting institution.[18]

III. Fair Use Cannot Be Defined by Bright-Line Rules and Presumptions

The fair use doctrine must be applied on a case-by-case basis, and facts must be analyzed in an appropriately nuanced fashion to achieve the balance the law envisions. Favoring bright-line rules and mechanical formulas over a nuanced approach will have significant unintended consequences.

For instance, in the Georgia State litigation, the lower court devised arbitrary bright-line formulas that failed to address the fact that each contribution to a collective work holds its own copyright "distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution."[19] Applying the court's suggested bright-line rules would have allowed copying of up to a full chapter of a collective work.[20] This could in many cases mean allowing the wholesale reproduction of an entire independently copyrightable contribution. Such a result would have a damaging effect on individual authors who make illustrations, photographs, and similar pictorial or graphic contributions available for use in a

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[17] For instance, artists may choose to withhold a work from a given platform or release works on different platforms in different timeframes, not because the works have no value or demand on a yet-to-be-authorized platform, but because the terms of use for a given platform may be inappropriate for the work at a given time, or because an exclusive release on a particular platform has been negotiated in order to finance the creation of the work, or to ensure the most successful marketing and distribution for the work.

[18] *See, e.g. Pac. and S. Co. v. Duncan*, 744 F.2d 1490, (11th Cir. 1984) ("Copyrights protect owners who immediately market a work no more stringently than owners who delay before entering the market."); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001) ("Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.").

[19] 17 U.S.C. § 201(c) (2011).

[20] *See Cambridge*, 863 F. Supp. 2d at 1234.

collective work. Such a bright-line rule undervalues the contributions of independent authors whose works constitute a separable whole.

Contributions to collective works often enrich our cultural, human, and scientific understanding in ways that cannot be defined formulaically. For example, a broad variety of scholarly books depend largely on visual works to convey information, including medical textbooks, field guides, surveys of art history, and books used in web design, architecture, animation, and motion picture production courses. Without images, those works would be of little purpose to their users. Applying the district court's bright-line rule, an institution could appropriate wholesale any photographs or images contained within an excerpt of a scholarly or educational book, notwithstanding that the photograph or image might be highly expressive and central to the work.

Individual authors whose works are appropriated through application of a bright-line rule such as the ones at issue in the Georgia State litigation may be discouraged from contributing their work to a larger scholarly work. This would ultimately harm the institutions seeking to access such works. The Supreme Court recognized the risk of unintended consequences inherent in setting bright-line rules when it stated that the fair use analysis cannot be "simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."[21]

Conclusion

Fair use in educational settings, when appropriately scoped, serves the long-standing goals of copyright. However, as new modes of distribution and new business models for licensing works develop, courts and Congress should take care that the law (including the scope of any exceptions and limitations) continues to appropriately incentivize the creation and dissemination of works by authors and publishers, which in turn ultimately benefits the public at large.

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[21] *Campbell*, 510 U.S. at 577.

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

HEARING ON COPYRIGHT, EDUCATION, AND VISUALLY IMPAIRED PEOPLE

STATEMENT OF THE LIBRARY COPYRIGHT ALLIANCE

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

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

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

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

I. EDUCATION

A. Section 110(1)

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

B. TEACH Act

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

The TEACH Act includes the following requirements:

i) the performance must not be of "a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks....";

ii) the performance must be of "reasonable and limited portions;"

iii) the performance must be made by, at the direction of, or under the actual supervision of an instructor as an "integral part of a class session....;"

iv) the transmitting institution must apply technological measures that reasonably prevent retention of the work by recipients for longer than the class session and unauthorized dissemination by recipients to others.

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

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

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

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

C. Fair Use

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

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

[3] http://www.librarycopyrightalliance.org/bm~doc/stfairusepsarev.pdf.

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

1. Georgia State University Electronic Reserves Case

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

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

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

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

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

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

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

2. The UCLA Streaming Case

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

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

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

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

3. Open Access and Open Educational Resources

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

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

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

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

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

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

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

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

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

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

[12] Simba Information, 2010, http://home.simbainformation.com/.

[13] http://www.morganstanley.com/institutional/research/.

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

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

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

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[14] David Wiley, et al., *Dramatically Bringing Down the Cost of Education with OER*, CENTER FOR AMERICAN PROGRESS (Feb. 7, 2012), http://www.americanprogress.org/issues/labor/news/2012/02/07/11167/dramatically-bringing-down-the-cost-of-education-with-oer/.
[15] Jonathan Band, *New Study: The Profitability of Copyright Intensive Industries*, INFOJUSTICE (June 17, 2013), http://infojustice.org/archives/29916.
[16] SPARC, *Open Education*, http://sparc.arl.org/issues/oer.

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

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

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

In 2012, California Governor Jerry Brown signed legislation[18] that would fund the creation by California universities of 50 open textbooks targeted to introductory courses. A California Digital Open Source Library would be created to host the textbooks, and the California Open Education Resources Council would oversee the book approval process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. No Need For Legislation

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

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

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

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

II. VISUALLY IMPAIRED INDIVIDUALS

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

A. The Chafee Amendment

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

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

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

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

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

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

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

B. Fair Use

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

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

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

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

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

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

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

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

C. The Marrakesh Treaty

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

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

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

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

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

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

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

[27] 17 U.S.C. § 121(a) (2011).

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

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

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

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

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

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

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

Article 7 provides that when a Contracting Party prohibits the circumvention of technological protection measures, it must take appropriate measures to ensure that this legal protection does not prevent beneficiary persons from enjoying the exceptions provided for in the Treaty. The Digital Millennium Copyright Act, 17 U.S.C. § 1201, prohibits the circumvention of technological protection measures, thereby triggering this obligation. Under section 1201(a)(1)(C), the Librarian of Congress may provide a three year exemption to the section 1201(a)(1)(A) prohibition on the circumvention of a technological measure that effectively controls access to a work. In four consecutive rulemakings, the Librarian has granted exemptions to the print disabled for the circumvention of software that disabled the text to speech function on screen readers. The most recent exemption, granted in 2012, meets the requirements of Article 7.[31]

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

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

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

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

November 18, 2014

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enabling of read-aloud functionality or interfere with screen readers or other applications or assistive technologies, (i) when a copy of such a work is lawfully obtained by a blind or other person with a disability, as such a person is defined in 17 U.S.C. 121; provided, however, the rights owner is remunerated, as appropriate, for the price of the mainstream copy of the work as made available to the general public through customary channels; or (ii) when such work is a nondramatic literary work, lawfully obtained and used by an authorized entity pursuant to 17 U.S.C. 121." Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260, 65,262 (Oct. 26, 2012) (to be codified at 37 C.F.R. pt. 201). LCA has just filed a petition with the Copyright Office to renew this exemption.

Statement Submitted for the Record
Subcommittee on Courts, Intellectual Property and the Internet
House Committee on the Judiciary
Hearing on Copyright Issues in Education and for the Visually Impaired, November 19, 2014

By the Association of Medical Illustrators (AMI)

Cory Sandone, President

Submitted on behalf of AMI by Bruce Lehman, Legislative Counsel

Background on AMI and the Medical Illustration Profession

Medical Illustrators are highly specialized visual artists who apply their creativity, scientific expertise and interdisciplinary skills to further medical and scientific understanding. Certification in the profession requires training in the fine art of pictorial illustration and completion of post graduate, advanced courses in human anatomy, pathology, molecular biology, physiology, embryology and neuroanatomy.

The Association of Medical Illustrators was established in 1945 as the principal professional association for medical illustrators. AMI establishes academic standards and guidelines that are the basis for the accreditation of graduate programs in medical illustration and board certification of qualified medical illustrators, publishes the leading scholarly journal in the field and represents its members on copyright and other public policy matters that directly affect the profession. Only four universities in North America offer an AMI-compliant, advanced degree program in biomedical illustration and visualization.

The work of medical illustrators is core to teaching and research in science and medicine. Medical illustration makes it possible to convey to students complex aspects of anatomy, biology and related scientific disciplines. Without quality medical illustrations and animations it would be more difficult to train doctors and scientists and for research scientists to convey to their peers and the public the details of their discoveries. Medical illustrators are problem-solvers, storytellers and innovators. They are artists in the service of science.

Thirty five percent of AMI's members are salaried employees of institutions such as hospitals, research laboratories, and pharmaceutical and medical devices companies. 65% are either sole proprietors or small business owners who work in studios with a handful of other illustrators. Without exception each illustration they create is a copyrighted work, and the Copyright Act is the primary guarantor of their ability to earn a living.

The universal contemporary experience of medical illustrators is that of substantial economic loss through unauthorized use of their works despite the most proactive efforts to protect their rights.

Education is the Primary Market for Medical Illustration

The subject of the Subcommittee's hearing is of vital importance to medical illustrators because educational texts and publications account for the vast majority of uses of their works. While medical illustration is sometimes used in advertising and marketing materials, even these uses are educational in that they convey visually the relationship of the product being marketed to human anatomy. With the exception of salaried illustrators employed directly by institutions, medical illustrators create works when commissioned to do so by an author or publisher requiring pictorial representations of concepts contained in a written text. Traditionally, when commissioned to create an illustration, the artists' work has been licensed only for use in the original publication and rights to re-use the work are reserved to the artist. This includes typical printed works but increasingly digital learning materials in the form of media-rich eBooks, interactive Apps, and online courseware including MOOCs are important licensing streams. Therefore any unauthorized re-use deprives the medical illustrator of an opportunity to receive compensation by licensing the re-use.

Fair Use and Medical Illustration

The scheduled witnesses who presented live testimony at the subcommittee's hearing discussed extensively the circumstances under which copying of a work or parts of a work might be fair use in the context of higher education. Jack Bernard, Associate General Counsel for the University of Michigan, expressed support for the Second Circuit's decision in *Authors Guild, Inc. v. HathiTrust*, 755 F. 3d 87 (2014) which held that digitizing and enabling full-text search is a transformative use, therefore fair use. Mr. Bernard emphasized that, even though the Second Circuit's decision permitted full text search, the lawful uses of such a search were limited to reproducing only small portions of the text of an article or other literary work. He argued that such full text searches actually promoted the authorized sale of complete works by guiding the searcher to works he or she might wish to buy, and he noted that his university annually spent considerable amounts of money on such purchases. He also noted that the University of Michigan purchases an annual collective license from the Copyright Clearance Center (CCC) for photocopying and electronic reproduction of online versions of academic works for re-use by faculty in course-packs or similar materials provided to students.

Allan Adler, General Counsel for the Association of American Publishers (AAP) expressed concern that cases such as *HathiTrust* could open the door to broader application of the transformative use principle that would hold copying of complete texts "transformative" in ways that would upset the careful balance between "free speech" uses allowed by fair use and wholesale copying that would undermine the incentives to authors provided in Article 1, Section 8 of the Constitution. AMI shares his concerns and urges the Subcommittee to consider them carefully. Mr. Adler discussed pending Georgia State University litigation, currently the subject of a petition for *en banc* review, where a panel of the 11th Circuit that found widespread use of e-reserves by Georgia State University faculty to create unlicensed course-packs constitutes infringement.

Roy Kaufman, representing the CCC, argued that his organization provided licensed re-use of full text works such as those that are the subject of the Georgia State litigation through its "Get-it-Now" license that enables academic re-use of the full text of "millions of articles."
AMI wishes to convey in the strongest possible terms that none of the arguments or factual circumstances set forth in the testimony of these three witnesses accurately describes the routine infringements by academic users of medical illustrations, animations, computer 3D models, photographs and videos.

First, the *HathiTrust* litigation was directed at infringement of written text, and the fair use finding in that case rests upon the fact that only limited excerpts of the full text of an article or other work can be used by a researcher using the HathiTrust database. However, unlike written text in a literary work, it is extremely rare for only a snippet of a medical illustration to be downloaded from the database and re-used. A simple search of Google Images will reveal that, unlike textual works where only a few phrases or sentences are revealed in the search, the entire image is reproduced in the case of illustrations and pictures.

Attached to this statement is a representative page from a Google Image search for an illustration of a human glenoid (shoulder). Even though the textual material from numerous publications discussing this anatomy consists only of a few phrases, the complete image of Scott Holladay's illustration entitled "Healthy Human Glenoid" is reproduced repeatedly in the Google Image screen display and can be copied at will without restriction. Most of these infringing reproductions of Mr. Holladay's work have stripped out the copyright notice and author identification drawn into the original illustration. Such massive infringement renders meaningless Mr. Holladay's ability to license re-use of his popular copyrighted image.

Mr. Holladay's example also demonstrates very clearly the special problems for medical illustrators and other visual artists created by any attempt to apply a broad orphan works exception to their works. Unlike other authors, copyright notices and author identification can be easily stripped from images that find their way into the digital Internet environment so that nearly everything created becomes an orphan the moment it is uploaded to an online database by an infringer.

Theoretically, a comprehensive secondary use license such as the CCC's "Get-it-Now" license described by Mr. Kaufman could provide a means of authorizing licensed, educational use of AMI members' illustrations. However, as explained below, the CCC does not provide such an opportunity and, in fact, has actively refused to discuss the matter with the two organizations that have specifically been authorized by AMI member copyright holders to offer licenses on their behalf.

The CCC, Collective Licensing, and Visual Artists

AMI is unaware of any instance in which CCC has ever shared royalty revenue from its *non-title specific*, blanket licenses with copyright holders of visual content of the publications it licenses. This includes fine artists, illustrators and photographers whose work is included in books, magazines and newspapers pursuant to contracts that limit use to the sale of the actual printed publications. This is the overwhelming majority of visual content found in any

publication. The only significant exception would be periodicals such as newspapers that employ staff photographers and illustrators whose rights vest in the publisher as works-made-for-hire.

In this regard the CCC is different from its counterpart reprographic rights organizations in other countries. The practice elsewhere is to have an overall reprographic rights licensing and collecting organization comparable to the CCC, but also to have subsidiary collecting societies that represent the various categories of individual rights holders such as visual artists. The umbrella society collects the licensing fee from institutional users and then distributes a percentage to the subsidiary societies who then remit royalties to their individual rights holder members. In these countries as much as 25% of total royalties are distributed to rights holders in the visual content of the published works covered under the over-all blanket licenses.

Two *fine arts* collecting organizations exist in the United States. The largest is the Artists Rights Society (ARS) which is authorized by rights holders to license the reproduction of copies of over 50,000 artists. The Visual Artists and Galleries Association (VAGA) is a smaller organization, primarily representing American fine artists who have not chosen to use ARS. However, in comparison with their counterpart foreign societies and the CCC both ARS and VAGA are very small. The primary reason for their small size is that, unlike their foreign counterparts, they have been unable to share in the blanket licensing revenue of the larger publishers' society, the CCC. They license only on a case-by-case, title-specific basis and do not issue reprographic licenses.

Efforts by *professional illustrators*, including AMI, to form a collecting society that would issue reprographic licenses have culminated in the formation of the American Society of Illustrators' Partnerships (ASIP) which has brought together over 4,000 individual artist rights holders in the various branches of the profession (medical illustrators, architectural illustrators, natural science illustrators, editorial illustrators, cartoonists, etc.). However, as in the case of ARS and VAGA the CCC has refused to discuss with ASIP sharing any portion of its licensing revenue. Since, unlike ARS and VAGA, ASIP has not yet generated revenue, it must rely on the limited personal resources of its individual members to cover operating expenses and has never had the capability to engage in the active assertion of its members' rights. Therefore, ASIP rights holders, including members of AMI have now authorized ARS to represent them in attempts license their works in a manner that will actually generate royalties to be paid to artist copyright holders.

CCC marketing materials and its website clearly imply that its "annual copyright license" covers virtually all content in the publications it licenses. Its website states that the "coverage provided by the annual license" permits licensees to "photocopy articles," "scan paper copies of works," "distribute copies internally," and "download and print portions of electronic works," among other representations. This clearly implies that the visual content – which is often a very significant portion of a publication – is covered under the license. CCC's promotional materials directed at higher educational users state that the CCC Annual Copyright License "provides content users campus-wide with the copyright permission they need in a single multi-use license." CCC's online databank of publications included in its annual license contains works in which visual art is an indispensible component.

Of particular relevance to the Subcommittees hearing on educational uses of copyrighted works, CCC purports to license scientific, technical, and medical (STM) publications, which tend to be

copied disproportionately to their actual paid circulation. This is because copies of journal articles are widely circulated within medical institutions such as hospitals and research centers by a central library with a subscription providing both print and electronic journal resources. So, for these very expensive STM publications the CCC license has a disproportionately larger value than for mass-market periodicals. Medical illustration is an indispensable part of the content of such publications. The value to physicians and scientists is meaningless without this visual content. CCC returns considerable royalty revenue to publishers of scientific and technical journals. But, not a cent is returned to visual content rights holders and CCC refuses to enter into any discussion with ASIP or ARS involving the sharing of royalty revenue received for the works of AMI members.

It is AMI"'s understanding that CCC shares some of the royalty revenue it collects with sister publishers' collecting societies in other countries. This represents the license revenue attributable to foreign publications. Similarly, foreign publishers' societies remit revenue attributable to American publishers to the CCC for distribution. When CCC first developed these reciprocal relationships, some foreign societies representing visual artists remitted payments based on use of the works of American visual art rights holders directly to CCC because they were receiving revenues based on American usage from their umbrella publishing societies.

However, early on a new organization, the Authors' Coalition, was then formed to directly claim the payments. It consists of a group of disparate organizations that, at best, could be characterized as trade associations, clubs and a self-described labor union. AMI is not aware of a single medical illustrator who has authorized **one of these organizations to license or to receive licensing revenue on his or her behalf.**

When the Authors' Coalition was formed it was to be governed according to an "operating agreement." This published agreement specifically states that the remittances received from foreign subsidiary collecting societies are to be used to "assist in the further development of collective licensing programs" for rights holders – in other words for subject matter specific collecting societies that would actually distribute royalties to the copyright owners as is the practice in the countries providing the funds. To date, two decades after the creation of the Author's Coalition, not a penny has been used to create a mechanism for distributing non-title-specific licensing revenue – foreign or domestic – to rights holders even though publicly available records reveal that the amounts repatriated to the Authors' Coalition and divided among its constituent associations are in the range of several million per year.

One Author's Coalition Member Organization, the Graphic Artists Guild, (which represents itself as a labor union) has used its financial might created by the voluntary remittances of foreign visual artists' societies to silence all efforts by the actual rights holders from collecting these foreign royalties by suing visual artists in New York State Supreme Court. This suit, alleging defamation and tortious interference with GAG's business, was defended *pro bono* by attorneys supplied by New York Volunteer Lawyers for the Arts. The outcome was a dismissal of all charges alleged by GAG. The charges of defamation were dismissed out of hand in the judge's written opinion on the ground that "truth is a defense." Regretfully, while Volunteer Lawyers for the Arts provided counsel to defend against the GAG lawsuit, this representation did

not extend to providing legal counsel for rights holders to challenge, and halt, GAG's receipt of their copyright royalty income.

Neither the Authors' Coalition nor any of its members have ever challenged CCC's practice of remitting royalty revenue from its licenses solely to publisher copyright holders, and CCC does not interfere with Authors Coalition practices. CCC's refusal to acknowledge visual art rights holders in its domestic licenses and Authors' Coalition payment of repatriated reprographic income earned by American visual artists through overseas licenses to the Authors Coalition own member associations has deprived these artists of the financial resources necessary to defend and assert their copyrights.

Therefore, AMI strongly recommends that the Subcommittee exercise its oversight authority to examine carefully CCC's licensing practices before accepting its representations that its blanket licenses, such as the Get-it-Now license, actually offer higher educational institutions a meaningful mechanism to clear copyrights for re-use by faculty and students and whether CCC has made any meaningful attempt to incorporate rights holders other than publishing companies into its royalty distribution activities.

The Need for Special Attention to the Needs of Visual Artists

As noted above, AMI members – like nearly all illustrators – are often sole proprietors or small business owners working alone or with a handful of colleagues in a business that centers on obtaining commissions from clients who are usually large companies or institutions, such as large universities, hospitals and research organizations. In contrast to other classes of creators, such as those in the music field, who have meaningful collective organizations to police their copyrights and to collect and distribute royalty payments for uses covered under the exclusive rights provided in the Copyright Act, AMI members have no effective means of participating in the copyright system or receiving the incentives provided to them under the Constitution. And, organizations purporting to represent them in copyright matters such as the CCC and the Authors' Coalition distribute royalty income paid by users to non-rights holder organizations who are not authorized to receive such payments, and have used this financial empowerment to actively assure that their unauthorized collection of royalties goes unchallenged.

Should the Subcommittee consider possible changes to the Copyright Act after the 114th Congress convenes next year, AMI strongly urges that it consider the special needs of its members in any revision effort.

Appendix 1: Infringement of Healthy Glenoid, used with permission Scott Holladay.

Statement for the Record of
Andrew Shore, Executive Director
Owners' Rights Initiative
Before the House Committee on the Judiciary's Subcommittee on Courts, Intellectual Property and the Internet
Hearing on "Copyright Issues in Education and for the Visually Impaired"
November 18, 2014

On behalf of the businesses and associations who are members of the Owners' Rights Initiative, a coalition dedicated to promoting and protecting the First Sale Doctrine, I respectfully submit the following statement for the record.

The first sale doctrine is essential to keeping down the costs of education to taxpayers and students. In *Kirtsaeng v. Wiley*, a textbook publisher claimed that a person who had legally acquired a less expensive foreign-edition of a book did not have the right to resell the book in the United States – only the publisher's authorized distributor had the right to resell it. The Supreme Court ruled otherwise, agreeing with the Owners' Rights Initiative motto "You Bought It, You Own It," and holding that the owner of the book could resell it, lend it, or give it away.

The first sale doctrine permits the Internet to facilitate the purchase and rental of used textbooks, thereby expanding on the long-standing marketplace provided by campus bookstores. Online platforms, such as Half.com, enable the selling of books between students at different institutions – helping to keep down the ever-rising costs of higher education. The Internet has also facilitated the renting of textbooks. Companies, such as Chegg, offer rentals of textbooks between 30 and 180 days at a discount from the purchase price. The publisher still collects revenue on the first sale of the book– just like they would for any physical good.

While the first sale doctrine is operating appropriately in the textbook market, it is not operating as well in the market for the technology purchased by educational institutions at all levels. This is because manufacturers claim that they are only licensing the software essential to the operation of hardware, and that the purchaser of the hardware thus does not have the first sale right to resale the software along with the hardware. This constrains the secondary market in hardware such as servers, computers, and telecommunications equipment.

Constraining the secondary market harms educational institutions that purchased new hardware by reducing or eliminating the product's residual value. Educational institutions are prevented from recouping some of their investment by reselling these goods on the secondary market, and reinvesting those funds to meet evolving needs. Constraining the secondary market also harms

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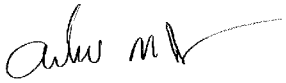
those educational institutions and school districts with reduced budgets which would want to purchase used equipment to provide a better education for their students.

In the educational context, the manufacturers' use of the software "license" as a means of restricting the resale of hardware will result in higher taxes, less money spent on students, or possibly even both. Furthermore, this issue impacts our way of life far beyond educational institutions. With a growing trend of physical goods relying on software to operate, this approach will put the United States on a course to become more of a renting society and less of an ownership society.

The first sale doctrine must be preserved both in educational institutions, as well as society at large.

Respectfully submitted,



Andrew M. Shore
Executive Director
Owners' Rights Initiative

January 2, 2015

BY EMAIL ONLY

Mr. Joe Keeley
Ms. Olivia Lee
Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515-6216

Re: Reply to Additional Questions for the Record – Hearing on Copyright Issues in Education and for the Visually Impaired, November 19, 2014

Dear Mr. Keeley and Ms. Lee:

I write in response to Committee Chairman Goodlatte's letter to me dated December 19, 2014, enclosing a set of questions for the record of the above Hearing from Subcommittee Chairman Coble.

First, I thank Chairman Coble for his questions.

With respect to Chairman Coble's first question, yes, most of CCC's licensing and permissions services include medical and life sciences journals.

With respect to the second and third questions, CCC does in fact have authorizations from persons and entities other than publishers to grant permissions and licenses to use copyrighted works. As I stated during my appearance before the Subcommittee, CCC's services (unlike the services of many of our counterpart organizations in other countries), are entirely based on voluntary, opt-in, market-driven, non-exclusive contracts that rightsholders sign with us. Many of those CCC-participating rightsholders are publishers who, under their own contracts with other rightsholders – including without limitation authors and creators of visual content as well as learned societies – combine rights and works from various contributors into the final published works that they make available to users. Other participating rightsholders may be individuals themselves. For example, before I joined CCC as an employee, I registered one of my own books for licensing to users through CCC's services for academic institutions.

Those rightsholders who contract with CCC convey to CCC the rights necessary for us to issue licenses on their behalf. We issue these licenses to users who seek to reproduce (or otherwise

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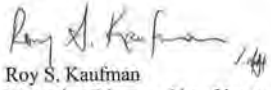
www.copyright.com

use as authorized) the published works in accordance with the terms of our services. Out of the license fees that we collect from users, CCC pays the rightsholders who contract with us based on the usage information that we collect, and those rightsholders pay any other rightsholders to whom they may owe a share of the money received from us. In this way, revenues flow in accordance with contract. This is driven by the private ordering of business relations that contracts perform in the U.S. economic system. In short, our licenses are open to non-publishers, and payment is based on usage and contract.

Sincerely yours,



Roy S. Kaufman
Managing Director, New Ventures

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