

Item 1. Commenter Information

My name is John Edwin Miller. I am a US Library of Congress Certified Braille Transcriber and the Founder/Director of the (very) small IRS 501c3 Non-Profit 121AuthEnt.org, Inc. that was structured to meet the requirements of an 'Authorized Entity' under Section 121 of the US Copyright Act

Item 2. Proposed Class Addressed

Proposed Class 9: Literary Works Distributed Electronically – Assistive Technologies

“This proposed class would allow circumvention of access controls on lawfully made and acquired literary works distributed electronically for purposes of accessibility for persons who are print disabled. This exemption has been requested for literary works distributed electronically, including e-books, digital textbooks, and PDF articles.”

Item 3. Statement Regarding Proposed Exemption

The following quote is excerpted from the First Round response by the AFB, ACB, TLPC, & LCA

http://copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_AFBetal_Class09.pdf

at Pages 9-11:

Congress made clear in the 1976 Copyright Act that reproducing inaccessible literary works for use by people who are blind, visually impaired, or print disabled is a noninfringing use of those works. ...

Even without the Chafee Amendment, reproducing inaccessible literary works in accessible formats for use by people who are blind, visually impaired, or print disabled is a noninfringing fair use of those works.

Converting inaccessible literary works into accessible and useable formats is also a noninfringing fair use of those works. The legislative history of the 1976 Copyright Act makes clear that converting inaccessible literary works for use by people who are blind, visually impaired, or print disabled is a quintessential example of fair use. * 46

Footnote * 46: H.R. Rep. No. 94-1476, at 73 (1976); S. Rep. No. 94-473, at 80 (1975).

From the same HR 94-1476 paragraph from which was both quoted and referenced above Footnote 46 and as the 'Committee' in the above 2nd Circuit Ruling quote to follow:

“For the most part, such copies and phonorecords are made by the Library of Congress’ Division for the Blind and Physically Handicapped *with permission obtained from the copyright owners*, and are circulated to blind persons through regional libraries covering the nation.”

(My italics)

From 1976 until the Chafee Amendment was enacted in 1996 — and drafted with the help of the Authors Guild v. HathiTrust intervener National Federation of the Blind (NFB) — the Library of Congress itself through its National Library Service (NLS) was *still* required to obtain permission from the Publisher to make an access copy.

Pursuant to above, the following is excerpted from Senator John Chafee’s 1996 Senate Floor remarks upon the introduction of what became known as the Section 121 ‘Chafee Amendment’:

The National Library Service selects the books to reproduce in these specialized formats.

Frequently, the National Library Service issues request after request only to wait months for a response from the publisher. These delays are not because the publishers have a desire to withhold permission; it is simply a low priority. They just set it aside.

There are still 17 books from the 1995 best seller list for which permission is still pending.

This is a very simple amendment. This says groups that produce specialized formats for the blind *no longer* are required to gain permission from the copyright holder before beginning production.
(My italics)

The HathiTrust Digital Library (HDL) was comprised of 80 college, university, and nonprofit member institutions at the time of the court filings.

From the Second Circuit Court of Appeals Ruling No. 12 - 4547
Page 28 Line 24:

‘In light of its understanding of the market (or lack thereof) for books accessible to the blind, the Committee explained that “the making of a single copy or phonorecord *by an individual* as a free service for a blind persons [sic] would properly be considered a fair use under section 107.” Id. We believe this guidance supports a finding of fair use in the unique circumstances presented by print - disabled readers.”
(My italics)

From 'The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.

What is INDIVIDUAL?

As a noun, this term denotes a single person as distinguished from a group or class, and also, very commonly, a private or natural person as distinguished from a partnership, corporation, or association ...

The Second Circuit apparently sees no discrepancy in recognizing that the HathiTrust and its 80+ Member institutions and their

respective libraries should be collectively and properly equated as 'an individual' as per the language 94-1476 House Copyright report.

The following is from the House testimony of James Gashel, then Director of Governmental Affairs, NFB:

STATEMENT OF THE NATIONAL FEDERATION OF THE BLIND

The following testimony was submitted on February 8, 1996 by the National Federation of the Blind to the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, United States House of Representatives.

The amendments to the Copyright Act now before you in the form of H. R. 2441 give recognition to what I am saying. Section 3 of the bill proposes to establish a *new limitation* on the exclusive rights of copyright owners which would apply to the reproduction and distribution of nondramatic literary works in formats which blind and visually impaired people can use. The provision would allow a nonprofit agency to reproduce and distribute an otherwise copyrighted work without regard to section 106 of Title 17, United States Code.

For example, it would not be a copyright infringement under this section for a nonprofit agency to convert a printed, published work into Braille without first asking for permission and waiting to receive it

Subsection A of our proposal would allow authorized entities, as we define them later, to reproduce or distribute copies or phonorecords of previously published, nondramatic literary works in specialized formats, as later defined, for exclusive use by blind or other persons with disabilities. Under this subsection it would not be an infringement of copyright for the Library of Congress or the American Printing House for the Blind, for example, to proceed immediately with the conversion of a printed book into Braille as soon as they could feasibly arrange to do so. This section would not require copyright permission and would therefore avoid the lengthy waiting time that is often involved. (My italics)

So when the National Federation of the Blind gave testimony to a House hearing in 1996, saying that the proposed legislation which became the Chafee Amendment was being presented as a '*new limitation*' and that reproduction in copyrighted material in accessible format without the consent of the rights holder would *no longer* be an infringement, there was no mention at any time by either the NFB or Senator Chafee that this amendment was a clarification, 'safe harbor', or otherwise an embodiment of already existing fair use legislation.

What the people in the AFB et al Round 1 Submission as above are, in effect, now saying is that the Library of Congress itself, for the period of 20 years from the 1976 Copyright Act until the Chafee Amendment was enacted in 1996, needlessly sought permission to reproduce and distribute an accessible format version of copyrighted material when their lawyers *should* have advised them that such obtaining permission of the copyright holder was not necessary under the existing provisions of Section 107 'Fair Use' as enacted in 1976.