

November 13, 2009

Maria Pallante  
Associate Register, Policy & International Affairs  
U.S. Copyright Office  
Office of Policy & International Affairs  
Copyright GC/I & R  
P.O. Box 70400  
Washington, DC 20024

Dear Ms. Pallante:

Please accept my attached comments in response to the Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons with Disabilities published in the Federal Register on October 13, 2009.

Sincerely,

Dr. George Kerscher  
1203 Pineview Dr.  
Missoula, MT 59802  
Tel: 406/549-4687  
E-mail: Kerscher@montana.com

George Kerscher is Secretary General of the DAISY Consortium, Chair of the ANSI/NISO Z39.86 Specifications for the Digital Talking Book Maintenance Advisory Committee, Senior Officer, Accessible Technology for Recording for the Blind and Dyslexic (RFB&D), Chair of the Steering Council of the Web Accessibility Initiative (WAI), Chair of the EPUB Maintenance working group, and a member of the Board of Directors for the International Digital Publishing Forum (IDPF), which is the standards organization for eBooks.

Within the WIPO Stakeholders Platform, Dr. Kerscher co-chairs the Enabling Technologies working group and co-chairs the Trusted Intermediaries working group.

The views expressed herein are my own and do not necessarily reflect the views of the organizations I am affiliated with.

## Preamble

The copyright treaty proposed by Brazil, Paraguay, and Ecuador underscores the need to address the book famine that persons who are blind or print disabled experience today. An international copyright treaty that provides exceptions should be supported by the United States as part of a comprehensive solution. Because of the broad support for this treaty, publishers are now proposing a licensing approach between Rights Holders and what is called "Trusted Intermediaries", which in the US context would be what we call authorized entities.

This “Twin Track approach” provides a more comprehensive solution than a copyright exception alone. However, the establishment of positive relationships between Trusted Intermediaries and Rights Holders would not have been initiated, nor will it be sustained without the international copyright exception in place. The international copyright exception should be the fallback when licensing fails. The twin track approach provides a proper balance in the struggle to provide fully accessible published materials to persons who are blind or print disabled.

The twin track approach is described in the white paper, " Copyright Exception and Trusted Intermediaries: Two Concepts that work together." I have included this white paper as Appendix A to this document. It can also be found on the WIPO web site at:

[http://www.visionip.org/stakeholders/en/trusted\\_intermediaries.html](http://www.visionip.org/stakeholders/en/trusted_intermediaries.html)

## Question 1.

How would the treaty proposal interact with United States law under Title 17 or otherwise?

### Comments:

**A. Population served:** Currently US law is inconsistent regarding persons who are blind or otherwise print disabled and their use of copyrighted materials. Section 504 and the Chafee amendment (121) and IDEA have different criteria regarding the population who can use alternative materials available to persons with disabilities. US law should be revised to be consistent across these regulations.

The Proposed WIPO Copyright exception defines a population consistent with the Convention on the Rights of Persons with Disabilities, which the President has signed and which the Congress will consider at some point in the future. I feel that the population should be clarified to address the functional limitation, not a medical diagnosis, which is costly to diagnose and which is not required in education. I use the following definition to describe the print-disabled population: “A person who cannot effectively read print because of a visual, physical, perceptual, developmental, cognitive, or learning disability.”

Persons with Learning disabilities should not be excluded. Persons with learning disabilities who can read effectively would not have a reason to seek out services they do not need. Therefore, simply referencing persons with learning disabilities who cannot effectively read print should be sufficient.

When considering the population served, persons who are deaf or hearing impaired may need to use alternative versions of printed text. Only 50% of persons who are born deaf ever learn to read beyond a fourth grade level. Developing digital publishing technology is expected to include a sign language video

track that could make text accessible to this population. Here too using the functional definition of persons who cannot read print effectively addresses the population that should be served by an exception.

In addition, teachers, parents, and others providing training and support should have sufficient access to the alternative materials to provide assistance to the person with a print disability.

**B. International Exchange:** Today Section 17 is silent regarding the cross border exchange of materials between organizations serving persons with disabilities. The proposed WIPO Copyright exception would establish the clear right to exchange materials across national borders. US law should be clarified to allow the import and export between authorized entities (Trusted Intermediaries).

**C. Specialized formats:** Authorized entities should continue to be allowed to produce alternative versions suitable for the blind and print disabled population without regard to the format. The original intent of this stipulation was to keep the titles intended for persons with disabilities apart and separate from the commercial products. This can be accomplished by limiting the access to the alternative formats and by technological safeguards.

EPUB is the dominant commercial format for digital publications and this format has been universally designed to be fully accessible to persons with disabilities and the mainstream population. Today (November 13, 2009) there are no commercially available versions of digitally published copyrighted works that are accessible through "Assistive Technology" (AT), such as screen readers. However I fully expect that this will change in the near future. There are no commercial applications that read EPUB that are accessible. There are applications that read EPUB that are fully accessible, but the mainstream DRM keys are not being shared with these companies. EPUB could become accessible overnight and many are working to make this happen. In addition to text-based works there are "audio books" on music CD or in MP3, which are accessible. The question then is, "Should authorized entities be allowed to create alternative versions under exception if an 'accessible' version is commercially available?"

In my opinion, authorized entities should continue to have the flexibility to determine if a commercial version is fully accessible to the population they serve and if the organization determines that the commercial version does not serve the population, they should be allowed under the copyright exception to create one that will work effectively. For example, a commercial audio book on music CD (74 minute) might contain many CDs. Technically this is accessible, but if this is a piece of literature for a student, the format prevents the student from using it effectively. For example, chapter navigation, go to page, speed up and slow down, and bookmarking, etc. are not supported. (These functions are all supported in DAISY versions.) The authorized entity may determine that the student cannot use the music CD version and compete successfully in school and should therefore be allowed to create a version with these features. There is nothing that prevents the commercial company from creating a DAISY version and introducing this into the marketplace. If that version is commercially available, then the authorized entity should be encouraged to purchase or license the fully accessible version and add it to their collection. For example, if the format needed by the person is braille and it is only available in

audio or e-text, then the authorized entity should continue to have the flexibility to produce the braille version. This applies to other accessible formats as well.

Another consideration which supports this aspect is that many persons with disabilities, especially the older adults do not have computer skills that would allow them to use an accessible commercial digital version. For example, if an EPUB version and accessible reader was available, it would still require the use of a computer with AT to access the information. An authorized entity would still need to provide the version that simplifies the complete user experience and makes the content available to this portion of the disabled population.

**D. Contracts or agreements that defeat copyright exceptions:** In efforts to collaborate with publishers and obtain files suitable for conversion into accessible formats, authorized entities may be asked to agree to limit the legitimate use of the accessible materials they produce. The contract or agreement may narrow the population to be served, i.e. only people who have purchased a copy of the book, or restrict the distribution area, i.e. not to be exported outside the USA. I feel the copyright exception should trump these restrictions in agreements and contracts that undermine copyright exceptions. This would have the major beneficial effect of creating contracts that are consistent with copyright exceptions. We would then have a licensing and copyright exceptions regime that can be consistently implemented nationally and internationally.

## Question 2.

How would the treaty proposal interact with the international obligations of the United States?

### Comments:

The Convention on the Rights of Persons with Disabilities requires that Information and Communication Technology (ICT) is made accessible to every extent possible. It is clear that the published information and the technology used to read the content is intended to be made accessible. The organizations serving persons with disabilities have the most experience in this area. Cooperation between the publishing community, authorized entities, and the Assistive Technology industry should be encouraged so that commercial publications are accessible directly at point of sale.

However, there will always be publishers who choose not to make their publications accessible. A copyright exception will be needed as a fallback in these cases. In addition, even if the publication is accessible, further enhancements may be needed to augment the commercial version to make it fully functional by a person with a disability. For example, highly graphical content will require figure descriptions, tactile drawings, or physical models. These would need to be produced and shared internationally through exceptions. Finally, there are situations where current technology does not meet the needs of persons with disabilities and the provision of alternative materials through authorized entities will be the mechanism to make it accessible until the technology is developed to meet the needs of persons with print disabilities.

The combination of collaboration between rights holders and Trusted Intermediaries (authorized entities) and the application of a copyright exception as a fallback is an example of how ICT can be structured to provide the highest level of access possible.

### Question 3.

What benefits or concerns would the treaty proposal create?

#### Comments:

A. The treaty would have immediate benefit to persons with print disabilities, because organizations producing materials in foreign countries could share this content through the existing authorized entities in the USA.

B. The treaty would have immediate benefit to authorized entities in the USA, because they could share content in other countries and collect modest fees for the provision of these materials. These modest fees should help offset the costs of production. It is expected that the organizations in the USA would be a net exporter.

C. Persons in the U.S. come from a variety of language backgrounds. Having materials from other countries and in multiple languages would enrich the lives of people in the USA.

D. Protecting copyrighted materials transferred to other countries would be accomplished through the Global Accessible Library Initiative. The monumental work of developing a Global Library (GL) serving persons with print disabilities has been championed by the DAISY Consortium and the IFLA Libraries Serving Persons with Print Disabilities (IFLA-LPD). Its origins can be traced to the first Global Library conference hosted by Microsoft in 2004. The intervening five years have seen technological developments and the growth of DAISY digital publishing in national organizations and libraries.

The Global Library Initiative (<http://www.daisy.org/projects/global-library/>) is a collaborative activity between the DAISY Consortium (<http://www.daisy.org>) and the IFLA section, Libraries Serving Persons with Print Disabilities (IFLA-LPD) (<http://www.ifla.org/en/lpd>).

As the Global Accessible Library moves forward a set of best practices and agreements between the Trusted Intermediaries will be developed. It has been proposed that Publishers and rights holders be included in the governance of the Global Accessible Library. It is in the best interests of everybody for materials distributed either through licensing or through copyright exceptions to be secure and monitored. It is this closed network of well respected libraries and organizations that will safeguard the intellectual property of the copyright owners.

## Question 4.

Other possible courses of action that would facilitate access by “blind, visually impaired, and other reading disabled persons.”

### Comments:

A. Within the WIPO Stakeholders Platform, a proposal is being tabled that would help the evolving Global Accessible Library of Trusted Intermediaries. This effort should also be supported in the USA so that existing authorized entities (which are Trusted Intermediaries in this context) can benefit in similar ways. For example, publishers can be encouraged to make accessible versions of their digital products. In this way libraries could purchase/license digital versions of commercial products and grow their collections without the high cost of manufacturing the accessible version.

B. With a copyright exception, we may find that the organizations serving the print disabled population add value to commercial products by providing much needed descriptions of graphical content and tactile representations of these graphics necessary to understand the associated text. Partnerships between publishers and the organizations serving persons with disabilities should be encouraged. Working together is a wonderful approach. A summit should be organized that brings the leading authorized entities and publishers together to examine practical mechanisms to ensure access to information by all. This is in support of the Stakeholders Platform approach. However, publishers who do not cooperate should understand that the copyright exception must be used as the fall back to licensing; this is the reason for exceptions.

C. The publishing processes can be improved to facilitate the provision of files to authorized entities in their efforts to make accessible versions. Integrating accessible publishing into normal publishing process should be funded. Open source tools, techniques, and training should be provided in an governmental effort to help the publishing industry modernize.

D. The U.S. should take an active role in developing the Global Accessible Library Initiative. Systems need to be put in place to support monitoring, reporting, and the development of licenses and agreements that benefit the publishing community and the Global Accessible Library.

E. Standards development is a time consuming and costly process. Today within the IDPF, the organization producing the EPUB standard, and within NISO in the revision to the ANSI/NISO Z39.86 commonly called the DAISY standard, only a few qualified people from the non-profit disability sector are participating. It would be wonderful if funding could be identified to assist the non-profit organizations currently participating in this work. The commercial interests are well represented, but the socially responsible, non-profit, disability focused organizations are struggling to keep up with the developments. Only a handful of people are technically qualified to participate and these resources are terribly over extended. We need to support the existing efforts and also work to develop new people who can work in the standards arena.



## Appendix A

# Copyright Exception and Trusted Intermediaries: Two Concepts That Work Together

---

Short White Paper

By George Kerscher, Secretary General, DAISY Consortium

Draft: May 27, 2009

### Introduction

The concept of an international copyright exception similar to that proposed by the WBU for the WIPO meeting in November 2008, and the concept of a set of relationships between publishers and trusted libraries and organizations whose mission is to serve persons with disabilities are in perfect harmony. This short white paper will attempt to lay out the rationale and bring those that see these concepts as opposing together.

**Principle:** These concepts are in harmony as long as it is understood that the long term solution is the direct purchase of fully accessible versions of published materials by persons with disabilities and by libraries who serve persons with disabilities. If this white paper is read with this underlying principle in mind, then the harmony I seek to explain will be easier to grasp.

### Trusted Intermediaries

Understanding that everybody is looking forward to the time when all digital publications are available at the same time and at the same cost to persons with disabilities and to the population as a whole. The libraries who are currently serving persons who are blind and print disabled can be trusted to work towards this common vision. We also understand that it will take time and work to get to this state. At present, voluntary licensing is quite limited and complex, covering a tiny fraction of published works. Building trust, which is essential, and negotiating licenses with rights holders can be time consuming and take a great deal of limited staff resources. We will need to clarify how Trusted Intermediaries can be identified and clearly describe their qualities, characteristics, and acceptable behaviors to build the relationships we all need.



Trusted Intermediaries want to purchase or license accessible versions from the Rights Holder. The current controversy in the USA over the use of Text-To-Speech (TTS) in Amazon's Kindle underscores the clarifications that need to take place, or we will never be able to reach our ultimate goal. The Trusted Intermediary only wants to produce an accessible version if it cannot be directly purchased from the rights holder or obtained from another Trusted Intermediary who has already produced it.

The Trusted Intermediaries want to work with the publishers and rights holders to produce books and other publications that are not yet accessible through the current publishing process. Many different agreements can be worked out that are mutually beneficial, including the publisher obtaining the accessible version and making it available for sale. Of course, this must be financially equitable to both parties, creating a win-win situation.

Trusted Intermediaries have extensive knowledge of persons with disabilities. This puts them in an excellent position to provide guidance to publishers as the various reading systems are considered or developed. Testing and modification recommendations are only a few of the services a publisher can look to their Trusted Intermediaries to provide. In addition, we expect Trusted Intermediaries to identify and help to develop additional markets the traditional publisher has not considered.

### **International Copyright Exception**

First, with an international copyright exception, there would be extensive immediate gains. Primarily, it would be possible for existing libraries and service organizations to share content they produced across national borders. It is expected that this exchange would be a library-to-library model. The libraries in each country would continue to distribute content to their patrons under their current national laws. The only change is that the libraries would legally be able to share their productions of accessible versions with each other. This immediate gain is based on the collections that have been developed by these libraries through the years. For example, a library in country X could make available to library Y in another country a title based on an agreement that covers costs and has the provision that further distribution is not allowed. The agreement would allow library Y to distribute to their patrons, but no broader. It is expected that library X would want to have similar agreements with other cooperating libraries. This process is focused on titles that are not commercially available from publishers directly; this is for titles that the library has had to manufacture in an accessible format. Having this exception available as quickly as possible will benefit people who are starving for information.

Second, it is expected that an international copyright exception will be needed in the foreseeable future whenever publishers do not see a market value in producing accessible versions of their publications themselves.

Finally, an exception is needed so organizations can provide supplemental materials, such as figure descriptions, tactile graphics, and braille versions even when the publisher is selling a fundamentally accessible version. This service is in support of the publisher's product and makes it more attractive,

especially to educational institutions that are purchasing digital products, but must have the supplemental materials to fully engage students with disabilities.

## **Conclusion**

From this perspective the concept of an international copyright exception is in harmony with the concept of having a Trusted Intermediary relationship to build upon. The cost to a library to produce an accessible version can be drastically reduced if acceptable computer files are transferred from the publisher to the Trusted Intermediary. The tools and technology that support this interoperability must be jointly developed between publishers, Trusted Intermediaries, technology vendors, and standards organizations. The file transfer from publisher to Trusted Intermediary must happen with clear agreements in place so that there are no surprises. Within these agreements a mechanism for reporting on the activities of the Trusted Intermediary would be expected. At the same time, a publisher who is unresponsive to their local Trusted Intermediary should understand that this Trusted Intermediary may produce accessible versions of their publications and legally distribute the materials to their patrons and to other Trusted Intermediaries throughout the world, but this is still in a trusted controlled environment that protects the rights of everybody.