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RE: Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons With Disabilities.

Pursuant to the Notice of Inquiry and Request for Comments published by the U.S. Copyright Office in the Federal Register, 74 FR 52507 (daily edition, October 13, 2009), the Association of American Publishers ("AAP") submits these Reply Comments regarding possible solutions to enhance the accessibility of copyrighted works for the benefit of the blind or other persons with disabilities, including specifically the objectives and text of a draft treaty prepared under the auspices of the World Blind Union and proposed formally at the May 2009 session of the World Intellectual Property Organization's Standing Committee on Copyright and Related Rights.

As the principal national trade association of the U.S. book publishing industry, AAP represents some 300 member companies and organizations that include most of the major commercial book and journal publishers in the United States, as well as many small and non-profit publishers, university presses and scholarly societies. AAP members publish literary works in hardcover and paperback formats in every field of human interest, including trade books of fiction and non-fiction; textbooks and other instructional materials for the elementary, secondary, and postsecondary educational markets; reference works; and scientific, technical, medical, professional and scholarly books and journals. In addition to publishing in print formats, AAP members are active in the ebook and audiobook markets, and also produce computer programs, databases, Web sites and a variety of multimedia works for use in online and other digital formats. AAP advocates the public policy interests of its members, including the protection of intellectual property rights in all media; the defense of both the freedom to read and the freedom to publish at home and abroad; the advancement of education; and, the promotion of literacy and reading.

Introduction

AAP has already expressed its views in this proceeding on the international copyright law implications of the proposed draft treaty by joining with other copyright industry organizations in Comments submitted by Steven J. Metalitz of Mitchell Silberberg & Knupp LLP.

After reviewing the Comments filed by others in this proceeding, I submit these Reply Comments on behalf of AAP in order to briefly make several observations regarding the proposed draft treaty and the work in progress related to "Trusted Intermediaries" and cross-border transfer of copyrighted content under the aegis of the "WIPO Stakeholders' Platform."

The Draft Proposed Treaty

It is beyond dispute that key elements and concepts in the proposed draft treaty are based upon several of the more notable regulatory initiatives undertaken within the United States over the past fifteen years to address the special needs of individuals who are blind or have other print disabilities that make it difficult or impossible for them to read books and other printed materials. This is made clear in the Comments I submitted on behalf of AAP on April 21, 2009 (hereinafter "AAP Comments") in response to an earlier Notice of Inquiry and Request for Comments published by the U.S. Copyright Office in the Federal Register, 74 FR 13,268 (daily edition, March 26, 2009) concerning facilitation of "access to copyrighted works for the blind or persons with other disabilities." See http://www.copyright.gov/docs/sccr/comments/2009/adler.pdf.

Those AAP Comments identify, among other things, the respective roles of the Chafee Amendment (17 U.S.C. Section 121); Bookshare, Inc., and certain provisions of the IDEA Amendments of 2004 (P.L.108-446) in addressing accessibility needs of individuals with print disabilities. AAP's involvement in the creation and advancement of each of these initiatives is briefly described in the AAP Comments, along with some of the problems encountered and important lessons learned by AAP in these efforts.

Although the proposed draft treaty and the "Trusted Intermediaries" project each borrow key elements and concepts from these U.S.-based initiatives, the effect of such borrowing is more to "adapt" rather than "adopt" major aspects of these initiatives. Comments that assert the proposed draft treaty "closely mirrors" the Chafee Amendment, see *Comments of Recording for the Blind & Dyslexic (RFB&D)* at page 1, or "is similar to" that statutory exception, see *Comments of the American Council of the Blind (ACB) and the American Foundation for the Blind (AFB)* at page 8, and *Comments of the Library Copyright Alliance, the Electronic Frontier Foundation (EFF) and the Chief Officers of State Library Agencies (COSLA)* at page 4, are misleading upon a comparison of the scope and effect of the two copyright exception schemes; indeed, these same Comments belie such contentions as they describe in varying detail the numerous significant ways in which the proposed draft treaty substantively departs from the Chafee Amendment by vastly expanding the types of copyrighted works to which it applies (Article 16 of the proposed draft treaty), the scope and size of the eligible beneficiary class (Articles 2 and 15), the formats in which the copyrighted works may be reproduced and distributed without the copyright owners' permission (Article 16), and who may exercise that privileged ability to make and distribute "accessible" versions of such works (Article 4).

Advocates of the proposed draft treaty who assert that its "main benefit" will be "to extend the benefits of the enlightened approach demonstrated by the United States in adopting" the Chafee Amendment, see *Comments of Benetech* at page 1, should note how far beyond that objective this initiative would actually reach. For example, nothing in the Chafee Amendment purports to authorize the circumvention of technological protection measures (Article 6), allow "contrary" contractual provisions to be considered null and void at will (Article 7), or address the issue of commercial use of "orphaned [sic] works" (Article 12). Nor do any of the provisions in the U.S. statutory exception to copyright purport to:

- self-certify its consistency with a host of international agreements (Article 3);

- apply to *unpublished* copyrighted works (Article 16), uncopyrightable database contents (Article 14), and copyrighted works that are already available from the copyright owner or an authorized third-party in accessible form (Article 4);

- allow for-profit entities to engage in commercial transactions with respect to copies made under its privileged exception, subject only to vague conditions; e.g., that the work at issue is not "reasonably available in an identical or largely equivalent format" (which, in developing countries, would depend upon its availability at "affordable" prices), the copyright owner receives notice of such use, and "adequate remuneration to copyright owners" is (uncertainly, at best) "available" (Article 4(c)(3) and (d)(2)); and,

- authorize the importation and exportation of "any version of a work or copies of the work," where any person (apparently not necessarily the exporter) in one country "is entitled to possess or make" such work or copy, and the importer of that work or copy is "able" (perhaps even if not actually *authorized*) "to act" under the terms of its privileged exception. (Article 8).

More importantly, advocates who advance this view of the draft proposed treaty should carefully review the legislative history that is referenced in the earlier-submitted AAP Comments to refresh their understanding of the fundamental economic premise that underlies the Chafee Amendment and was clearly understood by its supporters – including the AAP, the National Federation of the Blind (NFB), the American Foundation for the Blind (AFB), the American Printing House for the Blind (APHB), Recording for the Blind and Dyslexic (RFB&D), and the U.S. Copyright Office – at the time of its enactment (i.e., "blind and physically handicapped readers" did not constitute "*a viable commercial market*" for publishers). If they do, they will also note that the definitional limitations in the Chafee Amendment, which were explicitly informed by that underlying premise, have since come under extreme pressure from disabilities advocates to be reinterpreted or revised so that the exception may serve a different and exponentially larger eligible beneficiary class (i.e., persons with "learning disabilities" rather than just "print disabilities"), with "specialized formats" that closely resemble or embrace standard technologies used by individuals without any disabilities, rather than special equipment that is not generally available to the public and "exclusively for use" by persons with print disabilities. See *AAP Comments* at page 7-8.

Advocates for such reinterpretation or revision of the Chafee Amendment no doubt seek these changes with good intentions in an effort to serve individuals whose needs stem from disabilities that were considered outside the parameters of "print disabilities" when the Chafee Amendment was crafted and enacted. Nevertheless, they should understand that extending its scope in this manner – or attempting to do so on a global basis in the form of the draft proposed treaty – would completely detach the copyright exception from the circumstances and rationale that justified its creation and shaped its operational provisions. This is a significant point because it is the key to fully appreciating the inherent tension that exists between maintaining and expanding the "regulatory" exception approach to accessibility, on the one hand, and developing and advancing a "market-based" incentives approach to accessibility, on the other.

Virtually all disabilities advocates, in this proceeding and elsewhere, have recognized that the "long term solution" for serving the accessibility needs of individuals with disabilities is "the direct purchase of fully accessible versions of published materials by persons with disabilities and by libraries who serve persons with disabilities." See, *e.g.*, *Comments of Dr. George Kerscher* at page 1 of Appendix A. Unfortunately, such advocates also publicly despair over the inability of publishers and other commercial distributors of copyrighted works to achieve this marketplace goal in the short term, and even characterize the situation as a "classic example of market failure" that can be attributed primarily to the unwillingness of the rightsholders in such copyrighted works to take necessary actions. See, *e.g., Comments of Benetech* at pages 1-3.

Book publishers generally are not insensitive to the accessibility needs of individuals with print disabilities, and the failure of the industry *as a whole* to make great strides toward achieving accessibility in the marketplace cannot fairly be attributed to any single cause or reason. As noted in the earlier Copyright Office proceeding, AAP has been a key partner working with the U.S. Congress, the U.S. Department of Education, State legislatures and educational agencies, and a variety of advocacy groups for individuals with print disabilities to advance some of the more notable "regulatory" initiatives undertaken in the United States to address these special needs, but always with an eye toward the ultimate goal of transition to a "market-based" incentives solution. See *AAP Comments* at pages 2-8. In the meantime, many AAP members have individually worked in other ways to increase the number of published books that are available in accessible formats, including through cooperative agreements with Bookshare. See, *e.g., "First Partnerships with Prestigious University Presses Add Scholarly and Award-Winning Titles to Bookshare Library,"* Press Release of July 22, 2009 (University of Chicago Press, University of California Press and New York University Press agreed to provide Bookshare with digital book files that will contribute thousands of new scholarly works to the Bookshare collection); *"U.S. Trade and Textbook Publishers Partner with Bookshare,"* Press Release of April 29, 2009 (Two dozen publishers signed agreements to provide digital content, which over time will add tens of thousands of books in accessible formats to the Bookshare collection). See also http://bookshare.org/about/communityPublishers#PublishingPartners for a current listing of Bookshare's publishing partners.

Of course, not all book publishers see partnership with Bookshare, or providing files to any other "authorized entity" under the Chafee Amendment, as in their best interests, given the publishers' preference for maintaining control over their valuable digital book files and some continuing disputes regarding the qualifications for "authorized entity" status. The current inability of the

publishing industry *as a whole* to transition to a "market-based" incentives solution is largely due to the multidimensional nature of the industry, its current economic problems, and the growth of online book piracy. However, the diverse accessibility needs of individuals with print disabilities, and the frequently divergent viewpoints of the leading disabilities advocacy groups regarding how best to address those needs, also contribute significantly to the difficulties of achieving that transition.

The "book publishing industry" is really not a single industry; it is comprised of distinct publishing sectors in which the markets, products, delivery formats, production processes, licensing practices, and copyright rights differ significantly from one sector to another. Moreover, while some publishing sectors may appear to be dominated by a relatively few of its largest publishers, the U.S. book publishing industry overall (according to the most recent obtainable U.S. Government figures) consists of over 3,000 firms, with more than three-quarters of these firms having fewer than 20 employees and more than two-thirds having fewer than 10 employees. See 2006 County Business Patterns, U.S. Census Bureau, www2.census.gov/econ/susb/data/2006/US_6digitnaics_2006.xls. Because the various publishing sectors are populated by so many different business models and so many "Mom & Pop" - sized firms, it should not be surprising that many publishers still have not made the transitions in book production technologies and processes, marketing strategies and practices, and contractual rights and licensing policies that are necessary to satisfy accessibility needs directly at the point of sale. For book publishers, as a practical matter, there simply is no "one size fits all" approach to achieving this goal.

At the same time, the accessibility needs of individuals with respect to works published in each of the various publishing sectors differs significantly depending on such variables as the nature of the needed publications, the intended use of such publications, the resources available to acquire and use such publications, and the presence and nature of social and technical infrastructures involved in facilitating such acquisition and use. For example, the highly *decentralized* nature of the manner in which reading materials are selected and acquired for higher education class curricula, as contrasted with the highly *centralized* nature of those processes in the elementary and secondary education context, means that there is no "one size fits all" approach to satisfying accessibility needs for educational use of copyrighted works by students. See *AAP Comments* at pages 4-6.

Similarly, it is far from clear that any single approach to resolving accessibility needs makes sense for use of copyrighted works by individuals in distinct business, employment, entertainment, family, or other personal contexts outside that of educational use by students. Sorting through the challenges of addressing accessibility needs in these diverse contexts is further complicated by the fact that the various advocacy groups for individuals with print disabilities frequently have different institutional views that often lead them to pursue different practical and political agenda in efforts on behalf of their constituencies. Such considerations complicate the ability of book publishers and other copyright owners to determine what advice or guidance from these advocates should be followed regarding "best practices" and the means for achieving maximal results in seeking both regulatory and market-based approaches to address accessibility needs.

The inherent tension that exists between the "regulatory" exception approach to accessibility, on the one hand, and a "market-based" incentives approach to accessibility, on the other, is apparently overlooked by some advocates of the draft proposed treaty who insist that the former approach is needed as a "fallback" because "there will always be publishers who choose not to make their publications accessible," see *Comments of Dr. George Kerscher* at page 4, or, even more disparagingly, because the publishing industry "consistently fails to make accessible materials available for sale, even when it's possible and there's a high degree of willingness on the part of people with disabilities and schools to pay for such materials." See *Comments of Benetech* at page 1. Their reasoning, however, is flawed.

In 1996, book publishers accepted the need for the "regulatory" approach of the Chafee Amendment because, under the circumstances as they were then understood, the acknowledged absence of a market for commercial books within the defined community of individuals with print disabilities meant that the statutory exception would not interfere with the copyright owners' right and ability to exploit their works in the commercial market. Beyond merely "accepting" the underlying rationale for the Chafee Amendment, AAP actively supported enactment of the statutory exception because its operational provisions were directly shaped by that rationale, ensuring that the statutory exception would not be applied in ways that adversely affected an existing market for book publishers.

Today, increasing calls for reinterpretation or revision of the key operative terms in the Chafee Amendment create the potential for the statutory exception to be applied in circumstances where an expanded eligible beneficiary group and increasingly product-like privileged formats combine to signal the advent of a viable market for accessible versions of copyrighted works. As previously noted, such changes would detach the Chafee Amendment from its original justifying premise; even as unimplemented demands, they cast a pall over publishers' incentives to make the investments necessary to produce those accessible versions for the market. Under these circumstances, publishers not unreasonably hesitate and wonder whether they can expect such a market to flourish when potential customers would still have the option of relying upon a statutory exception to get an accessible version of a work *without having to pay for it.* Under the proposed draft treaty, where it appears that privileged copies could be made even where accessible versions were commercially available, copyright owners would have understandable doubts about the wisdom of investing in the production of accessible versions for the market.

Trusted Intermediaries and the WIPO Stakeholders' Platform

The "Trusted Intermediaries" (hereinafter "TI") concept, as it is currently under development by a Working Group of the WIPO Stakeholders' Platform, proposes a variation on the "authorized entity" concept of the Chafee Amendment to address the needs of individuals with print disabilities on an international, cross-border basis. AAP has not participated directly in the Working Group's TI meetings and discussions, but is a member of the International Publishers Association (IPA), which is a participant in the Working Group.

While only in the early stages of developing intermediary "high-level principles" guidelines and pilot projects, the Working Group's approach to the TI initiative demonstrates that the

Stakeholders' Platform is a far more flexible and likely productive approach for WIPO's efforts on accessibility issues than is the draft proposed treaty.

That said, AAP hopes that the Working Group will act deliberatively in developing the TI initiative and carefully consider the U.S. experience with the "authorized entity" model of the Chafee Amendment as it has been utilized in a number of contexts, including the effort to address the needs of elementary and secondary education students with print disabilities under the IDEA Amendments of 2004. Two issues in particular should be highlighted for study.

TI Status and Accountability – The first issue concerns the need for clear enforceable criteria and an identified mechanism for determining who qualifies for "TI" status and how TIs will be monitored and held accountable for the proper exercise of their responsibilities. Unfortunately, the drafters of the Chafee Amendment took a "bare bones" approach to establishing and implementing the role of an "authorized entity," providing only a minimal and somewhat vague statutory definition of the criteria for claiming such status. This approach, in the absence of any subsequent judicial interpretation or application of the statutory exception, has fueled a long-simmering dispute regarding whether entire educational institutions or only their "disabled student services" (DSS) offices – lately being referenced as "disabilities services provider" (DSP) offices – qualify for "authorized entity" status under the Chafee Amendment. In the context of the IDEA Amendments of 2004, the absence of legislative and judicial instruction has generated a separate dispute over whether a recognized or asserted "authorized entity" under the Chafee Amendment qualifies for access to electronic files deposited by publishers in the National Instructional Materials Access Center (NIMAC), despite the fact that the statutory language which established the NIMAC provides only for State or local education agencies (or their properly designated "alternative media providers") to have such authority.

Apart from the absence of clear enforceable qualifying criteria and a related mechanism for making status determinations, neither the statutory language of the Chafee Amendment nor its scarce legislative history provides any instruction or guidance regarding the issues of oversight and accountability for anyone claiming the status of an "authorized entity." In the IDEA context, the U.S. Department of Education has, in practical terms, declined to accept such responsibility. Without proper oversight and accountability mechanisms, it is difficult to see how the TI concept – with the significant additional complexity of its application in an *international* context – can win the confidence and participation of publishers who would be willing to share digital book files with such entities. To borrow President Reagan's signature comment regarding U.S. relations with the Soviet Union, "trust, but verify" must be the accepted standard of conduct for holding "trusted intermediaries" accountable or there will be no way of ensuring that such entities live up to their nominal promise.

Contractual Relationships – Despite the evident understanding of the importance of contractual relationships to the implementation of the TI concept that is reflected in the Intermediary Guidelines developed by the Working Group, there is relatively little useful experience with contractual relationships in the "authorized entity" concept under the Chafee Amendment to provide guidance for implementation of the TI concept on such matters. Moreover, publishers considering the merits of the TI initiative will no doubt be quite unsettled to learn that some leading advocates of the TI initiative consider it to be "in perfect harmony" with the draft proposed treaty, notwithstanding the latter's gratuitous and legally dubious inclusion of a

provision vaguely stating that any contractual provisions "contrary" to the regulatory exception which would be established by the treaty "shall be null and void." (Article 7) See *Comments of Dr. George Kerscher* at Appendix A. It would appear that Article 7 would apply not only to the "contractual relationships" between publishers and TIs under the Working Group's conception, but also to contractual agreements that publishers may have with authors and licensees that inform the terms under which the publishers can offer accessible digital book files to TIs for their use in delivering accessible content to qualifying end users. It is inconceivable that the TI scheme, with its acknowledged dependency on contracts allowing the controlled use of the files transferred by publishers, could succeed in attracting participation by publishers in a legal environment that would inherently create such uncertainty about the validity of the publishers' contracts.

Conclusion

AAP believes that consideration of the draft proposed treaty by the WIPO Standing Committee on Copyright and Related Rights will be a counterproductive and, ultimately, futile exercise that will needlessly draw WIPO attention and resources away from possibly developing better alternatives through the work of the Stakeholders' Platform.

Although its members still reserve judgment regarding the "trusted intermediaries" concept, AAP believes the Working Group should continue to develop this initiative through the pilot project stage and evaluate its merits for continued development.

In addition, AAP suggests that the Stakeholders' Platform consider the relatively low cost and highly effective approach of establishing an online clearinghouse for works in accessible market versions or specialized formats. In the U.S., for example, the Louis Database, housed with the American Printing House for the Blind, acts as a clearinghouse for tens of thousands of titles of accessible materials listed for sale by publishers and value-add organizations. See http://www.aph.org/ablouis.htm. This simple tool has facilitated communications between content providers and end users for years, with great success, and appears to be a method of distribution has not yet been attempted but might succeed at the international level.

Respectfully Submitted,

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