

**Testimony Submitted by  
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**For the Hearing on  
“Copyright Issues on Education and for the Visually Impaired”**

**Hosted by the  
Judiciary Committee  
United States House of Representatives**

**Washington, D.C.**

**November 19, 2014**

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**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 Chafee, 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.