

Before the
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Judiciary Committee
Subcommittee on Courts, Intellectual Property, and the Internet
Hearing on Chapter 12 of Title 17
Testimony of Mark Richert
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Chairman Goodlatte, Ranking Member Conyers, Chairman Coble, Ranking Member Nadler, and Members of the Subcommittee, thank you for inviting me to speak about the experiences of the blind and visually impaired communities with the anti-circumvention measures in section 1201 of the Digital Millennium Copyright Act (DMCA). My name is Mark Richert, and I am the Director of Public Policy at the American Foundation for the Blind (AFB), a non-profit organization dedicated to removing barriers, creating solutions, and expanding possibilities so people with vision loss can achieve their full potential.¹ I'm grateful to Professor Blake Reid, Molly McClurg, and Mel Jensen at Colorado Law's Samuelson-Glushko Technology Law and Policy Clinic (TLPC) for their assistance in preparing this testimony.²

For 93 years, the AFB has sought to expand possibilities for the tens of millions of Americans with blindness or vision loss. We champion access and equality and stand at the forefront of new technologies and their ability to create a more equitable world for people with disabilities.

More particularly, we have worked for nearly a century to break down societal barriers and eliminate discrimination by achieving equal access to the world of copyrighted works. Helen Keller, the AFB's most famous ambassador and a noted deaf-blind author, activist, and teacher, once wrote about the importance of access to books for people who are blind or visually impaired:

In a word, literature is my Utopia. Here I am
not disenfranchised. No barrier of the senses
shuts me out from the sweet, gracious

¹ For more information, see <http://www.afb.org/info/about-us/1>.

² For more information, see <http://www.colorado.edu/law/academics/clinics/technology-law-policy-clinic>.

discourse of my book-friends. They talk to me without embarrassment or awkwardness.³

The advocacy of Helen and others led to the widespread adoption of braille, which transforms written text into raised dots readable by people who are blind or visually impaired. In 1952, Helen spoke of the critical role that access to braille versions of books and other written works played in affording people with disabilities access to the societal benefits of the copyright system:

[T]hese raised letters are, under our fingers, precious seeds from which has grown our intellectual harvest. Without the [Braille dot system, how incomplete and chaotic our education would be! The dismal doors of frustration would shut us out from the untold treasures of literature, philosophy and science. But, like a magic wand, the six dots of Louis Braille have resulted in schools where embossed books, like vessels, can transport us to ports of education, libraries and all the means of expression that assure our independence.⁴

The adoption of braille ran in parallel with the development of other transformative accessibility technologies for copyrighted works. In 1878, Thomas Edison suggested that the newly developed phonograph player would lead to the use of “[p]honographic books, which will speak to blind people.”⁵ Blind inventor Robert Irwin helped adapt the phonograph to operate at slower speeds and offer longer play times.⁶ The efforts of Irwin and others led to the adoption of accessible “Talking Book” recordings of printed books and magazines in the 1930s and later gave rise to a long-running staple of the music industry: the long-play record.⁷ The Talking Book also foreshadowed the rise of the audiobook and modern text-to-speech and screen reader technologies, which are now poised to facilitate

³ Helen Keller & Annie Sullivan, *The Story of My Life* 117-18 (1924).

⁴ Helen Keller, Speech Honoring Louis Braille at the Sorbonne, Paris (June 21, 1952), <http://www.afb.org/section.aspx?SectionID=86&DocumentID=4620>.

⁵ United States Library of Congress, *The History of the Edison Cylinder Phonograph*, <http://memory.loc.gov/ammem/edhtml/edcyldr.html>.

⁶ Frances A. Koestler, *The Unseen Minority: A Social History of Blindness in the United States*, <http://www.afb.org/unseen/book.asp?ch=Koe-10>.

⁷ *Id.*

access to textual works for people with visual, print, and cognitive disabilities.

Access to copyrighted audiovisual works has also been a long-standing priority for people with disabilities. When “talkies” hit American theaters in the late 1920s, deaf and hard of hearing people who had previously enjoyed subtitled silent movies lost one of their primary sources of entertainment and information.⁸ However, the arrival of the talkies led the deaf Hollywood actor Emerson Romero, cousin of Hollywood star Cesar Romero, to splice subtitles into the frames of feature films, documentaries, and short subjects for use by schools and clubs for deaf and hard of hearing people.⁹

The efforts of Romero and others gave rise to the modern captioning movement, which has resulted in the captioning or subtitling of a significant proportion of television and Internet-delivered video programming and motion pictures.¹⁰ Romero’s work foreshadowed the efforts of Gregory T. Frazier, a publisher and writer who conceived the idea of narrating visual elements of video programming during natural pauses in dialogue to facilitate access to movies for people who are blind or visually impaired, a process that became known as “audio description” or “video description.”¹¹

For all the promise of technology to provide equal access to copyrighted works, the copyright laws that protect those works have sometimes served to impede that technology. For example, in 1996, Congress enacted the Chafee Amendment to the Copyright Act in an effort to overcome what the National Library Service called “significant” delays in obtaining permission from copyright holders to create braille and other alternate-format versions of books.¹² The Chafee Amendment reinforced Congress’s and the Supreme Court’s long-standing views that efforts to make copyrighted works accessible is a non-infringing fair use—a

⁸ Harry G. Lang & Bonnie Meath-Lang, *Deaf Persons in the Arts and Sciences: A Biographical Dictionary* 302-303 (1995).

⁹ *Id.*

¹⁰ See generally Karen Peltz Strauss, *A New Civil Right: Telecommunications Equality for Deaf and Hard of Hearing Americans* 205-273 (2006).

¹¹ See Robert McG. Thomas Jr., *Gregory T. Frazier, 58; Helped Blind See Movies with Their Ears*, NY Times, July 17, 1996, <http://www.nytimes.com/1996/07/17/us/gregory-t-frazier-58-helped-blind-see-movies-with-their-ears.html>.

¹² Library of Congress, *NLS Factsheets, Copyright Law Amendment, 1996: PL 104-197* (Dec. 1996), <http://www.loc.gov/nls/reference/factsheets/copyright.html>.

determination reaffirmed in the Second Circuit’s recent *HathiTrust* decision.¹³

Just two years later, however, the first electronic book readers were released, and the ebook revolution was born—spawning with it a generation of books delivered with digital locks, or digital rights management (DRM) technology.¹⁴ Along with ebooks came the DMCA and its anti-circumvention measures, which cast the circumvention of DRM into legal doubt, even for the explicitly non-infringing purpose of making a book accessible to a person who is blind or visually impaired—or for other non-infringing accessibility-related uses like adding closed captions or video descriptions to a DRM’d video program.

In short, the DMCA made the type of accessibility efforts Congress had sought to enable in the Chafee Amendment—efforts embodied in the long-standing goal of equal access codified in the Americans with Disabilities Act and other laws, including the recently enacted Twenty-First Century Communications and Video Accessibility Act (CVAA)—effectively illegal for digital books and other digital copyrighted works. The DMCA’s triennial review process left the door open, however, for people with disabilities to ask for exemptions to the DMCA.¹⁵

And ask we did. In 2002, the AFB, other blind advocates, and library associations went to the Library of Congress—indeed, in the twenty-first century, in America—for permission to *read books*.¹⁶ While the Library

¹³ See H.R. Rep. 94-1476, at 73 (1976) (“[A] special instance illustrating the application of the fair use doctrine pertains to the making of copies or phonorecords of works in the special forms needed for the use of blind persons”); *Sony Corp. 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.”); *Authors Guild v. HathiTrust*, 755 F.3d 87, 101-03 (2d Cir. 2014) (citing the Americans with Disabilities Act and the Chafee Amendment in holding the provision of accessible books to library patrons with print disabilities a fair use).

¹⁴ See Joel Falconer, *The 40-year history of ebooks, illustrated*, The Next Web (Mar. 17, 2011), <http://thenextweb.com/shareables/2011/03/17/the-40-year-history-of-ebooks-illustrated/>.

¹⁵ See 17 U.S.C. § 1201(a)(1)(C)-(D).

¹⁶ *Comments of AFB*, Copyright Office Docket No. 2002-4E, available at <http://copyright.gov/1201/2003/comments/026.pdf>; see also *Comments on Rulemaking on Exemptions on Anticircumvention*, Copyright Office Docket

granted us that permission through an exemption from the DMCA in 2003, it expired, under the DMCA's provisions, just three years later.¹⁷ And so we went back, again, in the 2006 review, and sought it again.¹⁸ That time, we received it.¹⁹

But when we went back again to ask for the same exemption in the 2010 review, the Register of Copyrights recommended that it be denied.²⁰ Even though no one, including copyright holders, opposed the exemption, and even though the National Telecommunications & Information Administration recommended that it be renewed—we were a hair's breadth away from losing the legal right to read electronic books.²¹

No. 2002-4E (Comments 9, 20 & 33), *available at*

<http://copyright.gov/1201/2003/comments/index.html>.

¹⁷ See *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 68 Fed. Reg. 62,011, 62,014, 62,018 (Oct. 31, 2003) (codified at 37 C.F.R. § 201.40), *available at* <http://copyright.gov/fedreg/2003/68fr2011.pdf>

¹⁸ *Comments of AFB*, Copyright Office Docket No. RM 2005-11, *available at* http://www.copyright.gov/1201/2006/comments/discipio_afb.pdf.

¹⁹ See *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 71 Fed. Reg. 68,472, 68,475-76, 68,479 (Nov. 27, 2006) (codified at 37 C.F.R. § 201.40), *available at* <http://www.copyright.gov/fedreg/2006/71fr68472.pdf>.

²⁰ See *Comments of AFB*, Copyright Office Docket No. RM 2008-8, *available at* <http://www.copyright.gov/1201/2008/comments/american-foundation-blind.pdf>; *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 75 Fed. Reg. 43,825, 43837-38 (July 27, 2010) (“2010 Final Rule”) (codified at 37 C.F.R. § 201.40), *available at* <http://www.copyright.gov/fedreg/2010/75fr43825.pdf>.

²¹ See *Reply Comments of the American Association of Publishers, et al.*, Copyright Office Docket No. RM 2008-8, at 50 (Feb. 2, 2009) (“Joint Creators and Copyright Owners do not oppose renewal of the exemption related to literary works in ebook format...”), *available at* <http://www.copyright.gov/1201/2008/responses/association-american-publishers-47.pdf>; *Reply Comments of the American Intellectual Property Law Association*, Copyright Office Docket No. RM 2008-8, at 1-2 (Feb. 2, 2009), *available at* <http://www.copyright.gov/1201/2008/responses/aipla-23.pdf>; Letter from Lawrence E. Strickling, National Telecommunications and Information Administration to Marybeth Peters, Register of Copyrights (Nov. 4, 2009) (“[E]ven a limited number of literary works without access for the visually

Fortunately, the Librarian of Congress overruled the Register and granted us the exemption.²² In the 2012 review, we went back for a fourth time and successfully renewed the exemption with our colleagues from the American Council of the Blind.²³

We were also joined by our colleagues in the deaf and hard of hearing community, including Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Gallaudet University, and the Participatory Culture Foundation, who sought an exemption to develop advanced tools for making video programming accessible.²⁴ Unfortunately, the exemption was granted only in a limited form, precluding valuable research efforts that could have meaningfully advanced the state of video programming accessibility.²⁵

For those keeping score, we've now been through four rulemaking proceedings spanning more than a decade. In a seemingly endless loop that calls to mind the dilemma of Bill Murray's character in the movie *Groundhog Day*, we, our colleagues, and our pro bono counsel have poured hundreds of hours of work into a lengthy bureaucratic process that requires us to document and re-document the accessibility of copyrighted works and argue and re-argue the rarely-disputed premise that making books and movies accessible to people with disabilities does not infringe or even remotely threaten the rights of copyright holders. In short, section 1201 has forced us to strain our limited resources simply to achieve the human and civil right to access digital copyrighted works on equal terms.

And yet, for all this work, we are scarcely further along than where we started more than a decade ago, as the exemptions we have achieved begin to fade below the horizon yet again. This fall, we face the prospect of a *fifth*

impaired is too many.”), available at <http://www.copyright.gov/1201/2010/NTIA.pdf>.

²² 2010 Final Rule, 75 Fed. Reg. 43,838-39.

²³ *Joint Comments of American Council of the Blind and the American Foundation for the Blind*, Copyright Office Docket No. RM 2011-7, available at

http://www.copyright.gov/1201/2011/initial/american_foundation_blind.pdf; *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 77 Fed. Reg. 65,260, 65,262, 65,278 (Oct. 26, 2012) (“2012 Final Rule”) (codified at 37 C.F.R. § 201.40), available at <http://copyright.gov/fedreg/2012/77fr65260.pdf>.

²⁴ *Comments of TDI*, et al., Copyright Office Docket No. RM 2011-7 (Dec. 1, 2011), available at http://www.copyright.gov/1201/2011/initial/IPR_TDI_gallaudetU.pdf.

²⁵ See 2012 Final Rule, 77 Fed. Reg. at 65,270-71, 65,278.

trip to the Copyright Office to reaffirm our right to read and experience video programming on equal terms. We face the burden of making our case yet again, even in the wake of the declaration of the world in implementing the historic Marrakesh Treaty that access to books is a basic human right, the denial of which should not and cannot be tolerated by civilized countries in the twenty-first century.²⁶

Even if we win yet again, our victory will be short-lived, as our exemption will expire again in three years. And the exemption will only provide limited relief, as it leaves unaffected the DMCA's trafficking ban, which prevents us from creating and distributing advanced tools and services to people with disabilities who don't have the ability to circumvent DRM to make works accessible on their own.

The shortcomings of this process are manifest. Even the Librarian of Congress has noted that:

The section 1201 process is a regulatory process that is at best ill-suited to address the larger challenges of access for blind and print-disabled persons. The exemption that the Librarian is approving here offers a solution to specific concerns that were raised in the narrow context of the rulemaking. Moreover, it is a temporary solution, as the 1201 process begins anew every three years.²⁷

We join the many other public interest organizations that have urged Congress to fix the problems with section 1201 of the DMCA by limiting violations of the circumvention prohibitions to cases where there is a nexus with actual copyright infringement—a result that Representative Zoe Lofgren's Unlocking Technology Act would accomplish.²⁸ This would bring to fruition the common sense proposition that efforts to make copyrighted works accessible to people with disabilities should not run aground simply because the works are protected with DRM.

In the meantime, we urge reform of the triennial process itself. At a bare minimum, we urge Congress to take action to relieve the burden of

²⁶ See generally World Intellectual Property Association (WIPO), *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, <http://www.wipo.int/treaties/en/ip/marrakesh/>.

²⁷ 2010 Final Rule, 75 Fed. Reg. 43,839.

²⁸ See H.R. 1892 113th Cong. (2013), available at <https://beta.congress.gov/bill/113th-congress/house-bill/1892/text>.

repeatedly seeking re-approval of uncontroversial exemptions like the one we must re-propose during each review.

Members of the Subcommittee, you can count the blind and visually impaired communities among the leading champions for the success and development of the copyright industries. At AFB, we believe that access to the social, cultural, economic, and participatory opportunities afforded by copyrighted books, movies, music, software, and more are profoundly important in enabling people with disabilities to access a democratic society on equal terms—particularly as those works migrate to digital distribution systems in our ever-advancing information age. However, we urge you to act swiftly and decisively to limit the negative impacts of section 1201 on the right of people with disabilities to access those works.

Respectfully submitted,

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