



AUTHORS  
ALLIANCE

authorsalliance.org  
510.480.8302

2705 Webster St. #5805,  
Berkeley, CA 94705

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Kevin Amer  
Senior Counsel for Policy and International Affairs  
Regan A. Smith  
Associate General Counsel  
U.S. Copyright Office  
101 Independence Ave. S.E.  
Washington, D.C. 20559-6000

Re: Docket No. 2015–8, Section 1201 Study, Request for Additional Comments

Dear Mr. Amer and Ms. Smith,

Authors Alliance is a nonprofit organization that works to empower and advocate for authors who, like our roughly 900 members, “write to be read.”<sup>1</sup> These are creators who are motivated in their work primarily by the prospect of advancing knowledge, discourse, and culture, and who want to see their work widely disseminated.

Authors Alliance participated in the previous rulemaking cycle—the first since our launch—seeking a renewed and expanded exemption for the authors of multimedia ebooks. We anticipate returning in future years to advocate for similar exemptions, and are pleased to see this effort to improve the statute and rulemaking continue to move forward.

Our responses to the Office’s specific inquiries follow below:

*1.a Proposals for New Permanent Exemptions: Assistive Technologies for Use by Persons Who Are Blind, Visually Impaired, or Print Disabled.*

Authors Alliance commends the Library for having granted exemptions supporting the needs of people who are blind, visually impaired, and print disabled in every rulemaking cycle since 2003. As this process has now repeatedly shown, there is broad consensus about the need for an exemption facilitating access to copyrighted works for these underserved communities.

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<sup>1</sup> More about our organization, our mission, and our projects is available on our website. See Authors Alliance, *About Us*, <http://authorsalliance.org/about>.

Given this background, Authors Alliance supports a permanent exemption that would mitigate the deleterious effects of the DMCA’s anti-circumvention provisions on access to copyrighted works by people who are blind, visually impaired, and print disabled. Our members seek the broadest possible audiences for their creative works. Existing markets and intermediaries that authors rely on to reach readers have left people who are blind, visually impaired, and print-disabled underserved, running contrary to the wishes of both our community of authors and the needs of their potential audiences.

One of our Advisory Board members, Paul Courant, was the Librarian at the University of Michigan at the time the decision was made to use the texts of digitized books in the HathiTrust collection to enable people who are blind, visually impaired, and print-disabled to have access to books that sighted students can use simply by taking them off library shelves to read. This was a bold initiative, given the in-copyright status of these books and the then-ongoing Authors Guild lawsuit against Google, but it was ultimately deemed to be a fair use.<sup>2</sup>

Indeed, the Second Circuit’s opinion in *Authors Guild v. HathiTrust* provides an excellent summary of the strong public policy interest the United States has repeatedly recognized in ensuring that the print disabled have access to copyrighted work.<sup>3</sup> In that case, the Court found a digital library’s provision of digitized books converted into formats accessible to people who are blind and print disabled to be a fair use.<sup>4</sup> In analyzing the first statutory fair use factor, the Court cited the legislative history of the Copyright Act of 1976,<sup>5</sup> where making accessible copies for people who are blind was highlighted as a possible fair use the clear policies behind the Americans with Disabilities Act;<sup>6</sup> and the Chafee Amendment, enacted in response to the continuing scarcity of works published in accessible formats.<sup>7</sup>

The Marrakesh Treaty is the most recent marker of both the ongoing need for works accessible to people who are blind, visually impaired, and print disabled and the United States’ commitment to addressing the issue. Marrakesh, which the United States negotiated, signed, and is expected to ratify, expressly commits parties to “take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not

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<sup>2</sup> *Authors Guild v. HathiTrust*, 755 F. 3d 87 (2d. Cir. 2014).

<sup>3</sup> *Id.* at 101–103.

<sup>4</sup> *Id.*

<sup>5</sup> H.R. REP. No. 94-1476, at 73 (1976)

<sup>6</sup> 42 U.S.C. § 12101 et seq.

<sup>7</sup> 17 U.S.C. § 121.

prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.”<sup>8</sup>

The Copyright Office’s proposal to make the existing exemption language permanent would certainly improve the statute and ensure our domestic law reflects the policy goals reflected in the Marrakesh treaty and our own laws. It could, however, be improved further by removing the remuneration provisions of section (i). As authors, our members understand the principle of rightsholder remuneration,<sup>9</sup> but as currently implemented, this additional language is both redundant and a possible source of confusion. It is redundant because the rule already provides that copies first must be lawfully obtained—in general, this requirement alone will suffice to see rightsholders remunerated, particularly in a digital licensing environment. And it is possibly confusing because requiring that “the rights owner is remunerated, as appropriate, for the price of the mainstream copy of the work as made available to the general public through customary channels” raises more questions than it answers. What if the work is no longer made available through the customary channels? What makes the remuneration appropriate? Given the applicability of fair use in many of these circumstances, per *HathiTrust*, a remuneration requirement puts the exemption out of step with the applicable copyright limitation, and appears to reward rights holders for failing to make work available in accessible formats.<sup>10</sup> If the exemption recognizes the importance of supporting the beneficiaries of the Chafee amendment without further burdening those uses, why then distinguish that case—which has no fair remuneration provision—from established fair uses? An additional remuneration requirement is simply not needed, and it muddies the waters of what could otherwise be a clear exemption.

If we believe as a society that copyright law should enable access to knowledge and culture for people who are blind, visually impaired, and print disabled, then we must also recognize and account for the obstacles to this goal the legal protection of technological protection measures presents. This permanent exemption would be an important step toward bringing the DMCA into alignment with the values of our nation and of our copyright law, and we applaud the effort.

#### *1.d Proposals for New Permanent Exemptions: Obsolete Technologies.*

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<sup>8</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, art. 7, June 27, 2013.

<sup>9</sup> Although, from an author standpoint, it is worth noting that it is common practice to contractually waive the right to royalties generated from the sale or licensing of copies accessible to people who are blind and print disabled, signaling the importance of this issue to authors.

<sup>10</sup> As per note 9, *supra*, it is important to note that many times, the remunerated rights holders in questions will *not* be authors.

In a digital environment, technological obsolescence is one of the largest threats to the long-term preservation and accessibility of copyrighted work. A point of emphasis in Authors Alliance's activities has been to assist our members and others take the necessary steps to see that their works remain accessible to the public in today's preferred formats and ensure that they will remain preserved and available to be enjoyed by future generations of readers.<sup>11</sup> To date, this has largely meant seeing print works made available in digital formats, but we are rapidly approaching the point where similar measures will increasingly need to be taken for born-digital works more likely to suffer from digital locks that have rusted shut. Several members of the Authors Alliance Board of Directors and Advisory Board participated in a September 23, 2016, workshop hosted by the American Academy of Arts and Sciences on "Preservation of Intellectual Legacies." Concern about the difficulty of preserving born-digital works was at the forefront of the discussion there among leading scholars, technologists, and librarians, and the matter is only complicated by legal protection that outlasts the technologies it serves. In light of the importance of long-term accessibility and preservation of these works, we fully endorse exemptions that would help prevent inevitable technological obsolescence from risking the long-term accessibility of works of authorship.

### *3. Anti-Trafficking Provisions*

The Office asks:

*A few parties argued that section 1201 contains an implied right permitting a beneficiary of a statutory or administrative exemption to make a tool for his or her own use in engaging in the permitted circumvention. What are commenters' views regarding this interpretation of the statute? To what extent, if any, does the statutory prohibition on the "manufacture" of circumvention tools affect the analysis? If such a right is not currently implied, or the question is uncertain, should Congress consider amending the statute to expressly permit such activity, while maintaining the prohibition against trafficking in such tools?*

Authors Alliance agrees with the interpretation of the statute that provides an implied right for beneficiaries of exemptions to be able to actually create the technologies necessary to enjoy their exemptions. It is an established rule of statutory interpretation that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."<sup>12</sup> It is readily apparent that any reading of Section 1201 that would prohibit beneficiaries of exemptions from creating the

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<sup>11</sup> In particular, see the work that we have done regarding rights reversions, summarized at <http://authorsalliance.org/reversion>.

<sup>12</sup> Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).

tools necessary in order to exercise these exemptions is an absurd result that renders the entirety of the Section 1201(a)(1) exemption process futile. Meanwhile, it is eminently reasonable to read the word “manufacture” in the statute’s anti-trafficking provisions in the context of the surrounding language. It is not for nothing that they are commonly referred to as the “anti-trafficking provisions”<sup>13</sup>—a plain reading of the statute clearly demonstrates the provisions are about the provision of tools and services *to others*, and not about the self-help that is the baseline necessity of an effective exemption process.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Wolfe", with a stylized flourish at the end.

Michael Wolfe  
Executive Director  
Authors Alliance

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<sup>13</sup> See, e.g., *Chamberlain Group v. Skylink Tech., Inc.*, 381 F. 3d 1178, 1181 (Fed. Cir. 2004); *Universal City Studios, Inc. v. Corley*, 273 F. 3d 429 (2d Cir. 2001).