



THE ADVISORY COMMISSION ON ACCESSIBLE INSTRUCTIONAL MATERIALS IN
POST-SECONDARY EDUCATION FOR STUDENTS WITH DISABILITIES

REPORT OF TASK FORCE 4 (LEGAL)

FEBRUARY 24-25, 2011

JACKSONVILLE, FLORIDA

1. Review of Goals and Expectations of the Legal Task Force

- a. Create an accurate and succinct summary of the legal landscape.
- b. Isolate primary points of tension and analyze operation and intersection.
- c. Formulate recommendations relating to (b) based on consensus.
- d. Represent the full spectrum of possibilities in the report, including minority views.
- e. Ensure the legal discussion relates to work product of other taskforces.
- f. Include real-life depictions and experiences as illustrations, as appropriate.

2. Task Force Agreement as to Policy Goals

- g. Fully accessible content
- h. Identical or comparable price points
- i. Reduced certification and eligibility requirements
- j. Viable new products and delivery models
- k. Incentives for publishers and other content providers
- l. Effective and efficient licensing mechanisms
- m. Availability of public and private library resources as a safety net

3. Substantive Issues for Discussion

- n. **Definition of Instructional Materials** – to be discussed at a later meeting.
- o. **Eligibility: Scope of the Beneficiary Class** – the Chafee Amendment’s beneficiary class is deliberately narrow. At the time of enactment, Congress intended to reach a population that had been previously identified and served (including, particularly by the government) and which was sufficiently measurable and contained from the perspective of the copyright owners whose rights are reduced by the exception. In practice, in the context of higher education students, there has been some confusion about the scope of the beneficiary class, in part because scientific and medical views have provided new insights into diagnoses and in part because Chafee and disabilities laws have different standards.

- i. Various statutes at play
 - 1. Chafee (17 U.S.C. § 121)
 - a. “blind or other persons with disabilities” as defined by NLS statute.
 - b. Cross references to NLS statute (2 U.S.C. § 135a)
 - i. “blind and [] other physically handicapped readers certified by a competent authority as unable to read normal printed material as a result of physical limitations.”
 - ii. Library of Congress regulations set forth a more specific definition of who is eligible and who is authorized to certify an individual as qualifying.
 - c. There is a diversity of views on the scope of the eligibility requirements, and who qualifies as a competent authority to certify Chafee beneficiaries.
 - 2. Americans with Disabilities Act (42 U.S.C. § 12102) – broader in scope.
 - a. Physical or mental impairment that substantially limits one or more major life activities.
- ii. Challenges of differing standards
 - 1. Frustration for both providers of services to individuals with disabilities as well as individuals who have disabilities.
 - a. *E.g.*, ADA may require an accommodation for a disability that is not covered by Chafee; accommodating entity must consider whether there is a different legal basis for accommodation (for example, fair use) or secure permission from a publisher before creating or providing accessible materials:
 - i. Slow, laborious process
 - ii. Administrative complexities dealing with multiple copyright owners or difficulty identifying or locating the copyright owner.
 - iii. Failure to obtain appropriate permissions results in potential litigation risk which most organizations find objectionable.
 - 2. Authorized entities are uncertain as to the scope of protection, also leading to potential litigation risk in the event they are deemed to have exceeded the scope of Chafee.
 - 3. Large groups of qualifying beneficiaries may be underserved because some entities might decline to service them because the perceived litigation risk is too high.
- iii. Must remember that Chafee is an exception to copyright protection enjoyed by authors and publishers. It was carefully calibrated so that it served the population Congress wanted to reach, at the same time carving out from the property rights of copyright owners a traditionally narrow exception.
 - a. Requiring certification by a “competent authority” was one mechanism by which Congress ensured that the exception reached no further than it intended.

- b. Typically copyright law’s limitations and exceptions have been confined to those circumstances where there is evidence of a market failure, or where some culturally desirable purpose requires such an exception.
 - c. The United States’ international treaty obligations require that exceptions be limited to certain special circumstances and not impact ordinary exploitation of copyrighted works.
 - 2. Nothing in the legislative history of Chafee suggests that Congress intended all individuals afflicted with a disability to receive materials through an outright exception, nor is there a broad exception for education.
 - a. “Education” forms the basis of markets for university presses, textbook publishers, some trade publishers, as well as faculty authors at institutions of higher education.
 - b. To the extent that exceptions apply, it has been through the TEACH Act – aimed principally at distance education – and fair use, which remains sufficiently flexible so as to apply to new technologies and uses.
- p. **Definition and Role of “Authorized Entity”** – the concept of an authorized entity is only meaningful under the Chafee Amendment. Congress included the concept in order to limit the number of actors permitted to reproduce and distribute copyrighted works to a few entities trusted by authors and publishers. Since then, DSS offices and perhaps other actors on college campuses have stepped in to fill a void in service but are frustrated by the lack of legal clarity about whether their reproductions and/or distributions are permissible under Chafee or under fair use.
 - i. Defined by Chafee, 17 U.S.C. § 121(d)(1)
 - 1. Nonprofit organization or a governmental agency.
 - 2. Primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities.
 - ii. There is a lack of clarity among certain stakeholders as to which entities fall within the definition; many higher education DSS offices, for example, engage in functions reserved for authorized entities, in good-faith, but without confirmation that they are immunized from copyright liability.
 - iii. Traditionally authorized entities, or those that purport to operate as authorized entities, have taken several forms:
 - 1. National focus – e.g., National Library Service, RFB&D, Bookshare
 - 2. Regional/municipal/metro focus – e.g., audio book services aimed at serving particular towns, cities, or metropolitan areas.
 - 3. Limited community focus – e.g. school DSS offices that exist solely to serve the student population at a particular school.
 - iv. If market-based models develop as anticipated, the role of authorized entities could evolve to include other functions.
 - 1. Students may obtain materials on the open market through traditional sales channels – e.g., online vendors, campus booksellers, etc.

2. Colleges and universities might engage in licensing transactions allowing students to obtain accessible files and materials directly from the school (perhaps through it's DSS office)
3. Authorized entities that engage in production of materials could shift more resources to new distribution models, thus reaching more people:
 - a. voluntary collective licensing agent for publishers;
 - b. administrators of a statutory extended collective licensing model; and/or
 - c. centralized distribution hubs for accessible files and related materials.

q. **Definition of “Specialized Formats”** – like “authorized entity,” the concept of “specialized formats” is specific to the Chafee Amendment. When drafted, specialized formats were truly specialized, and had few, if any, applications outside of the print disabled market. Technology has advanced such that the formats required by the print disabled community are quickly becoming the same formats sold in mainstream markets.

i. Defined by Chafee, 17 U.S.C. § 121(d)(4)

1. Braille, audio, or digital text which is exclusive for use by blind or other persons with disabilities.
2. With respect to instructional materials, it also includes large print formats that are distributed exclusively for the blind and disabled.

ii. Technological and market landscape has changed since Chafee was enacted in 1996.

1. “Specialized formats” then largely meant Braille and recorded books; screen magnifiers and screen readers helped make computer displays accessible.

iii. In the ensuing years, technology has evolved, markets have developed.

1. The Internet has become a viable distribution mechanism for digital content.
2. Electronic reading devices and electronic books are now a rapidly growing market.

a. According to the Association of American Publishers, electronic book sales reached \$313 million in 2009, up nearly 177% over 2008 sales figures.

b. There appears to be a trend towards standardization in formats for digital content, allowing certain content to be used across multiple devices, including, perhaps, adaptive technologies.

i. *E.g.*, The Digital Accessible Information System (DAISY) Consortium standard for digital talking books and accessible media allows content creators to more easily output their content in a format that can be interpreted more widely by adaptive technologies.

ii. Authorized entities today, using formats like DAISY (which are built on top of mainstream technological standards), focus principally on distribution to the intended beneficiary class of Chafee rather than advancing interoperability and facilitating

usage on mainstream devices such as personal computers, smart phones, and the like.

- iii. Format is an issue that goes beyond accessibility. For example, the Library of Congress builds its national collection of books and other materials, in part, through deposits which are submitted with applications for copyright registration. Under the law, the library is entitled to the “best edition” of the work. For some materials, the question is whether the question is whether the Library really wants or needs the best edition, or whether an edition short of the one published would be better suited to collection, long term preservation, and access.
3. Digital rights management (“DRM”) – technologies that allow copyright owners to control access to their content – often impose restrictions on the number and type of devices that can access the content.
 - a. Sometimes, even if a device can interpret content in a particular format, the DRM on that content prevents certain devices from accessing it, or permits access only under certain conditions.