



DRAFT REPORT FROM TASK FORCE 4 (LEGAL)

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MISSION

1) Charge of the Advisory Commission

- a) Assess the barriers and systemic issues that may affect, and technical solutions that may improve, the timely delivery and quality of accessible instructional materials for postsecondary students with print disabilities, as well as the effective use of such materials by faculty and staff; and
- b) Make recommendations related to the development of a comprehensive approach to improve the opportunities for postsecondary students with print disabilities to access instructional materials in specialized formats in a time frame comparable to the availability of instructional materials for postsecondary nondisabled students.

2) Charge of Task Force 4 (Legal)

- a) Assess the existing legal landscape that facilitates, prevents or otherwise affects the creation, conversion, and/or distribution of accessible instructional materials for postsecondary students with print disabilities; and
- b) Make recommendations related to the development of a comprehensive legal framework that would increase and improve the opportunities for post secondary students with print disabilities to access instructional materials in specialized formats in a time frame comparable to postsecondary nondisabled students.

IDENTIFICATION OF THE LEGAL LANDSCAPE

1) Individuals with Disabilities Education Act of 2004 (“IDEA”)

a) Individuals with Disabilities Education Act of 2004 (“IDEA”)

See generally 20 U.S.C. §1412(23), §1413(a)(6), §1474(e),
34 FR §300.172 and §200.210

- i) Seeks to improve production and delivery of accessible instructional materials to students with print disabilities.
- ii) 2. Part B of IDEA serves students with disabilities in K-12.
- iii) IDEA requires the LEA/SEA to identify students with disabilities and provide appropriate accommodations (i.e. Students do not self-disclose)
- iv) Provides direct services *and* accommodations to eligible students with disabilities

according to each student’s Individualized Education Program (IEP).

Under IDEA, an individual with a disability does not “automatically” gain access to accessible instructional materials, such as text-to-speech and digital readers—the need for such accommodations must be made explicit in the student’s IEP, which is determined by the MDT/ IEP Team.

- v) Established NIMAS standards and Materials Center (NIMAC)

Duties:

- 1) To receive and maintain a catalog of print instructional materials prepared in the National Instructional Materials Accessibility Standard, as established by the Secretary, made available to such center by the textbook publishing industry, State educational agencies, and local educational agencies.
- 2) To provide access to print instructional materials, including textbooks, in accessible media, free of charge, to blind or other persons with print disabilities in elementary schools and secondary schools, in accordance with such terms and procedures as the National Instructional Materials Access Center may prescribe. (C) To develop, adopt and publish procedures to protect against copyright infringement, with respect to the print instructional materials provided under sections 612(a)(23) and 613(a)(6).

2) Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and the Americans with Disabilities Act (“ADA”)

a) Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and Title II of the Americans with Disabilities Act of 1990 (“ADA”)

- i) The U.S. Department of Education, Office for Civil Rights (ED/OCR) enforces Section 504 and Title II of the ADA.

- ii) Both laws protect students with disabilities from discrimination by educational institutions, including institutions of higher education.
- iii) Section 504 and Title II of the ADA differ in jurisdiction:
 - 1) Section 504 applies to any entity that receives Federal financial assistance. ED/OCR enforces Section 504 with respect to entities that receive Federal financial assistance from the Department of Education, including Pell Grants.
 - 2) Title II of the ADA applies to public entities, including public educational institutions, regardless of whether or not they receive Federal financial assistance.
 - 3) There is significant overlap between the jurisdictions of these two laws. Almost all institutions of higher education fall under the purview of at least one of these laws.
- iv) Under Section 504 and Title II of the ADA, the process for obtaining accommodations for a disability differs greatly from the elementary-secondary education context to the higher education context.
 - 1) In higher education, there are no “504 Plans” or IEPs, schools are not required to seek out and identify students with disabilities, and postsecondary students do not have a right to a FAPE (free appropriate public education).
- v) Both Section 504 and Title II of the ADA require that institutions of higher education provide auxiliary aids, where necessary, to qualified students with disabilities.
 - 1) Person with a disability: Anyone who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment.
 - 2) Qualified person with a disability (postsecondary context): A person with a disability who, with or without reasonable modifications and/or provision of auxiliary aids and services, meets the academic and technical standards requisite for admission or participation.
 - 3) Auxiliary aids and services must be provided when they are necessary for a qualified student with a disability to have an equal opportunity to participate in and enjoy the benefits of an educational program or activity.
 - 4) Institutes of higher education may create their own reasonable policies and procedures for qualified students with disabilities to apply for accommodations such as Accessible Instructional Materials (AIM).
- vi) OCR Complaint Letters
 - 1) ED/OCR investigates thousands of complaints of discrimination every year, and issues letters to educational institutions explaining the outcomes of the investigations.
 - 2) These letters are not policy documents, and should not be relied upon as such. They are particular applications of statutes, regulations, and ED/OCR policy to specific factual findings.
 - 3) Letter to California State University, Fullerton (2003), #09-03-2166, 108 LRP 20251.
 - (a) This letter is not a formal statement of ED/OCR policy, but rather the resolution of a particular complaint.
 - (b) The Department of Justice has recently published updated regulations for ADA Title II and III that will take effect March 15, 2011. In the new regulation, the ADA Title II Regulation section at 28 C.F.R. § 35.160 has

been updated to explain in more detail what constitutes effective communication as provided by auxiliary aids and services. Once this regulation takes effect, it will constitute ED/OCR's policy in this area. The updated regulation describes a three-part test for effective communication that is similar to the interpretation of § 35.160 in the Fullerton letter.

- 4) Complaints regarding use of e-book readers in postsecondary programs
 - (a) DOJ and ED/OCR recently received several complaints regarding the use of inaccessible e-book readers in pilot programs at institutions of higher education.
 - (b) DOJ and ED/OCR produced a joint Dear Colleague Letter — a formal statement of policy — explaining that it is impermissible under federal law for colleges and universities to use electronic book readers or similar technology in a teaching or classroom environment as long as the devices remain inaccessible to individuals who are blind or have low vision and reasonable accommodations or modifications for this type of technology are not available.
 - (c) The Dear Colleague Letter is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.html>.

3) Copyright Act of 1976 (“Title 17”) – 17 U.S.C. § 101, et seq.5

- a) *Protects original works of authorship fixed in a tangible medium of expression, including books, music, sound recordings, and audiovisual works. 17 U.S.C. § 102.*
- b) *Section 106 provides several exclusive rights:*
 - i) Reproduction (*e.g.*, printing books, copying electronic files)
 - ii) Preparation of derivative works (*e.g.*, audio book recording)
 - iii) Distribution (*e.g.*, retail sale of books, audio books, etc.)
 - iv) Public performance (*e.g.*, streaming audio on a web site)
 - v) Public display (*e.g.*, text display on a web site)
 - vi) Digital audio transmission (sound recordings only) (*e.g.*, satellite radio broadcasts of copyrighted works)
- c) *Sections 107 through 122 contain various limitations and exceptions to the exclusive rights.*
 - i) Some of the limitations are structured as exceptions for certain kinds of uses (*e.g.*, certain reproductions by libraries and archives permitted under 17 U.S.C. § 108) while others are structured as statutory licenses (*e.g.*, the compulsory license for making and distributing phonorecords under 17 U.S.C. § 115).
 - ii) Uses of a copyrighted work under an exception do not require that compensation be paid to the copyright owner, while uses subject to statutory licensing require that the copyright owner be paid a statutorily or administratively set fee.
 - 1) Statutory licenses are generally only appropriate when a genuine market failure exists; license fees are frequently set in an attempt to mimic competitive market conditions (*i.e.*, the price a willing licensee would pay a willing licensor).

- iii) Of particular relevance here is the exception set forth in 17 U.S.C. § 121 (“the Chafee exception”).
 - 1) shields authorized entities; an authorized entity is defined as “a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities.” 17 U.S.C. § 121(d)(1).
 - 2) applies to reproduction or distribution rights only and implicates only previously published works. 17 U.S.C. § 121(a).
 - 3) pertains only to specialized formats defined as “braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities” and “large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities.” 17 U.S.C. § 121(d)(4).
 - 4) materials must be for the benefit of “the blind and for other physically handicapped residents of the United States” who are “certified by competent authority as unable to read normal printed material as a result of physical limitations.” 17 U.S.C. § 121(d)(2); 2 U.S.C. § 135a.
 - (a) Note that 2 U.S.C. § 135a is the statute that provides for the National Library Service for the Blind and Physically Handicapped.
 - 5) Prior to Chafee, organizations devoted to supplying accessible materials to print disabled individuals sought permission from individual copyright owners on a work-by-work basis:
 - (a) Slow, laborious process
 - (b) Significant administrative complexities for some works as a result of rights transfers (*e.g.*, from the original author to a publisher, to subsequent publishers, authors’ heirs, publisher acquisitions and mergers, etc.).
 - (c) Often materials sought included components from third parties (*e.g.*, syndicated content in a magazine), which required obtaining permission from multiple rights holders.

- d) *Fair use is another well-known limitation on exclusive rights, set forth in 17 U.S.C. § 107.*
 - i) Originally created by the courts, *see Folsom v. Marsh*, 9 F. Cas. 342 (1841), and later codified in the Copyright Act of 1976.
 - ii) Application requires a very fact-intensive analysis leading to uncertainty and potential litigation risk. Because of its judicial origins, such case-by-case factual analysis will likely remain a staple of the fair use doctrine for the foreseeable future.
 - iii) Requires the court to balance at least four factors set forth in the statute:
 - 1) purpose and character of the use
 - 2) nature of the copyrighted work
 - 3) amount and substantiality of the portion used
 - 4) effect upon the market for the copyrighted work
 - iv) The uncertainty inherent in the case-by-case applicability of the doctrine makes it difficult to craft policies based upon fair use.
 - v) Fair use is often used in an attempt to “fill the gap” where a particular use of copyrighted material is not covered by a clear statutory limitation or exception.

- e) *The Digital Millennium Copyright Act (“DMCA”)*
 - i) Passed in 1998, the DMCA made several changes to U.S. copyright law largely pertaining to media technology. Among its many provisions is a rule prohibiting the circumvention of technological protection measures often used to control access to copyrighted content. Such measures are often referred to as digital rights management (“DRM”) technologies.
 - 1) Examples of DRM technology include:
 - (a) Content Scrambling System (CSS) used on many commercially-released DVDs to allow playback only on authorized devices.
 - (b) Certain content (*e.g.*, electronic books, digital music) purchased through some online retailers can only be played on certain, licensed devices.
 - ii) 17 U.S.C. § 1201 provides that circumvention of DRM is unlawful except for certain narrowly crafted exceptions.
 - 1) Statute empowers the Librarian of Congress, upon recommendation of the Register of Copyrights, to evaluate exceptions triennially; most recent review began in 2008; final regulations were issued in June 2010.
 - 2) Among the 2010 exceptions: “Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book’s read-aloud function or of screen readers that render the text into a specialized format.” 37 C.F.R. § 201.40.
 - iii) Anticircumvention provisions required by U.S. participation in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.
- f) *Reduced statutory damages for good-faith actors – 17 U.S.C. § 504(c)(2)*
 - i) If the infringer sustains the burden of proving that he or she believed that a particular use of a work was not copyright infringement, the court may reduce damages to \$200 per work infringed.
 - ii) If an employee or agent of a nonprofit institution, library, or archive, acting within the scope of his/her employment believes that his/her conduct was fair use, then a court may remit damages entirely.
 - 1) Applies only to reproductions (no other exclusive rights).

4) International Obligations

- a) *U.N. Convention on the Rights of Persons with Disabilities (entered into force on May 3, 2008; signed by the U.S. in July 2009; not yet ratified by the U.S. Senate)*
 - i) The U.N. Convention on Disabilities contains a number of provisions related to accessibility and education, including:
 - 1) Article 9 – Accessibility: “. . . State Parties shall . . . ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services”

- 2) Article 21 – Freedom of expression and opinion, and access to information. This article addresses the provision of information in accessible and usable formats for persons with disabilities.
- 3) Article 24 – Education: “State Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others.” Art. 24 (5).
- 4) Article 30 – Participation in cultural life, recreation, leisure and sport. This article contains general provisions on enjoying access to cultural materials and activities in accessible formats. It also provides that “State Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.” Art. 30 (3).
- 5) Prior to signing the U.N. Convention on Disabilities, the U.S. government determined that U.S. law is consistent with the provisions of the Convention.

b) International Copyright Agreements

- i) Treaties to which the United States is a signatory include:
 - 1) Berne Convention for the Protection of Literary and Artistic Works. Major international copyright agreement with 164 contracting parties. The U.S. became a party in 1989. Administered by the World Intellectual Property Organization (WIPO).
 - 2) Trade-Related Aspects of Intellectual Property Rights (TRIPS) – this international trade agreement incorporates copyright provisions from the Berne Convention.
 - 3) WIPO Copyright Treaty (WCT). Updates the Berne Convention to address new technological developments. The U.S. became a party in 2002.
 - 4) WIPO Performances and Phonograms Treaty (WPPT). Updates international protections for performers and producers of phonograms to address new technological developments. The U.S. became a party in 2002.
- ii) Three-step test. This test contained in international treaty provisions requires that national limitations and exceptions to exclusive rights must be confined to:
 - 1) certain special cases that
 - 2) do not conflict with a normal exploitation of the work; and
 - 3) do not unreasonably prejudice the legitimate interests of the rights holder.
- iii) Digital Rights Management (DRM) provisions are included in the WCT and the WPPT.
 - 1) Technological Protection Measures (TPM): Parties must provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by” authors, performers or producers of phonograms “in connection with the exercise of their rights.” WCT Art. 11; WPPT Art. 18.
 - 2) Rights Management Information (RMI): Parties must provide “adequate and effective legal remedies” for “information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram” WCT Art. 12; WPPT Art. 19.

- 3) The U.S. implemented these DRM provisions in the 1998 Digital Millennium Copyright Act, see 3)e) above.

c) *Current Events*

i) WIPO Activity on Accessibility for the Print Disabled

- 1) Standing Committee on Copyright and Related Rights (SCCR). Multilateral discussion of accessibility for the print disabled in the context of national exceptions and limitations has been ongoing in the WIPO SCCR for several years. Four draft international instruments have been tabled for formal discussion: a proposed Consensus Instrument from the United States addressing the issue of the cross-border transfer of accessible versions of copyrighted works, a proposed treaty focused on access to copyrighted materials for the print disabled, another proposed treaty that would address multiple exceptions and limitations including access for the print disabled, and a proposed Joint Recommendation focused on cross-border transfer of works for the print-disabled and the encouragement of national exceptions. The next SCCR meeting in June 2011 will include extensive consideration of these proposals.
- 2) WIPO Stakeholders' Platform. The Stakeholders' Platform was established in January 2009 to explore voluntary approaches to issues of concern to both copyright owners and print disabled persons, such as accessible technologies and the cross-border transfer of copyrighted works. It brings together representatives of the print disabled community and publishers. The Platform approved the launch on November 1, 2010 of TIGAR - the trusted intermediary global accessible resources project – with the goal of enabling publishers to make their titles easily available to trusted intermediaries (the international term for “authorized entities”). TIGAR will be phased in with a three-year pilot project using a licensing model.
- ii) Hardware Accessibility. Over the past few years issues have been raised regarding the accessibility of hardware devices (*e.g.*, the Amazon Kindle portable e-book reader) used to obtain access to educational materials. In 2009-2010 the Department of Justice entered into agreements with a number of universities to resolve complaints regarding the inability of print-disabled students to utilize the menus and controls of the Kindle DX in order to use features of the device, including the text-to-speech capability.

5) *State Laws*

a) *State disability laws.*

i) California

1) AB 422 (1999)

- (a) This bill relates to the provision of instructional materials to students with disabilities attending the University of California, California State University, or a California Community College. It states that the publisher must provide alternate electronic copies of materials to students with disabilities in a timely manner, and the materials must retain the structural integrity of the original

format. This format must be agreed upon by the campus/college and the publisher.

- 2) AB 386 (2010)
 - (a) This bill updates existing legislation that requires non-print instructional materials be compatible with Braille translation and speech synthesis software. It further includes captioning for students with hearing impairments. Publishers will provide this format at no additional cost to the college/university.
- ii) New York – Chapter 219 (2003; revised Nov. 30, 2004)
 - 1) This bill was written to ensure that students with disabilities who are attending postsecondary institutions in New York receive accessible instructional materials in a timely manner. It recommends four different file formats in a preferred order. They are: DAISY3, HTML, structured PDF, and finally structured word files. It also suggests that the publisher/manufacturer produce the file.
- iii) Texas – Chapter 51 Sec. 51.970 (2007)
 - 1) This section mandates that public postsecondary institutions in Texas provide electronic versions of instructional materials to blind students and students with dyslexia. Further, all alternative materials must include, “any text, sidebar, table of contents, chapter headings, chapter subheadings, footnotes, index, glossary, and bibliography”. It also gives authority to a coordinating board to enforce this legislation.
- iv) Arkansas – SB 537 (2001) Act Number 758
 - 1) This act mandates that publishers provide students attending any institution of higher education in Arkansas with instructional materials, which are compatible with speech synthesis and Braille translation software. The materials must retain the structural integrity of the original copy.
- v) Kentucky – SB 85 (2003)
 - 1) This bill requires publishers to provide students with disabilities instructional materials that are in an accessible electronic format. It also permitted the establishment of a variety of procedures for requesting and obtaining the materials, such as the establishment of a file repository. The preferred formats are XML or HTML.
- vi) Nevada – Chapter 175 SB 62 (2003)
 - 1) This bill mandates that public postsecondary institutions in Nevada provide students with disabilities with accessible electronic versions of instructional materials. This will be proved at no cost to any student who qualifies.
- vii) Washington – SSB 6501 (2004)
 - 1) This bill mandates that accessible electronic versions of instructional materials are given to students with print access disabilities who attend a university/college, public or private, in Washington state. Electronic versions include captioning videos and transcribing audio clips.
- viii) Missouri – Chapter 170 Section 170.132
 - 1) This law requires that when purchasing materials for schools preference should be given to the vendors that supply accessible formats. These formats specifically

include electronic and Braille. This law applies to all levels of public education in Missouri.

- b) *Agency principles (potential institutional liability for actions of faculty and staff)*
- c) *Possible sovereign immunity for state-run institutions. See U.S. Const. amend. XI.*

6) Licensing

- a) *Virtually every aspect of the publishing value chain implicates some type of copyright license:*
 - i) *Author to publisher – e.g., reproduction, distribution, derivative works rights, and the right to sublicense those rights as well as the public performance and public display rights.*
 - ii) *Publisher to ancillary product producers (e.g., audio books) – e.g., sublicenses to prepare derivative works; reproduction; distribution; public performance; and public display rights (rights package will vary with licensed uses).*
 - iii) *Publisher to distributors – e.g., sublicenses of distribution, public performance, and public display rights.*
- b) *Contract language is often outpaced by technology which can lead to confusion about who owns, or is licensed to exploit, certain rights. Courts have taken multiple views leading to uncertainty and potential litigation risk.*
 - i) *Although the phenomenon is not new, a recent incarnation of confusion over rights as a result of emerging technology is illustrated by text-to-speech technology, where there are significant questions about whether such technology is an exploitation of the reproduction right and whether traditional publishing contracts cover such technology, or whether the rights remain with authors.*