



**ELECTRONIC FRONTIER FOUNDATION SUBMISSION TO
THE UNITED STATES COPYRIGHT OFFICE AND THE UNITED STATES
PATENT AND TRADEMARK OFFICE ON THE TOPIC OF
FACILITATING ACCESS TO COPYRIGHTED WORKS FOR THE
BLIND OR PERSONS WITH OTHER DISABILITIES**

The Electronic Frontier Foundation (EFF) appreciates the opportunity to submit the following comments to the United States Copyright Office and the United States Patent and Trademark Office in response to the Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Persons with Other Disabilities, published in the Federal Register on March 26, 2009 (Volume 74, Number 57, pages 13268-70). EFF has been participating as a non-governmental organization (NGO) observer at the World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR) since 2004 and welcomes the U.S. delegation's encouragement of public debate on this important humanitarian issue in preparation for the 18th meeting of the SCCR.

EFF is the leading non-profit member-funded advocacy organization working on behalf of Internet users and innovators to support the public interest in the digital environment. We encourage autonomy and defend the rights of all individuals online, and we especially support the effort to expand the overlooked reading-disabled population's access to knowledge. As an organization devoted to online freedom, our comments are focused on: 1) the affordances of digital technology for the reading disabled, 2) the obstacles confronted in a technological landscape still dominated by digital rights management (DRM), 3) the DMCA's restrictions on accessing content, and 4) seeking an international solution of exceptions and limitations.

We support the Copyright Office and USPTO's pursuit of a wide range of possible solutions to facilitate access and enable user freedom. We believe that the development of an international instrument establishing minimum requirements for limitations and exceptions for the reading disabled is the most appropriate course of action to ensure a more just and equitable dissemination of knowledge, in the U.S. and around the world.

Digital Technology Enables Unprecedented Autonomy for the Reading Disabled.

As the Register of Copyrights noted when considering the anti-circumvention exemption for ebooks in the 2003 Rulemaking:

" . . . digital formats . . . perhaps for the first time offer an individual blind person the possibility of 'self-help' in making a copy of a literary work

perceptible."¹

Until recently, media was by its very nature only available in a restricted set of static formats: a hardback book, a paperback book, a large-print book, or an audiotape. Conversion from one format to another was laborious, costly, and within the tight purview of all too often ineffectual clearinghouses. Blanket solutions for accessibility tended to provide a clumsy fit for every level of ability -- a large print book may be cumbersome for those with relatively clear vision but frustratingly on the borders of perceptibility for those with more profound impairment.

Digital media, on the other hand, enables fast deployment of the most current innovations in assistive technology. As functionality such as text-to-speech penetrates further into mainstream consumer electronics, the reading disabled can access works on the same popular devices as everyone else -- for the same cost -- rather than having to rely on assistive technologies that may be stigmatized and disproportionately expensive.

Even more significant, digital media's flexibility -- its capability to be parsed, interpreted and transformed at any point in its production and delivery -- offers the potential for copyrighted material to be precisely tailored to an individual's specific perceptual requirements. Such extensibility can help solve one of the most pervasive problems with providing universal accessibility: accommodating the vast extent, variability and individual character of impairment. Digital media can empower readers to choose and configure their own formatting; individuals could have the autonomy to seek solutions to their own satisfaction.

While the advantages to end user control over digital media are clear, such adaptability is being stymied by digital rights management and other technical protection measures that get additional legal punch from the Digital Millennium Copyright Act.

Private Sector Initiatives Are Locked Down with Digital Rights Management

Despite a relatively long history in the digital environment, electronic books are only now beginning to see widespread distribution and adoption. For many publishers stepping into this area for the first time, a major concern has been preventing the unauthorized distribution of their works online. While there is no commercial interest, by definition, in the distribution of works to the reading disabled where exempted by statute, many publishers are concerned that works provided under these exemptions may spill over and find their way to be distributed outside the class of legitimate users.

Publishers are currently experimenting with digital rights management, or DRM, to prevent this unauthorized distribution. DRM is generally implemented as software designed to hamper transformation or manipulation by the end user or other software

¹ Recommendation of the Register of Copyrights, *Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works*, Page 71, footnote 121. Available at <http://www.copyright.gov/1201/docs/registers-recommendation.pdf>

through the use of technical protection measures.

The aim of digital rights management is directly at odds with the flexibility required by assistive technology. In order to work as advertised, DRM must require end users to only read books using explicitly permitted software or equipment. Any output that can be transformed into a preferred format by a reader is an output that can ostensibly be recorded and re-distributed by the same end-user.

Given the overwhelming advantages for empowering persons with disabilities to transform media in the way best perceived by them, governmental and international groups should strongly encourage publishers to provide their content to authorized entities in formats unencumbered by DRM. Publishers concerned about the dangers of content "leaking" into the commercial market can be addressed through the use of less restrictive technologies, such as watermarking.²

Accessibility Loophole for Circumvention Devices in the DMCA

The anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA) serve as the legal fortification of technological protection measures, such as DRM. The DMCA permits book publishers to put "access controls" on their works, and circumvention of those controls is illegal, even where circumvention is trivial or where the underlying content is legal to use. This legal protection against the disabling, decrypting, routing around, or other means of shutting off the DRM attached to a digital file focuses on two distinct behaviors that have profound effects on a sight-impaired user's ability to adapt the underlying content: Section 1201(a) prohibits the act of circumvention itself, and Section 1201(b) prohibits trafficking in circumvention devices - in other words, selling technology that circumvents DRM to empower end-users.

The Copyright Office Rulemaking, and the exemption for ebooks granted in the last two triennial reviews, apply only to the 1201(a) *act* of circumvention prohibition. A reading disabled individual who wants to gain access under the specific exemption granted would not be able to do so unless she developed her own circumvention device to gain access. Individuals who could legally take advantage of the exemption cannot practically do so unless someone makes available a circumvention device, which would be a prohibited act, subject to criminal sanctions.

In order to leverage the dynamic accessibility of digital formats, the Copyright Office and the USPTO should consider the impact of the DMCA in facilitating access as well as in circumvention itself to the reading disabled.

An International Instrument of Minimum Standards for Exceptions & Limitations

² For privacy reasons, EFF would recommend institutional watermarking, rather than storing the personal data of the user within the content. For more information on watermarking, see xxx.

Digital technology has the potential to bring dramatic improvement to the quality of life of the reading disabled. Fulfilling that promise of autonomy and access must be protected with the rights of the user. Facilitating equitable access cannot be entrusted to the good will of publishers, which have historically demonstrated their reluctance to make accessible works available affordably. Enshrining the rights and freedoms of the reading disabled in minimum standards of exceptions and limitations is crucial to avoid being subject to the expansive control of copyright owners. They should not have to ask permission and/or pay for every use and feature of copyrighted works.

The situation is even more compelling when one considers the patchwork of national copyright laws and the uneven implementation of exceptions and limitations around the world. Given the dismal availability of copyrighted works in accessible formats in most countries, the U.S. has an important leadership role to play. Of the various possible actions being considered, the establishment of an international instrument setting minimum standards for exceptions & limitations is the most effective means of implementing exceptions and limitations, because it ensures that freedom and access principles are guarded.

Conclusion

EFF once again commends the Copyright Office and USPTO for initiating this process of public debate on the rights of the reading disabled. We respectfully submit these comments emphasizing the magnitude of opportunity afforded by digital technology and the importance of facilitating access for this regrettably often overlooked population. We urge the U.S. delegation to make the public interest objectives of facilitating access and enabling autonomy its highest priorities.

We highlight in particular the technological obstacles created by DRM technologies and the accessibility made possible by the pursuit of open interoperable formats. We hope that this investigation will expand to include consideration of the impact of the DMCA anti-circumvention provisions on access to digital works as well as access to circumvention devices enabling access to those works. Finally, we appreciate the opportunity to advise the U.S. delegation in preparation for the upcoming SCCR and encourage the delegation to pursue a strategy that truly empowers the reading disabled to gain access independently rather than perpetuates the notion that their access is a diminished need that is the object of charity.

Thank you for your consideration

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