

US and Canadian Disability Policies, Recent Challenges, and US and Canadian Copyright Law

In the US, there are a number of laws that serve as the basis of federal policy for persons with disabilities. These include the ADA of 1990, Section 504 of the Rehabilitation Act of 1973, and a 1998 amendment to the Rehabilitation Act (Section 508). Combined, these statutes and amendments ensure accessibility for individuals with disabilities to public accommodations, services, employment, and more. In addition to federal law, many states have implemented accessibility statutes and regulations.

The ADA mandates the elimination of discrimination on the basis of disability. Titles I, II, and III of the ADA prohibit discrimination against individuals under certain circumstances. Title I prohibits discrimination in public and private employment against individuals with disabilities. Title II of the ADA provides individuals with disabilities with an equal opportunity to benefit from all state and local government programs, services, and activities. Finally, Title III prohibits discrimination against individuals with disabilities regarding the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations” of any public accommodations, including private, postsecondary institutions. Thus, research libraries in public and private institutions must comply with selected ADA provisions.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in programs and activities by those entities that receive federal financial assistance. Pell Grants and Federal Work Study grants are examples of federal assistance via the Department of Education relating to higher education.

Finally, Section 508 of the Rehabilitation Act Amendments of 1998 relates to access to federally funded programs and services. The amendment requires that the electronic and information technologies that an agency develops, procures, maintains, and/or uses must be accessible to federal employees and all members of the public. Since Section 508 was enacted, 20 states have enacted similar laws and requirements.

The US Department of Justice (DOJ) Civil Rights Division and the US Department of Education (ED) Office of Civil Rights share oversight and enforcement of legal provisions relating to individuals with disabilities at colleges and universities. For example, the DOJ is responsible for enforcement of Title III of the ADA relating to private universities and colleges, and both departments jointly enforce legal requirements under Title II of the ADA applicable to public universities; additionally, ED oversees Section 504 regarding public and private educational institutions that receive financial aid from the Department of Education. Finally, the Institute of Museum and Library Services (IMLS) issued guidance “Making Museums and Libraries More Accessible” in February 2011.¹⁶

Recent Challenges to Institutional Practices

Over the last two years, there have been a growing number of complaints filed by print-disabled individuals in academic and non-academic institutions regarding use of inaccessible IT products and services. Settlements have favored those filing the complaints. There are several outstanding challenges, and it is likely that more will be forthcoming, given the tension between rapidly changing IT products

and services and the need to ensure effective access to information services and resources for all members of the academic and research community.¹⁷

In 2010, the US Departments of Justice and Education entered into settlement agreements and/or letters of resolution with a number of academic institutions regarding accessibility and use of e-readers in the classroom. Case Western Reserve University, Reed College, Pace University, Arizona State University, and Princeton University participated in pilot projects with Amazon.com to test the value and utility of using the Kindle DX in a classroom setting. The DOJ determined that the Kindle DX was “inaccessible to an entire class of individuals with disabilities—individuals with visual impairments.”¹⁸

In the settlement agreements, the academic institutions agreed to only purchase e-readers that were fully accessible to individuals with visual impairments or provide “reasonable modification for this type of technology.”¹⁹ Reasonable modification, in this instance, is defined as changes so that “blind individuals may access and acquire the same information, engage in the same interactions, and enjoy the same services as sighted students with substantially equivalent ease of use.”²⁰ The Departments of Education and Justice also entered into an agreement with the University of Virginia Darden School of Business regarding its use of the Kindle DX. It is important to note that ED and DOJ issued guidance to colleges and universities stating that all programs including pilot programs are fully subject to the nondiscrimination requirements of the ADA and Section 504.²¹

Students and other members of the campus community can raise accessibility concerns via the ED’s Office of Civil Rights, through the DOJ, or locally within their own institutions. For example, a student at the University of California (UC), Berkeley, recently raised accessibility concerns regarding scanning technology in the library. This led the campus to enter into a structured negotiations process with a disabilities rights organization, Disability Rights Advocates, to cooperatively resolve many cutting-edge print access issues, including the question of the University Library’s responsibilities to make its large collection of hard-copy bound books accessible to those with print disabilities—specifically, the degree to which the library will convert hard-copy print into a digital format. Traditionally, some campuses have relied upon the disability services office to convert books needed by students with print disabilities doing library research for a course assignment or even for a graduate thesis. Of necessity, this has limited the number of books converted to a relative few, compared to the vast resources of a research library.

In another instance, following five years of campus discussions, the Alliance for Disability and Students at the University of Montana (ADSUM) filed a complaint with ED alleging that some disabled students at the university face discrimination, as educational technologies are not accessible. In August 2012, the ED confirmed that it is investigating the complaint and is focused on the following services: inaccessible class assignments and materials in the learning management system, Moodle; inaccessible live chat and discussion board functions in Moodle; inaccessible documents that are scanned images on webpages and websites; inaccessible videos, and videos in Flash format, that are not captioned; inaccessible library database materials; inaccessible course registration through a website, Cyber Bear; and inaccessible classroom clickers.²²

In November 2010, as a part of the ED’s Early Complaint Resolution process, Penn State University and the NFB entered into a voluntary agreement to ensure that all electronic and information technology systems used on all Penn State campuses be fully accessible to blind students, faculty, and staff. Information technology services include course management systems, websites, classroom technology,

library resources, banking services, and more. The agreement is comprehensive, and it includes accessibility goals to be achieved within certain timeframes, that members of the university community be educated regarding print-disability issues, and that accessibility must be addressed in all campus-wide information technology procurement.²³ The agreement serves as a model for other colleges and universities. Indeed, setting precedent for other academic institutions was a stated goal of the NFB in reaching this agreement.

Similarly, based on complaints by two print-disabled students, Florida State University agreed to make a number of its science and math courses more accessible, as the students were unable to complete courses related to their academic track.

In response to the growing number of e-reader pilot programs and the development and adoption of IT services at colleges and universities throughout the US, the Departments of Education and Justice issued a joint “Dear Colleague Letter” to college and university presidents.²⁴ The letter stated that use of information technologies such as e-readers—both existing and emerging—must be accessible to students with disabilities, or institutions would risk violating the ADA and Section 504 unless other accommodations or modifications could be made to allow these students to “receive all the educational benefits provided by the technology in an equally effective and equally integrated manner.”²⁵

The authors of the letter to the presidents stated, “[w]e ask that you take steps to ensure that your college or university refrains from requiring the use of any electronic book reader, or other similar technology, in a teaching or classroom environment as long as the device remains inaccessible to individuals who are blind or have low vision. It is unacceptable for universities to use emerging technology without insisting that this technology be accessible to all students.”²⁶ In a subsequent FAQ to presidents of colleges and universities (May 2011), ED reiterated that “equal access for students with disabilities is the law and must be considered as new technology is integrated into the educational environment.”²⁷

In September 2012, the President of the NFB, Marc Maurer, wrote to the presidents of Internet2, EDUCAUSE, McGraw-Hill Education, and the CEO and founder of Courseload concerning a joint EDUCAUSE/Internet2 e-textbook pilot. The pilot seeks to advance a new model for the purchase, distribution, and use of e-textbooks and digital course materials. Twenty-five academic institutions are participating in the pilot in the current academic semester (fall 2012), with expansion anticipated in the spring of 2013. In his letter, Maurer noted that, “although we support the use of e-textbooks at colleges and universities, we are shocked and dismayed that you are moving forward with the program without first correcting the obvious accessibility barriers that prevent blind students from participating.”²⁸ He further noted that the program “in its current form does not meet the participating schools’ obligation under ADA and Section 504.” Maurer asked that the pilot not continue until accessibility issues were resolved. In response, the presidents of EDUCAUSE and Internet2 noted that “recognizing the pace of change in technology, and specifically in outside tools has dramatically increased, the only way to identify challenges and make progress is by assessing tools and materials that may not yet be mature.” They indicated their intention to “build on these results and more to deploy a diverse set of pilots involving several e-reader platforms and several publishers” in the spring of 2013.²⁹ Developments are ongoing as of the writing of this report and further conversations amongst the groups are underway.

AIM Commission

In 2011, the Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities (AIM Commission) released a report to Congress that focused on improving access to instructional materials for students with disabilities in a timely and cost-effective manner.³⁰ Key findings include:

- Students with disabilities, and most notably students with print disabilities, often experience a variety of challenges that result from inaccessible learning materials and/or their delivery systems.
- Disability resource service providers and other university personnel often must engage in labor-intensive practices to provide accessible instructional materials to students with disabilities.
- Textbook publishers and a number of electronic text vendors are moving to incorporate accessibility into their products, but many products are still inaccessible to students with disabilities who have difficulties accessing printed text.
- Opportunities for capacity building within postsecondary educational institutions are essential for improving the ability of these institutions to provide accessible instructional materials to students with disabilities.

Key recommendations of AIM include:

- Congress should authorize the United States Access Board to establish guidelines for accessible instructional materials that will be used by government, in the private sector, and in postsecondary academic settings.
- Congress should review the scope, effectiveness, and function of the Copyright Act as amended (section 121, the Chafee Amendment) to determine whether it or any of its key component elements, as well as its implementation through applicable regulations, need to be updated to adequately address the needs of individuals with print disabilities, including those enrolled in postsecondary education.
- Congress should consider incentives to accelerate innovation in accessibility by publishers and producers of course materials, hardware, and software by offering support and inducements for the production, sale, and consumption of accessible instructional materials and delivery systems.
- The commission recommends that federally sponsored projects and programs encourage and support systematic faculty and staff professional development with respect to selection, production, and delivery of high-quality accessible instruction materials to meet the needs of students with disabilities in postsecondary settings.

US Copyright Law and Issues for Print-Disabilities Services

Libraries have important policy commitments and substantial legal obligations to make materials fully accessible to patrons. Until recently, copyright law presented challenges for libraries seeking to provide full access to materials because some believed that it did not allow copying and modification of existing works without permission. As a result, there has been tension between copyright law and effective library access for those with print disabilities. Solutions to this tension are based on the exceptions built into the Copyright Act. Indeed, a recent court decision, *The Authors Guild, Inc., et al., v. HathiTrust, et al.*, declared

expressly that Section 107 of the Copyright Act, fair use, is available to resolve the apparent tension between copyright and accessibility (see next section for details about this court decision).

The Copyright Act recognizes the importance of making works accessible and provides several specific exceptions that support library efforts for this purpose: Sections 107, 110(8), and 121.

The primary copyright exception in this area is Section 121 of the Copyright Act, often called the “Chafee Amendment,” which permits copies of previously published, nondramatic literary works to be translated into “braille, audio, or digital text” and distributed to individuals with specified disabilities.³¹ Many established formats for disabled patrons, such as large-print books, are not included. This privilege is qualified by several important limitations regarding the type of use, the items that may be copied, and the institutions that are authorized to create these translations.

Copies under the Chafee Amendment can only be made by an authorized entity—a government agency or a nonprofit organization that has a “primary mission to provide specialized services relating to adaptive reading or information access needs.” Many libraries and other organizations believe that providing services to the print disabled is a primary mission and thus have been serving the print-disabled community. The ruling in *The Authors Guild, Inc., et. al., v. HathiTrust, et. al.* fully supports this view. As stated by Judge Baer, “The ADA requires that libraries of educational institutions have a primary mission to reproduce and distribute their collections to print-disabled individuals, making each library a potential ‘authorized entity’ under the Chafee Amendment.”³²

Libraries also rely on partnerships with other authorized institutions, such as the National Library Service Program, Learning Ally (formerly Recordings for the Blind and Dyslexic), State and Regional Libraries for the Blind, Bookshare, and the American Printing House for the Blind.³³

Finally, the Chafee Amendment clearly delineates which patrons may avail themselves of copies made under this exception. Copies may only be distributed to “individual(s) with a disability” who are certified by a competent authority as unable to read normal printed material as a result of physical limitations. Library of Congress regulations—described in 36 CFR 701.6(b)(1) & (2)—explicitly define the types and degree of disability as well as the particular bodies that qualify as “competent authority” to certify disabled individuals. Disabled patrons who have not been certified by one of the authorities named in the law may not access copies made under Chafee.

Overall, the Chafee Amendment provides an important exception to copyright’s limitations on copying, but some believe it offers insufficient latitude to support libraries’ efforts to fully serve all patrons and meet their legal obligations.

The Copyright Act provides another exception for libraries: 17 U.S.C. §110(8) permits “performance of a nondramatic literary work, by or in the course of a transmission specifically designed for and primarily directed to” patrons who are unable to “read normal printed material” or “hear aural signals” as a result of their disability.³⁴ These transmissions must be “made without any purpose of direct or indirect commercial advantage” and made available through the facilities of a government body, a noncommercial educational broadcast station, or a narrowly defined set of broadcasters. This permits qualifying libraries to stream content directly to patrons with disabilities in these limited situations.

Copyright law also provides a general exception for socially valuable uses. Fair use may support copying to “fill the gap” in cases where copying benefits society and where the market is not reasonably providing necessary services. A claim of fair use is evaluated based on the statutory factors described in 17 U.S.C. § 107, including the following: (1) the purpose and character of the use, including whether such

use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.³⁵

Fair use is a fact-specific analysis that weighs all four factors. Fair use generally privileges nonprofit efforts that do not disrupt existing markets, so library services that do not compete with services offered by rightsholders may be strong candidates for a claim of fair use. Indeed, the *Code of Best Practices in Fair Use for Academic and Research Libraries* expresses the consensus of academic and research librarians—providing accessible material is likely to be fair, particularly when tailored to the specific needs of the patron.³⁶ The fair use case is strongest when efforts are coordinated with the university's disabilities services office, which works with individuals entitled to service, informs them of their rights and responsibilities, and adopts policies that are widely and consistently applied. The combination of the Chafee Amendment and fair use generally provides sufficient latitude to overcome any concerns about possible institutional risk in order to best meet mission and serve the needs of the print-disabled community. As noted by Judge Baer in the recent ruling concerning HathiTrust, "I cannot imagine a definition of fair use that would not encompass the transformative uses made by the Defendants' MDP [Mass Digitization Project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the ADA."³⁷

Libraries can also seek permission for specific uses from the rightsholder. Because there can be tens or hundreds of individual rightsholders who must be contacted, however, transactional costs present a major barrier to large-scale efforts. Libraries may mitigate these costs by leveraging their partnerships and collaborative networks as well as their expertise and experience with licensing.

Authors Guild v. HathiTrust Litigation

The recent landmark decision in *The Authors Guild, et. al., v. HathiTrust, et. al.*, litigation provides important guidance on key legal questions around accessibility. For several years, the HathiTrust Digital Library (HDL) and its member libraries have worked to index and preserve digitized works from library collections to foster research, teaching, and learning. The Authors Guild (AG), with other associations and a handful of individual authors, sued HDL claiming that its mass digitization program, in collaboration with Google, constituted copyright infringement. The Library Copyright Alliance filed two amicus briefs in this case in support of HDL. The NFB and three individuals with print disabilities intervened in the case. In its brief before the District Court for the Southern District of New York, the NFB noted, "without the HDL, the blind are relegated to second-class academic citizenship—one without the privilege of access to the print collections of university libraries. With the HDL, the blind have the same comprehensive access to the print collections of university libraries as the sighted, and as a result, can learn and contribute to learning as do sighted students and scholars."³⁸

On October 10, 2012, Judge Baer of the US District Court for the Southern District of New York ruled in favor of HDL and the NFB. First, the court held that fair use is a supplement to Section 108, and, contrary to the AG's arguments, libraries are entitled to a full fair use defense and are not required to rely only on Sections 108 and 121 to preserve and provide access to library collections.³⁹ Second, the court held that mass digitization for search, preservation, and accessibility is a fair use and two of HDL's purposes (search and accessibility) are "transformative," because the works are used for a different purpose from

the original, intended purpose. The court found that use of the entire work is fair where appropriate to the purpose. Moreover, the court pointed to evidence showing that a market likely could not develop for licensing these kinds of uses, and that further, because they are transformative, these uses cannot be subject to licenses. The ADA requires, and fair use and the Chafee Amendment allow, digitization for accessibility.

Finally, the court determined that making library collections equally accessible is required for equal access to education for the print disabled. The market will not satisfy the need. The court found that the Chafee Amendment applies because the ADA makes accessibility a “primary mission” for all libraries. And Judge Baer noted that even if the Chafee Amendment does not apply, fair use does. This landmark ruling is powerful evidence that the law will strongly favor libraries when they do what is necessary—up to and including digitizing millions of books—in order to provide equitable access to materials.

This decision presents many opportunities for research libraries. For example, the decision strongly suggests that research libraries now may retain scanned, digital copies that were previously made available to a disabled student and make them available to other print-disabled students. Retention of these copies for that purpose constitutes a fair use. In addition, once a research library or disability services office makes a scanned copy of a work under the Chafee Amendment, the print disabled at other institutions may use this copy, rather than duplicate the scanning effort. Moreover, if vendors and publishers do not provide works in an accessible format to the research library, fair use entitles the library to make these resources accessible. Finally, the use of descriptive metadata to improve accessibility to the Hathi corpus, such as the labeling of images, will over time result in a more effective and higher quality search for all users.

US Engagement with World Intellectual Property Organization (WIPO)

The US government is participating in international discussions at the World Intellectual Property Organization (WIPO) in support of an international instrument for exemptions and limitations for the visually impaired. It is not clear if the “Working Document on an International Instrument on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities”⁴⁰ will become a binding treaty or take another form of international agreement such as guidelines or recommendations known as “soft law.” The Library Copyright Alliance, as a non-governmental organization represented at WIPO, is actively engaged in these discussions. A meeting in November 2012 is seen as central to determining the pace and progress of whether an international instrument will be completed in the near term. WIPO discussions typically take years to conclude, and this discussion concerning access to copyrighted works by the visually impaired has been under discussion since 2006.

Disability and Copyright Law in Canada

In Canada, accessibility law is under provincial or state jurisdiction. There is no national legislation specific to the area of accessibility. Therefore, practices supporting people with disabilities may vary from province to province. In Ontario, for example, academic institutions and libraries work under the Accessibility for Ontarians with Disabilities Act (AODA); whereas, in Saskatchewan, the Saskatchewan Human Rights Code, alongside the Canadian Charter of Rights and Freedom, is applied.

Unlike accessibility law, copyright law is under federal jurisdiction. Copyright issues affecting persons with disabilities are dealt with solely at the federal level in the Copyright Act.

The Canadian copyright landscape has changed appreciably over the last six months. New copyright legislation was passed on June 29, 2012, and is known as Bill C-11, or the Copyright Modernization Act. As of October 16, 2012, the legislation awaits “proclamation” in whole or in part, which is expected at any time. In addition, the Supreme Court of Canada (SCC) made judgments in July 2012 on five simultaneous copyright decisions. A key point emerging from these decisions is that there is a far greater scope of fair dealing in the educational sector than the Copyright Board had recognized previously. The SCC ruled that the provision by teachers of multiple copies of short excerpts, and the making of copies of material prescribed by a teacher, may be fair; the purpose of the student is relevant.

Bill C-11 includes general provisions of interest regarding accessibility in addition to provisions solely focused on disabilities issues. The legislation provides that “organizations acting for the benefit of persons with a ‘perceptual disability’ can copy a work protected by copyright in alternate formats such as Braille, talking books or sign language.”⁴¹

Provisions in Bill C-11 will make the following three changes, according to the Library of Parliament summary.⁴² First, the bill provides “amendments to the exceptions available to educational institutions, libraries, museums, archives and persons with a ‘perceptual disability’ in order to facilitate the use of digital technologies and make the provisions more technologically neutral.”⁴³

Second, there are exceptions for persons with perceptual disabilities (sections 32 and 32.01 of the Act) and an exception for nonprofit organizations acting for the benefit of persons with a print disability to make a copy of a work in a format specifically designed for persons with a print disability. This includes the ability to send a copy of the work to similar organizations abroad, as long as the work being adapted is by a Canadian author or a national from the country to which the adapted work is being exported.

Finally, the liability of a nonprofit organization that makes a good-faith mistake regarding an author’s nationality is limited. This amendment would clarify or would allow the courts to take into account good-faith efforts taken by the nonprofit organization when awarding damages, and copyright owners would then be able to seek only an injunction against the nonprofit organization rather than damages.

Licensing Issues

Librarians seeking to provide accessible content for their patrons must also grapple with licensing, rather than purchasing, electronic content, thus licensing is important to ensuring accessibility. Since the growing adoption of e-journals in the 1990s, content provided by libraries is increasingly acquired digitally through a license that provides specific terms of use. This practice may significantly limit libraries’ ability to make such materials as e-journals, databases, e-books, and online textbooks accessible, since accessibility features may not be built into the vendor platform or the terms and conditions of the license.

In cases where library materials are licensed, the terms of use may be governed by the private law agreement—the license—rather than simply by the public law of the US Copyright Act or Canadian copyright law. Although traditional copyright law remains the default in the absence of explicit language, the terms of a license can affect libraries’ ability to make works fully accessible.

As a result, carefully and deliberately negotiating these licenses is critical to making materials accessible. Terms limiting libraries' ability to copy and modify content may foreclose the ability to make accessible versions of library materials, compounding the issues described above. By the same token, however, more favorable terms may give libraries broader rights to adapt content to meet the needs of patrons. Libraries can require that any licensed content come with accessibility "baked in" (see Appendix A). Individual libraries and consortia must carefully strike this balance, as they have always done when acquiring content.