

# **The Law and Accessible Texts:**

## Reconciling Civil Rights and Copyrights

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**ASSOCIATION  
OF RESEARCH  
LIBRARIES**



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## Executive Summary

Institutions of higher education (IHEs—colleges, community colleges, and universities) have a mission to provide all students, including those with disabilities (a physical or mental impairment that substantially limits one or more major life activities), with opportunities for a rich, deep, and equitable learning experience, and to provide all researchers with access to a comprehensive and varied collection of information resources to support their work. Several disability rights laws create obligations for IHEs to ensure that students and researchers with disabilities have access to resources, including texts, at a level that is as close as reasonably possible to the level of access provided to those without disabilities. Enforcement actions can be brought by federal government agencies (the civil rights division of the Department of Education, for example) or by private citizens, and the result of these actions has typically been that IHEs are compelled to improve levels of access, including by incorporating new technology, creating new staff positions, and implementing new policies.

For years, disability services offices (DSOs—the office or department at an IHE tasked with supporting the needs of users with disabilities) and others involved in fulfilling the requirements of disability rights laws have viewed copyright (the body of law that governs copying, adaptation, distribution, and certain other uses of works of creative expression) as an impediment to their work. They have been uncertain about what is permitted, and have constrained their activities in support of civil rights out of fear of violating copyrights. The tension has dramatically curtailed their efficiency.

This fear is due primarily to a misunderstanding of voluntary arrangements DSOs have with some of the biggest publishers. These arrangements place strict constraints on DSOs' use and reuse of accessible texts, based on the publishers' view of their commercial interests, not on the law. Some publishers have also included misleading warnings on accessible texts they provide to DSOs.

In reality, even in the absence of such voluntary arrangements, copyright law provides IHEs with broad, clear authority to create accessible copies of in-copyright works (i.e., to “remediate” them by converting them into a format that makes it possible for users with disabilities to acquire the same information, have the same interactions, and otherwise derive the same benefits as other users), to distribute accessible texts to qualified users, and to retain and share remediated texts in secure repositories for use in serving future qualifying requests.

The key provisions in U.S. copyright law that make this possible are Section 121, also known as the Chafee Amendment, and Section 107, the fair use doctrine. Section 121 is a specific but broad exception permitting authorized entities to make copyrighted works available to the print-disabled in accessible formats without permission from the copyright holder. Section 107 is the general right to use copyrighted

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works without permission when a set of flexible, equitable factors weigh in favor of the use. A landmark case, *Authors Guild v. HathiTrust*, has established that fair use authorizes IHEs to create and manage repositories of digital texts in support of accessibility, among other legitimate uses.

Together, these two rights enacted by Congress permit each step in a workflow that starts with a request from a student or researcher with a disability, involves remediation and delivery of an accessible version to the requestor, and culminates with deposit of the remediated version in a secure repository for appropriate future use (including future remediation) in the service of other requestors. Along the way, copyright law provides some guidance as to how exactly each step might be conducted, but

leaves IHEs with discretion to design their systems in consideration of values and priorities both intrinsic and extrinsic to copyright.

In addition to copyright, IHEs working together to provide accessible texts to qualified users should consider a range of values and priorities as they decide whether and how to take advantage of their rights. These include their own missions, the privacy and autonomy of those they serve, and the plausible risks (if any) associated with increasing access to information.

## Introduction

This report is written to inform the participants in a new collaborative project to improve how accessible texts (i.e., texts in formats that meet the needs of users with disabilities)<sup>1</sup> are created, managed, and stored. It provides a concise, up-to-date summary of the two key legal pressures that bear on the creation and sharing of accessible texts: the civil rights laws that require creation and distribution of accessible texts by IHEs to ensure equitable access to information, and the copyright laws that are sometimes (as we will show) misperceived as barriers to that effort. Concern that these legal regimes may be in tension contributes to inefficiency in making and sharing accessible texts. Reconciling the mandates of copyright and civil rights clears the way for dramatic improvements in service that both vindicate civil rights and serve the First Amendment values that animate copyright.

Indeed, reconciliation is possible because both bodies of law serve the same core First Amendment value: increasing access to knowledge. The title of the world's first copyright law, England's 1710 Statute of Anne, was "An Act for the Encouragement of Learning," a phrase so apt that the U.S. Congress copied it wholesale in the title

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of its first Copyright Act in 1790. Both copyright laws reflect two assumptions: that granting authors a limited monopoly over certain uses of their works would give them the incentives needed to create new works; and that while copyright would impose some short-term limits on access, the increase in available works would more than compensate overall. From its earliest days, however, copyright law also has included limitations and exceptions to ensure immediate access in cases where exclusive rights overburden the ultimate goal of promoting learning. We will show below that the general fair use right and the specific exceptions and rules favoring access for the disabled in current copyright law provide amply for IHEs' creation and sharing of accessible texts.

An important precursor to this report is the white paper *Libraries: Take AIM!* (LTA),<sup>2</sup> which describes (among other things) the challenges to accessibility posed by copyright concerns in the DSO community, as well as some of the shortcomings of existing efforts led by big publishers to provide accessible texts to IHEs. LTA correctly suggests that recent developments in copyright law give IHEs reason to rethink copyright and take a more optimistic view of its effects on accessibility. Our report picks up where LTA left off and explains the relevant developments in greater detail.

Another important antecedent to this report is a two-day meeting of experts convened in January 2019 to reexamine these legal issues and develop a sensible consensus about how copyright law (together with a few related concerns) would affect an accessible text-management workflow that included federated repositories, from patron request to remediation to multi-institutional sharing. That discussion was striking both for its richness and for the robust consensus it achieved. This report benefits tremendously from those conversations, but it is ultimately the product of its authors and should not be attributed to attendees at the meeting. Additional details about the meeting can be found in the Acknowledgments section.

The report begins with a brief description of the current state of civil rights laws favoring accessibility, including trends in enforcement in recent years. Section II provides an account of why and how copyright concerns have served as stumbling blocks for disability service offices (DSOs). Section III walks through each step in a remediation workflow and provides some key legal ramifications for how that step may proceed. Section IV explores more deeply the key provisions in copyright law favoring the creation and sharing of accessible texts; this section will be of most interest to university counsel's offices and other legal experts. Finally, Section V surveys some legal and policy considerations beyond copyright and civil rights that may be worth bearing in mind as institutions design their collaborations in areas where law gives them flexibility.

## **1. Disability Rights Obligations for Institutions of Higher Education**

IHEs have legal and moral obligations to provide all students and researchers with an equal opportunity to participate in and benefit from their programs, and cannot discriminate on the basis of disability.<sup>3</sup> Failure to meet that obligation exposes IHEs to risk of enforcement actions that can be brought by multiple federal agencies as well as by affected individuals and associations committed to disability rights. Accordingly, the law provides a strong incentive, in addition to IHEs' own commitment to mission, to adopt programs that ensure instructional materials are available in accessible formats.<sup>4</sup> An efficient, reliable shared source of accessible texts would be a powerful bulwark against IHE liability. This section surveys the primary sources of legal authority supporting disability rights as well as the enforcement landscape.

## **Key Legal Provisions**

In the U.S., there are a number of laws that serve as the basis of federal policy for persons with disabilities. These include the Americans with Disabilities Act of 1990 (ADA), 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.<sup>5</sup>

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, while Title II 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 regarding the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations” of any public accommodations, including private, postsecondary institutions. Thus, campuses and, in particular, research libraries and disability services offices, in both public and private institutions, must comply with certain ADA provisions.

In addition, 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.

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, many states have enacted similar laws and requirements.

One important aspect of these laws and regulations is that the obligations they place on regulated entities evolve and change as new technologies are developed. Disability rights law does not require measures that would impose undue burdens on institutions, but as technology changes the calculus of what constitutes a reasonable accommodation, institutions need to reevaluate their obligations toward disabled members of their communities.<sup>6</sup> Just as accessibility law discourages use of inaccessible technology, it also *encourages* the adoption of accessible technology.

## **Enforcement**

The U.S. Department of Justice (DOJ) Civil Rights Division and the U.S. Department of Education (ED) Office of Civil Rights share responsibility for 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, in February 2011,<sup>7</sup> the Institute of Museum and Library Services (IMLS) issued guidance on “Making Museums and Libraries More Accessible,” intended to help grantees comply with federal regulations barring discrimination by recipients of federal funds.<sup>8</sup>

Federal agencies’ commitment to enforcing disability rights laws is bipartisan and has spanned multiple administrations.<sup>9</sup> As a result, wide-ranging consent decrees have compelled universities to create comprehensive policies and procedures, and to devote substantial resources to ensuring that disabled members of the campus community

have equitable access to technology and other university services, including course materials.<sup>10</sup> IHEs, and in particular research libraries, have made accessibility a priority in recent years, developing best practices and working collaboratively with disability rights groups to ensure compliance not only with the letter but also with the spirit of the law.<sup>11</sup>

DSOs are on the frontlines of ensuring compliance with civil rights laws. Without their considerable efforts to ensure material required for coursework and independent research is available in accessible formats, for example, print-disabled students could have credible claims of discrimination. IHEs can strengthen their support for civil rights, and reduce risk of liability, by empowering DSOs wherever possible with new tools, including legal sources of accessible texts as well as infrastructure for managing remediation of texts and coordinating fulfillment of qualifying requests.

## **2. Why Perceived Copyright Limits Have Been a Barrier to Accessibility**

Copyright has been perceived by DSOs and others as a major barrier to providing accessible texts to persons with disabilities. Most learning and research materials fall within the scope of copyright protection under federal law. Interviews and focus group discussions with members of the DSO community recounted in the *LTA* report suggest these professionals feel a general sense of anxiety about perceived legal risk associated with remediating and sharing texts. This anxiety leads to self-policing behavior that impedes the mission of their offices. Permissions are sought needlessly (and sometimes repeatedly for the same title), remediating texts are needlessly destroyed only to be recreated when the next semester begins or the next request is received, a practice the law simply does not require. In addition, dire legal warnings accompany texts shared with print-disabled students, and needlessly exhaustive records are kept, all in deference to the

perceived requirements of copyright law. Perhaps most alarmingly, students and their institutions routinely purchase additional inaccessible copies solely as a predicate for receiving accessible ones. DSOs routinely engage in these behaviors due to anxiety over copyright law.

The causes of this anxiety are multifarious, but a few key vectors surfaced in the *LTA* discussions and in the course of the expert meeting that informed this white paper. Perhaps the most important is the practice of large publishers who impose costly and wasteful contractual restrictions when they voluntarily provide accessible texts to

“[N]one of these conditions is required by or even related to copyright law; they are included in licenses and terms of use and enforceable only by contract law, and only against those who accept the terms.”

DSOs. For example, the Access Text Network (a service created under the auspices of the Association of American Publishers) requires DSOs to agree to seek publisher permission for each individual student who needs access to an ATN-provided accessible file, not to share such files with other IHEs (even other “qualified” ATN users) without advance publisher permission, and to destroy or “securely archive” each ATN-provided file after the student who requested the text graduates.<sup>12</sup>

As we will see below, none of these conditions is required by or even related to copyright law; they are included in licenses and terms of use and enforceable only by contract law, and only against those who accept the terms. Unfortunately, DSOs perceive these requirements as derived from the publishers’ copyrights rather than as contractual obligations.

Indeed, some publishers go one step further and include alarming and misleading warnings in the forms and cover sheets they use when providing accessible texts to DSOs. For example, one publisher currently includes this warning on its accessible text order form:

EXCHANGE OF THIS OR ANY OTHER FILE, IN A MODIFIED FORMAT OR COPY THEREOF, IS A VIOLATION OF THE U.S. COPYRIGHT ACT. SEPARATE AUTHORIZATION MUST BE OBTAINED FOR EVERY USER OF THIS FILE, ITS MODIFIED FORMAT OR COPY THEREOF, AND SEPARATE PROOF OF PURCHASE OF THE TEXT MUST BE PROVIDED. [Capitalization in the original.]

As explained below, this statement is simply false. Both fair use and Section 121 authorize “exchange” of files in support of accessibility without any need to seek “authorization,” whether for the first or any subsequent user, and no proof of purchase is required.<sup>13</sup> Nevertheless, most DSOs trust that such publishers’ statements provide accurate information about the law, and limit their practices accordingly.

Two more factors likely contribute to copyright anxiety in the DSO community. One is the relative novelty of some key legal developments favoring accessibility. The Second Circuit’s landmark opinion in *Authors Guild v. HathiTrust*,<sup>14</sup> for example, was issued in 2014. Five years may seem like a long time, but it can take years for large institutions to change their practices related to copyright law. For example, as late as the early 2000s many IHEs still were attempting to conform their course support activities to copyright guidelines for “classroom photocopying” from the 1970s that bear little resemblance to the way the law applies to technology in use today.<sup>15</sup>

A second, related factor may be the relative paucity of litigation (and consequently of case law) on this particular set of overlapping issues. No DSO has ever been sued (or threatened with suit, as far as we can tell) for copyright infringement. With the instructive exception of the Authors Guild’s failed litigation against HathiTrust and some of its members, would-be copyright plaintiffs have generally steered clear of lawsuits against libraries and IHEs for making works accessible to people with disabilities. Even that case began as an adjunct to a previous litigation campaign against Google, and the accessibility

issue arose only because it was raised and vigorously defended by the defendants. As a result, the *HathiTrust* opinion is the only circuit court opinion dealing with the application of fair use to accessibility issues, and the district court's opinion is the only judicial application of Section 121. IHEs and other entities who operate under the Chafee Amendment and fair use to provide accessible texts have typically been careful and conscientious, and they are potentially sympathetic defendants. Copyright holders also recognize that the downside risk of a lawsuit includes not only losing a particular case but also establishing clear precedent favoring access more generally, as happened in the *HathiTrust* litigation.

While the case law directly on point may be limited, the principles applied in the two *HathiTrust* opinions are clear, convincing, and consistent with other lines of case law. The scope and purpose of Section 121 are broad and clear. The Marrakesh Treaty and regulations promulgated by the Copyright Office add to the authority favoring accessibility. Section IV provides a more detailed discussion of each of these legal authorities, but first Section III provides practitioners a quick guide to copyright law's most important implications for a networked, cooperative arrangement for providing accessible texts to qualified users.

### **3. Each Step of a Remediation and Sharing Workflow Is Permitted by Copyright**

The law is much more permissive than is reflected in common practice at many DSOs and in voluntary arrangements offered by publishers. It leaves ample room for IHEs (individually and collectively) and allied organizations to shape their actions to their own circumstances and to users' needs. This section will describe how copyright affects each major step in a workflow that leverages large collections of digital texts to provide accessible copies to qualified users.

## The Request

Anyone with a disability that inhibits them from using traditional print or electronic formats may request an accessible version. Persons with print disabilities (including learning disabilities as well as visual and physical impairments) are explicitly covered by both Section 121 and *HathiTrust*. The inherent logic of the *HathiTrust* opinion certainly can go further, however.

The court in *HathiTrust* recognized that the text of the legislative history of Section 107, which refers to blindness, was giving an example of the scope of fair use with respect to disability, not describing its outer bounds. The court's reliance on general disability policy, such as the Americans with Disabilities Act, and on market failure (which recurs across other disabilities) supports application of fair use across all disabilities. While the project that this white paper seeks to inform will begin with print materials, it need not limit itself strictly to these materials due to copyright concerns. For example, the Copyright Office has found that adding closed captioning and audio description to audiovisual materials is an important and lawful accommodation that authorized entities can make to ensure equitable access.

“Neither the requestor nor the fulfilling institution needs to purchase an inaccessible copy in connection with each (or any) request for an accessible one.”

Neither the requestor nor the fulfilling institution needs to purchase an inaccessible copy in connection with each (or any) request for an accessible one. Section 121 makes no mention of a purchase. Producing multiple accessible copies from a single source fits perfectly well within the text of Section 121 and its application by Judge Baer in *HathiTrust*. The fair use analysis in *HathiTrust* is premised on the importance of accessibility as an objective, and failure of the market to meet it; again, it makes no mention of additional purchases by either users or fulfilling institutions.

Indeed, as the *LTA* report points out,<sup>16</sup> to the extent that the emergence of a market solution would be desirable, the best incentive for that emergence is the expectation of new revenue to be derived from serving the disabled. Requiring the purchase of an inaccessible copy removes that incentive.

## **Remediation**

As noted above, the preparation of a remediated copy in response to a request is unproblematic from a copyright standpoint. Likewise, IHEs and their affiliates are free to anticipate future requests by preparing accessible texts of works that are likely to be in demand.

A secondary copyright puzzle that might arise at this stage is whether a new copyright-eligible work is created as a result of the remediation process. The Copyright Act does provide for new copyrights in “derivative works” based on existing works, “such as a translation... sound recording...or any other form in which a work may be recast, transformed, or adapted.”<sup>17</sup> In order to merit a new copyright, however, a derivative work must itself embody new original expression contributed by its author(s), a condition highly unlikely to obtain where texts are remediated with an intent to reproduce the underlying work as faithfully as possible in an accessible format.<sup>18</sup>

Mere changes in file format or technical interventions such as adding markup tags would not reach the requisite threshold of creativity. Even changes that involve human judgment aren’t necessarily creative in the way required by copyright.<sup>19</sup> Some remediations, however, such as the creation of written descriptions of images or figures, or the audio recording of a reading (arguably a performance) of a textual work, may involve the creation of new expressive content that could, arguably, result in a new copyright-eligible work.

To avoid needless complexity and ensure the smooth functioning of the remediation service, IHEs should consider steps to clearly, consistently,

and systematically renounce any copyright interest associated with their remediation activities. The CC0 Public Domain Dedication license<sup>20</sup> may be a useful tool for this purpose.

## **Delivery**

Once accessible copies are created, they can be delivered to requestors in file formats appropriate for their use, without technological protection measures (TPMs). Of course, it is important to have a system in place to verify eligibility. But neither Section 121 nor the application of fair use in the *HathiTrust* opinion requires use of TPMs, which can create compatibility problems with reader software. Indeed, the Library of Congress has repeatedly issued rules that permit *breaking* TPMs in order to ensure that accessible materials can be made available for use by persons with disabilities.<sup>21</sup> Some repositories have used fingerprinting or watermarking to facilitate monitoring whether accessible copies are further distributed.<sup>22</sup> Their findings so far suggest such sharing is exceedingly rare. IHEs should weigh serious privacy and efficiency concerns against existing evidence of low incidence of downstream sharing in considering whether and how to implement such measures. DSOs should include simple, accurate<sup>23</sup> information about the copyright status of the work shared and the legal rights of the requester to make further uses of the work. Importantly, DSOs should create prudent practices to assure that accessible copies are made and distributed exclusively to qualified people who have disabilities.

## **Retention and Sharing**

A long line of fair use case law supports the creation of databases of in-copyright works as part of a system that is reasonably necessary to support a legitimate fair use.<sup>24</sup> Since the delivery of accessible texts to qualified persons is a lawful fair use, the creation of the underlying database(s) that make that delivery possible is also noninfringing. Indeed, this is one of the primary lessons of the *HathiTrust* decision. Libraries and disability services offices have long relied on partnerships

with other authorized institutions, such as the National Library Service Program, the HathiTrust Digital Library, 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.

In creating and administering a shared database (or federated collection of databases), IHEs should take reasonable steps to ensure the security of the stored materials. The court's discussion of this issue in *HathiTrust* is instructive. There the Authors Guild raised the general prospect of the database being hacked as evidence of market harm, but gave no evidence of specific vulnerabilities in HathiTrust's systems. HathiTrust gave a clear account of the various steps it takes to ensure its database is secure against intrusions, and the court found these steps were reasonable. It compared the Guild's worries to similar cases where such concerns were held to be "speculative."<sup>25</sup>

#### **4. Copyright Law Provides IHEs and Affiliates Broad Latitude to Make and Share Accessible Texts**

IHEs in the United States have broad latitude to make and share accessible texts in order to provide equitable access to knowledge for qualified researchers and learners they serve. Copyright law includes two key statutory provisions, fair use and Section 121, that protect this activity domestically.<sup>26</sup> The Copyright Office's triennial anti-circumvention rulemaking has also consistently recognized and vindicated accessibility as an important value, and has declared repeatedly that fair use protects the creation and distribution of accessible texts.<sup>27</sup> The Marrakesh Treaty provides another clear pathway for cross-border sharing of accessible texts. By means of these provisions, copyright law ensures that proprietary interests yield to accessibility when the two come into apparent conflict.

## **Copyright's Purpose**

Copyright law in the U.S. exists to serve the public interest.<sup>28</sup> The Constitution empowers Congress to award copyrights to authors “for limited times” in order to “promote the progress of science....”<sup>29</sup> The copyright system assumes that, generally speaking, granting exclusive rights will provide an incentive to authors and publishers who might not otherwise create or publish new works. These incentives are a means to an end, however, and the law includes limitations and exceptions to exclusive rights to ensure they do not unduly burden the very public interest they were designed to serve, especially the First Amendment values of freedom of expression and access to knowledge.<sup>30</sup> We should recognize, then, that the general fair use right and the specific provisions described below are as important to the vindication of copyright’s ultimate purpose as the copyright holder’s exclusive rights themselves.<sup>31</sup> The limitations Congress enacted in Sections 107–122 help to define the ambit of the copyright holder’s Section 106 rights, which themselves exist explicitly “Subject to” the rights and uses described in Sections 107–122.

## **Fair Use and the *HathiTrust* Opinion**

The broadest protection for making and sharing accessible texts comes from fair use, codified at Section 107 of the Copyright Act. Fair use was originally developed by judges to ensure that the exclusive rights granted by copyright do not unduly frustrate socially beneficial uses, especially ones that advance the goals of copyright law. Its origin in the U.S. is often traced to Judge Joseph Story’s opinion in *Folsom v. Marsh*,<sup>32</sup> the first opinion to describe what were later codified as the four statutory factors that courts must consider in deciding whether a use is fair. The doctrine has even deeper roots in English common law, as courts have recognized from the earliest days of copyright that strict enforcement of copyright will sometimes conflict with general principles of justice and sound policy.<sup>33</sup> Congress codified fair use at Section 107 in the Copyright Act of 1976. The Supreme Court has described fair use as one of the “built in First Amendment safety valves” in the U.S. copyright system.<sup>34</sup>

The text of Section 107 reads:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The statutory factors provide a useful framework for judicial consideration of the facts in each case, but they guide a flexible process of legal development that continues in the courts. This is clear from the text itself, which instructs courts to consider a non-exclusive list of four factors, but leaves them discretion to include additional factors. Use of the phrase “such as” in the preamble indicates that the statute’s list of favored purposes (news reporting, scholarship, criticism, etc.)

is open-ended. We must turn to legislative history and case law, then, to learn more about how fair use applies today.

### *Legislative History*

The House Report expresses a legislative intent merely to “endorse” the common law doctrine as it had developed in the courts, and disclaims any intent to “freeze” it.<sup>35</sup> Nevertheless, the House Report describes several activities Congress believed were likely to be fair under the newly codified doctrine, and courts have relied on these examples for guidance in relevant circumstances. One such illustration is “the making of copies or phonorecords of works in the special forms needed for the use of blind persons.”<sup>36</sup> The report goes on to give as examples of these “special forms” both Braille and recordings of books being read aloud. It notes that works in these formats “are not usually made by the publishers for commercial distribution,” and endorses both the efforts of the Library of Congress and the work of “individual volunteers” in local libraries who made accessible copies in response to patron requests. This congressional intent was endorsed by the Supreme Court in the *Sony Betamax* case, and later weighed as part of the first factor inquiry in *HathiTrust*. It also factored into the development of best practices for academic and research libraries.

### *Code of Best Practices*

Fair use best practices statements, developed through a rigorous process of interviews and small group discussions followed by independent legal review, have enabled a wide array of communities to better understand and exercise their fair use rights.<sup>37</sup> *The Code of Best Practices in Fair Use for Academic and Research Libraries*<sup>38</sup> (ARL Code) expresses the consensus of academic and research librarians on the application of fair use to a set of situations they frequently encounter. Principle Five of the ARL Code states that providing accessible material is likely to be fair, particularly when tailored to the specific needs of the patron.<sup>39</sup> The ARL Code also provides that the fair use case is strongest when efforts are

coordinated with the university's DSO, when the library informs users of their rights and responsibilities, and when it adopts policies that are widely and consistently applied.

### *Authors Guild v. HathiTrust*

No cases involving copyright and accessibility were decided prior to or for almost four decades following the passage of the 1976 Copyright Act. The appellate courts' first encounter with it was in *Authors Guild v. HathiTrust*,<sup>40</sup> part of the litigation in response to the Google Books project.<sup>41</sup> No court has ruled on the application of fair use to accessible texts since the Second Circuit's 2014 opinion in *HathiTrust*, which is destined to be highly influential.<sup>42</sup>

The case's import is deepened by the tendency of appellate courts in other circuits to look to the Second Circuit as a source of expertise on copyright. The court handles a steady diet of complex copyright cases thanks to the concentration of media businesses in New York, and judges on the circuit have shaped the law nationwide. This influence includes groundbreaking cases and articles on the meaning and scope of fair use. The court's application of fair use therefore merits a detailed recapitulation.

HathiTrust was created by research libraries and operated by the University of Michigan with the initial task of managing the library of digitized works that was started with the Google Books project. Since its creation, HathiTrust has grown its membership to more than 140 institutions, and has continued to grow its collection (the HathiTrust Digital Library, or HDL) with contributions from other digitization initiatives.<sup>43</sup> The Authors Guild brought suit against HathiTrust and several of its member libraries in order to block all unauthorized uses of the HDL. In particular, the Guild alleged that HathiTrust and the University of Michigan were infringing copyrights by providing accessible texts to qualified print-disabled patrons. The National Federation of the Blind (NFB) and several of its members, in an unlikely

but ingenious strategic move, joined the case as defendants on behalf of the print-disabled users of the HDL. Judges in both the District Court and the Second Circuit ruled strongly in favor of HathiTrust, its member libraries, and the NFB. The district court opinion, by Judge Baer, dealt with both Section 121 and fair use, whereas the appeals court focused only on the latter doctrine.

The first important takeaway from the Second Circuit *HathiTrust* opinion is not specific to accessibility, but is rather a reaffirmation of an important general principle of fair use in the digital age: fair use protects the creation and manipulation of databases of in-copyright material as part of a technological process that is

“Fair use protects the creation and manipulation of databases of in-copyright material as part of a technological process that is reasonably necessary to produce fair use results.”

reasonably necessary to produce fair use results.<sup>44</sup> The creation of such a full-text database “behind the curtain” (i.e., inaccessible to the public) is not evaluated separately from its ultimate public-facing use; instead, the fair use evaluation of the resulting use provides the predicate for evaluating the invisible, technological processes (including the building of the database itself) that are reasonably necessary to make those results possible. This is an important insight, given that the third statutory factor asks courts to consider the “amount and substantiality of the portion used.” In some cases, the use of an entire work could weigh heavily against fair use, but in cases involving databases like this, use of entire works is consistent with fair use because that is the amount that must be collected and processed in support of public-facing uses that are deemed fair uses.

Next, the court turns to the first factor: the nature and purpose of the use. This factor has come to play a pivotal role in the fair use analysis in recent decades, as its outcome tends to color the evaluation of the remaining factors. Here the court weighs several considerations before

concluding that providing accessible texts to the print-disabled is a valid fair use purpose under the first factor.

First, the Second Circuit finds that providing accessible copies for users to read is not “transformative,” a term of art in fair use jurisprudence that denotes use for a new or different purpose. Examples of transformative use include parody, news reporting, and the operation of a search engine. Such uses are strongly favored, but the court is quick to point out that a finding of transformative use is not necessary to tilt the first factor, much less the final fair use analysis, in favor of the user.<sup>45</sup>

Second, the court looks to Supreme Court jurisprudence and legislative history. These two reinforce one another. The Supreme Court has acknowledged that, “Making a copy of a copyrighted work for the convenience of a blind person” is an example of fair use, citing legislative history. The Second Circuit cites both the Supreme Court and the underlying House Report language described above, weighing both as evidence that accessibility is a favored fair use purpose.<sup>46</sup> The court also quotes with approval the House Report’s allusion to the lack of a functioning market to provide accessible format copies to the print disabled, an issue that resurfaces in consideration of the fourth factor.

Finally, the court rounds out its consideration of the first factor by highlighting the importance of accessibility as a social “purpose.” It notes that since the passage of the 1976 Copyright Act, Congress has “reaffirmed its commitment to ameliorating the hardships faced by the blind and the print-disabled.”<sup>47</sup> As evidence, the court cites the Americans with Disabilities Act and the Chafee Amendment. Taken together, these considerations tilt the first factor decisively in favor of HathiTrust. To these expressions of federal policy favoring accessibility we can now add the Marrakesh Treaty and implementing legislation, as well as the Copyright Office’s DMCA rulemakings,<sup>48</sup> further reinforcing the logic of the opinion.

The court gives the second factor (the nature of the work used) the swift, dismissive treatment that has become standard in fair use cases. Because HathiTrust includes all kinds of works (fiction and nonfiction, scholarly and popular, etc.), that factor technically disfavors fair use, but the court is quick to note that it is “rarely determinative.”<sup>49</sup> Indeed, scholars have found the second factor is never determinative, and rarely influential at all.<sup>50</sup>

The third factor (the “amount and substantiality” of the use) is assessed entirely in light of the first: the court asks whether the nature and quantity of copying is appropriate to the purpose of providing access to the print-disabled, which it has already found to be a valid one. Here, the only dispute appears to be over which files and how many copies of a given work HathiTrust can retain as part of its efforts to serve the print-disabled. In finding the HathiTrust Digital Library can retain page images as well as extracted text, the court reasons that doing so is reasonable because “gaining access to the HDL’s image

“The court’s conclusion is clear, broad, and unconditional: ‘we conclude that the doctrine of fair use allows [HathiTrust] to provide full digital access to copyrighted works to their print-disabled patrons.’”

files—in addition to the text-only files—is necessary [for some print-disabled users] to perceive the books fully.”<sup>51</sup> Keeping four copies in disparate locations is justified by the need to “balance server load” and to “guard against risk of data loss,”<sup>52</sup> reasonable technological steps in achieving HathiTrust’s valid overarching purposes.

Finally, the court turns to the fourth factor, the effect of the use on the market for the works used. Here the court notes that the commercial market in books for the print-disabled is extremely limited, “a mere few hundred thousand titles, a minute percentage of the world’s books,” especially when compared to the “more than 10 million volumes” in the HathiTrust Digital Library. The court also cites the common practice of authors foregoing royalties on accessible formats, then returns to the

1976 House Report, which invoked market failure in its own finding that fair use should protect the provision of accessible copies to the print-disabled.

The court's conclusion is clear, broad, and unconditional: "we conclude that the doctrine of fair use allows [HathiTrust] to provide full digital access to copyrighted works to their print-disabled patrons." The breadth of this conclusion, together with the clarity of the foregoing analysis, establishes fair use as a powerful source of authority for IHEs to create and use digital collections like the HDL to serve disabled communities with accessible texts.

## **Section 121**

The Second Circuit concludes its fair use analysis in *HathiTrust* with a footnote explaining that the scope of its fair use holding makes it unnecessary to consider the applicability of Section 121. Nevertheless, Section 121 of the Copyright Act, often referred to as the Chafee Amendment because it was first introduced by Rhode Island Senator John Chafee, merits coverage here because it further demonstrates congressional intent to limit copyright's exclusive rights to facilitate broad access to information for the disabled. Specifically, it provides clear protection for making and sharing accessible texts. Indeed, in the *HathiTrust* case itself, the district judge had found Section 121 as well as fair use applied to the defendants' conduct. Also, some of the DMCA exemptions described below still track Section 121 rather than Section 107. The provision was first adopted in 1996, and was recently updated as part of the U.S.'s implementation of the Marrakesh Treaty, resulting in additional clarity and a broader scope, in regards to both works covered and eligible persons.<sup>53</sup>

### *Interpreting the Text*

Section 121(a) is the key provision for IHEs, and it provides that,

“Notwithstanding the provisions of section 106, it is not an infringement of copyright for an *authorized entity* to reproduce or to distribute in the United States copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation if such copies or phonorecords are reproduced or distributed in *accessible formats* exclusively for use by *eligible persons*.” [italics added]

The italicized terms have statutory definitions worth unpacking. IHEs may wonder whether they are considered “authorized entities” for purposes of the statute. The answer is certainly “yes.” The term’s statutory definition is: “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[.]”<sup>54</sup> IHEs meet this definition, as they do have provision of such services as “a primary mission.” For further guidance, we can turn to the district court’s opinion in *HathiTrust*, which addressed both fair use and Section 121. That opinion held: “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.”<sup>55</sup>

The next defined term is “accessible formats.” Added to Section 121 by the Marrakesh Treaty Implementation Act, it is defined in a way that reflects the reality of digital accessible texts. The original Section 121 used the term “specialized formats,” which was limited to “braille, audio, or digital text.” The Authors Guild and some of its *amici* relied on the word “specialized” to argue that versatile digital text formats potentially useful to those without disabilities should be excluded from Section 121, an argument both courts rejected. The Marrakesh Treaty Implementation Act now broadly frames the types of accessible formats as “an alternative manner that gives an eligible person access to the work . . . to permit him or her to have access as feasibly and

comfortably as a person without such disability.” The Senate Report language clarifies that the provision includes “related illustrations” such as graphs, maps, tables, or other forms of presentation. Furthermore, “It is understood that authorized entities may introduce such changes in a copyrighted work as are necessary to make the work accessible in the alternative format, taking into account the accessibility needs of the persons concerned. Such changes include, but are not limited to, differences in format or presentation.”<sup>56</sup>

The next term that needs definition is “eligible persons.” The Marrakesh Treaty Implementation Act amended Section 121 to remove certification requirements. Now, the statute describes three categories of persons who meet this definition—anyone who:

(A) is blind;

(B) has a visual impairment or perceptual or reading disability that cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(C) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading[.]

When compared to the previous version of the statute, this language helps clarify that the provision is meant to apply not only to physical disabilities specifically affecting vision, but also to *any* disability (including learning disabilities and mobility impairments) that affect the ability to read text in a standard format.

Other key aspects of the law are the works to which it applies and the additional requirements it creates for copies and phonorecords created under its authority. Section 121 applies to all “previously published

literary work[s] or...previously published musical work[s] that ha[ve] been fixed in the form of text or notation.”<sup>57</sup> This language expands the original Section 121 to add dramatic literary works (i.e., written plays and screenplays) and written musical works to the scope of the law, which previously only covered “non-dramatic literary works.” The statute (redundantly) bars the creation of copies that are not intended for eligible persons.<sup>58</sup> It also requires two notices be included with accessible copies: a copyright notice identifying the copyright owner and date of publication (this notice can typically be found on the original work and simply reproduced),<sup>59</sup> and a “notice that any further reproduction or distribution in a format other than an accessible format is an infringement.”<sup>60</sup>

Given the folk practice around this among DSOs, one aspect of Section 121 bears specific mention (indeed, repetition): there neither was nor is any requirement that either the authorized entity or the eligible person purchase an inaccessible copy before providing or receiving an accessible one. The law also says nothing about either the provider or the recipient having a responsibility to destroy accessible copies at any time after the transfer. This arrangement—permitting copying without purchase, and with the assumption that the copy will be retained by the recipient—is not unique to Section 121; the Copyright Act similarly provides in Section 108 that libraries and archives may provide patrons with copies of portions or, where they are not commercially available, copies of entire works, with one condition being that the copy “becomes the property of” the requestor.<sup>61</sup>

### *Relation to Fair Use*

While Section 121 describes a relatively generous scope of protected activity for IHEs serving researchers with disabilities, the fair use right remains vital. This is so in part because of its potential applicability to an open-ended class of works, including those excluded from Section 121. The most important of these is audio-visual works, including motion pictures, which can be made accessible to learners with

hearing disabilities by adding closed captions, or to those with visual disabilities by adding audio description. Remediation, distribution, and retention of such works would have to rely on fair use. Other works excluded from Section 121 and 121A include unpublished works; pantomimes and choreographic works; pictorial, graphical, and sculptural works; and architectural works.

Specific copyright limitations do not limit the general availability of fair use in related (or even identical) situations. Courts affirmed this principle repeatedly in the *HathiTrust* case. In the district court, Judge Baer said the Authors Guild’s argument “that the Chafee Amendment defines the outer bounds of protected copying on behalf of print-disabled individuals is without merit,” saying there was nothing in Section 121 showing an intent to preempt fair use.<sup>62</sup> On appeal, the Authors Guild tried again, arguing that fair use should be preempted by Section 108, which permits libraries and archives to engage in certain kinds of reproduction and distribution. That strategy failed, as the court dismissed the argument in a footnote, citing the savings clause at Section 108(f)(4).<sup>63</sup> As noted above, the Second Circuit held that fair use applied so decisively to *HathiTrust*’s accessibility program that it did not need to reach Section 121.<sup>64</sup> Congress later made its intent to leave fair use in place explicit in Section 121A(e): “Nothing in this section shall be construed to limit the ability to engage in any activity otherwise permitted under this title.”

“Specific copyright limitations do not limit the general availability of fair use in related (or even identical) situations.”

### **The Marrakesh Treaty, Section 121A, and the United States’ Continuing Commitment to Accessibility**

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled<sup>65</sup> was adopted by the World Intellectual Property Organization’s (WIPO) member states (including the United States) in

2013. The treaty is a response to what is often characterized as a “global book famine,” in which 285 million people in the world live with print disabilities but only 1–7% of books are published in accessible formats.<sup>66</sup> According to WIPO, “The Treaty has a single objective: to increase access to books, magazines and other printed materials for people with print disabilities. It aims to achieve this by making it easier for accessible copies to be created and shared across international borders.”<sup>67</sup> It requires all signatories to create exceptions to copyright that clearly permit the creation and cross-border sharing of accessible texts for the benefit of the print disabled.

### *Section 121A and Cross-Border Sharing*

To ensure compliance with the Marrakesh Treaty, Congress added a new Section 121A to Title 17 of the U.S. Code. Under that section, it is lawful to export accessible texts to authorized entities or eligible persons in other Marrakesh Treaty signatory countries. It is also lawful to import copies (or phonorecords, in the case of sound recordings) of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation in accessible formats. This sharing is permitted subject to the requirement to establish and follow practices to achieve a laundry list of objectives:

- Ensure the person being served is eligible
- Limit distribution of copies only to eligible persons or authorized entities
- Discourage reproduction and distribution of unauthorized copies
- “Maintain due care in, and records of, the handling of copies of works by the authorized entity, while respecting the privacy of eligible persons on an equal basis with others”
- Make publicly available titles of works that are available in accessible formats
- Make publicly available information about the policies, practices, and partners of the authorized entity partners for cross-border exchange

So, while Section 121A provides a clear right to share accessible texts across borders, it requires institutions to do some work developing policy. Moreover, it applies to the sharing of only certain kinds of works with specific countries.

Fortunately, thanks to the savings clause at Section 121A(e), institutions can also rely on fair use for cross-border sharing of accessible texts in cases where Section 121A might not apply (principally, in dealing with countries who are not signatories to the Marrakesh Treaty). Section 602(a) bars exportation without permission where the copy at issue is infringing. Section 107, however, provides that fair use “is not an infringement of copyright.” Because the provision of accessible texts to qualified persons constitutes a fair use, exportation does not violate Section 602. Likewise, U.S. institutions and individuals can rely on fair use to justify the importation of accessible materials from foreign countries, without regard for the restrictions (to published literary and musical works only) incorporated in Section 121A.

### *The Treaty as Evidence of Ongoing Legislative Commitment to Accessibility*

The process of negotiating, adopting, ratifying, and implementing the Marrakesh Treaty establishes a broad, deep, ongoing commitment to accessibility by both the executive and legislative branches of the government, and it shows their recognition that copyright limitations are essential to ensuring access for the disabled. Indeed, the Senate Report accompanying the Marrakesh Treaty Implementation Act concludes that ratification “will help give people with print disabilities, here and all over the world, greater access to books and other texts in accessible formats.”<sup>68</sup> In the negotiation process, the United States Trade Representative led a diverse delegation of executive branch agency representatives and consulted with representatives from disability rights organizations, creative industries, library and education groups, and public interest organizations.

After WIPO’s adoption of the treaty, the Senate took up ratification, including consideration of implementing legislation, i.e., changes to U.S. law to ensure compliance with the treaty. While many experts argued that U.S. law was already consistent with the treaty, the Senate ultimately decided, in consultation with federal agencies and others, that implementing legislation was needed. The Marrakesh Treaty Implementation Act (MTIA) was signed into law in October 2018, an occasion then-Acting Register of Copyrights Karyn A. Temple called “an exciting day for copyright law.”<sup>69</sup> Finally, in January 2019, the Trump administration deposited its ratification documents with WIPO, bringing the U.S. officially into the community of Marrakesh Treaty ratifiers.

The treaty affects accessibility law in three main ways. First, as the discussion above describes, the MTIA expanded and clarified Section 121’s protection for domestic provision of accessible texts. Second, the strong, repeated affirmation of U.S. government policy favoring accessibility should add weight to the first factor fair use argument made in *HathiTrust*. This multi-year process leaves no room for doubt that public policy favors accessibility. The evidence marshalled in favor of the treaty also supports the fourth factor argument that the market continues to fail decisively in providing accessible copies for the print disabled. The legislative history of the MTIA shows congressional intent that amendments to Section 121 were done only “to conform certain terms and provisions of section 121 to the language of the Marrakesh Treaty for purposes of clarity and consistency,”<sup>70</sup> rather than to alter its relationship with other provisions of the Copyright Act (including fair use). Section 121A provides that “Nothing in this section shall be construed to limit the ability to engage in any activity otherwise permitted under this title,” such as fair use. And third, of course, the legislation creates new, explicit exportation and importation rights, described in more detail above.

## **The Copyright Office and Librarian of Congress's History of Favoring Accessibility in the 1201 Rulemaking**

The Digital Millennium Copyright Act created a new cause of action, separate from copyright infringement, that a copyright holder could bring against anyone who circumvents a technological protection measure that effectively controls access to an in-copyright work.<sup>71</sup> In other words, it created a new bar against the hacking of digital locks. This bar is not expressly subject to any of the limitations and exceptions in the Copyright Act, including fair use.<sup>72</sup> In recognition of the likely burden the provision could place on lawful uses, Congress also requires the Copyright Office to conduct a rulemaking process every three years during which it hears evidence of Section 1201's effect on lawful uses and recommends rules exempting certain uses from the law's bar on circumvention. The Librarian of Congress has the ultimate authority to issue exemptions based on the Register's recommendations. Advocates for exceptions bear the burden of convincing the Register and the Librarian that their uses are lawful and that they are unduly burdened by the anti-circumvention provision.

Since 2003, every set of exemptions has included a rule permitting circumvention of TPMs protecting ebooks that prevent use of accessibility functions by print-disabled readers.<sup>73</sup> This means that the Register of Copyrights, in consultation with attorneys at the Copyright Office and at the National Telecommunications and Information Administration, has found repeatedly that such uses are likely to be lawful and non-infringing. The shape of these exemptions has evolved over time thanks to the efforts of disability rights organizations, education groups, and law clinics.

Starting in 2012, the rules were expanded to cover circumvention by "authorized entities" as defined in Section 121.<sup>74</sup> The rules were renewed in each subsequent cycle, and the policy of the Americans with Disabilities Act has been cited in support of the lawfulness of these uses. In 2018, a new rule was adopted to permit captioning

and audio description of video material for instructional uses, again with a predicate finding that “making motion pictures accessible to students with disabilities by adding captions and/or audio description is likely noninfringing.”<sup>75</sup> That finding is based on fair use, not Section 121, which does not apply to audiovisual works. It is also noteworthy that the 2018 rule specifically references the legal obligations that disability rights laws place on educational institutions, recognizing that copyright must yield to these obligations.<sup>76</sup>

Future rulemakings will be affected by the Marrakesh Treaty, which requires signatories to provide for the ability to circumvent technological protections in support of accessibility. The Copyright Office and the Librarian of Congress will have to renew the current exemption (in some form) in order to remain compliant with the treaty. Indeed, the current exemption is narrower than what is permitted by Section 121 as it was updated by the Marrakesh Treaty Implementation Act.

This long pattern of rulemaking activity provides more evidence of a general government policy favoring accessibility, and it adds an expert agency’s repeated endorsement to the judicial recognition of fair use’s applicability in *HathiTrust*. More broadly, it shows the U.S. Copyright Office recognizes, in its own rulemakings, the scope and validity of exemptions to copyright rules favoring accessibility.

## **5. Risk Management in Areas of Discretion**

In several areas, copyright law does not prescribe exactly how accessible texts should be created, handled, or shared. In these areas where we have discretion to act as far as copyright is concerned, there are other factors to consider as IHEs endeavor to make wise policy. It is beyond the scope of this paper to explore these factors in detail. Some of them, like risk aversion, may lead to doing less than the law actually allows, or imposing restrictions on the process that the law doesn’t

actually require. Others may incline decision-makers in the other direction. Some key considerations are sketched below.

## **Mission Risk**

Mission risk<sup>77</sup> is the risk that IHEs will fail to achieve their core objectives. Ultimately, every IHE has a mission to provide all students, including those with disabilities, with opportunities for a rich and deep learning experience, and to provide all researchers with access to a rich and varied collection of information resources to support their work. As IHEs consider measures to reduce other kinds of risks, it will be important to weigh those risks (and the anticipated effectiveness of risk-reduction measures) against the impairments, if any, that they may cause to IHEs' core missions. The use of some technological protection measures, for example, may reduce the likelihood of illicit downstream uses (for which institutions are unlikely to be liable in any event<sup>78</sup>), but that reduction should be weighed against the countervailing mission risk associated with adding technical complexity to the accessibility workflow, which could reduce IHEs' capacity to serve its core constituents.

## **Privacy**

At several points in the workflow of providing accessible texts to qualified users, there are opportunities for the collection, retention, and even disclosure of information about users. The information most likely to be generated in this context—users' identities, the nature of their disabilities, and the materials they are consulting—can be quite sensitive. Creation, retention, and sharing of this information may be regulated by state and federal laws that protect privacy, such as the Family Educational Rights and Privacy Act (FERPA).<sup>79</sup> Ethical and professional norms also provide guidance as to what kinds of information about students and other library users should be gathered or shared and in what circumstances.<sup>80</sup> These two can be related: the American Library Association points to patron privacy laws passed

in 48 states and the District of Columbia, thanks in part to librarian advocacy.<sup>81</sup> Freedom from undue government surveillance is a closely related concern, and one that recurs wherever substantial amounts of information are collected, including in libraries.<sup>82</sup> The risk to users' privacy may be impossible to completely eliminate given the legitimate need for information about users at certain stages of the workflow,<sup>83</sup> but institutions and consortia should consider building in “privacy by design”<sup>84</sup> in the systems they build, including setting rigorous retention schedules that preclude holding information for longer than it is needed for the fulfillment of the request.

## **Autonomy**

Fulfillment of the full spirit of the disability rights laws would require not only that users with disabilities have access to the same materials as their peers, but also that they have access with the same ease and autonomy afforded to others. Systems that require mediation necessarily impose delays and other barriers to access, resulting in a research or learning experience that is less robust in important ways than the experience available to folks without disabilities.

For example, many researchers say they value “serendipity” in their research—the discovery of unexpected materials through informal, unstructured browsing helps them make new connections and take unanticipated directions in their work.<sup>85</sup> When access to materials is highly mediated (works can only be consulted one-by-one, by special request, perhaps with a delay), it is more difficult to experience serendipity. Another example is procrastination, a word with pejorative connotations but a practice that is nevertheless widespread among those without disabilities. Students and researchers can engage in more extracurricular activities

“Fulfillment of the full spirit of the disability rights laws would require not only that users with disabilities have access to the same materials as their peers, but also that they have access with the same ease and autonomy afforded to others.”

or take on more research responsibility if they can expect to have relatively easy access to browse and interrogate collections materials in an unmediated way right up to the last second before a particular assignment is due.<sup>86</sup> A heavily mediated research experience takes procrastination off the table for users with disabilities, reducing their opportunities for both recreation and additional curricular work (and possibly reducing their creativity). As IHEs build and improve their systems for making accessible texts available to qualified users, they should factor in the legitimate autonomy interests served by reducing mediation and other sources of friction.

## Politics

Any effort to make information more widely available can stir political opposition. In cross-border sharing, for example, anecdotal evidence suggests that political opposition to the content of shared materials is much more likely to impede access than opposition from copyright holders. This opposition may be expressed through local laws or regulations banning certain books or the works of certain groups or

“Fear of political backlash should be calibrated to reflect its low likelihood, its inefficacy were it to come to pass, and the countervailing risk of ceding hard-won fair use territory.”

in certain genres, or through the exercise of power by local officials interested in suppressing particular material. Institutions considering exportation of accessible materials may have to weigh their commitment to free access to information against the risk of violating content regulations or angering political elites in the importing country, which could have serious consequences for local allies or for their own campuses there.

Another, more doubtful, category of perceived political risk arises from IHEs' perceptions of the trade associations and lobbying groups in the U.S. that have shown hostility toward the exercise of users' rights in the copyright law, and that have sometimes reacted to the exercise

of those rights by seeking new laws or regulations to constrain it. Some institutions may accordingly consider whether angering these groups is a risk worth avoiding. This risk should not be overstated, however. The Marrakesh Treaty negotiations featured deep, sustained engagement from groups representing authors, publishers, and even motion picture studios; given the strong requirement of consensus in U.S. copyright policy making,<sup>87</sup> we can be sure that the resulting treaty and implementing legislation (including savings clauses recognizing fair use) secured at least their acquiescence, if not their full-throated endorsement. The consensus requirement also makes it unlikely that rightsholder groups, even if they were to pursue a political response to accessibility efforts, could succeed in the face of opposition from groups representing libraries, higher education, and disability rights organizations. Institutions who are confident of their legal rights risk grave damage to themselves and their constituents if they demur in exercising those rights. Courts look to actual practice as one indicator of the scope of rights like fair use, so overly modest practice can actually impair the scope of the rights themselves.<sup>88</sup> Fear of political backlash should be calibrated to reflect its low likelihood, its inefficacy were it to come to pass, and the countervailing risk of ceding hard-won fair use territory.

## 6. Conclusion

In 2016, Stevie Wonder addressed the United Nations, urging member states to ratify the Marrakesh Treaty. He told the assembly, “This is a truly life changing opportunity. It opens the door to the world’s knowledge to the visually impaired people.”<sup>89</sup> Indeed, the U.S. ratification of the Marrakesh Treaty is the culmination of a series of developments in U.S. law favoring access to knowledge regardless of ability, from the Rehabilitation Act to the codification of the fair use doctrine in the 1976 Copyright Act, to the passage of the Chafee Amendment and the courts’ decisions in the *HathiTrust* case. Collectively, these measures create a framework that IHEs and their allies and affiliated entities can leverage to increase access and vastly

improve education and research for all. They ensure that institutions with an obligation and a mission to pursue justice also have the right to do so.

Perhaps the most striking takeaway from this survey has been the extent to which copyright defers to accessibility, not the other way around. What has emerged is a hierarchy of legal interests, arrayed under the general heading of the First Amendment and its protection for expression and access to information. Contrary to what some have assumed in the past, the first priority under that heading is accessibility, which consistently trumps the exclusive rights granted by copyright when the two come into conflict. This priority is built into the copyright law itself, through both its general fair use right and its specific provisions favoring accessibility. The effort involved in ending the book famine for thousands of students and researchers will be substantial, and there will surely be challenges along the way, but copyright law should not be one of them

## Endnotes

1. The National Federation of the Blind provides helpful definitions of a variety of key terms often used in these discussions, including: “Accessibility means that individuals with disabilities can, with or without the benefit of assistive technologies, independently acquire the same information, engage in the same interactions, use a product or system, and enjoy the same services within the same timeframe as individuals without disabilities, with substantially equivalent ease of use.” National Federation of the Blind, Higher Education Accessibility Online Resource Center, <https://www.nfb.org/programs-services/center-excellence-nonvisual-access/higher-education-accessibility-online-resource> (accessed June 11, 2019). Whether a particular format is “accessible” in a particular context will depend on the needs of the particular user seeking access. For example, at the Washington, DC, meeting, one attendee noted that statistics about “accessible format” works may be inflated insofar as they include audiobooks that are “performed” by dramatic readers. Many of these recordings are not amenable to being played at higher speeds, an affordance that many print-disabled people use to consume audio texts more efficiently and equitably.
2. Laura C. Wood et al., *Libraries: Take AIM!* (2017), <https://dl.tufts.edu/concern/pdfs/fn1079946> (accessed June 19, 2019).
3. This is in stark contrast to other industries, including public accommodations, telecommunications, and broadcast video, where the obligation to ensure accessibility is on the original provider of the resource, rather than a downstream intermediary. *See, e.g.*, Federal Communications Commission, *Twenty-First Century Communications and Video Accessibility Act*, <https://www.fcc.gov/general/twenty-first-century-communications-and-video-accessibility-act-0#block-menu-block-4> (accessed May 29, 2019). The seeming conflict between copyright and accessibility is due largely to the vesting of rights and responsibilities in separate parties, and perhaps could have been avoided by placing the responsibility

alongside the rights, with the copyright holders. Instead, as we will see, copyright holders are under no such obligation, but their rights must yield to the obligations of others, like IHEs, who are obliged to remediate their content for them.

4. See, e.g., Consent Decree, U.S. v. Miami University, No. 1:14-cv-38 (S.D. Ohio 2016), [https://www.ada.gov/miami\\_university\\_cd.html](https://www.ada.gov/miami_university_cd.html) (accessed June 19, 2019) (“Miami will provide students with disabilities equally effective communication of curricular materials (e.g., textbooks, workbooks, articles, compilations, presentations, collaborative assignments, videos, and images or graphical materials) converted to alternate formats....”).
5. For example, California Code Section 11546.7 requires all state government websites to comply with the WCAG 2.0 standard and its successor standards for accessibility.
6. See *Southeastern Commun. Coll. v. Davis*, 442 U.S. 397, 412-13 (1979) (“Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.”)
7. Inst. Museum and Lib. Serv., *IMLS Guidance on Making Museums and Libraries More Accessible* (updated September 2018), <https://www.imls.gov/sites/default/files/making-museums-libraries-more-accessible.pdf> (accessed June 19, 2019).
8. Nondiscrimination on the Basis of Handicap in Federally Assisted Programs or Activities, 45 C.F.R. §1170.
9. See, e.g., Laura L. Carlson, Higher Ed Accessibility Lawsuits, Complaints, and Settlements, <https://www.d.umn.edu/~lcarlson/atteam/lawsuits.html> (accessed May 3, 2019).

10. See Consent Decree, U.S. v. Miami University, *supra* n. 4.
11. See, e.g., Association of Research Libraries, Report of the ARL Joint Task Force on Services to Patrons with Print Disabilities (2012), <https://www.arl.org/resources/report-of-the-arl-joint-task-force-on-services-to-patrons-with-print-disabilities-nov-2-2012/>.
12. See [http://accesstext.gatech.edu/wiki/Authorized\\_User\\_Membership\\_Agreement](http://accesstext.gatech.edu/wiki/Authorized_User_Membership_Agreement) (accessed June 19, 2019). The legal consequences of these agreements for downstream use of copies obtained from ATN are unclear. On one hand, it could be argued that contractual conditions that limit fair use are preempted by the Copyright Act, or else that exceeding the scope of the license is permissible because fair use will cover the unlicensed behavior. On the other hand, it could be argued that violating the terms of the license is at least a breach of contract and may also be copyright infringement. In the absence of more clarity, DSOs should avoid including ATN texts in workflows that exceed the scope of the ATN arrangement. Of course these issues will not arise for copies created by DSOs and their partners or otherwise obtained outside of the Access Text Network or other contractual arrangements with publishers.
13. This warning resembles the kinds of warnings and legends some scholars have called “copyfraud.” See Jason Mazzone, *Copyfraud*, 81 NYU L. Rev. 1026 (2006). Misleading copyright warnings are common across a wide variety of contexts.
14. 755 F.3d 87 (2d Cir. 2014).
15. See Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 Ohio State L. J. 1 (2001).
16. Wood et al., *supra* n. 2, at 11 (“[I]f we purchase inaccessible copies that aren’t needed, while separately creating accessible ones, we short circuit any incentive for publishers to support students with disabilities.”).

17. 17 U.S.C. 101.
18. See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991) (“Originality is a constitutional requirement.”); *Meshwerks, Inc. v. Toyota Motor Sales U.S.A, Inc.*, 528 F. 3d 1258, 1268 (10th Cir. 2008) (“If an artist affirmatively sets out to be unoriginal – to make a copy of someone else’s creation, rather than to create an original work – it is far more likely that the resultant product will, in fact, be unoriginal.”).
19. See *Meshwerks*, 528 F. 3d at 1268 (“[I]n assessing the originality of a work for which copyright protection is sought, we look only at the final *product*, not the process, and the fact that intensive, skillful, and even creative labor is invested in the process of creating a product does not guarantee its copyrightability.”).
20. CC0 1.0 Universal (CC0 1.0) Public Domain Dedication, <https://creativecommons.org/publicdomain/zero/1.0/> (accessed June 19, 2019).
21. See the discussion of the 1201 Rulemakings in Section IV for details.
22. Bookshare, Digital Rights Management, <https://www.bookshare.org/cms/legal/seven-point-digital-rights-management-plan> (accessed May 29, 2019).
23. See *infra* n. 60 and accompanying text regarding the inaccurate notice language included in Section 121 as amended by the Marrakesh Treaty Implementation Act.
24. See *infra* n. 44 and accompanying text.
25. *HathiTrust*, 755 F. 3d at 101.
26. The Copyright Act includes another limitation favoring libraries serving disabled persons: 17 U.S.C. § 110(8) permits “performance of a non-dramatic 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. 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.

27. *See, e.g.*, U.S. Copyright Office, *Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Register’s Recommendation* 134 (2015) (“making e-books accessible to persons who are blind, visually impaired or print disabled is a noninfringing use”).
28. *See, e.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016) (“[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works.”) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994); *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”); *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”)).
29. U.S. Const. Art. I, Sec. 8, cl. 8.
30. *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003) (characterizing fair use as a “built-in First Amendment accommodation” in copyright law); *Golan v. Holder*, 565 U.S. 302 (2012). The First Amendment protects the right to receive information as well as the right to speak. *See Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853, 867 (1982) (the right to receive information is “an inherent corollary of the rights of free speech and press that

are explicitly guaranteed by the Constitution” and “a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”).

31. In addition to being among the beneficiaries of fair use, libraries and educational institutions in particular have been granted special dispensations to ensure that copyright’s purpose is served when exclusive rights get in the way. Section 108 of the Copyright Act empowers libraries to make and distribute copies in a variety of situations—replacement copies for themselves or for other libraries, chapters and articles for personal study, entire works for personal study, entire works for any purpose during the last 20 years of a work’s copyright term, and to users at other libraries through interlibrary loan. Most recently, as part of the Music Modernization Act, Congress empowered libraries to copy and distribute sound recordings first published prior to 1972 when they are no longer commercially available. *See* 17 U.S.C. § 1401 (f)(1)(B). That provision makes 108 (h) applicable to these sound recordings, so the additional conditions in 108(h) will apply here, too.
32. 9 F. Cas. 342 (C.C.D. Mass. 1841).
33. Matthew Sag, *The Prehistory of Fair Use*, 76 Brooklyn L. Rev 1 (2011).
34. *Eldred v. Ashcroft*, CITE.
35. H.R. Rep. No. 1476, 94th Cong., 2nd Sess. 66 (1976)(“House Report”).
36. *Id.* at 73.
37. Peter Jaszi and Patricia Aufderheide, *Reclaiming Fair Use* (2nd ed. 2018).
38. Association of Research Libraries et al., *Code of Best Practices in Fair Use for Academic and Research Libraries*, Washington, DC: ARL, Jan. 2012, <https://www.arl.org/wp-content/uploads/2014/01/code-of-best-practices-fair-use.pdf>.
39. *Id.* at 22.

40. 755 F.3d 87 (2d Cir. 2014)

41. Starting in 2004, major research libraries (primarily but not exclusively university libraries) partnered with Google to digitize millions of volumes from their collections. Google used the scans to create a new search tool, analogous to its web search engine, enabling users to find books relevant to their queries. The results included “snippets” of relevant text from the book, again analogous to web search results, to help the searcher see their term in context and determine whether the result was truly relevant to her query. To read the entire book, however, Google Book search directs users to online bookstores (including Google’s ebook store, if the publisher has consented to participate in that venue) and local libraries. University partners received copies of the digital scans from their collections and have used these copies in a variety of ways, including for preservation and, importantly, as a source of digital texts that could be remediated and supplied to print-disabled users. Publishers’ and authors’ groups brought a series of lawsuits against all the participants in the book scanning program, filing separate suits against Google and its library partners, alleging all uses were infringing, and asking the court to order destruction or injunction of use of the scans. Courts at both the district and appellate level ruled in favor of Google and its partners, finding the mass digitization, search, preservation, and accessibility programs were all lawful.

42. Even organizations that filed briefs against HathiTrust during the litigation seem to have made their peace with the opinion, subsequently praising the court’s “carefully-limited reasoning and interest balancing.” Jonathan Band, *AAP Praises Wisdom of HathiTrust and Google Books Decisions*, Project DisCo, <http://www.project-disco.org/intellectual-property/051817-aap-praises-wisdom-of-hathitrust-and-google-books-decisions/>, (May 18, 2017) (accessed June 19, 2019).

43. See Welcome to HathiTrust, <https://www.hathitrust.org/about> (accessed March 23, 2019).

44. See *HathiTrust*, 755 F. 3d at 97 (noting that “in order to perform a full-text search of books, the Libraries must first create digital copies of the entire books”). See also, *A.V. ex rel. Vanderhuyse v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009); *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); and *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003). This treatment of full-text databases is consistent with prior cases involving “behind the curtain” copying of software for purposes of reverse engineering, a non-infringing result. See *Sony Computer Entm’t v. Connectix Corp.*, 203 F.3d 596, 599-600 (9th Cir. 2000); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1518-19 (9th Cir. 1992); *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 842 (Fed. Cir. 1992).
45. *HathiTrust*, 755 F.3d at 101–102.
46. 755 F.3d at 102.
47. *Id.*
48. The Music Modernization Act’s new exemptions favoring the use of pre-1972 sound recordings by libraries, archives, and noncommercial users also show ongoing congressional interest in safeguarding access when markets fail. See U.S. Copyright Office, *Classics Protection and Access Act*, <https://www.copyright.gov/music-modernization/pre1972-soundrecordings/> (accessed May 29, 2019).
49. *Id.*
50. Robert Kasunic, *Is That All There Is: Reflections on the Nature of the Second Fair Use Factor*, 31 Colum JL Arts 529–570 (2007).
51. 775 F. 3d at 103.
52. *Id.* at 98–99.
53. The Copyright Office has published a concise and useful guide to the Marrakesh Treaty Implementation Act, including references to relevant legislative history: U.S. Copyright Office, *Understanding The Marrakesh Treaty Implementation Act* (May 2019), <https://>

[www.copyright.gov/legislation/2018\\_marrakesh\\_faqs.pdf](http://www.copyright.gov/legislation/2018_marrakesh_faqs.pdf) (accessed June 19, 2019).

54. 17 U.S.C. 121(d)(2).

55. Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 465 (S.D.N.Y. 2012).

56. S. Rep. No. 115-261 (2018), <https://www.Congress.gov/115/crpt/srpt261/CRPT-115srpt261.pdf> (accessed June 19, 2019).

57. 17 U.S.C. 121(a).

58. 17 U.S.C. 121(b)(1)(A).

59. 17 U.S.C. 121(b)(1)(C). Copying such notices is a familiar practice for libraries, who are subject to the same requirement under 17 U.S.C. 108, which permits copying for library patrons in certain circumstances but requires inclusion of the copyright notice.

60. 17 U.S.C. 121(b)(1)(B). This requirement presents a challenge to authorized entities, because such a notice, without further elaboration, is a misstatement of the law. A disabled person is as free as anyone else to reproduce or distribute some or all of an accessible format copy in accordance with her fair use rights—for example, quoting from it in a critical essay, or storing a copy in the cloud to facilitate accessing the work from another device. Some institutions may prefer to omit the warning rather than mislead their readers. The risk of liability for lack of such a notice seems very low given that virtually any activity protected by Section 121 will also be subject to a compelling fair use argument, and fair use does not require an inaccurate warning. Alternatively, the notice could be supplemented with additional language, e.g., “*Unless permitted by the fair use doctrine or another provision of the Copyright Act, further reproduction or distribution....*”

61. 17 U.S.C. 108 (d), (e).

62. 902 F.Supp.2d at 465, n. 33.

63. 755 F.3d at 94, n.4. While the savings clause in Section 108 makes its relationship to fair use especially clear, the legislative history of the 1976 Act makes clear that Congress intended fair use to be available in support of accessibility. Nothing in the text or legislative history of Section 121 signals any intent to upset that intention.
64. *Id.* at 103, n.7.
65. <https://www.wipo.int/treaties/en/ip/marrakesh/> (accessed March 29, 2019).
66. World Intellectual Property Organization, *The Marrakesh Treaty—Helping to end the global book famine*, [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_marrakesh\\_overview.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_overview.pdf) (2016) (accessed June 19, 2019).
67. *Id.*
68. S. Rep. No. 115-261 at 8 (2018), <https://www.Congress.gov/115/crpt/srpt261/CRPT-115srpt261.pdf>.
69. Karyn A. Temple, *The Marrakesh Treaty Implementation Act*, Copyright: Creativity at Work, Oct. 10, 2018, <https://blogs.loc.gov/copyright/2018/10/the-marrakesh-treaty-implementation-act/> (accessed June 19, 2019). Temple’s blog post describes her office’s engagement in the years-long process of developing the Treaty, and lists some of the U.S. agencies most involved in its negotiation: the U.S. Patent and Trademark Office, the State Department, the U.S. Trade Representative, the Institute of Museum and Library Services, and the Department of Justice.
70. S. Rep. No. 115-261 at 2.
71. 17 U.S.C. 1201(a).
72. Judges in some circuits have argued there should be a nexus to infringing activity in order to find liability under Section 1201(a). See *Chamberlain Group v. Skylink Tech., Inc.*, 381 F. 3d 1178 (Fed. Cir. 2004)(holding Section 1201(a) “prohibits only forms of access that

bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners”); *Lexmark International, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004) (Merrit, J., concurring). Institutions in circuits where the issue has not been decided may factor in this possible interpretation as they design their policies around circumvention.

73. All the triennial rules and related materials are collected together at <https://copyright.gov/1201/> (accessed June 19, 2019).

74. U.S. Copyright Office, *Section 1201 Rulemaking: Fifth Triennial Proceeding Recommendation of the Register of Copyrights* 25 (2012). Another innovation in the 2012 rules is that the exemption for individual users who circumvent e-books for their own use is subject to the proviso 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.” This language was added by the Register in her Recommendation, based on an extemporaneous statement made by one of the proponents of the exemption during a hearing. *Id.* at 23. As explained elsewhere in this report, there is no support in either Section 121 or the fair use case law for the proposition that rightsholders must be remunerated for each accessible copy that is provided to qualified persons. In any event, the language added by the Register in 2012 modifies only the rule for individuals circumventing for their own use, not the one for authorized entities serving others, and it does not clearly require remuneration in every circumstance. Remuneration is to be made “as appropriate” and “for the price of the mainstream copy;” remuneration is arguably not appropriate when the use is fair, and in any event the rightsholder will be remunerated for the lawfully-made copy from which an accessible text is derived. (This may be why previous versions of the rule did not expressly mention remuneration—the owner was already required to have lawfully acquired the e-book before circumvention.) The 2012 rule text also predates the *HathiTrust* opinion. Subsequent rules, such as the exemption for educational institutions engaged in

captioning and audio description, have not taken this approach. That the rule has not been clarified in light of *HathiTrust* is most likely a result of the considerations above as well as the incentives created by the rulemaking procedure: existing rules can be renewed using a streamlined process if there is no change to the rule and no meaningful opposition, as has been the case for the e-book exemption for the last several cycles.

75. U.S. Copyright Office, *Section 1201 Rulemaking: Seventh Triennial Proceeding Recommendation of the Acting Register of Copyrights* 101 (2018).
76. *Id.* at 107 (noting that the DMCA’s rule against circumvention was “adversely affecting the ability of educational institutions to offer accessible formats of motion pictures on an equal basis *in conformance with their legal responsibilities*”)(emphasis added).
77. The concept of mission risk derives from systems theory and seems to be used most often in the context of software engineering. *See, e.g.*, Christopher Alberts, & Audrey Dorofee. A Framework for Categorizing Key Drivers of Risk (CMU/SEI-2009-TR-007). Pittsburgh, PA: Software Engineering Institute, Carnegie Mellon University, 2009. <http://resources.sei.cmu.edu/library/asset-view.cfm?AssetID=9093> (accessed June 19, 2019).
78. *See* Brandon Butler, Should Libraries Fret Over Mischievous Users?, ARL Policy Notes, Mar. 16, 2012, <http://policynotes.arl.org/?p=307> (accessed June 19, 2019).
79. 20 U.S.C. § 1232g. Article 8 of the Marrakesh Treaty and its implementation at Section 121A(c)(4) also include duties to safeguard user privacy.
80. *See* “Privacy”, American Library Association, July 7, 2006. <http://www.ala.org/advocacy/intfreedom/librarybill/interpretations/privacy> (accessed May 14, 2019).

81. “State Privacy Laws Regarding Library Records”, American Library Association, May 29, 2007, <http://www.ala.org/advocacy/privacy/statelaws> (accessed May 14, 2019).
82. *See, e.g.*, “Law Enforcement Inquiries,” American Library Association, April 19, 2017, <http://www.ala.org/advocacy/privacy/lawenforcement> (accessed May 29, 2019).
83. Participants in the Washington, DC, roundtable mentioned that users themselves sometimes want libraries and others to retain records of what they read or do online, as such records can power recommendation engines or citation management functionality.
84. *See, e.g.*, 32nd International Conference of Data Protection and Privacy Commissioners, Resolution on Privacy by Design (2010), [https://edps.europa.eu/sites/edp/files/publication/10-10-27\\_jerusalem\\_resolutionon\\_privacybydesign\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/10-10-27_jerusalem_resolutionon_privacybydesign_en.pdf) (accessed June 19, 2019).
85. As any librarian can tell you, that kind of serendipity is made possible in large part by the curation and organization imposed on collections materials by librarians.
86. Research suggests procrastination can even increase “divergent thinking,” leading to more creative solutions to proposed problems. *See* Adam Grant, Why I Taught Myself to Procrastinate, NY Times, Jan. 16, 2016, [https://www.nytimes.com/2016/01/17/opinion/sunday/why-i-taught-myself-to-procrastinate.html?\\_r=1](https://www.nytimes.com/2016/01/17/opinion/sunday/why-i-taught-myself-to-procrastinate.html?_r=1) (accessed June 19, 2019).
87. *See* Thomas P Olson, The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act, 36 J. Copyright Soc’y 109 (1988).
88. *See* Jim Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 Yale LJ 882 (2007), <http://www.jstor.org/stable/20455747> (accessed Oct 5, 2014).

89. World Intell. Prop. Org., “Stevie Wonder to UN Member States: Help Others Beat the Odds Like I Did, Join Marrakesh Treaty,” Dec. 5, 2016, [https://www.wipo.int/pressroom/en/stories/stevie\\_wonder\\_marrakesh.html](https://www.wipo.int/pressroom/en/stories/stevie_wonder_marrakesh.html) (accessed May 29, 2019)

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