

## U.S. Fair Use versus the Chafee Amendment: How Do They Overlap?

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\*\*The following commentary is a draft\*\*

The United States has a strong system of limitations and exceptions, both in terms of the broad “fair use” activities that are permitted as well as specifically enumerated limitations and exceptions. In the United States, one area where there are robust limitations and exceptions benefits persons who are visually impaired. The United States has a robust limitation to benefit persons who are visually impaired, known as the Chafee Amendment. However, the Chafee Amendment alone does not cover all activities or works necessary to fully serve the visually impaired community and fair use therefore also plays a significant role. The following analysis compares the U.S. fair use tradition with the Chafee Amendment and illustrates why both are necessary tools for both persons who are visually impaired as well as those serving persons who are visually impaired.

### Introduction

In the United States, persons who are visually impaired have long relied on limitations and exceptions to copyright in order to obtain access to accessible format works. The Supreme Court of the United States confirmed in the 1984 case, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, that fair use permits the creation and distribution of accessible format works for persons who are visually impaired (*See* n.40, “Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying.”). The Court noted that copying “of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying.”

Fair use covers broad and varied areas of use not considered an infringement of copyright and a specific provision of the Copyright Act, Section 107, sets forth a four factor test to determine whether a particular case constitutes fair use. The factors considered include: the purpose and character of the use, including 1) 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. Notably, these factors are considered together and failure to satisfy one or more factors does not automatically render a fair use claim invalid. The recent case of *Authors Guild v. Hathitrust*, No. 11 CV 6351 (HB) (S.D.N.Y. 2012) noted that “A defendant need not prevail with respect to each of the four enumerated fair-use factors to succeed on a fair-use defense. Rather, the factors are ‘explored and weighed together, in light of copyright’s purpose.’ ‘The ultimate focus is the goal of copyright itself, whether ‘promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it’” (internal citations omitted). The fair use

factors thus provide a broad framework for limitations and exceptions and the focus is on the Constitutional rationale of the copyright system.

***§ 107 . Limitations on exclusive rights: Fair use***

*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.*

While fair use covers a broad spectrum of uses, the Copyright Act also includes specifically enumerated limitations and exceptions. One such specific limitation benefits persons who are blind or have other disabilities. This limitation, known as the Chafee Amendment, was added to the Copyright Act in 1996. It provides that creation and distribution of accessible format works by an authorized entity (defined in the text to include Braille, audio, or digital text for the exclusive use by blind or other person with disabilities) is not an infringement of copyright.

***§ 121 . Limitations on exclusive rights:  
Reproduction for blind or other people with disabilities***

*(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are*

*reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.*

*(b)(1) Copies or phonorecords to which this section applies shall—*

*(A) not be reproduced or distributed in a format other than a specialized format exclusively for use by blind or other persons with disabilities;*

*(B) bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement; and*

*(C) include a copyright notice identifying the copyright owner and the date of the original publication.*

*(2) The provisions of this subsection shall not apply to standardized, secure, or norm-referenced tests and related testing material, or to computer programs, except the portions thereof that are in conventional human language (including descriptions of pictorial works) and displayed to users in the ordinary course of using the computer programs.*

*(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a publisher of print instructional materials for use in elementary or secondary schools to create and distribute to the National Instructional Materials Access Center copies of the electronic files described in sections 612(a)(23)(C), 613(a)(6), and section 674(e) of the Individuals with Disabilities Education Act that contain the contents of print instructional materials using the National Instructional Material Accessibility Standard (as defined in section 674(e)(3) of that Act), if—*

*(1) the inclusion of the contents of such print instructional materials is required by any State educational agency or local educational agency;*

*(2) the publisher had the right to publish such print instructional materials in print formats; and*

*(3) such copies are used solely for reproduction or distribution of the contents of such print instructional materials in specialized formats.*

*(d) For purposes of this section, the term—*

*(1) “authorized entity” means 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;*

(2) “blind or other persons with disabilities” means individuals who are eligible or who may qualify in accordance with the Act entitled “An Act to provide books for the adult blind”, approved March 3, 1931 (2 U.S.C. 135a; 46 Stat. 1487) to receive books and other publications produced in specialized formats;

(3) “print instructional materials” has the meaning given under section 674(e)(3)(C) of the Individuals with Disabilities Education Act; and

(4) “specialized formats” means—

(A) braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities; and

(B) with respect to print instructional materials, includes large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities.

While Congress did pass this limitation for the benefit of persons who are blind or have other disabilities, clearly and specifically permitting certain categories of works to be made in an accessible format by an authorized entity without the permission of the rightholder, it did not cover all works and the fair use exception remains important for the visually impaired community. Furthermore, the Association of American Publishers (AAP) has made aggressive statements, interpreting the Chafee Amendment to have limited scope and application. While the AAP has made far-reaching statements trying to limit the scope of the Chafee Amendment, it conceded that reproduction and distribution of accessible format works under the Amendment “probably would qualify in most instances for a ‘fair use’ defense against a claim of infringement by the copyright owner [and] enactment of the Chafee Amendment was intended to authorize such activity under a general rule” rather than on a case-by-case basis as done under fair use.

Significantly, the fair use doctrine applies to areas not covered by the Chafee Amendment and also serves as an additional legal protection where the Amendment is ambiguous or where the meaning of the statute is controversial, including, for example:

- To create or distribute accessible formats of unpublished works
- To create or distribute accessible formats of works other than a nondramatic literary work, including published scripts of plays
- Educational institutions creating or distributing accessible format works
- Other institutions or organizations that wish to create or distribute accessible format works for persons who are visually impaired or have other disabilities
- Creation of accessible formats in certain digital formats

These issues are more fully discussed below

## **Works Covered**

The class of works covered under the Chafee Amendment is limited in scope. It permits reproduction of works in an accessible format only for “a previously published, nondramatic literary work.”

First, then, the Chafee Amendment does not cover unpublished works. In comparison, the fair use provision explicitly states that, “The fact that work is unpublished shall not itself bar a finding of fair use.” Thus, for an unpublished work, a person who is visually impaired who needs an accessible copy of that work would not be able to obtain one under the Chafee amendment, but could potentially through a finding of fair use.

The Chafee Amendment further restricts application to “nondramatic literary works.” While the Amendment does cover a number of works, including, for example, books or periodicals, it fails to include several other classes including audiovisual works or published scripts of a play. See National Library Service, Factsheet: Copyright Law Amendment, 1996, available at <http://www.loc.gov/nls/reference/factsheets/copyright.html>. By comparison, fair use is not limited to a class of works and does not exclude audiovisual works or dramatic works. Thus, for example, a visually impaired literature student asked to read “Death of a Salesman” by Arthur Miller for class would not be able to obtain an accessible format of the script under the Chafee Amendment, but would instead rely on the fair use doctrine.

## **Authorized Entities**

Another feature of the Chafee Amendment rendering Section 121 more restrictive than the fair use doctrine is that the former restricts the use of the limitation to an “authorized entity.” The Chafee Amendment defines this term as “a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities.”

The exact limits of what constitutes an authorized entity are controversial. It has been noted that in 2004, the Association of American Publishers (AAP) stated that “it is doubtful that Congress intended the typical educational institution, by virtue of its legal responsibility to accommodate students with disabilities to qualify as an ‘authorized entity’ under the Chafee Amendment.” Allan Adler & Liz Delfs, *Association for American Publishers Position Paper Presented at AHEAD 2004* (April 19, 2004); See also Association for Research Libraries, *Briefing: Accessibility, the Chafee Amendment and Fair Use* (2012), available at <http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices/2445-briefing-accessibility-the-chafee-amendment-and-fair-use>. The AAP focused on the “primary mission” portion of the definition of an “authorized entity” to support its position and argues that the Chafee Amendment was intended to promote the efforts of the National Library for the Blind (NLS) or Recording for the Blind and Dyslexic (RFBD). According to the Association for Research Libraries, the AAP has never departed from this position. Whether an educational institution “has a primary mission to provide specialized services” for the blind or persons with disabilities is therefore a controversial one and a university providing accessible format works

for its visually impaired students may be subject to litigation if relying solely on the Chafee Amendment.

The AAP concludes its 2004 memo by asserting “the misuse of Chafee’s ‘authorized entity’ status by well-intentioned college staff who erroneously believe that not only their reproduction and distribution activities are protected, but they are entitled to do so, can place the colleges and the students at risk of copyright infringement suit because the Copyright Act does not distinguish between different categories of well-intentioned and ill-intentioned infringers,” implying that it might initiate litigation against universities that claim to be an authorized entity under the Chafee Amendment.

Fair use thus remains an important tool for a number of institutions and organizations that serve those who are visually impaired. Legally, fair use provides protection for institutions of higher education that serve persons who are visually impaired by creating, providing or distributing accessible format works. Without the availability of a fair use defense, educational institutions would have to rely on the Chafee amendment, a risky legal prospect considering the ambiguity in the statute and the position of the Association of American Publishers. While other legal arguments may be advanced to protect such educational institutions, fair use provides additional potential protection.

The University of Michigan, for example, offers extensive coverage to persons who are visually impaired through its e-reserve system. Those with the documentation to support the disability have full access to electronic reserves that have been converted to accessible formats and are used with commonly available technologies used by persons who are blind.

Similarly, the HathiTrust Digital Library is composed of several universities, including the University of Michigan, and provides a database for full-text access of its collections to students with visual impairments. HathiTrust was, subsequently, sued by the Authors Guild and the district court for the Southern District of New York found both that HathiTrust was an “authorized entity” within the meaning of the Chafee Amendment, but even failing that, that fair use applied. The case is now on appeal to the Court of Appeals to the Second Circuit, but the fact that HathiTrust can rely on both the Chafee Amendment and fair use strengthens its case.

The restrictive definition of “authorized entity” limits application of the Chafee Amendment and organizations that are not 501(c)(3) nonprofit organizations may not make use of this specifically enumerated limitation to Copyright. Additionally, individuals that are not agents of the authorized entities are similarly not eligible for the Chafee amendment exemption. Thus, a mother, teacher or friend of a person who is visually impaired may not make or distribute an accessible format work under the Chafee Amendment. It may, however, still rely on fair use to do so; in fact, the Supreme Court has already noted in a footnote to *Sony Corp. of Am. v. Universal City Studios, Inc.* that the making of an accessible format work for a person who is blind is fair use.

## Specialized Formats

The Chafee Amendment defines “specialized formats” to include “(A) braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities” According to AAP’s 2004 memo, however, the specialized formats “are limited to those which at the time of enactment, were recognized as ‘exclusively for use’ by persons suffering physically based visually impairment.” The AAP continues to specifically detail the ways, in its view, the Chafee Amendment provides for only limited formats to apply. According to the AAP, for example, audio formats “was understood to involve *only* the kind of magnetic tape technology that was typically used by blind persons, which *could not be used in ordinary commercially available playback devices*” (emphasis added). Furthermore, the AAP claims that the Chafee Amendment’s reference to digital text:

*It was understood to refer to the process by which scanned text could be used by blind persons with specialized text-to-speech translation software, rather than to digital text that might be freely transmitted via the Internet or burned into CDs like popular music. ‘Digital Talking Books’ and other current and developing formats that not only serve special accessibility needs but could also prove attractive for use by persons without disabilities were not contemplated within the scheme of the Chafee Amendment.*

Thus, according to the AAP, the type of audio accessible format work permitted under the Chafee Amendment refers only to the use of “magnetic tape technology” and not if it can be used on traditional and commercially available playback devices. The AAP also takes a controversial position with regard to digital texts, claiming in its memo that it does not apply to “digital talking books” or other developing formats. Essentially, the AAP has taken the position that the Chafee Amendment is restricted to outdated technologies, despite the clear position taken by the Supreme Court of the United States that new technologies may qualify for fair use, despite the fact that it may not have been contemplated by the creators of the statute (for example, finding fair use in recording programs with a VCR in *Sony Corp. of Am. v. Universal City Studios, Inc.*). The AAP is, more or less, taking an originalist position with regard to the Chafee Amendment and would restrict it only to technologies in existence in 1996. While the courts might not uphold this position, it is still worth noting that the large rightholders represented by AAP have taken such a position and authorized entities acting under the Chafee Amendment may find themselves subject to litigation by publishers.

Additionally, even aside from the issue of new technologies, the AAP would likely argue that the existence of the clarifying clause contained in the Chafee Amendment, “exclusively for use by blind or other persons with disabilities,” does not encompass any audio formats that could be used on a traditional player used by persons without visual impairments. It might also suggest that this clause fails to encompass the “text-to-speech” function on e-readers because it may be possible for sighted persons to turn on this feature.

Fortunately, fair use may still provide a defense for the creation of accessible format works in formats not conceived of during the time the Chafee Amendment was created, or in formats that would not be “exclusively” used by persons with disabilities (even if used mostly by such persons). If the AAP was indeed successful in persuading a court that its interpretation of “specialized formats” under the Chafee Amendment was correct, an authorized entity could still fall back on the fair use doctrine. The Supreme Court has already confirmed in the fair use case, *Sony Corp. of Am. v. Universal Studios, Inc.*, that with respect to ambiguities in the Copyright Act, “When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [the] basic purpose” of “stimulat[ing] artistic creativity for the general public good.” *Citing Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Conversion of works to new and evolving accessible formats may therefore be reliant upon the existence of the fair use doctrine.

### **Conclusion**

Although the Chafee Amendment does provide for legal certainty for those qualifying to make use of the provision, it does not cover all circumstances and the AAP has taken a position that would greatly restrict application of the limitation. As a result, for works not covered by the Chafee Amendment, such as scripts of plays, or for organizations that may not qualify as “authorized entities” or to create certain types of accessible format works, the fair use doctrine remains an important tool for those organizations and individuals serving persons who are visually impaired or have other disabilities. While the Chafee Amendment should certainly be seen as a positive limitation to copyright, it is not comprehensive enough to cover all situations necessary to fully serve the visually impaired community.