



ACCESSIBILITY, THE CHAFEE AMENDMENT, AND FAIR USE

The Fifth Principle in the Code of Best Practices in Fair Use for Academic and Research libraries is entitled **Reproducing material for use by disabled students, faculty, staff, and other appropriate users**. It describes in some detail the circumstances in which making and providing copies of collection materials in formats that are accessible to persons with disabilities constitutes fair use, as well as certain limitations to which that general principle is subject. The accompanying text notes that for persons with non-print disabilities (hearing-impaired individuals who need close-captioned or narrated video, for example), fair use may be the only available alternative. It also suggests that there is clear authority for treating the preparation and making available of accessible copies as a fair use under Sec. 107. This authority is found in the House Report on the Copyright Act of 1976, which states that “the making of copies or phonorecords of works in the special forms needed for the use of blind persons” as a “special instance illustrating the application of the fair use doctrine.”

Questions may arise, however, whether fair use is needed to authorize such activities on the part of libraries, either alone or in conjunction with university disabilities services offices, where promoting accessibility for students, staff and others with print disabilities is concerned. One thing is clear: Only a tiny fraction of all the titles in an academic library collection will be available for purchase in accessible formats (including the e-texts which are increasingly preferred by print-disabled readers); nor do rights holders have an active program for licensing the preparation of accessible copies. If most books are to be available at all, they will be available only via an exception to the Copyright Act provisions that give copyright owners “exclusive rights” to regulate reproduction and distribution of protected works.

In 1996, the Congress passed the so-called Chafee Amendment (now Sec. 121 of the Copyright Act), which provides in part that “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.” Advocates for disability rights argue that this provision, in itself, should be enough to authorize colleges and university to provide print-disabled members of their communities with accessible copies.

What, then, is the importance of fair use? The answer is to be found in the public positions that consistently have been taken by American publishers, who effectively control a large number of the copyrights in materials found in academic library collections. Back in 2004, the Association of American Publishers stated a position from which it has never departed: “Yet, 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.” Rather, AAP maintains, the only authorized entities are smaller, free-standing institutions that specialize in promoting accessibility, such as Recordings for the Blind and Dyslexic.

Clearly, the enactment of Sec. 121 does not limit or restrict the scope of the fair use doctrine as a rationale for making and providing accessible texts. Until such time as the publishing industry changes its position, or the courts clarify the point, fair use under Sec. 107 will continue to be an essential tool.