

**Statement of Allan Robert Adler
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Before the

**Committee on Foreign Relations
Of the
United States Senate**

Regarding

**U.S. Implementation and Ratification
Of the
Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are
Blind, Visually Impaired or Otherwise Print Disabled**

April 18, 2018

Chairman Corker, Ranking Member Menendez and Members of the Committee:

On behalf of the Association of American Publishers (“AAP”), thank you for this opportunity to publicly support the ratification and implementation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (“Marrakesh Treaty”).

AAP represents the leading book, journal, and education publishers in the United States on matters of law and public policy. Our principle mission is a rational legal framework that incentivizes and protects the publication of creative expression, professional content, and learning solutions. AAP members participate in both local markets and the global economy to the betterment of the world we live in.

AAP and its member publishers have a strong history of working with government agencies and legislatures, disabilities advocacy groups, technology developers, and educational and library communities to make accessible versions of literary works more available for those who need them. Publishers regularly export the works of American authors to global audiences while introducing U.S. readers to wide varieties of foreign literature; they know firsthand the disparity that readers with print disabilities face around the world. For these reasons, AAP was pleased to work with the U.S. Government and the World Intellectual Property Organization (“WIPO”) to draft, adopt and implement the multilateral Marrakesh Treaty. *(Brief highlights of AAP’s accessibility efforts with relevant links appear in an Appendix following this statement.)*

The path of AAP’s efforts follows a chronological evolution in improving accessibility primarily on the basis of developments in digital technologies and their applications. Before the advent of the digital age, accessibility for hard-copy printed materials generally required the laborious individual conversion of publishers’ single-format production files to make accessible versions used with assistive technology. The inability to produce “born accessible” copies of commercial works meant that, as a practical matter, consumer markets for accessible publications did not exist, and dependence on regulatory approaches centered on copyright exemptions were necessary to ensure the availability of accessible versions of print literary works.

Overtime, however, digital applications have enabled many publishers to build accessibility features into their production systems, helping many readers with print disabilities to have immediate access to various literary works. As innovative means for enhancing digital formats continue to be developed and integrated into their products and platforms, publishers are moving closer to the ability to fully serve the extraordinary accessibility needs of individuals with print disabilities through ordinary consumer markets.

At its core, the Marrakesh Treaty adopts for international application the key concepts of the Chafee Amendment, an exemption enacted in the U.S. Copyright Act (17 USC Section 121) in 1996 to permit certain “authorized entities” to reproduce and distribute non-dramatic literary works in accessible formats exclusively for use by individuals with print disabilities without the need for permission from or payment to the owner of those rights for such works.

Countries that are Contracting Parties consenting to be bound by the terms and obligations set forth in the Marrakesh Treaty must enact standard provisions like the Chafee Amendment in their national copyright laws for the privileged creation and distribution of accessible format copies of covered works, and allow the import and export of such copies through cross-border exchanges with “authorized entities” or “eligible person” beneficiaries in other countries that are also Contracting Parties.

AAP’s support for the Marrakesh Treaty is a unique exception to our continuing opposition to WIPO’s consideration of multilateral treaties comprised only of limitations and exceptions to the rights of copyright owners. Like other representatives of copyright owners, AAP believes the marketplace functions best when international instruments reflect baseline protections, and do not interfere with private sector innovation or dictate the national legal norms of the United States and other countries.

The Marrakesh Treaty is a special case because it addresses the fundamental human rights concern of discrimination against individuals based on their personal disabilities, and does so in a manner that directly echoes the elements of the Chafee Amendment in U.S. copyright law. AAP, however, strongly opposes any additional international efforts to create new “limitations and exceptions only” treaties at the expense of the exclusive rights afforded to authors and publishers. For example, two such pending proposals at WIPO to create broad new copyright privileges for educational and research institutions, libraries and archives are unnecessary and inappropriate in the context of the well-established international legal regimes that delineate basic global standards for copyright rights, limitations and exceptions under the Berne Convention, the WTO-administered Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), and the 1998 WIPO Copyright Treaty. The proposed legal instruments could devastate important existing publishing markets both in the U.S. and abroad.

Given the multilateral nature of the Marrakesh Treaty and its particular importance for efforts to expand the availability of accessible copies of literary works in lesser- and least-developed countries, AAP and its members understood the need for Treaty obligations to be set forth in ways that allowed optimal flexibility for compliance across a diverse spectrum of national legal systems, cultural perspectives, and economic and technological resources and capabilities. The need to accommodate such diversity created special challenges for building reasonable levels of predictability and accountability into the Treaty, particularly for the “authorized entities” that would be the pivotal players in globally implementing the Treaty to achieve its goals.

The Obama Administration’s proposed implementing legislation fell short on this important issue, failing to incorporate the relatively modest but nonetheless significant “practices” that authorized entities are expected to “establish and follow” under Art. 2(c) of the Marrakesh Treaty. But S.2559, the proposed “Marrakesh Treaty Implementation Act” introduced last month by the Chairman and Ranking Member of this Committee, along with the Chairman and Ranking Member of the Senate Judiciary Committee, and their colleagues Senator Leahy, Senator Harris and Senator Hatch – the original sponsor of the legislation subsequently known

as the Chafee Amendment – corrects this omission in a manner endorsed by AAP and other stakeholder advocacy groups, and similar to the approach adopted by the European Union in the Directive and Regulations that will guide its 28 Member States in implementing the Treaty.

In conclusion, let me emphasize that AAP views the ratification and implementation of the Marrakesh Treaty as important *transitional* steps that are currently needed to expand the availability of accessible format copies of literary works for individuals with print disabilities as publishers and their partners in the technology community continue to make progress toward the routine marketplace availability that is the shared goal of all stakeholders on this issue.

In this continuing transitional environment, it is important to ensure that still-necessary regulatory measures like the copyright exemptions boosted by the Treaty do not diminish incentives for the investments that publishers and others are making to reach the point where individuals with print disabilities can – at the same time, in the same manner and at the same price as other consumers without such disabilities – acquire in commercial markets published literary works reflecting the full spectrum of human interests, and enjoy them without having to demonstrate any special qualifications or depend upon special privileges for their availability.

As marketplace accessibility becomes increasingly common, a critical issue for publishers and authors will be the need for a “commercially available” exclusion in the Chafee Amendment and similar foreign copyright laws to acknowledge the transformed accessibility landscape.

The key economic premise underlying enactment of the Chafee Amendment in 1996, as noted in contemporaneous Congressional testimony by the Register of Copyrights (which was cited in Senator Chafee’s floor remarks), was that “blind and physically handicapped readers” did not constitute a “viable commercial market” for publishers. Under those circumstances, it simply was assumed that publishers were not likely to publish for that defined market and thus would not experience economic harm if the law allowed a select group of governmental agencies and non-profit organizations to serve that specifically-defined population by reproducing and distributing copies of copyrighted works in “specialized formats.”

The validity of that premise, however, continues to diminish as ebooks and audiobooks, online digital platforms, and standardized publishing formats like EPUB3 have made literary works more accessible and easily available through downloads, streaming and online display. AAP’s EPUB3* Implementation Project and parallel efforts like the EDUPUB Initiative will continue to significantly advance accessibility in the marketplace as publishers work with retailers, digital content distributors, device makers, reading systems providers, assistive technology experts and standards organizations to advance EPUB3 as the global distribution format for publications on the World Wide Web.

As these developments produce accessible offerings in the market, it will be unfair to allow regulatory measures like the Chafee Amendment to privilege competing free reproduction and distribution of the same works in accessible copies. The Marrakesh Treaty treats adoption of a “commercially available” exclusion as an *option*, rather than a *requirement*, for Contracting

Parties, but publishers in the UK, Canada and Australia can already take advantage of such provisions in their national laws. While copyright exemptions may need to serve a continuing “safety net” function until marketplace accessibility reaches its tipping point (and even afterwards for certain works that are extremely difficult to make accessible), Congress should anticipate the need to consider adding a “commercially available” exclusion to the Chafee Amendment when the marketplace indicates it is appropriate to do so.

AAP looks forward to working with this Committee and the Senate to ratify the Marrakesh Treaty, as well as with the Senate and House Judiciary Committees and the rest of Congress to enact S.2559, the proposed Marrakesh Treaty Implementation Act. And, again, we thank you for this opportunity to state our support for ratification and implementation of the Treaty on the public record.

Appendix: Highlights of AAP Work on Accessibility Issues

Chafee Amendment (17 U.S.C. Section 121) – In 1996, AAP worked with Senator Hatch and advocacy groups for blind and visually-impaired individuals to draft and enact legislation establishing an exemption under U.S. copyright law to permit certain “authorized entities” to reproduce and distribute copies of previously published, non-dramatic literary works in “specialized formats” exclusively for use by “blind or other individuals with disabilities,” without the need to obtain permission from the copyright owners of such works.¹

Known today as “the Chafee Amendment” because of its subsequent enactment through the efforts of another Senate sponsor, the exemption has greatly aided the work of non-profit and governmental entities, including State and local educational agencies and university disability student services (DSS) offices (among others), in enabling them to convert certain literary works into accessible formats to meet the reading needs of persons with print disabilities.

State Accessibility Legislation – State legislatures periodically consider proposals to improve the timely availability of accessible instructional materials for students with print disabilities. Typically, these proposals involve statutory or regulatory requirements, usually implemented through contractual provisions regarding the adoption or procurement of textbooks and other instructional materials, which obligate publishers to provide electronic files in one of several specified file formats for use as source files from which accessible versions of the instructional materials may be produced and provided to students who are qualified to obtain them.

State legislative processes, however, are not always responsive to input from the publishing community, including on federal preemption issues, resulting in proposed legislation that publishers cannot support because of practical problems with their provisions and concerns that multiple new State laws of that type present a complicated patchwork of diverse and often inconsistent compliance requirements for publishers whose markets extend across State lines and national borders. Despite these drawbacks, AAP and its member publishers have engaged in good faith efforts to help State legislators develop workable initiatives to address certain accessibility needs of students.

Bookshare, Inc. – AAP has helped Bookshare, the first online library subscription service for people with print disabilities, establish its credibility within author and publisher communities from its inception as an “authorized entity” under the Chafee Amendment, and has encouraged publishers and authors to accept and support Bookshare’s policies and practices for “scanning” or acquiring digital files of print books that qualifying subscribers to the Bookshare service can download in accessible DAISY and BRF digital formats. AAP’s support has reflected Bookshare’s sensitivity to the legitimate concerns of copyright owners, including its willingness to work with AAP on matters such as its Seven Point Digital Rights Management Plan and the terms of its

¹ See Senator John Chafee’s floor statements upon offering amendment to the Legislative Branch Appropriations Act, 1997 (H.R.3754) at 142 Cong. Rec. S9066 (daily ed. July 29, 1996), and upon Senate passage of the Conference Report to the Act, at 142 Cong. Rec. S9763-9765 (daily ed. September 3, 1996).

legal agreements with qualifying members, volunteers and contributing publishers and authors.²

IDEA Amendments of 2004 – AAP worked with disabilities advocacy groups to try to improve the timeliness of the provision of accessible textbooks and other core instructional materials to elementary and secondary school students with print disabilities. Problems thwarting timely provision included the need to contact the publisher of a particular work to obtain electronic files in different formats for each of their materials in order to comply with individual requests received from different States or different localities within a single State. File formats widely used by publishers for ordinary publications were unsuitable for use in reproducing those materials in specialized formats for individuals with print disabilities, and the process of converting them into more suitable formats was costly and labor-intensive, requiring “tagging” in order to structure the file to reflect the actual visual characteristics of the printed materials.

Delays also occurred in the handling process through which the electronic file provided by the publisher eventually reached the people who actually use it to reproduce and distribute the embodied content in accessible specialized formats.

In response to these problems, AAP and the disabilities advocacy groups crafted the proposed “Instructional Materials Accessibility Act” which was designed to address the causes of these delays and inefficiencies by requiring that publishers’ electronic files be uniformly provided to a central national repository where they could be requested for use by State and local agencies in an XML-based format that would offer the capability for more flexible tagging to reproduce print materials in specialized formats with greater efficiency, quality and interoperability. Since their enactment as provisions of the Individuals with Disabilities Education Improvement Act of 2004, P.L.108-446, the legislation’s key “national file format” and “central national repository” features have been implemented as the National Instructional Materials Information Standard (“NIMAS”) and the National Instructional Materials Access Center (“NIMAC”) through federal appropriations to the American Printing House for the Blind.³

AIM Commission – AAP efforts to address the accessibility needs of students with print disabilities at institutions of higher education have been no less determined or ongoing than its efforts to meet the needs of such students at the elementary and secondary school level. But, these efforts have had to take into account essential differences in both the nature of the instructional materials at issue and the manner in which these instructional materials are selected and acquired for use by students at these different levels of educational instruction.

² See <https://www.bookshare.org/cms/legal-information> (AAP cooperation and support) and <https://www.bookshare.org/cms/partners/publishers> (how publishers support and partner with Bookshare).

³ See <http://www.nimac.us/>. AAP is a member of the NIMAC Advisory Council. See <http://www.nimac.us/advisory-council/>.

For elementary and secondary school students, textbooks and other core instructional materials for different subjects at different grade levels are generally selected by State or local education agencies according to a standardized curriculum, and the State or local educational agencies purchase these materials in bulk for students to use on loan but then return to school officials after the academic term so they can be redistributed for use by students at the same class level during the next academic term.

At colleges and universities, however, instructional materials are selected by faculty for each section of a course in much greater variety than is found at the elementary and secondary school level. They typically differ from section to section within the same course, and have to be purchased or otherwise acquired by individual students who expect to either keep the materials as their own property or seek to recoup part of the purchase costs by selling the materials to other students or to a bookstore at the close of the academic term.

In pursuit of solutions, AAP supported enactment of provisions in the Higher Education Opportunity Act of 2008 creating the Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities (“AIM Commission”), which was charged with making recommendations to Congress after “conducting a comprehensive study to assess the barriers and systemic issues that may affect, and available technical solutions that may improve, the timely delivery and quality of accessible instructional materials for postsecondary students with print disabilities.” AAP representatives participated in the Commission’s work and endorsed its Report and recommendations in December 2011.⁴

AccessText Network – While working with Congress, AAP and its members focused on higher education continued to seek opportunities to work with institutions of higher education, disabilities advocacy groups and technology experts to devise ways to make it quicker and easier for college and university students with print disabilities to obtain the accessible textbooks and other instructional materials they need. Initially, these efforts produced the Publisher Look-Up Service, a website interface providing a place where DSS offices could search for electronic text and permissions contacts at higher education publishing companies.

Subsequently, in 2009, AAP announced a major leap forward in the form of its agreement with the Alternative Media Access Center (an initiative of the Georgia Board of Regents and the University of Georgia) to develop and launch a comprehensive, national online system which would expand the timely delivery of print materials to campus-based DSS offices by many more publishers, and streamline the permission process for scanning copies of print textbooks when publisher files are unavailable.

Funded through donations by AAP member higher education publishers, the AccessText Network was established without legislation or taxpayer dollars, and has leveraged an online database to enable publishers and institutions of higher education to effectively combine and

⁴ See 20 U.S.C. Section 1140j, enacted by Section 709 of Public Law 110-315; see also links to the AIM Commission Report at <http://www2.ed.gov/about/bdscomm/list/aim/publications.html>.

share their resources and expertise to ensure that those institutions can more easily obtain information about publishers' course materials, request electronic text files, and use more efficient acquisition and distribution channels.⁵

WIPO Marrakesh Treaty – AAP worked with the U.S. Government and disabilities advocacy groups from 2008-2013 at the UN's World Intellectual Property Organization ("WIPO") to adopt the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. AAP worked both in Geneva and Marrakesh to ensure that the provisions of the intensely-negotiated final text of the Treaty remained focused on the twin objectives of (1) promoting enactment of limitations and exceptions for print disabilities in national copyright laws and (2) facilitating the cross-border exchange of accessible format copies of copyrighted textual works through Authorized Entities, and were consistent with the established framework of international copyright treaties and agreements. AAP was the only non-government organization, besides three advocacy groups for the blind, explicitly thanked for its assistance in the formal closing statement of the United States delegation.⁶ AAP supported the U.S. signing of the Treaty in October 2013 and looks forward to supporting Senate ratification of the Treaty and Congressional enactment of implementing legislation.⁷

Accessible Book Consortium – During the drafting of the Marrakesh Treaty, AAP – directly and through the International Publishers Association ("IPA") – worked with WIPO's "Stakeholders' Platform" on several accessibility pilot programs, including the November 2010 launch of the Trusted Intermediary Global Accessibility Resources ("TIGAR") project, to explore how licensing could facilitate cross-border exchange of accessible titles to individuals with print disabilities. In 2011, AAP endorsed the TIGAR project at the Frankfurt Book Fair and worked with participating members to authorize the availability of published works in accessible formats discoverable via database searches across distributed networks. In 2014, the pilot ended and TIGAR's database of nearly a quarter million works in 57 languages merged into the Platform's establishment of the Accessible Books Consortium ("ABC"), a WIPO-led public-private partnership to promote capacity building and Inclusive Publishing ("born accessible" training) programs based on the EPUB3 standard. The Consortium remains an active complement to the entry in force of the Marrakesh Treaty.⁸

AIM-HIGH Act – With publication of the previously-discussed AIM Commission Report at the end of 2011, AAP began considering action on its leading recommendation, i.e., that "Congress should authorize the Access Board to establish guidelines for accessible instructional materials that will be used by government, in the private sector and in postsecondary academic settings."

⁵ See <http://accesstext.org/about.php>.

⁶ See <http://geneva.usmission.gov/2013/06/27/wipo-marrakesh/>.

⁷ See the full text of the WIPO Marrakesh Treaty at http://www.wipo.int/treaties/en/text.jsp?file_id=301016.

⁸ See <http://www.accessiblebooksconsortium.org/portal/en/index.html>.

By the end of 2013, AAP had worked jointly with the National Federation of the Blind (“NFB”) to craft and secure bipartisan introduction of a proposed “*Technology, Education and Accessibility in College and Higher Education (“TEACH”) Act*” to obtain Congressional authorization and funding to support the U.S. Access Board’s development of voluntary accessibility guidelines for postsecondary education instructional systems as urged by the Commission. Since that time, AAP and NFB have been joined by the American Council on Education (“ACE”) and other higher education advocacy groups, along with the Software and Information Industry Association (“SIIA”), in redrafting and renaming the legislation as the “*Accessible Instructional Materials in Higher Education (“AIM-HIGH”) Act.*” Introduced last year in the House by Reps. Phil Roe (R-TN) and Joe Courtney (D-CT), the bill (H.R.1772) currently has 77 cosponsors. Introduced in the Senate by Senators Orrin Hatch (R-UT) and Elizabeth Warren (D-MA), the bill (S.2138) has garnered additional bipartisan support from Senators Joni Ernst (R-IA) and Jon Tester (D-MT).⁹

EPUB 3* Implementation Project – This AAP-led initiative was developed in a partnership with retailers, digital content distributors, device makers, reading systems providers, assistive technology experts and standards organizations, and with the support and engagement of leading advocates for people with disabilities. Its goal was to accelerate the across-the-board adoption of the EPUB 3 format in the consumer market by identifying and implementing what stakeholders consider to be the core set of baseline features critical to the format’s acceptance. In October 2014, the Project issued a White Paper to help advance implementation of the EPUB 3 standard in the marketplace for the purpose of achieving greater interactivity for users, multimedia-enhanced content, and expanded accessibility for people who are blind or have other print disabilities.¹⁰

In a separate effort, the **EDUPUB Initiative** has pursued the goal of advancing EPUB 3 for K-20 educational materials. Pearson Education, as one of the leaders of this initiative, is sharing one of its own specifications for generating EPUB files for the education market specifically (known as an “EPUB 3 Profile,” in other words, a particular implementation of EPUB 3 for educational markets), which the EDUPUB participants can use toward developing EDUPUB’s open-source EPUB 3 profile for the industry. The overall stated goal of the EDUPUB initiative is “to advance the effective adoption and use of e-textbooks and other digital learning materials by improving interoperability, accessibility, and baseline capabilities via broad adoption of enabling technical standards.” Other AAP members, working through the Book Industry Study Group (“BISG”)’s Content Structure Committee’s EDUPUB Working Group, published “*Getting Started with EDUPUB: A Guide for Understanding the EDUPUB Profile of EPUB 3*” in July 2015.¹¹

⁹ See <https://www.congress.gov/bill/115th-congress/house-bill/1772/related-bills>.

¹⁰ See <http://publishers.org/news/epub-3-implementation-project-white-paper-now-online>.

¹¹ See <http://epub3.ch/wp-content/uploads/2015/08/EDUPUB-Guide.pdf>.