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Copyright protection as access barrier for people who read differently:¹ the case for an international approach

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ABSTRACT

People with print disabilities have an interest in the contemporary debates concerning copyright. For them, copyright protection poses an access barrier. An accommodation that would balance access needs with protection needs is therefore of great potential importance.

Although people with print-disabilities have traditionally used Braille and audio materials to satisfy their reading needs, one should not, when considering access issues, confine the analysis to those media only. In a rapidly changing technological environment, accommodations are needed that will not become obsolete due to technological change that opens up new access opportunities.

In a number of countries the problems posed by copyright protection as access barriers have received legislative attention in the form of attempts to remove them. Those attempts have not always given rise to perfect solutions. This paper is concerned with access barriers to print posed by copyright protection, by successes as well as unfortunate by-products of previous attempts to deal with those barriers, by technological developments that affect copyright protection, and it tries to isolate lessons learnt so far.

¹ The term "people who read differently" has been borrowed from <http://www.andersleezen.nl>

1.

Most contemporary public discussions concerning copyright protection are not concerned with the legitimacy of copyright as a form of protection of intellectual property. They centre around protection measures, whether legal or physical, and the degree of copyright protection that such measures should or should not afford. The public debate is fascinating. It provides very important perspectives on the society we live in now. The advent of the information age has given rise to new opportunities for the exploitation of the labour of others and to new challenges of control over, and the exploitation of, property. As Robert S. Boynton² has observed:

"Once a dry and seemingly mechanical area of the American legal system, intellectual property law can now be found at the center of major disputes in the arts, sciences and ... politics."

The reason for these developments is not difficult to understand. As Boynton³ points out:

"Not long ago, the Internet's ability to provide instant, inexpensive and perfect copies of text, sound and images was heralded with the phrase "information wants to be free." Yet the implications of this freedom have frightened some creators -- particularly those in the recording, publishing and movie industries -- who argue that the greater ease of copying and distribution increases the need for more stringent intellectual property laws. The movie and music industries have succeeded in lobbying lawmakers to allow them to tighten their grips on their creations by lengthening copyright terms. The law has also extended the scope of copyright protection, creating what critics have called a "paracopyright," which prohibits not only duplicating protected material but in some cases even gaining access to it in the first place. ... In less than a decade, the much-ballyhooed liberating potential of the Internet seems to have given way to something of an intellectual land grab, presided over by legislators and lawyers for the media industries."

Boynton's article goes on to explore the development of a school of thought -- sometimes referred to as the free culture movement (also the title of a forthcoming book by Lawrence Lessig)-- which, although it is not a coherent theoretical movement, is using its joint intellectual powers to set itself against this land grab. Very significantly, it is using the tools of moral philosophy and historic analysis to develop culture- and research-oriented arguments in favour of the need to erode existing property claims of copyright holders. We need, so the argument goes, to reassert a modern day notion of the knowledge commons. Christopher May⁴ summarises the argument thus:

"At the centre of the protection of intellectual property rights (IPRs) is a long history of political bargains struck between private rights to reward and the social benefit of information/knowledge diffusion. The historical dynamic of politics in this policy area has been to expand the rights of owners while circumscribing the public realm of information and knowledge. In recent decades the public domain has become merely a residual, all that is left when all other rights (as constructed by IPRs) have been exercised. The advent of digital rights management (DRM) technologies has disturbed a reasonably legitimate politico-legal settlement over "fair use," challenging the existing balance between the rights of "creators" and the interests of users. The breakdown of the norms underpinning IPRs has prompted

² Robert S. Boynton "The Tyranny of Copyright?" New York Times, January 25, 2004

³ op cit

⁴ Christopher May "Digital Rights Management and the Breakdown of Social Norms" First Monday, volume 8, number 11 (November 2003) (http://firstmonday.org/issues/issue8_11/may/index.html)

renewed debate regarding their legitimacy. Although it is technological change that has enhanced not only the ability to copy but also the potential to control the distribution of content, ... this argument will not be won or lost in the realm of technology. Rather, new technologies return the question of the control of knowledge and information (content) to the realm of politics."⁵

(Swahili proverb: "Ndovu wawili wakipanga, ziumiazoni nyasi.": "When two elephants fight, it is the grass that suffers.")

These intensely political aspects of copyright-related discussions and their moral-philosophical overtones are of great importance to people with print and perceptual disabilities. Notwithstanding the legitimate interests of copyright holders, copyright protection constitutes an access barrier for them. They cannot access print materials in their original format.

In the ordinary course, not all copying is prohibited in all cases. It is nowadays commonly accepted that the so-called fair use or fair dealing principle permits copying which is consistent with the normal exploitation of a particular document. But it is striking that no library for the blind or publishing unit that supports it has ever asserted that the production of a book in an alternative format is permissible in terms of that principle, even if such production permits the normal exploitation of a book which is otherwise inaccessible to the print-disabled people who need access to it via a library. Free access to library books is as ancient an idea as libraries themselves.⁶

But this idea does not extend to access by the print-disabled community at large. Libraries for the blind and their book production agents have therefore been dependent on the cooperation of publishers and authors to provide their permission for the production of accessible literature without the payment of royalty.

Although the need to obtain this type of cooperation does not routinely hamper the provision of an effective library service in accessible formats, the needless trouble it causes is considerable and, in some cases, almost insurmountable.

- ❖ First, a significant time delay means that people with print-disabilities -- if they gain access to a book at all -- must wait even longer than it takes for the conversion process to be completed.
- ❖ Second, the routine administrative burden that this type of copyright management entails adds to the overall conversion cost.
- ❖ Third, this administrative process becomes even more complex as soon as the original copyright holder transfers those rights pursuant to a merger or take-over or if, in the case of smaller commercial concerns, they are wound up and the rights are not disposed of in a manner which makes it possible to trace the current holder. This is not an infrequent occurrence in developing countries.
- ❖ Fourth, of particular concern in most countries is the fact that student literature cannot be converted by libraries for the blind or their agents at a rate which does justice to the needs of the intended end-users thereof. To impose the additional administrative burden and delay factor on producers of student materials is, therefore, unacceptable if

⁵ See also David Marquand *The Decline of the Public* Marston Book Services LTD 2004; Siva Vaidhyathan "The state of copyright activism" *First Monday*, volume 9, number 4 (April 2004), and the authorities there cited

⁶ IFLA. *The Glasgow Declaration on Libraries, Information Services and Intellectual Freedom*. August 2002. <<http://www.ifla.org/faife/policy/iflastat/gldeclar-e.html>> (Feb 23, 2004)

the state has the legislative means at its disposal to prevent them. This consideration becomes particularly pressing when the state opts for an inclusive education model which permits children with disabilities to attend so-called mainstream schools which, in the ordinary course, find it difficult enough to convert printed materials for use by blind children.

- ❖ Fifth, the production of magazines for the use of people with print-disabilities is impossible where, as is often the case, those magazines carry syndicated materials over which the magazine publisher may not have further rights of disposition.
- ❖ Sixth, the administrative burden is further complicated by the fact that permissions to reproduce in alternative formats are almost never standard. They may, for example, be limited as to the number of permissible copies, the format in which the reproduction may be done, be renewable from time to time and so on. What makes those potential differences so hazardous is that, from time to time, the permissions granted must again and again be consulted and analysed to do work which is necessary. Whether the book needs to be restored by replacing torn or missing pages; whether a particular educational institution wishes to buy a copy for a student; or a parent wishes to buy a book for a child, the permission obtained requires examination. Of particular relevance in this regard is the development of the DAISY standard⁷ for digitally recorded books for people with print disabilities. Especially audio books will, as the result of the international adoption of this standard, eventually be regenerated from analogue to digital format. In each case, the copyright regime applicable to that particular audio book would require careful consideration and, if necessary, it must be revisited.

Deaf persons, similarly, have never been confident that they could rely on the support of the legal system if they claimed that it would be fair dealing or fair use if an interpreter were to translate a literary work or a play or a television broadcast for the benefit of deaf persons. On the other hand, though, it is hard to imagine a publisher asserting the contrary in a court of law. But no person with a perceptual disability, nor an institution serving the interests of such persons, really benefits from this twilight zone between strict legalism and public morality. Libraries for the blind depend for their survival on the perception that they respect the copyright of others absolutely. They depend on public funding. They employ professionals. If they are perceived to be anything other than scrupulous in their dealing with the rights of others, they may lose the ability to attract the finances, the skills and the international respect without which they cannot serve their constituencies.

An accommodation that would balance access needs with protection needs is therefore of great potential importance to people with print and perceptual disabilities. But it remains to be seen whether copyright holders will become so distracted by the larger debate that the accommodation remains an ideal, or whether they will use the opportunities presented by the need for such an accommodation to advance the proposition that for the publishing industry, the debate focuses on legitimate protection concerns and not on protectionism that tramples genuine aspirations for short-term goals. To be sure, there is much potential for distraction. Each technological advance which opens up opportunities for the erosion of access barriers seems to carry with it a potential threat. This is why, from the perspective of those who seek to eliminate access barriers, Christopher May's thesis that " new technologies return the question of the control of knowledge and information (content) to the realm of politics" is right. Without political intervention, the access barriers with which this paper is concerned

⁷ <http://www.daisy.org>

cannot be removed completely. But from the perspective of the owners of content, a measure of co-operation may yield beneficial returns on the investment, namely the elimination of political mistakes, increased access to control and, dare one postulate it, the moral high ground.⁸

In any event, the means to digitise print already exists. For practical reasons, it makes sense to work with libraries for the blind, who are committed enough to providing quality reader services, to obviate the need for the unlawful sharing of digital documents subject to copyright protection.

2.

People with print disabilities are those who, due to blindness, partial sight, dyslexia or physical impairments, cannot access visually represented information in the ordinary course. They require the conversion of such information into an alternative format which renders it accessible via their remaining senses, either through touch, hearing or increased visibility. Formats which are currently accessible are Braille, audio, larger print or digital text in some formats, but we should not try to list them more accurately, since we may blindfold ourselves before a proper examination of the problem.

The foregoing formulation has been made with some caution. Technology changes so rapidly that the accuracy of today's definition may become the basis for tomorrow's misunderstanding because of changed circumstances. For example, restricting the problem to print access only, ignores the point that a computer screen is not made of paper, but the access problem may be equally real if the technology in use at any given time renders access impossible at that stage. During 2003 technology that enables access to cellular telephones became readily available to blind people for the first time, although by then many of them had been using computer technology on other platforms since the early to mid-1980's with a considerable measure of success. What seems impossible today may, therefore, become perfectly possible due to an unforeseen technological development. It is therefore a potential mistake to circumscribe with the benefit of contemporary understanding, those means by which tomorrow's generation of blind people may be able to read. This point is not academic. Care should always be taken not to assume that contemporary practical solutions are all that is needed. Future developments may create new possibilities. The ideal attitude is a positive attitude. As has been observed with reference to the accessibility of the Internet:⁹

"Many people assume that web accessibility is an issue only for blind people, but Higher Education Statistics Agency data show that the largest group of students declaring themselves as disabled are those with dyslexia.

"So there is a danger of assuming that accessibility is associated with a single disability, when all are equally important and all access needs must be addressed."

For present purposes, therefore, it bears emphasis that the problem faced by people with a print disability is one of barriers to access, plain and simple. Access issues may differ in space in time, but "access" and "barriers" remain the analytical constants and overcoming barriers remains the problem to which an appropriate solution remains necessary.

⁸ See in this regard Richard Poynder "The Inevitable and the Optimal" Information Today Vol. 21 No. 4 -- April 2004 <http://www.infotoday.com/it/apr04/poynder.shtml>

⁹ Neil Witt and David Sloan "Access As The Norm, Not As An Add-on" The Times Higher Education Supplement, Friday, April 30, 2004

Access barriers are not experienced by people with print-disabilities only. In the Canadian Copyright Act this has been recognised by particular provisions that provide for the removal of access barriers posed by copyright protection to people with perceptual, rather than print-disabilities.¹⁰

The use of the term "perceptual disability" works well within the conceptual framework of the Canadian Copyright Act. But it would be a mistake to use it more generally as synonymous with a print-disability. Print-disability has to do with access to visual information; not with access to audio materials through, say, Sign. The media are different; the applicable technology is different; the issues may therefore well be different.

This paper is concerned with access barriers chiefly to print posed by copyright protection, by successes as well as unfortunate by-products of previous attempts to deal with those barriers, by technological developments that affect copyright protection, and it tries to isolate lessons learnt so far.

In a number of countries the problems outlined above have received legislative attention in the form of attempts to remove these access barriers that have been recognised as such by governments who take seriously the needs of disabled persons. Those attempts are impressive insofar as they reflect a public commitment to deal with the problem, but they have not always given rise to perfect solutions. They affect the intended beneficiaries, the institutions who must provide for their interests and publishers in different ways. One gets the impression that much more work needs to be done in order to come up with a dispensation that, even if it will not satisfy everyone, is not manifestly made of the stuff of compromises that satisfy fewer, rather than more people.

A brief consideration of some of those measures illustrates the trends, both favourable and negative. It may provide some indication as to what developing countries should consider when implementing similar types of solutions. But it may also provide some factual basis for the belief that an international arrangement is needed to standardise these matters. Without it, pressing issues are resolved nationally, while others are created at the international level, to the detriment of readers.

3.

The United States Congress adopted a law,¹¹ generally known as the Chafee Amendment,¹² which provides in effect for a blanket licence to certain entities to reproduce certain previously published literary works for the benefit of people with print-disabilities. Since the coming into operation of this measure, it is not an infringement of copyright if certain entities either reproduce or distribute copies or phonorecords of previously published non-dramatic literary works, provided that those activities comply with certain requirements.¹³

In Canada non-profit organisations acting for the benefit of persons with perceptual disabilities and even persons at the request of persons with perceptual disabilities, may (in terms of the already mentioned legislative amendment), make copies or sound recordings of literary, musical or artistic or dramatic works, other than cinematographic works. The legislature provided that doing so is not an infringement of copyright. What is more, such non-profit organisations or individuals may translate, adapt or reproduce in Sign language a

¹⁰ Copyright Act (R.S., 1985, c. C-42, s. 32; R.S., 1985, c. 10 (4th Supp.), s. 7; 1997, c. 24, s. 19)

¹¹ Public Law 104 of 1997

¹² after the senator that introduced the measure

¹³ The Chafee amendment to chapter 1 of title 17, United States Code, adds section 121 thereto

literary or dramatic work, other than a cinematographic work at the request of or for the benefit of persons with perceptual disabilities or they may perform in public a literary or dramatic work, other than a cinematographic work, in Sign language, either live or in a format specially designed for persons with perceptual disabilities.

In Australia the Copyright Act of 1968,¹⁴ was amended to permit institutions assisting people with print disabilities to make sound recordings, Braille versions, large-print versions, photographic and electronic versions of copyright protected works under certain conditions, without infringing copyright.¹⁵ Those institutions are afforded a statutory licence, subject to certain qualifications,¹⁶ if they register with a collecting society approved by the attorney-general of Australia to administer such statutory licence.

A directive of the European Union¹⁷ ("the EU Directive"), provides¹⁸ that member states of the European Union may in their legislation provide for exceptions or limitations to copyright for "uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability". Those exceptions may also relate to distribution, to the extent necessary.¹⁹ It is not compulsory for member states to enact such exceptions or limitations.

Pursuant to this Directive, the United Kingdom has enacted a law,²⁰ which amends the Copyright, Designs and Patents Act,²¹ "to permit, without infringement of copyright, the transfer of copyright works to formats accessible to visually impaired persons."

The Copyright, Designs and Patents Act now permits anyone to make a single copy of a protected work for a visually impaired person who has the master copy in his or her lawful possession or use,²² save for certain exceptions.²³ It also permits approved organisations to make multiple copies for use by visually impaired persons,²⁴ subject to exceptions.²⁵

4.

Typically, only some entities may reproduce and distribute such works. They may be referred to as authorised entities. In all of the jurisdictions considered here, those entities are either of a non-profit character, or the fee that may be charged for work done may not include a profit margin.

In Canada, as has already been pointed out, authorised entities are either non-profit organisations acting for the benefit of people with perceptual disabilities or individuals.²⁶ The Canadian statute does not expressly prohibit individuals from doing this kind of work for others for profit. But in the UK, "[i]f a person makes an accessible copy on behalf of a visually impaired person ... and charges for it, the sum charged must not exceed the cost of

¹⁴ Act no. 63 of 1968

¹⁵ Sections 135ZN, 135ZP, 135ZQ

¹⁶ subsections (3) and (4) of section 135ZP

¹⁷ Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

¹⁸ in article 5(3)(b)

¹⁹ article 5(4) and 5(5)

²⁰ Copyright (Visually Impaired Persons) Act of 2002

²¹ 1988 (c. 48)

²² section 31A(1)

²³ section 31A(2) and (3)

²⁴ section 31B(1)

²⁵ section 31B(2) and (3)

²⁶ Copyright Act, section 32(1)

making and supplying the copy."²⁷

In the UK, an approved institution authorised to make multiple copies is either an educational institution or a body which is not conducted for profit.²⁸

Under Australian law the sale or supply of otherwise licensed copies for profit, constitutes unauthorised use of such copies.²⁹

In the US, an authorised entity is a non-profit organisation or or governmental agency that has a primary mission to provide specialised services relating to training, education or adaptive reading or information access needs of blind or persons or other persons with disabilities.³⁰ This conceivably covers a large number of non-profit organisations serving people with print-disabilities in a variety of ways. But the Chafee Amendment does not seem to authorise such reproductions by educational institutions like schools or universities which, although they educate people with print-disabilities, do not have the education of such persons as their primary mission. Indeed, the law seems to postulate that unless the institution concerned serves such people primarily -- presumably if they are in the majority and if the institution's activities are so structured as to meet those people's needs in some demonstrable way -- the law will not benefit it. This thinking runs counter to the idea of social inclusivity and it postulates that the needs of people with print-disabilities must be served separately. A public library would therefore not be permitted by that law to reproduce a book, even if it had the technology to do so, for use by a blind person.

In the US the problems arising out of the "primary mission" requirement have been ameliorated by laws in different states which mandate the provision of study materials by publishers to educational institutions in digital formats. It is beyond the scope of this paper to examine those laws in detail. But it is worth noting that those laws are by no means uniform with regard to the educational level of institutions to which they refer; and they tend to refer to so-called textbooks only. So students participating in courses in popular culture may be less well provided for (if their books are not generally regarded as textbooks); a university student in one state may not benefit from the law while a school learner in the same state may. The anomalies arising out of fragmentary exceptions are obviously undesirable.

The Canadian law, as has already been noted, appears to take the broader, more realistic view of the type of problem that is to be addressed. Typically, specialised institutions cannot realistically meet each and every accessibility need. Typically, countless individuals are prominent in the social support infrastructure of a (perceptually) disabled person, from paid educational or therapeutic professionals with Braille skills, sign language skills and the like, to a volunteer who can read and operate a sound recorder. Persons with perceptual disabilities are able to turn for assistance with their access needs, even to an individual who is prepared to facilitate their access. So even if, at the institutional level, the Canadian exception has not been cast widely, the law of Canada admirably identifies not only the types of disability that may pose access barriers in the library-related world, but most of the types of solutions commonly required and implemented so as to enable access.

Neither in the United States nor in Canada does the law expressly permit the people affected thereby to use technology to eliminate their own access barriers. In particular, no blind person is expressly permitted by law to scan the printed images in his or her own books and to

²⁷ Copyright, Designs and Patents Act, section 31A(5)

²⁸ Copyright, Designs and Patents Act, section 31B(12)

²⁹ Copyright Act, section 135ZZH(1) and (2), read with Section 135ZP(1) and (2)

³⁰ USC Title 17 section 121(a)

convert them, with the aid of optical character recognition software, to computer readable text, ready for output in either Braille or synthetic voice. Nor is a partially sighted person expressly permitted to photocopy his or her own books so as to enlarge their typefaces.³¹

The so-called one-for-one exception that was introduced into the law of the UK³² is therefore worth noting. As has been pointed out, if a visually impaired person has lawful possession or use of a book or part of a book, it is not an infringement of copyright for an accessible copy to be made for use by that person if the master copy would be otherwise inaccessible. This law does not identify the agency permitted to make the accessible copy under these circumstances and it would therefore be lawful for a blind person to do so himself or herself.

Private enterprise is not totally excluded by way of those exceptions, but private entities may work either for libraries for the blind or for individuals on a not-for-profit basis. It is not entirely clear why this should be so. The making of a profit for work done does not seem to bear any relation to any of the exceptions under consideration here. The one-for-one exception makes it possible for one person to make an accessible copy for another, but such a person cannot make a career out of producing, for example, Braille for professionals who need it to do their work. They must presumably either make their copies themselves, or turn to non-profit institutions to do it for them, where they may not be able to claim preferential treatment on the basis that they are prepared to pay, because they need to make money in their turn. Likewise, one needs to think carefully about how the means are procured to educate children with print-disabilities in an inclusive education environment. While education authorities are usually non-profit public agencies, parents who take an active interest in providing their children with reading materials are also just required to join the cue, or to learn how to make accessible copies themselves. Their possibly being prepared to pay for quicker access to books for their children does not seem to count for much in any jurisdiction examined here.

If the idea is that people who work on a not-for-profit basis are less likely to abuse the exception for their financial advantage, it ought to be considered that people who stand to lose personally from their abuse are as likely as others to take care not to do so.

In any event the phrase used by the UK exception "the cost of making and supplying the copy"³³ is readily capable of being interpreted to mean that A's cost, if A does it for profit, ought to include a profit margin, because A's production time may be a costing factor, although this phrase was probably not intended to convey that meaning.

5.

In the US, the reproduction must be done in a so-called specialised format. Specialised formats are "Braille, audio or digital text which is exclusively for use by blind or other persons with disabilities."³⁴ The reference to digital text is to be welcomed because, as has been pointed out earlier, technological developments have added to the range of accessible media available to people with print-disabilities. The phrase "which is exclusively for use by blind or other persons with disabilities" is puzzling, particularly in relation to digital text. One wonders whether the "exclusive use" requirement refers to the intended use of the materials or whether it suggests that the medium itself must, objectively speaking, lend itself

³¹ Large print is expressly excluded from the Canadian exception; Copyright Act, section 32(2). See also the remarks below, concerning the definition of "specialised formats" in US law

³² See text to note 22 above

³³ See text to note 27 above

³⁴ USC Title 17 section 121(c)(3)

to such exclusive use only. The latter interpretation would be downright nonsensical, given the extent to which digital text can nowadays be accessed by way of not only refreshable Braille displays, but synthetic voice also.

In Australia reproductions are limited to sound recordings made by or on behalf of institutions assisting persons with disabilities, or Braille, large print or photographic versions.³⁵ Digital text does not appear to be covered by this provision.

The Copyright (Visually Impaired Persons) Act of the UK makes a reference to an "accessible copy" only. Accessibility is therefore always a question of fact; not of law.³⁶

The Canadian Copyright Act refers to "a format specially designed" for persons with perceptual disabilities.³⁷

The DAISY standard to which reference has already been made, is not a "format", but rather a standard, incorporating different commercial or proprietary formats,³⁸ together with a degree of encryption capability. Since Canada is one of the leading players with regard to the implementation of this standard, the reference in the Canadian statute to "format specially designed" appears to be unfortunate.

In some countries audio library services for people with print-disabilities are provided in both analogue and digital formats that are not commercially accessible and which can be accessed by way of adaptive equipment only. The South African Library for the Blind is one such institution. So, too, are certain institutions in North America and the United Kingdom. The experience in South Africa has been that the specialised equipment required to access such materials had proved expensive, in the end first difficult and then impossible to source and that, in the final analysis, served as a significant barrier to print access for the poorest of the poor with print-disabilities. Since the equipment that enabled the reproductions was of necessity also highly specialised and therefore expensive, the scale of reproduction was limited even further.

From a developing world perspective, restricting reproductions to specialised formats seems an indefensible practice. In a number of countries audio books were for years distributed in analogue format on commercially accessible cassettes, without serious repercussions for the publishing industry. Specialised formats require specialised equipment to access those formats. The higher the level of specialisation, the more expensive the equipment required for access. The UK formulation, relying on the idea of the accessibility of the reproduction, is therefore to be preferred.

Large numbers of persons are identifiable as having print-disabilities on the grounds that they cannot read a particular size typeface. Some of those persons are able to deal with the problem by acquiring expensive magnifying equipment, but in less severe cases an enlarged photocopy may suffice. The Chafee Amendment does not permit the making of such reproductions; the Australian statute does; it expressly refers to large print, while the UK law probably does, because it works with the concept of accessibility without defining it. Such reproductions are expressly prohibited under Canadian law.³⁹

The UK concept of accessibility of the reproduction is again preferable. The adoption of

³⁵ Copyright Act, 1968, section 10(3)(h)

³⁶ Copyright, Designs and Patents Act, section 31F(2) and (3)

³⁷ section 32(1)(a)

³⁸ http://www.daisy.org/about_us/default.asp

³⁹ Copyright Act, section 32(2)

Extensible Mark-up Language for computer-based book production purposes will, in all likelihood, render the production of different formats, whether Braille, synthetic speech or enlarged typefaces, potentially available on demand.

6.

In the US the beneficiaries are restricted. They are persons who are blind or have other disabilities. This seems an inoffensive requirement, until one examines the background legislative context. Those persons are identified and rendered eligible to receive books and other publications produced in specialised formats under United States law. In other words, only those persons who may benefit from United States special programmes to provide books accessible to persons with print-disabilities, may benefit from this statutory limitation on exclusive copyright.⁴⁰ Partially sighted persons are not included in these programmes.

With the benefit of hindsight, and in the light of subsequent legislative developments in especially the UK and Australia (to which reference has already been made), it is unwise to restrict the beneficiaries of statutory exceptions of this kind unduly.

7.

Exceptions of this type are often characterised by qualifications or exclusions. The Chafee Amendment applies to previously published non-dramatic literary works only.⁴¹ The National Library Service for the Blind and Physically Handicapped of the Library of Congress ("NLS") interprets this to mean that the published scripts of plays are therefore not included as reproducible under this particular provision.⁴² This seems a qualification which is difficult to understand and it has not been echoed in any of the other legal systems considered here. The Chafee Amendment refers to previously published non-dramatic literary works only; it therefore by necessary implication also disqualifies sheet music. The Library of Congress appears to regard sheet music as also excluded.⁴³

The Canadian Copyright Act⁴⁴ expressly includes music, as does the UK Copyright, Designs and Patents Act.⁴⁵

Because the Australian Copyright Act includes music in the category of "works", together with literary, dramatic and artistic works, sheet music does not appear to be excluded by Australian law.⁴⁶

Excluded under the Copyright, Designs and Patents Act are instances where musical works are to be copied, but where doing so would involve a performance thereof, or of part thereof. Also excluded are instances where the master copy is a database, or a part of a database, and where copying would infringe copyright in the database.⁴⁷

It is unfortunate that certain types of materials are excluded from some exceptions and not from others. A more unified approach is obviously desirable.

⁴⁰ Section 121(c)(2)

⁴¹ Section 121(a)

⁴² <http://www.loc.gov/nls/reference/factsheets/copyright.html>

⁴³ *ibid*

⁴⁴ section 32(1)(a)

⁴⁵ section 31A(1)(a) and 31B(1)(a)

⁴⁶ http://www.copyright.com.au/institutions_assisting_print.htm

⁴⁷ Copyright, Designs and Patents Act, section 31A(2) and 31B(2)

8.

In Australia, if a sound recording, Braille version, large print version, photographic or electronic version of a work has been separately published, the provisions permitting reproduction of print materials do not apply unless the person who wishes to make that version (or caused that version to be made) is satisfied, after reasonable investigation, that no new copy of the version of the work can be obtained within a reasonable time at an ordinary commercial price.⁴⁸

That particular provision is peculiar to the Australian statute where, with reference to the principle of "fair dealing", it is used repeatedly throughout the Act (commencing with section 40).

But it is by no means unique. In the UK Copyright, Designs and Patents Act it is also laid down that this type of exception permitting the reproduction of a work to make it accessible is not applicable "if, or to the extent that, copies of the copyright work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to the same or substantially the same degree".⁴⁹ The same principle is also applied in Canada if "the work or sound recording is commercially available in a format specially designed to meet the needs of any person" whom the exception is meant to benefit.⁵⁰

These provisions appear fair from the perspective of an apparently flourishing audio book industry: If books are available in audio format, why permit their reproduction for people with print disabilities without more? The publishers of such materials have an interest in having them purchased, rather than reproduced yet again.

But the Canadian formulation of the principle by no means guarantees this outcome. The emphasis on format, rather than accessibility, suggests a far more restrictive interpretation of what may not be produced under statutory licence. A commercially available audio book, whether on CD or on audio cassette, is not, after all, published in a specially designed format which is calculated to render it accessible to people with print-disabilities. Canadians reproducing materials for people with such disabilities may therefore not have to be too circumspect regarding compliance with this provision in each case where it is decided that a particular book ought to become part of a special collection.

With its emphasis on accessibility, the UK provision also appears to miss the point though, but here it is the potential reader, not the publisher who stands to lose. What renders a book accessible? If, for example, a book is to be published in Braille but it is available in an accessible audio format, does its commercial availability oblige the potential Braille producer to apply for permission from the copyright holder? Or does the intended format make a difference to the test that is to be applied? That seems a fanciful suggestion, because in the statutory provision itself, the accessibility factor is not expressed in terms that suggest it to be relative to the intended format. Still, a common-sense approach to the UK provisions probably justifies the conclusion that, whether or not this has been made clear in the provisions laying down the exception, the position was meant to be similar to that in Australia.

The Australian provisions are clearly related to the medium of publication in issue in each case.

⁴⁸ Copyright Act, 1968, section 135ZP

⁴⁹ section 31B(3) and 31A(3)

⁵⁰ Copyright Act, section 32(3)

The only instance when an audio book would not be accessible to a blind person is when that person also happens to be deaf; but that renders the book inaccessible to that person only; not inaccessible to library users in general. Does it make a difference if the book was initially requested by a deaf-blind reader? And must it then, for the sake of consistency, be produced under the one-for-one exception, rather than under the provision dealing with multiple copies? And if it has been produced under the one-for-one exception, is an application for permission required if it is intended, subsequently, to produce multiple copies of the same book?

The UK provisions attempt to relate the commercial availability requirement to the circumstances under which the document is being reproduced. When it is to be produced in terms of the multiple copies provision, the document may not be produced without permission if, in addition to it being commercially available, it is "in a form that is accessible to the same or substantially the same degree."⁵¹ If it is to be reproduced in terms of the one-for-one exception, it would qualify for the exception only if it is not commercially available "in a form that is accessible to that person."⁵² The deaf-blind person would therefore not be prejudiced if the reproduction is required in Braille, but in terms of the one-for-one exception only. But what is meant by "the same or substantially the same degree", is by no means settled. To complicate matters further, the "substantially the same degree" provision in the multiple copies section is followed by an exact replication of the "accessible to that person" provision.⁵³ The purpose it serves there, is not at all clear.

Regrettably, the answers to the foregoing questions appear to suggest that the UK commercial availability requirement, just like the Canadian one, creates more problems than it solves.

It would seem that the Australian provisions, because they are directly related to the question whether it is a sound recording, Braille version, large print version, photographic or electronic version that is to be produced, best achieves the purpose of the qualification the legislature sought to impose on the statutory exception.

9.

Most statutory exceptions are characterised by the fact that, if a publication is produced or a reproduction is made in accordance therewith, the resulting document must bear a notice recognising the original copyright in the materials concerned, as well as a notice that it has been produced in terms of the applicable exception.⁵⁴

It would seem that the notices contemplated must at least be in the format in which the document has been made available, but the legislation is by no means clear in this regard. A printed notice in some form or other is probably also desirable. Not much turns on those notice provisions, so they are not considered here in any detail. Two observations are however important in this context.

It is important to note here that individuals who wish to benefit from the one-for-one exception in the UK ought to comply with the notice provision associated with the UK statutory exception.⁵⁵ It seems prudent to require such compliance, even if it adds some burden to the individual concerned, because it may be important to identify legal copies in

⁵¹ Section 31B(3)

⁵² Section 31A(3)

⁵³ section 31B(4)

⁵⁴ USC title 17 section 121(b)(1)(b) and (c) in the US; Copyright, Designs and Patents Act section 31A(4) and section 31B(5) in the UK; Copyright Act, section 135ZQ(4) in Australia

⁵⁵ Copyright, Designs and Patents Act, section 31A(4)

certain cases.

The contents of those notices are important for another reason. When a work is produced in an alternative format, the question ought to arise whether the result is a mere reproduction of an existing publication or whether it is an edition in its own right. The answer to this question has important implications for whether, in jurisdictions where publications must be deposited centrally, the alternative format publication needs to be deposited in terms of the law prevailing in the country concerned. It also raises the question whether obvious mistakes may be corrected or, to put it differently, whether they need to be perpetuated; or whether regional differences that require different spelling may be respected when the reproduction is made of materials not published in the country where they are reproduced in alternative formats. If the accessible format publication is a reproduction only, mistakes ought logically to be perpetuated; if it is a publication in its own right, the position may be different. In each country the answer is one of law, not of fact.

The legislation considered in this paper appear, throughout, to be based on the legal premise that the accessible alternative format documents permitted to be made for the benefit of people with print disabilities are copies only; not separate publications.

10.

As is the case regarding notices, not much turns on enforcement provisions in the case of a breach of statutory exceptions. This is not because they are not important, but because they are best framed in terms of the existing legal framework of the country to which they apply.

11.

If the accessible version is a copy and not an alternative publication, how true to the original should it be? The medium chosen as appropriate alternative format often necessitates changes to layout. Braille is not a graphic medium. It simply is not as versatile as print when it comes to the production of aesthetic effects by means of paragraph styles, fonts, graphic symbols, borders and so on. It is at this stage still difficult and costly to accompany text with graphic representations. In addition, Braille is a bulky medium.

The UK Copyright, Patents and Designs Act makes provision for the fact that the accessible copy does not infringe the typographic arrangement of the original,⁵⁶ but it does not appear to have expressly taken cognisance of the fact that pictures, photographs and the like may be omitted from the accessible copy; nor of the practice of adding, in appropriate cases, descriptive captions to pictures. It is true that accessible copies may be made of " a literary, dramatic, musical or artistic work",⁵⁷ but it is doubtful whether this permits insertions of text into a literary work to make photographs, for example, accessible as "artistic works" within "literary works").

12.

The digital environment in which books are produced in alternative formats is not a static one. Reference has already been made to the possibilities that arise out of the use of Extensible Mark-up Language, which permit among others, the production of a book in more than one format from one digital source. In the developed world, some libraries for the blind are

⁵⁶ section 31A(1) and 31B(1)

⁵⁷ Copyright, Designs and Patents Act, section 31A(1)(a) and 31B(1)(a)

already making use of streaming audio technology and others are considering doing so. In any event, Braille has for some years now been produced from digital source files by a variety of institutions serving people with print-disabilities. Those files, once created, are extremely useful for the purposes of maintaining the integrity of collections. Books may be restored using them; schools may reuse them year on year. In some cases they may even serve as the collection itself: Materials can simply be archived and hardcopies can be produced on demand only, while the electronic files may be delivered instantly to readers via the web.

In short, what ever the use to which they are put, properly archiving source files and sound recordings has become an indispensable standard operating procedure in most leading libraries for the blind and production houses that support those libraries.

Only in the UK does the statutory exception deal directly with this important issue. It permits approved bodies to hold intermediate copies which are necessarily created during the production of accessible copies. Such intermediate copies may be held only for the purpose of making further accessible copies and only for as long as the approved institution remains entitled to do so.⁵⁸ This provision does not apply to individual accessible copies;⁵⁹ individuals therefore do not benefit from it.

The so-called one-for-one exception deserved closer consideration. Individuals are permitted to make accessible copies for themselves or have such copies made for them, but if the process gave rise to an intermediate copy, its retention is not permitted. The omission of this provision (in some form or other) from the one-for-one exception creates potentially serious compliance problems for people with print-disabilities who typically use more than one access medium, depending on what their circumstances require. A potential source file which enables the production of a Braille print-out may be access directly from a computer by way of screen reader software that provides synthetic speech output. In terms of the one-for-one exception, that type of access is legally acceptable. But it seems that once hardcopy Braille has been generated from the source file, its retention becomes impermissible, even if the hardcopy had been created for the purpose of single use only. The result is that, for example, blind parents cannot read poetry to their children in their own voices from Braille print-outs if they prefer to archive their literature primarily in electronic format, because according to the one-for-one exception, it is either Braille or bust for them. It seems more realistic to take account of how people live their lives and then to enact control measures on that basis.

13.

The already-mentioned notice provisions serve, apart from the purpose of acknowledging the author's copyright, as a mechanism to guard against unauthorised copying. So, too, do the records of those institutions that do the copying or for whom it is done. The Australian licensing system makes provision for central records to be kept of such copying. Modern libraries keep records, both of their holdings and of production. An additional record keeping system is therefore probably not a sine qua non for the effective operation of an exception system, save where it forms an essential component of the manner in which the system itself operates, as in Australia.

14.

Reference works pose the problem that, typically, students do not require access to them in

⁵⁸ Section 31C of the Copyright, Designs and Patents Act

⁵⁹ made under section 31A

their entirety. It is therefore in their interests that the reproduction of extracts from such works should be eligible for protection under statutory exceptions.

The Chafee Amendment contains no provision that seems to permit this, though the position under state laws may be different.⁶⁰

The Canadian Copyright Act also does not appear to make provision for this type of situation.

In Australia, making an accessible copy of part of a work for the benefit of a person with a print-disability or a person with an intellectual disability, is permissible.⁶¹

The UK Copyright, Designs and Patents Act makes express provision for the making of an accessible copy of a "master copy", which may also be part of a copy.⁶²

15.

It is important to stress that the beneficiaries of these statutory exceptions are people who read differently, not their libraries or those institutions that produce alternative format materials. Regrettably, however, production houses and libraries who had instigated the reforms that culminated in the legal provisions under discussion paid little, if any, attention to the consequences of those reforms for the interlending system.

At face value, the statutory exceptions under discussion here constitute drastic inroads on the rights of authors. They need not be consulted if their works are reproduced for the benefit of readers of alternative format materials in terms of those laws. The Berne Convention⁶³ vests the exclusive right to authorise the reproduction of literary and artistic works in their authors,⁶⁴ but it also sanctions statutory exceptions of the kind under consideration here:⁶⁵

"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

Members of the Berne union who enact such statutory exceptions therefore do not violate their international law obligations by imposing a form of quasi-expropriation on literary works of foreign authors who publish in the countries where such exceptions apply. It would appear to be reasonable to permit reproductions of existing publications in alternative formats, as long as the process is controlled. No doubt libraries for the blind and their production houses play a crucially important part in the operation of such control measures.

But does it follow that a book which is lawfully produced in one country in accordance with an exception that prevails there, may be regarded as having been published lawfully in another country which is also a member of the Berne Union? Do the enabling provisions in the Berne Convention that permit the curtailment of authors' rights apply internationally, so as

⁶⁰ See the remarks concerning the US dispensation in section 4 above

⁶¹ Copyright Act, section 112(a)(ii) and (b)(ii) regarding intellectual disabilities; section 135ZQ(1) regarding print-disabilities

⁶² section 31A(1) and section 31B(a)

⁶³ Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, and revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971 and amended on October 2, 1979

⁶⁴ Article 9(1)

⁶⁵ Article 9(2)

to protect books that travel across borders for interlending purposes?

The parties to this treaty are states. It is therefore the state, not the individual, that derives the right to curtail, by legislation, the rights of authors within the area of its sovereignty; not the individual or his or her library. In other words, the Berne Convention is facultative in its operation, permitting members of the Berne Union to make certain laws, but it does not confer its benefits without more on the individuals who reside or the institutions who are domiciled within a given member state's area of sovereignty.

The exceptions therefore appear to apply within the territories of the states that enacted them and therefore not internationally.

And so what is to be done then, to restore to people who read differently, the full benefits of a properly functioning interlending system?

The solution is not particularly complex. Each country that has already enacted an exception could, it is submitted, extend the protection contained in its currently prevailing exception, also to alternative format materials or accessible copies produced in terms of laws permitting such production beyond the jurisdiction of the country concerned, which are distributed on a non-profit basis in such country.

The World Intellectual Property Organisation is in the process of compiling a draft copyright law for countries in need of international assistance with the formulation of such laws. In it, that formulation is suggested in the following terms:

"... it shall be permitted without the authorization of the author or other owner of copyright to reproduce a published work for visually impaired persons in an alternative manner or form which enables their perception of the work, and to distribute the copies exclusively to those persons, provided that the work is not reasonably available in an identical or largely equivalent form enabling its perception by the visually impaired; and the reproduction and distribution are made on a non-profit basis.

" The distribution is also permitted in case the copies have been made abroad and the conditions mentioned above have been fulfilled."

It should be noted that this provision is in draft form only and therefore subject to review. It would seem less complex to provide that the distribution of any work which has been lawfully produced in its country of origin will be lawful in the country in which the exception containing this enabling provision, applies, provided such distribution is undertaken by a library or like institution, to its registered members. Such a formulation would avoid the any debate concerning the efficacy of controls designed to protect the publishers of commercially available audio books. If not, the WIPO draft provision amounts to saying that a book held by a library in one country cannot be lent to a library in another country if that book is commercially available in the country of the lender. That, with respect, is nonsense.

The draft provision ought also to contain a further clause regarding prima facie proof of lawful publication which, it is suggested, should be provided by the notice prescribed in the country in which the work was reproduced.

16.

As has been pointed out earlier, it is not mandatory for members of the EU to provide for statutory exceptions of the type discussed here. Importantly, however, the EU Directive provides that, in cases where such exceptions are indeed enacted, members are obliged to

enact further measures. ⁶⁶

"Member states shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article ... 5(3)(b) ... the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned."

This means that where statutory exceptions exist, member states should also ensure that those rightholders that can enable access to the means to benefit from such exceptions, must do so to the extent necessary. This provision does not bind member states where rightholders have taken voluntary measures, including agreements with those parties concerned, to achieve the same object.

This provision does not seem to require that the pre-existing voluntary measures must comply with any particular standard. The standard set is a high one: Rightholders must co-operate with beneficiaries to the extent necessary to enable them to benefit from the exception or limitation concerned. The question therefore arises whether licensing arrangements that do not meet that standard, exonerate member states from having to enact the provisions contemplated.

The Parliament of the UK, when it enacted the Copyright (Visually Impaired Persons) Act of 2002, adopted a prudent measure in this regard. The statutory exception that regulates the making of multiple copies, ⁶⁷ does not apply to the making of accessible copies if a licensing scheme operated by a licensing body is in force under which licenses may be granted by the licensing body, which permit the making and supply of accessible copies. ⁶⁸ But then the scheme is not permitted to be unreasonably restrictive. ⁶⁹ The scheme is unreasonably restrictive if it limits the statutory exception, ⁷⁰ unless "there are reasonable grounds for preventing or restricting the making of accessible copies of the work." ⁷¹

Those provisions are impressive. They permit licensing schemes to operate, notwithstanding the statutory exception, but they make it plain that licensing schemes may not be used to subvert the exception.

The UK statute probably falls short of the EU Directive, inasmuch as rightholders are not required by it to co-operate with the beneficiaries of the exception.

What sort of co-operation is it that the EU Directive requires? Reference has already been made to the fact that Braille may be generated by way of a computer-assisted process and to the fact that screen reader software can enable blind persons to access digital files. Access to publishers' or printers' files would therefore facilitate the production of accessible copies, whether in Braille or in audio formats, immensely. Publishers are often loathe to part with those. The fear seems to be either that they will be put to unlawful use by Libraries for the Blind or, more likely, that those institutions do not have digital asset management regimes in place that would serve as guarantees against their unlawful use by unauthorised persons. That apprehension is all the more acute in cases concerning digital media, in respect of which perfect copies may be made if mechanisms to guard against unauthorised copying are not

⁶⁶ Article 6(4)

⁶⁷ section 31B of the Copyright, Designs and Patents Act

⁶⁸ Section 35D(1)(a)

⁶⁹ Section 35D(1)(b) A

⁷⁰ Section 31D(2)

⁷¹ Section 31D(3)(b)

utilised.

To that end, the UK Copyright, Designs and Patents Act provides:⁷²

"If the master copy is in copy-protected electronic form, any accessible copy made of it under this section must, so far as it is reasonably practicable to do so, incorporate the same, or equally effective, copy protection (unless the copyright owner agrees otherwise)."

The Act contains no provision obliging the copyright owner to co-operate with regard to the disabling of the copy protection in question, but since the copyright owner is entitled to have similar copy protection incorporated into the accessible copy, the Act appears to imply such an obligation.⁷³

But can member states go so far as to oblige copyright owners to part with their digital files in order to facilitate the speedy production of accessible copies in alternative formats for the benefit of people who read differently? Strictly speaking, if the production process is not actually dependent on access to those files, the answer is probably in the negative. But publishers would do well to start paying attention to this problem and to co-operate with libraries for the blind in order to make digital files available to them.⁷⁴ If under the EU Directive they can be obliged to co-operate in respect of access to electronic media in copy protected form, it would be to their advantage to co-operate further and to reach agreements with such libraries regarding what would satisfy publishers' requirements for acceptable digital asset management standards. This need is all the more pressing one, because of what has been said with regard to intermediate copies or digital copies, the making of which are authorised by most of the exceptions analysed here.

17.

Increased co-operation between libraries for the blind and publishers is also in the interests of readers. Libraries for the blind themselves tend to be fearful of the freedom and the responsibilities conferred on them by those exceptions. And where the accessible media are digital media, they tend to be extra cautious, for the same reasons as publishers. There is therefore a very real risk that interlibrary loan operating procedures and increasing co-operation between libraries for the blind may not provide readers with the potentially increased access to books that recent technological advances make all the more possible.

The DAISY Consortium⁷⁵ was established to promote an internationally recognised standard for digital books that is to enhance access for all people with print-disabilities.⁷⁶ Unless a measure of international consensus can be achieved fairly soon with regard to the acceptable management of the digital assets this development was supposed to have produced at the international level, this Consortium will become transformed into a club of developers and audio recording technicians which exists for its own sake only; the impetus for the developing world to join the technological revolution it represents will have dissipated and large investments of time and energy will have been wasted, primarily because digital talking books will not be exchanged freely by way of interlibrary loan and the world will have been shrunk

⁷² in section 35B(8)

⁷³ For an excellent discussion of this problem, see George Kerscher and Jim Fruchterman "The Soundproof Book: Exploration of Rights conflict and Access to Commercial EBooks for People with Disabilities" http://www.daisy.org/publications/docs/soundproof/sound_proof_book.html

⁷⁴ See George Kerscher "DAISY For All: Publishers' Collaboration Enabling Print Access" http://www.daisy.org/publications/docs/pub_print_access/ITD-2003.htm

⁷⁵ <http://www.daisy.org/>

⁷⁶ http://www.daisy.org/about_us/default.asp

by the very media that could have enlarged it.

None of this is necessary. Libraries for the Blind should, for their part, promote sound digital asset management practices by agreeing standards among themselves. If they don't do so, individual libraries may resort to digital rights management practices that may be detrimental to increased co-operation between them. One such library that is likely to become a major player in the digital talking books arena has already introduced a copy protection mechanism which is questionable in terms of legislation regulating anti-competitive practices.

" Talking Book programs in the United States have historically used some kind of technology that is not commonly available to the general public, such as recording cassettes at half the speed of commercial recordings so that they cannot be copied and played on commercial machines by nondisabled readers. In addition, until 1996, organizations like NLS [National Library Service of the Library of Congress for the Blind and Print-Handicapped] and RFB&D [Recordings for the Blind and Dyslexic] first had to obtain explicit permission from the copyright holders to produce any titles as Talking Books. Beginning in 1996, a new amendment to U.S. copyright law (known as the Chafee Amendment) gave these agencies blanket permission to make any title available, as long as it was produced in a format that is not generally available to the public.

"Since DAISY titles are essentially HTML and MP3 files, RFB&D uses something it calls intellectual property protection (IPP) to make sure that only RFB&D subscribers read the organization's books. If you insert an RFB&D DAISY book CD into an approved player, you are asked to enter your personal identification number (PIN) to verify that you are an RFB&D subscriber. Once you enter your PIN on the player's keypad, you can listen to any book from RFB&D until you turn the player off. When you power the player on again, you must enter your PIN again. Players that have not been approved by RFB&D will not play RFB&D books.

"While the process of authorizing a player involves installing a software key in the player's permanent memory, it can no longer be accomplished by users because RFB&D has stopped sending out keys on CD. Instead, subscribers must now either buy their players directly from RFB&D or ship their players to RFB&D to have authorizations installed. In addition, RFB&D now requires subscribers to sign copyright agreements (available at <<http://www.rfb.org/copyright%20indiv.htm>>).

"Why is RFB&D doing all this? There is rampant fear among publishers that people will start to post books online illegally, just as they have done with music on Napster and elsewhere. These issues are now also covered under a U.S. law known as the Digital Millennium Copyright Act of 1998, which is the result of an international treaty under the World Intellectual Property Organization. Of course, it is not legal or appropriate for people to redistribute RFB&D or other titles. However, we hope that the benefits to users of DAISY technology will not be overshadowed by anticopying concerns, even if the process seems to be excessive or burdensome on consumers."⁷⁷

18.

An international effort to standardise statutory exceptions to copyright protection will be an important step towards affirming international trust in what libraries for the blind and those serving disadvantaged communities do. It will also contribute much towards a framework

⁷⁷ Jay Leventhal and Janina Sajka "A Rosy Future for DAISY Books" Access World, Volume 5 Number 1, January 2004 <http://www.afb.org/afbpres/pub.asp?DocID=aw050103>

that can assist those countries that have not as yet enacted such exceptions in their own jurisdictions, but who might want to do so. Once a degree of international co-operation has been established, the legitimacy of what many are trying to achieve ought also to become evident to the publishing industry. If that stage can be reached, it will no doubt pave the way for increased access to the means that should both speed up the production of accessible format books and increase the amount of books to which people with print-disabilities may have access.

The alternative is file sharing for a good cause.⁷⁸ To the reader, the results will be second rate; to the publishers, the results may be disastrous, because combating it is unlikely to be a popular cause.

19.

In April 2004 the General Assembly of the International Council on English Braille, meeting in Toronto, adopted the following resolution:

"This General Assembly affirms the principle of unrestricted international interlending of reading materials in alternative formats among recognized blindness agencies. Therefore the Executive Committee of ICEB should work through the Braille Authority of North America and with other relevant non-governmental organizations and governmental agencies to give non-citizens of the United States access to braille and other accessible format materials produced in the United States through the development of appropriate international protocols and legislative change if necessary."

This resolution is unfortunate. It unjustifiably targets the US, while other Libraries for the Blind, probably unbeknown to their members, labour under constraints no different from those that inhibit interlending practices in the US itself. But it highlights two key points: the first is that it is essential that misunderstandings are eradicated before they become totally entrenched; the second is that this ought to happen at the international level so that all who read differently, may benefit.

⁷⁸ That this is already happening is apparently general knowledge; see Sandeep Junnarkar "In the Virtual Stacks, Pirated Books Find Eager Thumbs" New York Times, June 3, 2004