

Policy, Property & Permissions II: Exploring Efficient and Effective Methods for the Delivery of Accessible Content

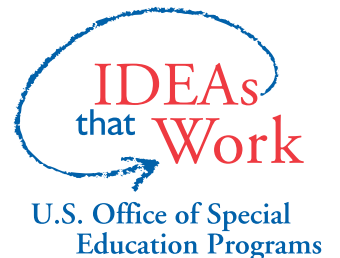
Summary of May 7, 2004 Meeting

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Background

On October 18, 2002, Harvard Law School hosted a landmark meeting concerning accessible curriculum materials for students with disabilities. The meeting, titled “Policy, Property and Permissions: A Discussion of Accessible Curriculum Materials” was cosponsored by the Berkman Center for the Internet and Society at Harvard Law School, The Harvard Children’s Initiative (HCI), the National Center on Accessing the General Curriculum (NCAC) at CAST, and the Association of American Publishers (AAP). Present at the meeting were representatives from several major publishers as well as intellectual property attorneys, academics and technology developers.

The meeting was groundbreaking because it provided an opportunity for publishers, technology experts, lawyers and scholars to collaborate with a common goal of improving the quality and availability of digital curriculum materials for students with disabilities. The primary focus of the group was to better meet the needs of “currently eligible” (under the Chafee Amendment to the copyright law) students for high quality digital versions of their textbooks. However, the group also discussed the possibility of future expansion of the category of eligible students beyond the scope of Chafee. The group noted that consideration of long range goals on the front end could avoid unnecessary and costly “retrofitting” at a later date. The group also considered the values of universally designed materials and the benefits for students and educators alike if the range and capabilities of digital curriculum materials were expanded in the future. The meeting concluded with plans for next steps: further research, the drafting of a white paper and an opportunity for the group to reconvene.¹

On May 7, 2004 the group reconvened at Harvard Law School. The group returned to the issues raised at the first meeting, digging deeper this time and discussing specific ways to deliver accessible content in a more efficient and effective manner and format. At the meeting, proposed models were submitted to the group for review and the group discussed the pros and cons of various approaches to what was termed “the payment problem”.

What follows is a summary of the conversations held and the views expressed at the May 7, 2004 meeting.

May 7, 2004 Meeting Summary

Starter Document

Following introductions and updates regarding NIMAS (National Instructional Materials Accessibility Standard) and the NFF (National File Format) working group, Professor Martha Minow led the morning session. She began the discussion by soliciting responses to a starter document that had been provided to the group prior to the meeting. The starter document presented three scenarios for changing the product delivery system for digital materials.²

¹ The White Paper can be found at: http://www.cast.org/publications/ncac/ncac_whitepaper.html

² Attached as Exhibit A.

- A participant observed that Scenario #2 is “pretty close” to what is currently happening in higher education.
- A participant voiced opposition to Scenario #2 in every respect but the fact that it “sets the groundwork for #3.” This participant also stated that the denominator is too small and if (Scenario #2) gets accepted, the risk is that people will be happy with it and not want to change to the (far preferable) Scenario #3.
- Discussion shifted to issues concerning Section 508. A participant noted that Europe is coming out with more restrictive laws than 508. Another participant mentioned a new service that automatically produces 508-compliant web pages from html code. Because this can result in different people who will see the web pages in different ways, publishers are concerned about losing control of look and feel.
- Discussion regarding the role of intermediaries in light of any changes to current system, they will probably get squeezed out but may get contracts for the work.

Chafee

Discussion began with shared anecdotes regarding the origin of the Chafee amendment and how it was not intended for broad scope of digital media (was originally supposed to be a way to expand blind access). Conclusion of group – there must always be a place for Chafee but it can exist as a separate track to the marketed digital materials.

- David Rose stated that there will still need to be some legal mandate to make sure that the smallest market (e.g., deaf-blind kids) is reached.
- A participant noted that the tiny piece of Chafee that goes beyond providing text to the blind is the reference to digital text.
- There seemed to be a consensus that Chafee is not a sufficient foundation for the educational sphere. It still serves a purpose for mainly the blind community at large, but is not the best way to build universal access in the education sphere. There may even be risks of undermining Chafee if people try to expand its applicable scope.
- Rural post office delivery analogy (everybody gets mail but not everybody gets it to their door).
- CAST supports use of Chafee to provide for a very small legal mandate, but still thinks that one must exist.

Rights and Royalties

- A participant observed that the publishers do not hold the electronic rights to all of the content in textbooks. The people who own it are going to try to ask for additional royalties.
- Question raised: Will the publishers have to compensate these copyright owners extra, or do they not get the extra royalties for the kids with disabilities?

- Participants noted that some small groups of copyright owners (MLK etc.) will not easily open up their content to a Scenario #3 world. They need to be adequately compensated not only for the number of copies of the internet content that is sold, but also for the corrosion of their market that occurs by having their material released at large on the internet.
- Participant notes that only 9,600 students nationwide are Braille students.

Scenario #3

Participants seem most interested in this scenario, although some note that we need to make sure that students with disabilities aren't forgotten if we go beyond Chafee.

- Professor Minow notes that Chafee will still apply to publishing at large and other classroom materials – it will just become irrelevant with regard to textbooks under Scenario #3.
- A participant also notes that Scenario #3 would solve the heavy backpack problem.

Terry Fisher's Presentation

Professor Terry Fisher of the Berkman Center for the Internet and Society addressed the group and presented his views on ways to solve what he referred to as “the payment problem.” He used a flow chart to illustrate his presentation and has made his notes available online.³

The Payment Problem

- Professor Fisher feels that as we move towards increased usage of online pedagogical opportunities, we should anticipate a disaggregation of textbooks.

There was some disagreement on this point from participants who feel that, especially in the lower grade levels, disaggregation shouldn't be as widespread (market data that few teachers vary the lesson plans let alone the textbook-like materials).

There was also some agreement from other participants who feel that there will be disaggregation and publishers are already coming up with business models to meet this.

David Rose stated that he thinks that education is moving away from content and more towards process which would reduce disaggregation.
- Professor Fisher emphasized the need to keep/advance the needs of students with various disabilities and handicaps.

Approaches

Professor Fisher proposed 4 possible approaches:

1. Technological Shields
 - E.g. Encryption (works well with fixed-media distribution), Password protection on web-sites, DRM (iTunes), Speedbumps (works better with music)
 - Disadvantages

³ Professor Fisher has posted his presentation notes online at:
<http://cyber.law.harvard.edu/people/tfisher/payment/index.html>

None of these have been successful to date – they have all been cracked.
They can impede but can't stop
They are costly – a race against the code crackers
Reduce the flexibilities of the materials

2. Enhanced Copyright Regime

- Increased criminal penalties
- Increased governmental involvement – DOJ (Ashcroft thinks piracy aids terrorism)
- Use of statutory damages – untapped so far.
- Major problem here is that it will make the publishers villains and plus you can't sue the school districts for damages

3. Alternative Compensation System

- Publishers register works (and subsets thereof) with Copyright Office
- Federal taxation provides pool of revenue to compensate creators
- School districts report adoptions
- Compensate according to percentage of uses

4. Possible Changes in Marketing Practices of Publishers

- Shift from per-book fees to per-student site licenses significantly reduce hazards of profit erosion through unauthorized distribution
- Makes format of distribution irrelevant and also reduces deterrent of updating materials periodically.

Discussion of Approach #4

- Concern: Second-degree price discrimination?

Possible problem – varying purchase price might compromise idea of equal access.

However, production price would vary depending on technology necessary to produce the particular format. Should this disparity be balanced to avoid price discrimination?

- Concern: Geographic price discrimination?

Participants uniformly rejected this concern because wealthy school districts have to pay more and geographic price discrimination already exists at the international level

But rare and controversial on the domestic level, participants noted:

Advantages:

Increased profits to publishers.

Equalizes access to materials.

Disadvantages:

Potentially illegal (Robinson-Patman Act) and would require some sort of legislative tweak to avoid anti-trust.

Unpopular as an idea – appears to be greedy.

“MFN” legal problem.

Publishers are not permitted to do price discrimination.

Semi-universal service obligations and serving sub-markets

Publishers obliged to make available versions configured appropriately to subsets of population above a threshold number at the same price.

For groups of smaller size, publisher makes available to any organization, for free, an appropriately formatted XML file.

Third-party providers use the file to create version appropriate to those markets.

Compensation through pay-as-you-go for different versions.

Discussion of Combining Scenarios #1 and 4

- Most promising combination is between a subset of technological protections (password protection of websites) and marketing changes (except for geographic price discrimination).
- Among other things, what is really attractive about this is, that it doesn't require any changes in the law – no legislative action.
- David Rose noted that CAST just released a universal product through Scholastic that Scholastic decided to price on a subscription basis. Participants noted that other non-profits and publishers are experimenting with this type of compensation system (both independently and in collaboration).

Discussion of Next Steps/Action items

- How would this model – combining technology and market mechanisms to protect rights while enabling access – be tested?
 - Possible grant opportunities from the Department of Education to fund proof of concept trials
 - SIGs (state improvement grants)
 - Unsolicited fed. Funding applications (part of EDGAR?)
 - Venture philanthropy
- Developing a pilot program taking Professor Fisher's suggestions
- Develop studies that encourage/require states and districts to be internally reflective about their practices
- Assuming the recent legislation (IDEA) goes through, have another conference with disability group representatives and educators as well to figure out how these laws are actually going to get implemented (legislation has a 2-year compliance deadline).

Conclusory Remarks

- One participant voiced the opinion that pilot efforts are best left to the publishers themselves.

- Another participant noted that despite the efforts of publishers, lots of educators are skeptical about whether an electronic revolution will take place for textbooks.
- Several participants expressed frustration with the fact that educational purchasers (for districts) expect to get digital products for free (as giveaways with bound text products). Because disability issues are not driving the contract negotiations, one person's valuable digital textbook is another person's bundled-in freebie.
- Participants agreed with one participant's view that the technological revolution will happen to textbook publishing and will have huge impact.
- Participants noted that, assuming the adoption of the voluntary standards, with or without Congressional approval, we will be entering a moment of opportunity for promoting coordination and perhaps more movement toward the full accessibility/new model of distribution. Participants expressed interest in seizing that moment for further conversation and collaboration around these issues.

Exhibit A

Policy, Property & Permissions II: Exploring Efficient and Effective Methods for the Delivery of Accessible Content **Harvard Law School** **May 7, 2004**

Starter Document: Considering Three Scenarios for Building Accessible Textbooks

Where We Are Now:

General Description:

Students with disabilities can receive free accessible versions of copyrighted instructional materials if they are eligible under the Chafee amendment to the copyright law. Once they have completed the required process for certifying their eligibility, students can obtain accessible versions of instructional materials through the systems that are in place in their respective states.⁴

Some states have no mechanisms to facilitate the process of obtaining accessible materials while others have preferential procurement laws and/or state repositories in place.⁵ In some states, the issue is handled by individual school districts, individual schools, or even individual teachers. Consequently, publishers must comply with a wide array of state laws as well as requests filed on behalf of individual students. However, Chafee does not empower publishers to distribute proprietary content. Intermediary organizations (“authorized entities” under Chafee) handle the conversion of texts into the accessible formats required to meet eligible students’ needs.

Currently, there is no national standard file format (although the U.S. Department of Education’s National File Format Technical Panel is seeking to propose a national instructional materials accessibility standard). In addition, there is no national repository for accessible materials (although there are localized repositories maintained by states, such as California, and repositories run by non-profit organizations, such as American Printing House for the Blind).

Assumptions Made for Purposes of Exploring Alternative Scenarios:

1. We seek a delivery system for accessible materials to meet the needs of as many students as could possibly benefit from them. This could mean sticking with the current recipient population (print-disabled students, eligibility determined by Chafee amendment) as the exclusive target. However, over time it could make more sense to serve a wider population of students with special needs. Therefore we should consider options such as proposing legislation to modify or expand Chafee to change the role of publishers or to further amend the Copyright law.

⁴ See **NCAC White Paper on Ordering, Producing and Obtaining Accessible Versions of K-12 Curriculum Materials in Five Selected States**, available at: http://www.cast.org/publications/ncac/ncac_whitepaper.html

⁵ http://www.cast.org/publications/ncac/ncac_stategrid.html

2. We seek a delivery system that will compensate creators, producers and transformers of accessible instructional materials for their work in an equitable fashion.
3. We seek a system that will provide eligible students with a scope of product usage with digital format instructional materials that is at least comparable to what other students have with traditional textbooks (i.e., they can be used at school or at home).
4. We seek an accessible product that is comprehensive and includes accessible versions of tables of contents, indexes, photographs and charts; not just text.

Considerations to be Weighed in the Examination of Scenarios:

1. Copyright compliance issues
2. Digital rights management (DRM) and security considerations and costs
3. Extent of accessibility (single source file able to be transformed for multiple users and formats such as digital talking book and Braille) in terms of feasibility and expense
4. Educational versatility and quality of product: look/feel and efficacy for educational purposes (to bring substantive content to learners with diverse needs)
5. Application of state legislation
6. Time frame for adoption and likely viability over time as the world continues to change

Scenario I: Modest Change: A National Repository Using a National Standard Format

General Description:

In this model, students with identified needs who are eligible for accessible versions of instructional materials would continue to acquire them through the systems that are currently in place in their respective states.⁶

One change, however, would be that a uniform National Instructional Materials Accessibility Standard (NIMAS) for digital text would be in place. Publishers would deliver a NIMAS version of each textbook to an intermediary organization (an authorized entity under the Chafee amendment) or a national repository.⁷ The intermediary, upon receiving a conversion request, would then locate the book within its holdings or that of the national repository. The intermediary would then produce or provide an accessible version of the textbook.

As is the case under the current system, the initial creation of an accessible version of the textbook would only occur if a student needed it. Once created, accessible versions of the textbook could be retained by the repository for future use.

⁶ See **NCAC White Paper** (link provided in footnote # 5).

⁷ A national repository could be solely for K-12 materials or could include post-secondary materials as well.

A. Benefits

1. To publishers:
 - a. Easy to implement – would retain the current intermediary system and publishers would not have to handle individual requests
 - b. Decreased costs to publishers in the long run, in part because of removal of publisher's current role in the requisition process
 - c. Enables publishers to maintain tight control on copyrighted materials
 - d. Continues system of selling textbooks on a one student, one book basis
 - e. Flow of money is straightforward and easy to track
2. To school districts, teachers, and students:
 - a. Facilitates the creation of a national repository of converted textbooks, which could avoid repetitious efforts and wasted time of teaching professionals
 - b. Decreases the lag time in requesting and obtaining materials (especially if the requested textbook is in a repository)
3. To intermediaries:
 - a. Preserves intermediaries' role in conversion process
 - b. NIMAS enables intermediaries to convert textbooks more efficiently
 - c. Resources that intermediaries currently use for format conversion would be freed up for other purposes

B. Costs

1. To publishers:
 - a. Up-front costs for conversion to NIMAS
 - b. Deposit fees might be associated with a national repository
2. To school/district and students:
 - a. Publishers' up-front costs might be reflected in higher book prices
3. To intermediaries:
 - a. Some of the profits currently seen from handling complicated conversions might be lost due to publishers' assumption of responsibility for providing materials in NIMAS
 - b. Might increase competition among intermediaries, thus encouraging margins to be trimmed

C. Analysis/Remaining Questions:

1. What would be the extent of any cost-savings realized by intermediaries as a result of a shift to a standardized format? Could some portion of the money currently going to the intermediaries be provided to publishers for up-front conversion costs (so that these costs would not be passed along to schools in the form of higher book costs)?
2. Where would the money that is currently going to intermediaries for complex conversions go if publishers provided textbooks in a standard format? How would the finances of these arrangements shift?

3. Who might fund the creation of the repository? Who would manage and maintain it?
4. Should the repository be K-12 only?
5. How big a burden is it on the publishers to switch to the National file format?
6. Is there effort wasted in going the modest change route if eventually there may need to be a bigger change?
7. What are the costs for copyright protection security?

Scenario II: Moderate Change: Web-based Distribution to Eligible Students

General Description:

In this scenario, all textbooks would be sold either with: 1) pass codes to websites with accessible versions of the text or; 2) fixed media in an accessible format. The books would still be sold in the ratio of one book to one student, but each book would come bundled with access to the materials in alternate form.

However, the text would only be altered and distributed to satisfy minimum accessibility needs of eligible students. The converted materials would not be “flashy” or “fun” in such a way that mainstream students would be attracted to them based on their appearance. Nor would they be marketed to appeal to educational purchasers as products for widespread use with entire classroom populations; nor would they be made available to noneligible students.

A. Benefits

1. To publishers:
 - a. Maintains market for publishers to sell updated versions of book
 - b. Provides opportunity for extra profit if publishers sells online updates
 - c. Allows publishers to invest in technology they can build on later
2. To school/district and students:
 - a. Eliminates current delays for production and delivery of materials
3. To intermediaries:
 - a. Provides potential opportunity to contract with publishers for bigger deals than the current system in which intermediaries get requests on a case-by-case basis

B. Costs

1. To publishers:
 - a. Slightly decreases control over the copyrighted material
 - b. Requires investing in developing or licensing technology to protect the material from unregulated uses in the face of higher demand
2. To school/district and students:
 - a. Creates need for more computers to accommodate students who will be using the adapted materials, both at school and at home
 - b. Possibly increases costs of materials for all students (depending on the pricing structure and whether or not model turns on Chafee eligibility)

- c. Requires adaptation by teachers
- 3. To intermediaries:
 - a. Could threaten their current role if publishers assume responsibilities currently performed by intermediaries

C. Analysis/Remaining Questions:

1. Should the distribution of the accessible materials be restricted to the students with print disabilities (e.g., based solely on Chafee eligibility)? Or should this model include expanding the distribution of accessible materials to a broader range of students that might benefit from them, even if it requires pricing these materials to reflect the increased costs associated with doing so?
2. What is the best pricing structure for this model since only students with print disabilities stand to benefit from this model if it is based on Chafee eligibility? What structure is most attractive to publishers? Schools? Intermediaries?
3. Is it cost effective to make the changes necessary here without simultaneously going all the way to the full change?
4. Will the work of the intermediaries to add content to make the materials fully accessible (e.g., scaffolding the text with additional information such as definitions of words) fall into this category?

Scenario III: Substantial Change: Universal Design of Digitally-based Instructional Materials with New Distribution and Pricing Systems

General Description:

Similar to the moderate change, this scenario envisions that all textbooks would be sold with pass codes to websites with interactive and accessible text (or a fixed media equivalent). But the changes would move beyond this to embrace the full potential of digitally-based instructional materials, enabling universal design in all materials as well as high-tech textbooks, constant rejuvenation of materials, and even packaging in units other than whole textbooks.

The organizing legal framework would no longer be the Chafee exception to the copyright law; carving out a targeted group of students eligible to receive modified materials. The products would not only be accessible for students with special needs but also they would also have a “flashy” appearance and a variety of tools to attract educational purchasers to use these products for all students.

Publishers would invest money in developing the new materials and new pricing and distribution mechanisms. The publishers could create a pay structure for access to the online materials, such as a web-based subscription service.

A. Benefits

1. To publishers:
 - a. Dramatically reduces costs for updating material and eliminates fixed media production costs
 - b. Provides large new potential market for publishers to enter
2. To school/district and students:

- a. Encourages full inclusion: Teachers would be able to use same materials for all students; socially beneficial to students needing the accessible materials to have full inclusion
 - b. Potentially increases the overall level of quality of instructional materials for students
 - c. Offers heightened opportunities for differentiated instruction because products include tools and qualities to modify curriculum for a wide variety of learners
 - d. Eliminates stigma of “special ed” versus other kids
 - e. Eliminates current delays for production and delivery of materials
3. To intermediaries:
- a. Provides opportunity to market their specialization to publishers under contract arrangements
- B. Costs
1. To publishers:
- a. Requires investing in developing or licensing technology to protect the material from unregulated uses in the face of high demand
 - b. Cost of designing and producing a new snazzy look
 - c. Cost of ongoing product support to maintain its usefulness and accessibility
 - d. Cost of creating a new payment structure for access, including dealing with losing the requirement that a school system purchase entire new texts rather than simply the updates or parts needed
 - e. Cost of creating new content and scaffolding to ensure universal design and access to the general curriculum goals
2. To school/district and students:
- a. Creates need for more computers to accommodate students who will be using the adapted materials, both at school and at home
 - b. Training costs for teachers and overcoming potential discomfort with technology and individualized instruction possibilities
 - c. Cost of computer/technical support
3. To intermediaries:
- a. Potentially eliminated from market (or would have to win contracts from publishers)
- C. Analysis/Remaining Questions:
- 1. How much more added value does the “substantial change” produce than the “modest change”?
 - 2. Would schools and mainstream students be interested in snazzy digital materials? How much technology would be necessary to smoothly integrate this into a typical classroom?
 - 3. What would exist during the (potentially lengthy) transition phase to a primarily computer-based instruction