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September 30, 2013

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: *Ex parte* letter -- CG No. 10-213**

Dear Ms. Dortch:

The record in this proceeding clearly establishes that a waiver for e-readers is warranted because e-readers are designed primarily for accessing text-based digital works, not for advanced communications services (“ACS”). The Coalition of E-Reader Manufacturers (“Coalition”) files this *ex parte* letter to address some issues raised by the National Federation of the Blind and other organizations (the “Joint Filers”) in a recent letter to the Commission (the “Joint Filers Letter”). First, the Coalition has shown — and the Joint Filers do not dispute and previously conceded — that e-readers are not marketed for ACS.<sup>1</sup> Second, the record establishes that Coalition members design their devices with features such as electronic paper screens and reading-focused interfaces that are optimized for the primary purpose: accessing text-based digital works. By contrast, the devices lack features that would facilitate general-purpose use. Finally, the Coalition has shown that the case for a waiver for e-readers is superior to that for other classes of devices that have already received waivers.

The Joint Filers Letter incorrectly implies that pre-installed Facebook features on e-readers can be used for chat. Pre-installed Facebook features can be used only for non-ACS social sharing concerning electronic publications, consistent with e-readers’ primary purpose. Make no mistake: the only method to access ACS on an e-reader is via the limited browser.<sup>2</sup>

The Commission has stated that “an examination of the impact of the removal of the ACS feature or function on a primary purpose for which the equipment or service is claimed to be

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<sup>1</sup> For example, recent advertisements for the new Kindle Paperwhite highlight that it is a device optimized for the single function of reading, in contrast to tablets. See All-New Kindle Paperwhite Commercial, [http://www.youtube.com/watch?v=x\\_8jegIbJ64](http://www.youtube.com/watch?v=x_8jegIbJ64); All-New Kindle Paperwhite Product Page, <http://www.amazon.com/gp/product/B00AWH595M/>.

<sup>2</sup> Moreover, the presence of pre-installed non-ACS Facebook features optimized for e-readers likely discourages users from accessing Facebook via the browser.

designed may be relevant to a demonstration of the primary purpose . . . .”<sup>3</sup> If the browsers were removed and thus the possibility of accessing ACS were eliminated entirely, e-readers would continue to be usable for their primary purpose of accessing text-based digital works. Users would lose out on ancillary reading-related browsing functionality, such as looking up items in Wikipedia or dictionaries and logging in to hotel WiFi (where browser-based login is required) to buy electronic publications while traveling, but the primary purpose would not be impaired. This demonstrates conclusively that ACS is not a primary or even a “co-primary” purpose of e-readers.

Browsers on e-readers facilitate functions ancillary to accessing text-based digital works. Contrary to the suggestion in the Joint Filers Letter, this ancillary access does not lead to the conclusion that e-readers are designed for every activity that can be performed via a browser. Thus, it is irrelevant that some third-party education websites have chat features because e-readers are not designed for using those sites. The third-party educational sites identified by the Joint Filers Letter are entirely independent of the Coalition, and Coalition members have no relationship with or control over those sites. Post-design uses that might be independently developed by third parties are legally irrelevant to the Commission’s waiver analysis. As the Commission has made clear, “this is not an examination of post-design uses that consumers may find for a product; but rather, an analysis of the facts available to the manufacturer or provider and their intent during the design phase.”<sup>4</sup> How a product is marketed is strong evidence of a manufacturer’s intent, and the Joint Filers have conceded that these devices are not marketed for ACS use. Usage data also provides strong evidence that those who want to use browsers (whether individuals or institutions) do not depend on e-readers. Finally, the fact that prices of some tablets are rapidly approaching those of e-readers, and that the Commission’s ACS accessibility rules will ensure that chat features are accessible on those tablets, demonstrates that tablet manufacturers are providing more robust browsing options for consumers than the ancillary functionality on today’s e-readers.

The Commission should reject the invitation in the Joint Filers Letter to rely on improper considerations. Achievability is not a part of the “primary purpose” waiver test; “[w]e find that the achievability factors are inappropriate to consider in the context of a waiver.”<sup>5</sup> Further, Section 716 of the Communications Act, as added by the CVAA, directs the Commission to

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<sup>3</sup> *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14636 (2011) (“ACS Order”).

<sup>4</sup> *Id.* at 14634-35 (emphasis added). The Commission also has stated that it would examine whether “the ACS functionality intends to enhance another feature or purpose,” and if so that would support a determination that ACS is not a primary purpose of the class of equipment. *Id.* at 14636 (internal quotation marks and citation omitted). Using an e-reader to ask help questions concerning electronic publications via a library website is an example of a function that, if ever used, at most would merely enhance the primary purpose of accessing text-based digital works.

<sup>5</sup> *Id.* at 14637.

consider the accessibility of ACS and not the accessibility of other non-ACS features or functions that are far beyond the Commission's jurisdiction. References to other agencies and other statutes again underline that the Joint Filers are reaching for authority outside the four corners of the CVAA. Setting aside the legal infirmities of Joint Filers' position, the Joint Filers Letter is factually incorrect by asserting that adding audio output and text-to-speech to make ACS accessible automatically would make non-ACS functionality accessible as well. First, adding text-to-speech and audio output alone would not make ACS functionality accessible to blind individuals because it still would be necessary to add other accessibility features, such as a screen reader, provide manual labeling of elements necessary to navigate to and use the browser, and provide necessary specialized gesture support. Second, even if a device is made accessible to the blind for ACS functions, that does not mean it is accessible to the blind for non-ACS functions because many of the accessibility features require additional work, integration and testing on a function-by-function basis. Third, this suggestion does not account for all of the steps needed to make the devices accessible for individuals with non-visual disabilities as required by the Commission's rules, such as making the devices accessible to individuals with mobility limitations through the addition of support for interfacing with peripheral devices or other features.

Lastly, the requested length of the waiver, which would be defined by the identified criteria, is completely justified. The Joint Filers Letter actually confirms this. It cites a concern about additional features added to e-readers that could make them converge with tablets — but if that happens, then the devices will not be class members and the waiver for those devices will expire on its own terms. The third and fourth factors of the class definition exclude anything that should be regulated because it is designed for ACS. The first and second factors, which refer to specific physical features, provide clear and objective criteria. The more stringent class definition and the stronger case for e-readers in comparison to other classes that received waivers argues strongly for a waiver that is more expansive than the waivers granted to those other classes, and the criteria-based waiver would enable the Commission to “bake in” a sunset provision without needing additional process.<sup>6</sup>

E-readers are precisely the kind of devices that provide access to ACS on an “incidental basis” for which Congress intended the Commission to apply the waiver provision in order to promote innovation.<sup>7</sup> The Commission should encourage the production of innovative single-purpose non-ACS devices and should not discourage the inclusion of browsers that support functions ancillary to the primary purpose of such devices. Accordingly, the Commission should grant the requested waiver.

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<sup>6</sup> The Joint Filers Letter also misapprehends the design and manufacture process of e-readers. The historical average period of time that it takes to get e-readers from the drawing board to introduction in the marketplace is approximately two years.

<sup>7</sup> H.R. Rep. No. 111-563, at 26 (2010); S. Rep. No. 111-386, at 8 (2010). As the Digital Media Association stated, “[t]he Commission should exercise its waiver authority appropriately to protect companies’ ability to offer innovative devices that meet specific non-ACS needs.” Reply Comments of the Digital Media Association at 2.

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Ms. Marlene Dortch  
September 30, 2013  
Page 4 of 4

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Please direct any questions to the undersigned.

Sincerely,

A handwritten signature in black ink that reads "Gerard J. Waldron". The signature is written in a cursive style with a large, stylized initial 'G'.

Gerard J. Waldron  
Daniel Kahn  
*Counsel for Amazon.com, Inc.; Kobo Inc.;  
and Sony Electronics Inc.*

cc: Ms. Karen Peltz Strauss  
Ms. Rosaline Crawford  
Mr. Eliot Greenwald  
Ms. Elaine Gardner  
Ms. Caitlin Vogus