Letter Sent on Behalf of Association of Research Libraries and American Library Association Regarding GC Docket No. 10-213, Petition for Class Waiver Regarding Access to Advanced Communication Services in E-Readers for People with Disabilities

We are writing to reiterate our opposition to the waiver sought by the Coalition of E-Reader Manufacturers ("the Manufacturers")[1] and present new information regarding the manner in which the e-readers covered by the Manufacturer's petition ("basic e-readers") are utilized. The Manufacturer's waiver request is based on the erroneous premise that basic e-readers do not have a co-primary purpose as a device that provides Advanced Communications Services (ACS) under the 21st Century Communications and Video Accessibility Act (CVAA). The use and marketing of basic e-readers demonstrates that Electronic Messaging Services (EMS), a type of ACS, is a co-primary purpose of such devices. Consequently, the Federal Communication Commission (FCC) should deny the Manufacturer's request for a waiver.

E-mail communication is a form of EMS that is specifically covered by the CVAA,[2] and the Kindle User's Guides instruct users on how to use their Kindle to communicate with other individuals through e-mail. For example, the User's Guide for Kindle 2nd Generation, a basic e-reader covered by the Manufacturer's petition, provides users with information on setting up an e-mail address for their Kindle, stating that "[y]ou and your friends can send documents to this address and they will be converted by Amazon.com and sent to your Kindle."[3] The User's Guide also provides information on how to set up a Kindle approved e-mail list, which "allows you to maintain a list of e-mail addresses authorized to send e-mail [sic] personal documents to your Kindle" and tells users how "to change [their] Kindle e-mail address to which [the user] and others can sent email attachments to be read on [their] Kindle."[4] The promotion of basic e-readers for this purpose directly contradicts the Manufacturer's claim that "listings for e-readers do not mention or describe any ACS features such as e-mail."[5]

Because of the importance that social media has assumed in routine and significant information exchanges between and among individuals, we contend that the social media functionalities of basic e-readers also fit under the statutory definition of EMS. The statute defines EMS as "a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks."[6] Interpreting this statutory language to include not only e-mail but also certain social media functionalities, such as Facebook Chat and point-to-point uses of Twitter, is in line with the stated purpose of the CVAA, which is to "ensure that individuals with disabilities are able to fully utilize communications services and equipment."[7] Social media as well as e-mail are increasingly ubiquitous – and diverse – aspects of day-to-day life in our society, even more so today than when the CVAA was passed three years ago.

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[1] **Petition for Waiver**, CG Docket No. 10-213, filed May 16, 2013 (Manufacturer's Petition).

[2] **ACS Report and Order**, 26 FCC Rcd 14557; *see also* **S. Rep No. 111-386, at 6 (2010) (Senate Report).**

[3] **User's Guide for Kindle 2nd Generation**, 5th Edition, at 120 (User's Guide 5th Edition).

[4] *Id.* at 137.

[5] **Manufacturer's Petition**, *supra* note 1, at 7.

[6] 47 U.S.C. §153(19) (2010).

[7] **Senate Report,** *supra* note 2, at 1.

The Manufacturers argue that the primary purpose of e-readers is reading[8], but this argument contradicts available information about the marketing and actual use of the devices. The Manufacturers fail to acknowledge that the development of e-reader technology has changed the act of "reading" itself. Thanks to basic e-readers like the Amazon Kindle, reading can no longer be considered a solitary activity. The Kindle User's Guide for the 2nd Generation Kindle, indicates that users can "[s]hare your notes and highlights with friends using your social network accounts."[9] Amazon even promotes the use of such social functions on their website by inviting users to "[s]hare [their] passion for books and reading with friends, family, and other readers around the world by posting meaningful passages to social networks like Facebook and Twitter directly from Kindle."[10] Basic e-readers make sharing the reading experience with friends and family easier and more seamless then ever before. As with e-mail and other modern forms of communication, e-reader users can share digital content either with a group of individuals or in a private message to a distinct recipient. Moreover, by promoting the use of Twitter and Facebook on basic e-readers, the Manufacturer's invite individuals who use these devices to take full advantage of the features of these social media networks, which include broadcasting information to a large audience of individuals as well as point-to-point communication between individuals or groups of individuals.

Furthermore, what was understood to be the function and capacity of social media at the time the CVAA was written is no longer reflective of the use of social media. Today, users of social media networks, such as Facebook and Twitter, increasingly rely on ACS functionality that allows users to communicate directly with one another instantaneously, similar to communication through traditional email or text messaging services. The rapid development of ACS functionality on social media networks is illustrative of the fast pace at which the communication environment has changed in recent years. Similar to the manner in which text messaging on mobile phones has replaced phone calls as a preferred means of communication, sending messages through social media has become an important means of point-to-point communication. Moreover, the rapid development of electronic communication makes it impossible to predict future developments in the use of social media for point-to-point communication.

The development of the use of Twitter is illustrative of the fast evolution of the environment for electronic communication as well as the use of social media for point-to-point communication. The very first tweet was posted on Twitter in March 2006, and less than three years ago, in February 2010, there were approximately 50 million tweets per day being sent out using Twitter.[11] Today there are over 200 million active monthly users of Twitter who send out approximately 500 million tweets per day.[12] Twitter boasts that it "provides a compelling and efficient way for people to stay informed about their interests, discover what is happening in their world right now and *interact directly with each other*."[13] When using Twitter, users "not only communicate with friends and family, but they also participate in conversations

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[8] **Manufacturer's Petition,** *supra* note 1, at 3.

[9] **User's Guide 5th Edition**, *supra* note 3, at 118.

[10] **Amazon Kindle Wi-Fi 6" Display: Notes and Sharing**, *available at* http://www.amazon.com/dp/B007HCCOD0 (last accessed Nov. 13, 2013).

[11] **Explore Twitter's Evolution: 2006 to Present**, *available at* http://mashable.com/2011/05/05/history-of-twitter/ (last accessed Nov. 5, 2013).

[12] **Twitter IPO Form S-1 Registration Statement**, *available at*, http://www.sec.gov/Archives/edgar/data/1418091/000119312513390321/d564001ds1.htm (last accessed Nov. 5, 2013).

[13] *Id.* at 1 (emphasis added).

with other people from around the world."[14] The number of active users on Twitter has continued to expand at a rapid rate, for example, from June 30, 2012, to June 30, 2013, alone Twitter saw a 44% increase in the number of average monthly users.[15] This rapid growth demonstrates the increasingly important role that communication through Twitter plays in individuals' day-to-day lives. Furthermore, the rapid development of the manner in which individuals use social media is illustrated by Twitter's recent addition of a direct messaging service, which allows users to send "a private message sent via Twitter to one of [their] followers."[16] Twitter had traditionally only allowed users who followed each other to send messages back and forth, but as of October 2013 Twitter modified this service to allow Twitter users to receive direct messages from any follower, regardless of whether or not they follow that individual.[17] Twitter's direct messaging service is a clear example of ACS functionality on a social media platform and an important manner in which individuals use Twitter. In recent years, Twitter has evolved from a relatively unknown service to a global phenomenon that is increasingly being use for point-to-point communication among individuals throughout the world.

Likewise, Facebook has expanded rapidly in recent years and Facebook Chat, an obvious example of ACS functionality on a new platform, has emerged as an important feature in the social media landscape. On February 4, 2004, Facebook was launched at Harvard University as a college social networking site.[18] The functionality of Facebook as a means of communication was expanded in September 2004 with the launch of the Facebook Wall, which provides users with a way to post messages to their friends.[19] Facebook reached one million users by December 2004, and on September 26, 2006, Facebook expanded no longer limiting registration to specific groups of individuals, allowing all individuals to join the social media network.[20] On April 6, 2008, Facebook launched Facebook Chat, which allows users to communicate one-on-one or with a group of individuals.[21] Prior to the launch of Facebook Chat, Wall and Inbox were the primary way for individuals to communicate through Facebook; the launch of Facebook Chat was intended to provide more immediacy with communication between users.[22] Facebook further expanded the manner in which social media is used to communicate, when it launched video calling on January 6, 2011.[23] The video chat functionality allows individuals to talk to

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[14] *Id.* at 5.

[15] *Id.* at 16 ("We had 218.3 million average [monthly users] in the three months ended June 30, 2013, which was a 44% increase from 151.4 million average [monthly users] in the three months ended June 30, 2012.").

[16] **Help Center, Posting or Deleting Direct Messages**, *available at* https://support.twitter.com/articles/14606-posting-or-deleting-direct-messages (last accessed Nov. 12, 2013).

[17] **Twitter Now Lets You Receive Direct Messages from Any Follower**, *available at* http://www.theverge.com/web/2013/10/15/4840190/twitter-direct-messages-from-any-follower-option (last accessed Nov. 12, 2013).

[18] **Facebook, Newsroom, Timeline**, *available at* https://newsroom.fb.com/Timeline (Newsroom Timeline) (last accessed Nov. 11, 2013).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] **Facebook Chat: Now We're Talking**, *available at* https://www.facebook.com/notes/facebook/facebook-chat-now-were-talking/12811122130 (last accessed Nov. 11, 2013).

[23] **Newsroom Timeline**, *supra* note 18.

their friends face-to-face using the social media network.[24] The number of Facebook users continues to grow and the social networking site is continuing to expand the types of communication available to users; as of September 30, 2013, Facebook had 1.19 billion active monthly users in the United States and abroad, and two-way interactive services, such as Facebook Chat, are an important way that individuals use Facebook.[25]

Results of a recent survey conducted by the Glushko-Samuelson Intellectual Property Law Clinic of the Washington College of Law[26] further highlights the use of basic e-readers for ACS functionality. The survey suggests that even if a narrow definition of ACS is adopted, excluding contemporary access to social media, basic e-readers still have ACS as a co-primary purpose along with reading. Of the individuals surveyed who used a basic e-reader,[27] 34% of respondents indicated that they used the device to communicate with other individuals through e-mail, chat, Skype, or a similar service. It was also significant that 68% of respondents who had purchased a basic e-reader indicated that the ability to post information online or communicate with other individuals from their e-reader influenced their decision to purchase the device. Additionally, 44% of respondents who did not own an e-reader indicated that the ability to access these features would influence their purchasing decision if they were to buy such a device. These survey findings underscore the important role that the ability to communicate with others plays in purchasing decisions and use of such devices.

Taking into account the use of e-readers to access social media for communication purposes further illuminates the important role that communication plays in the use of such devices. Of individuals that had utilized a basic e-reader, 24% of respondents indicated that they had used the device to access social media sites, including Facebook and Twitter. An additional 18% of respondents indicated that they were prompted to but chose not to access social media in the course of using such devices. In other words, not only are basic e-readers capable of letting users communicate through social media sites, but they are specifically programmed to prompt users to communicate in this manner. Moreover, of the individuals surveyed that had used a basic e-reader, 47% of respondents indicated that they used the device to browse the Internet, which directly contradicts the Manufacturers claim that although the basic e-readers covered by the Manufacturer's petition may include Internet browsers they are only incidental to the primary purpose of such devices.[28]

In sum, our reading and research confirm that basic e-readers provide access to ACS functionality, and that basic e-readers have access to such functionality as a co-primary purpose. If use of basic e-readers to communicate through social media is included, this co-primary purpose of such devices

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[24] **Video Calling**, *available at* https://www.facebook.com/videocalling/ (last accessed Nov. 11, 2013).

[25] **Facebook Newsroom, Key Facts**, *available at* https://newsroom.fb.com/Key-Facts (last accessed Nov. 11, 2013).

[26] The Clinic is still collecting survey data, but as of November 11, 2013, there have been 131 responses collected from a random sampling of individuals regarding their use of electronic devices for reading. However, not all respondents provided answers to all questions because some respondents had not used the type of basic e-readers covered by the Manufacturer's petition. Survey participants represent a random sampling of the general population that was obtained through posts on various websites and list serves; respondents, for the most part, are not print disabled individuals. A list of the survey questions is attached to this letter, and additional information regarding the survey is available upon request.

[27] The survey defined basic e-reader for respondents by providing examples of the types of e-readers that would be covered by the Manufacturer's petition.

[28] *See* Coalition *Ex Parte* Letter Supplementing the Coalition Petition (July 17, 2013) at 1.

becomes even more apparent. Therefore, under the CVAA, the FCC should deny the Manufacturer's petition for a waiver. Denying the Manufacturer's petition is also the right thing to do, as it would ensure that print disabled individuals have access to emerging technologies and would be consistent with the policies of promoting accessibility that the federal government has pursued for nearly forty years through laws such as the Americans with Disabilities Act (ADA) and the Rehabilitation Act.

Respectfully submitted,

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Appendix I:

This survey was conducted electronically and contained built in question logic that directed respondents to certain questions based on the response that they provided to the previous question. The bracketed information is included to help the reader understand how the survey worked when it was conducted electronically; the bracketed information was not included in the original survey. The notation "[TEXT BOX]" after a question indicates that participants were allowed to provide a free form response to the question.

[FIRST PAGE OF SURVEY]

IP Clinic Survey: Use of Electronic Devices for Reading

Amazon, Sony, and Kobo have asked the Federal Communication Commission (FCC) to grant a waiver permanently exempting basic e-reader devices from certain federal accessibility laws for the disabled. The manufacturers argue that they should NOT have to make the devices accessible to individuals with print disabilities because their e-readers are ONLY suited for one primary purpose: reading text.

We are attempting to compile data on the use of such devices for other purposes in order to assess the correctness of the manufacturers assertions.

Please take a moment to complete this short survey and help ensure that individuals with disabilities have equal access to emerging technologies. The survey will take less than 4 to 5 minutes to complete. ALL PARTICIPANTS WILL BE ENTERED INTO A RAFFLE FOR A $15.00 STARBUCKS GIFT CARD.

1. Have you ever read an e-book using an electronic device such as a phone, a computer, a tablet (for example, an iPad or Kindle Fire), or a basic e-reader (for example, a Nook or Kindle)?

   □ Yes [MOVE TO QUESTION 3]
   □ No [MOVE TO QUESTION 2]

2. If you were going to buy an electronic device for use when reading, would features that allow you to post information online or communicate with other individuals influence your purchasing decision?

   □ Yes [MOVE TO QUESTION 18]
   □ No [MOVE TO QUESTION 18]

Use of Functionality Beyond Merely Reading

The purpose of the questions that follow is to gain information on your use of electronic devices when reading. We want to determine whether your use of such devices goes beyond the level of merely reading.

3. When you accessed a book using an electronic device, were you ever prompted to write an on-line review?

   □ Yes, and I wrote a review. [MOVE TO QUESTION 4]
   □ Yes, but I did not write a review. [MOVE TO QUESTION 4]
   □ No, but I wrote a review. [MOVE TO QUESTION 4]
   □ No, and I did not write a review. [MOVE TO QUESTION 4]

4. When you accessed a book using an electronic device, were you ever prompted to use Twitter?

   □ Yes, and I posted a Tweet(s). [MOVE TO QUESTION 5]
   □ Yes, but I did not post a Tweet(s). [MOVE TO QUESTION 5]
   □ No, but I did post a Tweet(s). [MOVE TO QUESTION 5]
   □ No, and I did not post a Tweet(s). [MOVE TO QUESTION 5]

5. When you accessed a book using an electronic device, were you ever prompted to use Facebook (e.g., to post or to "like")?

   □ Yes, and I posted (or like) on Facebook. [MOVE TO QUESTION 6]
   □ Yes, but I did not posted (or like) on Facebook. [MOVE TO QUESTION 6]
   □ No, but I did post (or like) on Facebook. [MOVE TO QUESTION 6]
   □ No, and I did not post (or like) on Facebook. [MOVE TO QUESTION 6]

6. When you accessed a book using an electronic device, were you ever prompted to use another form of social media (i.e., something other than Twitter or Facebook)?

   □ Yes, and I did access another form of social media. [MOVE TO QUESTION 7]
   □ Yes, but I did not access another form of social media. [MOVE TO QUESTION 8]
   □ No, but I did access another form of social media. [MOVE TO QUESTION 7]
   □ No, and I did not access another form of social media. [MOVE TO QUESTION 8]

7. What was the form of social media? If you responded to the prompt, please explain how you used it.

   [TEXT BOX] [MOVE TO QUESTION 8]

8. When you accessed a book using an electronic device, were you ever prompted to purchase another electronic book or any other goods / services?

   □ Yes, and I made this type of purchase. [MOVE TO QUESTION 9]
   □ Yes, but I did not make this type of purchase. [MOVE TO QUESTION 9]
   □ No, but I made this type of purchase. [MOVE TO QUESTION 9]
   □ No, and I did not make this type of purchase. [MOVE TO QUESTION 9]

Use of E-Readers

9. Have you ever used a basic e-reader?

   □ Yes [MOVE TO QUESTION 11]
   □ No [MOVE TO QUESTION 10]

10. If you were going to buy an basic e-reader, would features that allow you to post information online or communicate with other individuals influence your purchasing decision?

    □ Yes [MOVE TO QUESTION 18]
    □ No [MOVE TO QUESTION 18]

Users of Basic E-Readers

11. When you used a basic e-reader, did you ever use the device to communicate with other individuals (i.e., use of email, chat, Skype, or a similar service)?

    □ Yes [MOVE TO QUESTION 12]
    □ No [MOVE TO QUESTION 12]

12. When you used a basic e-reader, did you ever use the device to browse the internet?

    □ Yes [MOVE TO QUESTION 13]
    □ No [MOVE TO QUESTION 13]

13. When you used a basic e-reader, were you ever prompted to access any form of social media?

    □ Yes, and I did access a form of social media. [MOVE TO QUESTION 14]
    □ Yes, but I did not access a form of social media. [MOVE TO QUESTION 15]
    □ No, but I did access a form of social media. [MOVE TO QUESTION 14]
    □ No, and I did not access a form of social media. [MOVE TO QUESTION 15]

14. What was the form of social media? If you responded to the prompt, please explain how you used it.

    [TEXT BOX] [MOVE TO QUESTION 15]

15. When you used a basic e-reader, were you ever prompted to purchase another electronic book or any other goods / services?

    □ Yes, and I made a purchase. [MOVE TO QUESTION 16]
    □ Yes, but I did not make a purchase. [MOVE TO QUESTION 16]

□ No, but I made a purchase. [MOVE TO QUESTION 16]
□ No, and I did not make a purchase. [MOVE TO QUESTION 16]

16. Have you ever owned a basic e-reader?

□ Yes [MOVE TO QUESTION 17]
□ No [MOVE TO QUESTION 18]

17. Did the ability to post information online or communicate with other individual influence your decision to purchase the device?

□ Yes [MOVE TO QUESTION 18]
□ No [MOVE TO QUESTION 18]
□ I did not purchase the device (i.e., I received it as a gift or won it as part of a promotion). [MOVE TO QUESTION 18]

18. Please enter your name and email address, if you wish to be entered in the drawing for a $15.00 Starbucks gift card. Your contact information will be destroyed once we have completed this survey and it will not be used for any purpose other than to identify the winner of the gift card.

Name: [TEXT BOX]
Email: [TEXT BOX]

[MOVE TO LAST PAGE OF SURVEY]

[LAST PAGE OF SURVEY]

Thank you!

Thank you for taking the time to help the Glushko-Samuelson Intellectual Property Law Clinic of the Washington College of Law with this important public policy project.