



ROPE & GRAY LLP  
ONE METRO CENTER  
700 12TH STREET, NW, SUITE 900  
WASHINGTON, DC 20005-3948  
WWW.ROPEGRAY.COM

January 26, 2009

Nathan A. Brown  
202-508-4763  
202-383-9368 fax  
Nathan.Brown@ropesgray.com

**BY E-MAIL**

Office of the Secretary  
Consumer Product Safety Commission  
Room 502  
4330 East West Highway  
Bethesda, MD 20814

**Re: Section 101 Determinations of Certain Materials or Products NPR: Application to Ordinary Books**

To Whom It May Concern:

The American Library Association submits these comments in response to the Notice of Proposed Rulemaking issued by the Consumer Product Safety Commission (Commission) on January 15, 2009, *Children's Products Containing Lead; Proposed Determinations Regarding Lead Content Limits on Certain Materials or Products*, 74 Fed. Reg. 2433.

The American Library Association was founded in 1876 and is the oldest, largest, and most influential library association in the world. We have 66,000 members, including libraries, librarians, library trustees, publishers, and other interested people from each state in the country. We serve public, state, school, and academic libraries, plus special libraries for people working in government, commerce, industry, the arts, and the armed services, and for people in hospitals, prisons, and other institutions.

We are extremely concerned that the Commission's implementation of the Consumer Product Safety Improvement Act of 2008 (CPSIA) will prevent libraries from providing children with access to books and other print materials. We urge the Commission to:

- (1) Issue a rule or other guidance confirming that the new lead limits do not apply to library books and related materials; and
- (2) Determine by rule that ordinary books do not inherently contain lead or contain lead below the CPSIA lead limits.

We believe each of these determinations is consistent with the language and intent of the CPSIA.

## I. The New Lead Limits in the CPSIA Should Not Be Applied to Library Books

The 110<sup>th</sup> Congress passed the CPSIA to protect children 12 years of age or younger from exposure to lead and certain phthalates, following widespread reports about the dangers of children's toys coming into the United States from China and other countries. The CPSIA applies lead limits to certain "children's products" effective February 10, 2009—barely two weeks from today. Although Congress raised no concern about lead in *books*, the Commission has interpreted the law to include children's books. According to a letter sent by the Commission to the Association of American Publishers (AAP) dated December 23, 2008, the Commission intends to apply the new lead standards to all books designed or intended for children aged 12 or younger. Furthermore, the Commission has indicated that it intends to apply these standards retroactively—to books already on shelves or in inventories.

Even if the CPSIA did technically apply to books, we believe it does not apply to library books and other print materials, and certainly not to books already on library shelves. The CPSIA applies to "children's products," which Section 235 defines as a "consumer product designed or intended primarily for children 12 years of age or younger" (amending 15 U.S.C. § 2052). In turn, the Consumer Product Safety Act, which the CPSIA amends, defines a "consumer product" as a product "produced or distributed" either (1) "for sale to a consumer ..." or (2) "for the personal use, consumption or enjoyment of a consumer ..." 15 U.S.C. § 2052(1). Furthermore, the terms "distributor" and "to distribute in commerce" are defined with reference to sale or delivery of a product. *Id.* § 1502(5) & (11).

A library's books are neither "produced" nor "distributed" by the library within the statute's meaning. The books may have originally been sold or otherwise "distributed" to the library, but once in the library for viewing and borrowing by patrons, they are neither produced nor distributed. In other words, the library is not producing or distributing these books within the meaning of the statute, any more than a man is producing or distributing a lawnmower when he loans it to his neighbor. Application of the CPSIA standards to children's books already on library shelves before February 10th therefore amounts to a retroactive application of the new standards. Retroactive application of a law is disfavored unless specifically contemplated by Congress, and the CPSIA reflects no such intent.<sup>1</sup>

At this point, however, the Commission has not acknowledged any exemption for libraries. Under the Commission's stated interpretation, the nation's libraries would be required to test each children's book in their inventories by February 10, 2009—an impossible task. As a result, as of February 10th the American Library Association's members will have to consider barring children from accessing children's books and other print materials. We are confident that Congress did not intend that result, and that it is not mandated by the CPSIA.

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<sup>1</sup> See, e.g., *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988); *Lee v. Reno*, 15 F.Supp.2d 26 (D. D.C. 1998).

## **II. The Commission Should Make a Regulatory Determination that Ordinary Books Do Not Contain Lead Above the CPSIA Standards.**

We recognize that the Commission faces significant challenges in implementing the CPSIA. While we disagree with the Commission's interpretation of the law as to books generally and library books specifically, the Commission has ample rulemaking authority under the CPSIA to mitigate the resulting damage that its interpretation would otherwise produce. Under these circumstances, the Commission is empowered by the CPSIA to make a regulatory determination that ordinary books inherently do not contain lead, or contain lead at levels under the statutory limits, such that these products would not be required to undergo individual testing prior to being made available to children. Accordingly, the American Library Association urges the Commission to add ordinary books to its list of determinations, consistent with sound scientific data and rational policy.

The publishing community has supplied the Commission with comprehensive evidentiary support (which can be viewed at <http://www.rrd.com/wwwCPSIA/home.asp>) that books and other paper-based printed materials need not be subject to the lead, phthalate, and other standards that are referenced in CPSIA because they do not present any of the health or safety risks to children that the law aims to address. Moreover, AAP and other representatives of the book publishing industry participated in an open meeting with the Commission on January 22, 2009, elaborating on this data and answering questions from the Commission.

The American Library Association fully supports and endorses these submissions, which clearly demonstrate that ordinary children's books inherently fall below the statutory lead limits. These submissions satisfy the "best-available" evidence standard in Section 101 of the CPSIA. As the Commission recognizes, those products or materials that receive such a determination "must still meet the statutory lead level requirements in actual fact." 74 Fed. Reg. at 2433. Moreover, the Commission has indicated that it will test products in the marketplace to confirm the continuing validity of such determinations. Particularly given these safeguards, providing a determination for children's books is in keeping with the intent and language of the CPSIA, and will ensure that the resources of the publishing industry and the Commission are appropriately focused on other products that are more likely to contain lead at levels that may harm children.

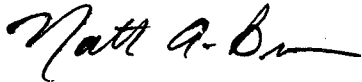
Without such a determination, there will be dire consequences for libraries and their young patrons beginning February 10th. On behalf of America's libraries, the American Library Association therefore urges you to add ordinary books to your rule as products that inherently do not contain lead in excess of the statutory limits.

\* \* \* \*

January 26, 2009

Thank you for your urgent attention to this matter. We would be happy to provide additional input if requested.

Sincerely,

A handwritten signature in black ink, appearing to read "Nathan A. Brown". The signature is written in a cursive, flowing style.

Nathan A. Brown

cc: Emily Sheketoff, American Library Association