

**BEFORE THE  
U.S. COPYRIGHT OFFICE**

In the Matter of	)	
Exemption to Prohibition on	)	
Circumvention of Copyright	)	RM 2011-7
Protection Systems for Access	)	
Control Technologies	)	

**COMMENTS OF  
NATIONAL ASSOCIATION OF THE DEAF,  
HEARING LOSS ASSOCIATION OF AMERICA, AND  
CALIFORNIA COALITION OF AGENCIES SERVING THE DEAF AND  
HARD OF HEARING**

The National Association of the Deaf (NAD), Hearing Loss Association of America (HLAA), and California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), collectively, the “Consumer Groups,” - submit their response to the request of the U.S. Copyright Office for public comment on proposed classes of works to be exempted from prohibition against circumvention of copyright of technological measures that control access to copyrighted works.<sup>1</sup>

We appreciate this opportunity to submit comments in this rulemaking. On behalf of approximately 36 million deaf and hard of hearing Americans, we strongly support exempting the classes of works proposed by the Telecommunications for the Deaf and Hard of Hearing, Inc., Gallaudet University, and Participatory Culture Foundation (TDI Proposals).<sup>2</sup> Access to motion pictures and other audio visual works is very important for individuals who are deaf or hard of hearing as they need to access to a wide range of

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<sup>1</sup> *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Notice of Proposed Rulemaking, Docket No. RM 2011-7, December 1, 2011 (NPRM).

<sup>2</sup> *TDI Proposals*, Docket No. RM 2011-7, December 1, 2011, [http://www.copyright.gov/1201/2011/initial/IPR\\_TDI\\_gallaudetU.pdf](http://www.copyright.gov/1201/2011/initial/IPR_TDI_gallaudetU.pdf).

information in order to better participate in society, whether it is video programs delivered via Internet protocol (IP) or on fixed disc-based media. We live in a society where having the latest information is critical to the job search, voting for candidates to public office, and participating in the marketplace. The TDI Proposals address four critical areas of need for class exemptions and have our full support.

**I. QUALITY AND QUANTITY OF CAPTIONED AND UNCAPTIONED VIDEO PROGRAMMING PROTECTED BY DRM**

A great deal of DRM protected video programs are inaccessible to deaf and hard of hearing people. This is usually because the video program is either uncaptioned or the quality of the captions provided are so poor that it is not possible to fully understand the video program.

**A. Quantity**

There are many DRM protected video programs that do not provide closed captions or subtitles and are therefore inaccessible to deaf and hard of hearing people. Current law does not require fixed disc-based media to be captioned for deaf and hard of hearing people. This means that VHS tapes, DVDs, and Blu-Ray discs are not required to be captioned. Further, there is a significant amount of DRM protected content available on the Internet that is not captioned. The Federal Communications Commission (FCC) recently released new rules implementing the 21st Century Communications and Video Accessibility Act of 2010 (CVAA) which among other things mandates captioning of full-length IP delivered videos previously shown on television after the effective date

and later on the Internet.<sup>3</sup> While this is a boon for deaf and hard of hearing people, there are large gaps in the coverage of videos delivered via IP. For instance, video clips are exempted and the FCC has interpreted video clips to be segments of programs shown on television and placed on the Internet. There is an enormous amount of video content online in this form such as at CNN.com and other news websites that is not accessible to deaf and hard of hearing people and is not currently required by law to be made accessible. We understand that many online video sources are encumbered with DRM. Moreover, there are many online exclusive programs that are similar to television programming, but only shown online. There is an enormous need for third party efforts to make this content accessible to deaf and hard of hearing people.

## **B. Quality**

There is a significant amount of DRM protected video programs with low quality or poor captions and are therefore inaccessible to deaf and hard of hearing people. A good example of this would be a program that is captioned but the captions are a few seconds ahead or behind the dialogue. This happens frequently with online programs such as a recent *Switched at Birth* episode on Hulu.com where the captions during the second half of the show were about 3-5 seconds ahead of the dialogue (imagine trying to follow a video program where the audio is off by 3-5 seconds).<sup>4</sup> Moreover, sometimes video programs are only partially captioned or in other instances the caption quality is so poor that it is not possible to follow the dialogue in the program. This might be due to garbled text, spelling errors, missing text, and mistakes in captioning such as the

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<sup>3</sup> *Closed Captioning of Internet-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, MB Docket No. 11-154 (January 12, 2012).

<sup>4</sup> *Switched at Birth*, Season 1, Episode 15: Expulsion from the Garden of Eden. ABC Family at Hulu.com (viewed on February 2, 2012).

captionist typing Iran instead of Iraq. Other times accessibility is impaired by the appearance of the captions. We have seen online programs where the captions are so large that they take up a third of the screen. This prevents people using the captions from being able to see important visual information in the program. Also there have been cases where the captions on the screen are too small and cannot be read easily. Many video programs are captioned real-time, where the text of the captions roll-up onto the screen as new text appears. We call these captions roll-up and they're much more difficult to follow than pop-on captions where the text appears all at once (3 or 4 lines of text).

Finally, a growing number of video programming software allows consumers to customize the captions on the screen, such as changing the color of the captions, the caption font and size, and even reposition the captions to a different part of the screen.<sup>5</sup> Being able to customize the appearance of captions is similar to a hearing person being able to adjust volume, bass, and treble in a program. This is especially important for deaf and hard of hearing people with low vision who need larger captions or better contrast between the text of the captions and the background picture.<sup>6</sup> We want to be sure that potential copyright liability does not chill video programming providers from allowing viewers to customize their captions. It is very important that third parties are able to edit or enable editing of the quality of the captions to make video programs more accessible, such as lining up the caption text with the speech, adding to the captions where there are gaps, and adjusting the appearance of the captions to make them more accessible.

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<sup>5</sup> A good example of this is YouTube's online video player.

<sup>6</sup> On TV, captions usually are white with black backgrounds, but on Internet video programs, such as Netflix, the captions are often white or yellow and lack a background color. This can be especially difficult to read when the captions are placed over a scene in the video that is the same color as the captions (ex. white captions with a scene showing a snowy location).

For these reasons, we strongly support the TDI Proposals and need exemptions for the proposed classes. We urge the Copyright Office to consider the importance of being able to add captions to uncaptioned video programs and also improving the quality of already captioned programs. These exemptions will greatly increase the quantity and quality of captioned video programs.

## **II. TECHNOLOGIES THAT CAN WORK TO INCREASE ACCESS TO DRM PROTECTED VIDEO PROGRAMMING**

There are various technologies that can be used to increase access to these inaccessible programs; however, they are hindered by potential liability under DMCA. For instance, Universal Subtitles,<sup>7</sup> a non-profit organization, has been leading an effort to caption programs online so that deaf and hard of hearing people can enjoy them. This has been incredibly beneficial to deaf and hard of hearing people and is currently about the only way deaf and hard of hearing people can enjoy many IP delivered programs. However, Universal Subtitles cannot expand its work to many sites, such as to Hulu.com without either getting permission from the video program owners or breaking their DRM and violating the DMCA.

Additionally, many uncaptioned programs delivered via IP have already been captioned or subtitled on television or DVD. It makes no sense that these programs are not captioned, but from conversations we've had with some of these online video distributors, there seems to be little interest in adding captions or sometimes they do not receive the caption files along with the video programs prior to distribution via IP. We need to allow third parties to be able take the captions from the fixed-disc or the

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<sup>7</sup> *Universal Subtitles*, [www.universalsubtitles.org](http://www.universalsubtitles.org).

television showing and add it to the IP distribution, or even create their own. Allowing these technologies will enable third parties the tools to make video programs accessible to deaf and hard of hearing individuals.

### **III. RESISTANCE FROM THE INDUSTRY TO REQUIRE CAPTIONING OF ITS PROGRAMS**

The video programming industry has consistently fought efforts to require captioning of its programming thus the need for third parties to be able to caption video programs. The National Association of the Deaf is currently suing Netflix for failing to caption most of its “Watch Instantly” movies and television streamed on the Internet.<sup>8</sup> Also the Greater Los Angeles Agency on Deafness (GLAD) is suing Time Warner, Inc., the owner of CNN.com, for discriminating against people who are deaf or hard-of-hearing by failing to provide any captioning of its on-line videos on its website.<sup>9</sup> Further, the video programming industry lobbied heavily against the CVAA requirements for the captioning of online video. In fact, their lobbying resulted in changes that limited the captioning of online video programs only to programs first shown on television with captions after the effective date rather than television-like programs shown on the Internet, as well as an exemption for video clips.<sup>10</sup> During the FCC rulemaking process implementing these IP Captioning rules, the video programming industry once again lobbied for a very limited implementation of these rules.<sup>11</sup> We believe that industry has

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<sup>8</sup> See *National Association of the Deaf, Western Massachusetts Association of the Deaf, Lee Nettles, v. Netflix, Inc.*, U.S. District Court for the District of Massachusetts, C.A. NO. 11-cv-30168-MAP.

<sup>9</sup> See *Greater Los Angeles Agency on Deafness, Inc., Daniel Jacob, Edward Kelly and Jenifer Olson v. Time Warner, Inc.*, Superior Court for the State of California, Case No. 11580682.

<sup>10</sup> H.R. 6320, 110th Cong., 2d Sess. (2008); see also S. Rep. No. 111-386, at 11 (2010).

<sup>11</sup> See comments, reply comments, and ex parte notices of the Motion Pictures Association of

an obligation to make its content accessible to all Americans, and we have worked tirelessly to support them in undertaking this obligation. But to the extent that industry cannot and/or will not take responsibility for captioning programming by itself, third-party technologists and researchers must be permitted to help lawful viewers fully experience programming on terms equal to their hearing peers, and industry should not be able to use the triumvirate of DRM, the DMCA, and copyright law—which are collectively designed to facilitate access to copyrighted works—as roadblocks.

With respect to the scope of the DMCA and this rulemaking, copyright law, generally speaking, may impose an undue chilling effect on technologists and researchers to develop accessibility technology, and this proceeding is admittedly not an appropriate venue in which to address that problem. But fair use provides at least some breathing room for technologists to add and improve captions on non-DRM encumbered video, as Universal Subtitles has done with YouTube and Vimeo. When DRM enters the mix, however, the DMCA imposes an insurmountable barrier because there is no fair use defense under the anti-circumvention measures. And asking permission is not a viable alternative, because the industry has made clear that it would rather exercise exclusive control over its content and make it accessible only slowly, if at all, instead of striking up partnerships with third parties in a cooperative effort to proactively accelerate accessibility. This resistance from the industry to caption their programs has created a crisis for deaf and hard of hearing Americans as they are unable to access vast quantities of video programs and the TDI Proposals go a long way in increasing access for deaf and hard of hearing people to valuable information.

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America among other members of the industry in FCC Docket No. 11-154.

#### **IV. THE NEED FOR THE EXEMPTIONS**

Deaf and hard of hearing people should be able to participate in the rich cultural and societal experiences offered by video programming. Allowing these anti-circumvention exemptions will make it possible for third parties to add or improve the captions on videos shown in schools, the work place and also in the public forum. This will permit deaf and hard of hearing students to enjoy important classroom instructional videos, allow people in the workforce to benefit from training videos and improve their skills, and even help deaf and hard of hearing members of the public access important video programs such as related to local elections. Further, this need is evident from conversations with a leading captioning company, Computer Prompting & Captioning Co. (CPC), as we have learned that they are often contacted by consumers and universities who want to pay to have video programs captioned, but cannot due to potential liability under copyright law. Some of these same individuals have even wanted to purchase CPC's captioning software and caption programs themselves. The CVAA Senate Report noted that the information divide is leaving people with disabilities behind and that people with disabilities suffer disproportionately higher rates of unemployment and poverty.<sup>12</sup> We need to bridge this information divide and allow third parties to add or improve captions to video programs by exempting these classes of works from the anti-circumvention provisions of the DMCA. We support the TDI Proposals without reservation and urge the Copyright Office to grant these exemptions.

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<sup>12</sup> *Report of the Senate Committee on Commerce, Science, and Transportation, Twenty-First Century Communications and Video Accessibility Act of 2010, S. Rep. No. 111-386, at 1-2 (2010)*



Respectfully submitted,



Andrew S. Phillips, Esq.  
Policy Attorney  
National Association of the Deaf  
8630 Fenton Street, Suite 820  
Silver Spring, MD 20910

Brenda Battat  
Executive Director  
Hearing Loss Association of America  
7910 Woodmont Avenue, Suite 1200  
Bethesda, MD 20814

Sheri A. Farinha  
Vice Chair  
California Coalition of Agencies Serving  
the Deaf and Hard of Hearing, Inc.  
4708 Roseville Rd, Ste 111  
North Highlands, CA 95660

**National Association of the Deaf**

The NAD is the nation's premier civil rights organization of, by and for deaf and hard of hearing individuals in the United States of America. The advocacy scope of the NAD is broad, covering a lifetime and impacting future generations in the areas of early intervention, education, employment, health care, technology, telecommunications, youth leadership, and more – improving the lives of millions of deaf and hard of hearing Americans.

[www.nad.org](http://www.nad.org)

**Hearing Loss Association of America**

The HLAA is the nation's leading grassroots organization representing the rights of people with hearing loss. The HLAA mission is to open the world of communication to people with hearing loss through information, education, advocacy, and support. HLAA impacts accessibility, public policy, research, public awareness, and service delivery related to hearing loss on a national and local level.

[www.hearingloss.org/](http://www.hearingloss.org/)

**California Coalition of Agencies Serving the Deaf and Hard of Hearing, Inc.**

The CCASDHH is a statewide nonprofit organization whose members are the California Association of the Deaf and eight community-based nonprofit agencies providing various social services to deaf and hard-of-hearing people in eight regions around the state under the philosophy of “of, by and for the deaf and hard of hearing.” The CCASDHH works to promote the social, recreational, cultural, educational, health, housing and vocational welfare of its deaf and hard of hearing constituents.

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