

June 11, 2018

via email

Regan A. Smith
General Counsel and Associate Register of Copyrights

Anna Chauvet
Assistant General Counsel

United States Copyright Office, Library of Congress

**Re: Docket No. 2017-10
2017–2018 Section 1201 Triennial Review
Proposed Class 2—Disability Services
Definition of “Disability” and Disability Services Offices in K-12**

Dear Ms. Smith and Ms. Chauvet,

On behalf of the Association of Transcribers and Speech-to-Text Providers (ATSP) and the Library Copyright Alliance (LCA), thank you for your continued consideration of Proposed Class 2 in the above-referenced proceeding, aimed at affording students with disabilities equal access to media in educational contexts, and for the opportunity to supplement the record in response to your post-hearing questions.¹ More specifically, you asked us to:

- Elaborate on the need for the proposed exemption in the context of K-12 schools;
- Opine on how to define “individuals with disabilities” under the proposed exemption.

I. K-12 Disability Services

Although the record has primarily addressed the significant adverse effects posed by Section 1201’s prohibition on circumvention in the context of disability services in higher education, K-12 institutions face similar needs to make accessible versions of videos encumbered with technological protection measures that must be circumvented to add captions and video descriptions. Accordingly, we urge the Office to include K-12 institutions within the scope of the proposed exemption.

To prepare this response, we reached out to a variety of K-12 educators, accessibility vendors, and disability advocates for their perspective. From the responses, a number of themes emerged:

¹ Letter from Regan Smith (May 21, 2018), <https://www.copyright.gov/1201/2018/post-hearing/Proposed%20Class%202%20-%20post-hearing%20letter.pdf>

- K-12 schools subject to accessibility laws routinely use videos in an educational context, such as showing students videos based on literature they have studied in English and reading classes and original explanatory videos posted to platforms like YouTube for concepts in science, social studies, and history. We received numerous responses from educators who use videos in their classes on subjects ranging from literary comparisons to chicken embryology to math to the biology of blood-borne pathogens.
- These works are routinely not captioned or described. For example, an organization that works to negotiate with copyright holders to create accessible versions of works in educational context reported to us that it had received numerous requests in the past year from K-12 educators to caption or describe inaccessible videos, including:
 - Through Deaf Eyes
 - Lewis and Clark Great Journey West (National Geographic)
 - The Men Who Built America (History Channel series) (multiple requests)
 - The Presidents (History Channel)
 - The Star of Bethlehem (Mpower Pictures)
 - Iron Jawed Angels (HBO)
 - The Lip Reader (Seinfeld Episode)
 - Switched at Birth
 - Before the Flood (Fisher Stevens)
 - The War of 1812 (History Channel)
 - Platoon (Oliver Stone; Orion Pictures)
 - Great Reasons to Learn History (Teacher Media Company)
 - Deaf Jam (New Day Producer)
 - Front of the Class: How Tourette Syndrome Made Me the Teacher I Never Had

The organization noted that it sometimes receives requests for content that has been captioned and/or described for television but is not available in an accessible format usable in the classroom. The organization also noted that even when it gets permission from copyright holders to caption materials, copyright holders sometimes provide source materials on retail DVDs whose CSS protections that must be circumvented to be made accessible or

specifically request that the organization “rip” the materials from streaming video sites like YouTube.

- Many educators responded to us that they simply choose not to show videos to any students when confronted with obligations to make the videos accessible under relevant accessibility law, or use inferior approaches that arguably do not comply with relevant disability laws or campus policies, such as arranging for a transcript of a video (which forces a student to avert his or her attention from the visual material in the video to follow the soundtrack) or arranging a sign-language interpreter (an expensive approach that is often not available, does not work for students who do not know American Sign Language, and also averts the student’s attention from visual material).
- There is significant interest among schools and educators, particularly as parents become more educated about their children’s rights to an accessible education, to make videos on optical media and streaming platforms accessible to students with disabilities. This interest is particularly high at schools for the deaf, whose student populations have a broad need for captioned materials and where the use of captions serves not only to make the underlying content accessible, but to help students develop English and reading skills critical to meet national standards through mandated testing. It is clear that Section 1201 poses significant adverse effects to their efforts.
 - For example, one educator with experience at multiple K-12 schools for the deaf noted that she and her colleagues would like to use DVDs, but often do not because they fear that adding captions is “against the law” and avoid “purchas[ing] curriculum materials that includ[e] DVDs that are not captioned”—a routine occurrence caused by many publishers’ failure to add captions proactively. The educator highlighted that this practice can cause tension with materials distributed on DVDs that are mandated by school districts to be shown on a district-wide basis, citing an inaccessible video associated with an anti-bullying program as a prominent example (which was also mentioned by another educator). The educator explained that this dynamic “is a serious problem across all school settings in all programs that serve deaf/hard of hearing students.” The educator also added that she is deaf, herself, and that the inability to add captions to a video creates a threshold barrier to even evaluating materials for their suitability in a curriculum.
- Likewise, disability advocates are keenly interested in improving the accessibility of educational video usage in K-12 contexts and want to ensure

that Section 1201 does not impose an unnecessary barrier to schools taking steps to comply with their obligations under disability law to make videos accessible.

II. Defining “Individuals with Disabilities”

During the hearing and in the above-referenced letter, the Office discussed the prospect a definition of the term “disability” or “individuals with disabilities,” presumably so that eligibility for the proposed exemption be limited to circumvention for the purpose creating an accessible version of a video for students with disabilities.

At the outset, we urge the Office not to include a specific limitation on the exemption that would restrict circumvention on the basis of the legal classification of students who might ultimately view an accessible version of the video. As a practical matter, an accessible version of a video with captions or descriptions added might be viewed by disabled and non-disabled students alike in a classroom context. The exemption should not require the distribution or performance of separate accessible and inaccessible versions of the video for disabled and non-disabled students, respectively, which would put an unfair and confusing burden on faculty, administrative staff, and students.

Likewise, we urge the Office not to restrict circumvention to where students where a particular student with a disability has been identified. An educational institution may chose to undertake proactive accessibility efforts, including the addition of captions or descriptions to a video, to comply with the terms of a settlement of a disability law claim, to meet in advance the terms of an Individual Education Plan for a student with a disability, or simply on the institution's own ethical initiative.

Accordingly, to the extent that the Office seeks to further define “disability” or “individuals with disabilities,” **it should at most link eligibility for the exemption to circumvention behavior performed with a good faith intent to comply with a federal or state disability law or otherwise serve the educational needs of a student with a disability recognized under federal or state disability law.**

In drawing any limitation broadly, the Office should bear in mind the variety of overlapping legal obligations that might compel an educational institution to provide an accessible version of a video, which together cover a broad swath of disabilities that might require accessible versions of a video. As we explained in our comment, these include but are not limited to the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act (IDEA), and Section 504 of the

Rehabilitation Act of 1973 (Section 504).² Each of these laws defines “disability” in slightly different ways that makes pinning down a definition that encompasses all the circumstances under which an educational institution might be legally responsible for ensuring equal access to a video for a student with a disability a difficult proposition.

The ADA broadly defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities,” a record of such an impairment, or being regarded as having such an impairment.³ “Major life activities” are broadly and non-exclusively defined to include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working” as well as the “the operation of . . . major bodily function[s], including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”⁴ Importantly, the ADA requires that “[t]he definition of disability . . . shall be construed in favor of broad coverage of individuals.”⁵ Section 504 incorporates the ADA’s definition by reference.⁶

IDEA adopts a somewhat different but likewise broad definition of a “child with disability” for the specific requirements in a K-12 setting.⁷ In particular, IDEA’s definition of “child with disability” encompasses “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities” that require the need for special education.⁸

² See Comment of ATSP, et al., at 3, 8-9, <https://www.copyright.gov/1201/2018/comments-121817/class2/class-02-initialcomments-atsp-et-al.pdf>; Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq.; Section 504, 29 U.S.C. §§ 701 et seq.; Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq.

³ 42 U.S.C. § 12102(1)(A)-(C), (3)(A)(B)

⁴ 42 U.S.C. § 12102(2).

⁵ 42 U.S.C. § 12102(4)(A).

⁶ See 29 U.S.C. § 705(20)(B) (applying the ADA’s definition for the purpose of discriminatory acts under chapter 16, subchapter V of Title 29, including nondiscrimination requirements that apply to public and private colleges and schools accepting federal funding under 29 U.S.C. § 794(b)(2)-(3)).

⁷ 20 U.S.C. § 1401(3)(A).

⁸ *Id.*

There are also a broader set of state laws that may in some cases compel accessibility. For example, the prohibition on discrimination in California’s Unruh Act applies to schools.⁹ That prohibition includes discrimination on the basis of “mental or physical disability,”¹⁰ which are in turn defined using elements of both the ADA’s and IDEA’s definitions and other constructs¹¹ with “the intent of the [California] Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.”¹²

While this letter does not aim to provide a comprehensive survey of definitions of “disability” in every potentially relevant disability law, the foregoing examples highlight that disability laws are, in general, intended to sweep broadly in their coverage and compel educational institutions to sweep broadly in their efforts to make educational content accessible. Accordingly, the Office should adopt a broad approach to defining “disability” for the purpose of this exemption to the extent it chooses to do so.

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We hope our answers are responsive to your inquiries. Please don’t hesitate to contact us with any questions or concerns.

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Respectfully submitted,
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⁹ *E.g., K.T. v. Pittsburg Unified Sch. Dist.*, 219 F. Supp. 3d 970, 983, (N.D. Cal. 2016).

¹⁰ Cal. Civ. Code § 51(e)(1).

¹¹ *See* Cal. Gov’t Code § 12926(j), (m)

¹² Cal. Gov’t Code § 12926.1(b).

¹³ This filing was drafted with the assistance of student attorneys Sophie Galleher and John Schoppert while they were members of the clinic.