



Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

Item A. Commenter Information

Association of Transcribers and Speech-to-Text Providers

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The Association of Transcribers and Speech-to-Text Providers (ATSP) is a non-profit organization devoted to advancing the delivery of real-time speech-to-text services to deaf or hard-of-hearing people.

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The Association on Higher Education and Disability (AHEAD) is the leading professional membership association for individuals committed to equity for persons with disabilities in higher education. Since 1977, AHEAD has offered an unparalleled member experience to disability resource professionals, student affairs personnel, ADA coordinators, diversity officers, AT/IT staff, faculty and other instructional personnel, and colleagues who are invested in creating welcoming higher education experiences for disabled individuals.

Library Copyright Alliance

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association (ALA), the Association of College and Research Libraries (ACRL), and the Association of Research Libraries (ARL)—that collectively represent over 100,000 libraries in the United States. Libraries provide services to visually impaired people, both inside and outside of educational settings, in particular by converting works into formats accessible to the print disabled.

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Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

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Item B. Proposed Class Addressed:
Proposed Class 3: Audiovisual Works—Accessibility

The Copyright Office initiated the eighth triennial rulemaking to consider exemptions from the anticircumvention provisions of the Digital Millennium Copyright Act (DMCA) on June 22, 2020 by issuing a Notice of Inquiry and Request for Petitions.¹ In response, the above-signed petitioners filed a petition² to renew the existing exemption for disability services professionals to circumvent technological protection measures (TPMs) on audiovisual works for “the of purpose of adding captions and/or audio description to a motion picture to create an accessible version” under Rule 201.40(b)(2).³ The Copyright Office issued a Notice of Proposed Rulemaking (NPRM) for this proceeding on October 15, 2020.⁴ In the NPRM, the Office announced that “[b]ased on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period” and that “the Office intends to recommend renewal of this exemption.”⁵

The current exemption applies to:

- (2)(i) Motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where the motion picture is lawfully acquired on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Content System, or via a digital transmission protected by a technological measure, where:
 - (A) Circumvention is undertaken by a disability services office or other unit of a kindergarten through twelfth-grade educational institution, college, or university engaged in and/or responsible for the provision of accessibility services to students, for the purpose of adding captions and/or audio

¹ Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 85 Fed. Reg. 37,399 (Jun. 22, 2020) (2020 NOI).
<https://www.govinfo.gov/content/pkg/FR-2020-06-22/pdf/2020-12911.pdf> .

² Petition for Renewal of ATSP, AHEAD, & LCA (July 22, 2020),
<https://www.copyright.gov/1201/2021/petitions/renewal/Renewal%20Pet.%20-%20Captioning%20-%20ATSP%20et%20al.pdf>.

³ 37 C.F.R § 201.40(b)(2)(i)(A).

⁴ 2020 Notice of Proposed Rulemaking, 85 Fed. Reg. 65,293 (Oct. 15, 2020) (2020 NPRM), <https://www.govinfo.gov/content/pkg/FR-2020-10-15/pdf/2020-22893.pdf>.

⁵ *Id* at 65,298.

description to a motion picture to create an accessible version as a necessary accommodation for a student or students with disabilities under an applicable disability law, such as the Americans With Disabilities Act, the Individuals with Disabilities Education Act, or Section 504 of the Rehabilitation Act;

(B) The educational institution unit in paragraph (b)(2)(i)(A) of this section has, after a reasonable effort, determined that an accessible version cannot be obtained at a fair price or in a timely manner; and

(C) The accessible versions are provided to students or educators and stored by the educational institution in a manner intended to reasonably prevent unauthorized further dissemination of a work.⁶

The above-signed organizations then filed a petition to modify the existing exemption in several distinct ways described in Item C.⁷

Item C. Overview

The existing disability services exemption has been widely used and appreciated by disability services professionals that must circumvent technological measures protecting audiovisual works to provide remediated versions for students at educational institutions.⁸ A significant proportion of the apprehension and lack of clarity surrounding the unique intersection of copyright law and disability law has been addressed by the existing exemption.

Nevertheless, there is still work to be done to ensure that disability services professionals can do their jobs to improve accessibility for students, faculty, and staff with disabilities who depend on their work.⁹ Disability services professionals have identified five specific improvements that would further empower them to make works accessible for people with disabilities in educational contexts:

⁶ 37 C.F.R § 201.40(b)(2)(i).

⁷ Petition for Modification of ATSP, AHEAD & LCA (“Modification Petition”) (Sept. 8, 2020), <https://www.copyright.gov/1201/2021/petitions/proposed/New%20Pet.%20-%20Association%20of%20Transcribers%20and%20Speech-to-Text%20Providers%20et%20al.pdf>. The Office sought comment on this petition. 2020 NPRM, 85 Fed. Reg. at 65,304.

⁸ See discussion *infra*, Item F.1 (Statement of Jason Kapcala).

⁹ See discussion *infra*, Item F.3 (Statement of Gretchen Rumsey-Richardson).

1. **Remediation for Faculty and Staff.** Expand the language of subsection 201.40(b)(2)(i)(A) of the existing exemption¹⁰ to allow for the remediation of motion pictures for faculty and staff with disabilities in Educational Institution Units (EIUs) in addition to the exemption’s current allowance of remediation for students with disabilities.
2. **Proactive Remediation.** Clarify that the exemption allows for the proactive remediation of motion pictures by EIUs in addition to remediation in response to an accommodation request.
3. **“Accessible Versions” of Sufficient Quality.** Clarify that “accessible versions” that satisfy limiting the application of the exemption under subsection 201.40(b)(2)(i)(B)¹¹ must be of sufficient quality.
4. **Qualifying the Commercial Availability Requirement.** Qualify the “reasonable effort” and “fair price” terms to clarify that under subsection 201.40(b)(2)(i)(B), an EIU has met the “reasonable effort” requirement when the publisher has not included an accessible version of audiovisual materials included with a purchased textbook.¹²
5. **Reuse of Remediated Works.** Clarify that the reuse of previously remediated works is permissible.

The final exemption, as amended, would read:

(i) Motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where the motion picture is lawfully acquired on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Content System, or via a digital transmission protected by a technological measure, where:

(A) Circumvention is undertaken by a disability services office or other unit of a kindergarten through twelfth-grade educational institution, college, or university engaged in and/or responsible for the provision of accessibility services for the purpose of adding captions and/or audio description to a motion picture to create an accessible version for students, faculty, or staff with disabilities;

(B) The educational institution unit in paragraph (b)(2)(i)(A) of this section has, after a reasonable effort, determined that an accessible version of sufficient quality cannot be obtained at a fair market price or in a timely manner, including where a copyright holder has not

¹⁰ 37 C.F.R § 201.40(b)(2)(i)(A).

¹¹ 37 C.F.R § 201.40(b)(2)(i)(B).

¹² *Id.*

included an accessible version of a motion picture included with a digital textbook; and

(C) The accessible versions are provided to students or educators and stored by the educational institution in a manner intended to reasonably prevent unauthorized further dissemination of a work, except for storage that allows for future reuse of the material by students, faculty, or staff with disabilities pursuant to subparagraphs (A) and (B).

(ii) For purposes of this paragraph (b)(2), “audio description” means an oral narration that provides an accurate rendering of the motion picture.

The proposed exemption language above would work to mitigate the adverse effects of the anticircumvention provisions of the DMCA on people with disabilities and, as recommended by NTIA in 2018, “increase clarity by removing requirements that overly complicate exemptions.”¹³ NTIA recommended exemptions that are “as clear and simple in formulation as possible . . . so that potential users of exemptions can properly understand the options and limitations.”¹⁴

NTIA also recommended that the Office adopt a “more structured” approach to applications for exemptions by laying out the “class of work, groups of beneficiaries, and types of circumvention permitted” to “improve readability” and streamline the process for managing applications for renewal or expansions during each rulemaking.¹⁵ Under this potential new framing of the exemptions, our proposed modifications would result in the following language:

- Class:* Motion pictures (including television shows and videos) distributed via DVD, Blu-ray disc, or digital transmission
- Use:* Adding captions and/or audio description—an oral narration that provides an accurate rendering—to create an accessible version for students, faculty, or staff with disabilities
- Users:* A disability services office or other unit of a kindergarten through twelfth-grade educational institution, college, or university engaged in and/or responsible for the provision of accessibility services

¹³ See Recommendations of the National Telecommunications and Information Administration to the Register of Copyrights at 3 (2018 NTIA Recommendation), https://www.ntia.doc.gov/files/ntia/publications/ntia_dmca_consultation_092520_18.pdf.

¹⁴ *Id.* at 4

¹⁵ *Id.*

Limitations:

- A user must determine that an accessible version of sufficient quality cannot be obtained at a fair market price or in a timely manner, including where a copyright holder has not included an accessible version of a motion picture included with a digital textbook; and
- A work must be provided to students or educators and stored by the educational institution in a manner intended to reasonably prevent unauthorized further dissemination of the work, except for storage that allows for future reuse of the material by students, faculty, or staff consistent with the permissible use.

Item D. Technological Protection Measure(s) and Method(s) of Circumvention

Disability services professionals deal primarily with two types of videos: those delivered via fixed media, such as Digital Versatile Discs (DVDs), and videos delivered via online streaming services. These two video sources are controlled by content creators and distributors using TPMs. While the TPMs used for videos delivered via fixed media and videos delivered via online streaming services vary in a technical sense, both types of videos are circumvented for the noninfringing accessibility purposes encompassed by the exemption. These TPMs are substantially the same as the TPMs that were in use and considered during the last triennial review when the Acting Register recommended the existing exemption,¹⁶ and the same as those considered by the Register in announcing the Office’s intent to recommend renewal of the exemption in this triennial review.¹⁷

Video Delivered via Fixed Media: When a DVD or Blu-ray disc is provided to disability services professionals for remediation, the disability services professionals will likely encounter either the Content Scramble System (CSS) in the case of DVDs or the Advanced Access Content System (AACS) in the case of Blue-ray discs.¹⁸ According to the Register’s 2015 Recommendation, “[t]he vast majority of DVDs use the Content Scramble System (“CSS”) to encrypt audiovisual works on DVDs using a fixed set of decryption keys.”¹⁹ Additionally, “Blu-ray discs are protected primarily by the Advanced Access Content System (“AACS”), which allows vendors

¹⁶ See Recommendation of the Acting Register of Copyrights at 92-93 (Oct. 2018) (2018 Recommendation), https://cdn.loc.gov/copyright/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf.

¹⁷ 2020 NPRM, 85 Fed. Reg. at 65,298.

¹⁸ Recommendation of the Register of Copyrights at 29 (Oct. 8, 2015) (2015 Recommendation), <https://www.copyright.gov/1201/2015/register-recommendation.pdf>.

¹⁹ *Id.*

to revoke compromised keys and distribute new keys.”²⁰ Just as the 2018 Comment supporting the existing exemption explained, the specific method used for circumvention will depend on how sophisticated the person doing the circumvention is.²¹

Video Delivered via Online Streaming: While disability services professionals must still circumvent TPMs concerning fixed media, a significant number of videos that must be remediated come from online streaming sources.²² As the Office has previously explained, “access controls used by online streaming services vary widely” and often rely on various “encryption and other protocols” to protect streamed content.²³

Item E. Asserted Adverse Effects on Noninfringing Uses

The NPRM encourages commenters to focus on the following elements to demonstrate that proposed modifications to existing exemptions satisfy the requirements for the exemption to be granted under Section 1201:

1. The proposed class includes at least some works protected by copyright;
2. The proposed uses are noninfringing under title 17;
3. Users are adversely affected in their ability to make such noninfringing uses and users are likely to be adversely affected in their ability to make such noninfringing uses during the next three years; and
4. The statutory prohibition on circumventing access controls is the cause of the adverse effects.²⁴

The exemption, as modified by the proposed changes, would continue to include copyrighted motion pictures. The uses contemplated by the proposed exemption, which would continue to center on accessibility of motion pictures for students with disabilities, would continue to be noninfringing. The users adversely affected in their ability to make noninfringing uses are disability services professionals at K-12 educational institutions, and they will continue to be adversely affected in their ability to make noninfringing accessibility uses during the next three years. Lastly, 1201(a)(1)’s prohibition on circumventing access controls continues to cause these adverse effects.

²⁰ *Id.*

²¹ Long Comment of ATSP, et al. at 7 (Dec. 18, 2017) (2018 Comment), <https://cdn.loc.gov/copyright/1201/2018/comments-121817/class2/class-02-initialcomments-atsp-et-al.pdf>.

²² See discussion *infra*, Item F.1 (Statement of Jason Kapcala).

²³ 2015 Recommendation at 29.

²⁴ 2020 NPRM at 65,294.

1. The proposed class continues to include copyrighted motion pictures.

The existing exemption, as amended by the proposed modifications, would continue to include copyrighted motion pictures, just like the exemption granted in 2018. The Register’s 2018 Recommendation of the exemption stated that “[t]here [was] no dispute that at least some of these works [were] protected by copyright.”²⁵ Nothing about the proposed modifications would change the focus of the class on copyrighted motion pictures. Accordingly, the proposed class continues to include at least some works protected by copyright.

2. Section 1201(a)(1) continues to adversely affect the ability of disability services professionals to make works accessible to people with disabilities.

Disability services professionals in educational institution units (EIUs) are adversely affected by Section 1201(a)(1)(A)’s prohibition on circumvention in their ability to make noninfringing uses of a class of copyrighted works and are likely to be adversely affected in the next three years. In particular, the prohibition continues to complicate EIUs’ ability to comply with disability law.²⁶ Under disability law, EIUs are required to provide individuals with disabilities with access to resources on par with their typical peers. EIUs often must circumvent TPMs on copyrighted works to create remediated versions. Although Congress, the courts, and the Office have recognized this type of remediation as non-infringing fair use,²⁷ Thus, the prohibition adversely affects EIUs by impeding EIUs ability to make noninfringing uses of copyrighted works.

Governing disability law prevents EIUs from discriminating against students, faculty, and staff with disabilities by denying these individuals reasonable and necessary accommodations. As the above-signed organizations explained in 2018, nearly all EIUs continue to be required to make copyrighted works available to their students under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Individuals with Disabilities Education Act (IDEA).²⁸ These requirements extend to ensuring accessibility for the faculty and staff they employ under Title I of the ADA, which prohibits employers from discriminating against employees with disabilities.²⁹

In 2018, the Acting Register highlighted the need for EIUs to be able to provide its students, faculty, and staff with disabilities with access to materials, which is archetypal fair use and necessitated by disability law. The Acting Register noted that “the prohibition on circumvention [was] adversely affecting the ability of

²⁵ 2018 Recommendation at 95.

²⁶ *See id.* at 97.

²⁷ *See* discussion *infra*, Item E.3

²⁸ 2018 Comment at 8-9.

²⁹ *See* 42 U.S.C. § 12112(a).

educational institutions to offer accessible formats of motion pictures on an equal basis in conformance with their legal responsibilities.”³⁰ The 2020 NPRM reaffirms this proposition in recommending renewal of the exemption.³¹

Though the current exemption has provided important relief for EIUs, EIUs continue encountering the prohibition’s adverse effects, which subsequently hinders students, faculty, and staff with disabilities’ access to accommodations. EIUs continue to struggle to timely provide remediated materials of sufficient quality to students, faculty, and staff—a struggle that has only intensified under COVID-19.³² Thus, the exemption must be modified to enable EIUs to provide its students, faculty, and staff with access to sufficiently remediated materials in a timely fashion. Accordingly, the exemption must be altered by:

- Enabling remediation for faculty and staff in addition to students;
- Enabling proactive remediation;
- Qualifying “accessible versions” as versions of “sufficient quality”;
- Qualifying the commercial availability requirement to clarify the contours of the “reasonable effort” and “fair price” terms; and
- Enabling reuse of remediated materials.

i. EIUs must be lawfully able to remediate resources for faculty and staff.

The prohibition adversely affects EIUs’ ability to make noninfringing uses by prohibiting EIUs from circumventing TPMs to remediate resources for faculty and staff. EIUs are currently prohibited from engaging in this noninfringing fair use because the current exemption only allows for remediation of video “as a necessary accommodation for *a student or students with disabilities*.”³³

EIUs’ inability to circumvent TPMs for faculty and staff adversely affects EIUs ability to comply with the Americans with Disabilities Act. Title I mandates that educational institutions remediate materials for faculty and staff if necessary.³⁴ Yet,

³⁰ 2018 Recommendation at 107.

³¹ 2020 NPRM, 85 Fed. Reg. at 65,298.

³² See discussion *infra*, Item F.1 (Statement of Jason Kapcala).

³³ 37 C.F.R § 201.40(b)(2)(i)(A) (emphasis added).

³⁴ See 42 U.S.C. § 12112(b)(5)(A) (discrimination against employees with disability includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee”); 42 U.S.C. § 12111(9)(B) (“The term ‘reasonable accommodation’ may include—(B) . . . acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.”).

faculty and staff currently fall outside the scope of the current exemption. Accordingly, this apparent prohibition on circumvention is adversely affecting the ability of educational institutions to offer accessible formats of motion pictures on an equal basis in conformance with their legal responsibilities.

ii. EIUs must be able to proactively remediate resources for students, faculty, and staff with disabilities.

The prohibition also adversely affects EIUs' ability to proactively remediate resources into accessible formats. This effect is because it is unclear whether the current exemption extends to proactive remediation, or rather is limited to reactive responses to accommodation requests.

The current exemption limits eligibility to remediation undertaken as “a necessary accommodation . . . under an applicable disability law.”³⁵ “Accommodation” is a term of art among disability services professions that typically implies an accommodation request by a student that an EIU acts upon only after receiving it.³⁶

The inclusion of the term “necessary accommodation” has led EIUs to question whether they can make use of the current exemption proactively. EIUs increasingly aim to proactively remediate materials to ensure that students, faculty, and staff with disabilities receive their remediated materials in a timely manner. For example, some EIUs seek to remediate materials that are commonly used in large classes that are likely to be the subject of future accommodation requests.³⁷ Proactive remediation eliminates the turnaround time that students, faculty, and staff with disabilities must wait to receive accessible materials after submitting an accommodation request.³⁸ Proactive remediation is so important that it is an affirmative policy of some educational institutions.³⁹

A failure to proactively remediate may in turn violate disability law. Students, faculty, and staff with disabilities rely on remediated materials to engage in their education and employment equal to that of their typical peers. Accordingly, students with disabilities are effectively “excluded from participation in . . . the

³⁵ 37 C.F.R § 201.40(b)(2)(i)(A).

³⁶ See, e.g., Barbara Palmer & Wendy Ulibarri, *Colorado Options: A Handbook of Post-Secondary Education Services for Students with Disabilities*, Colorado Department of Education Exceptional Student Leadership Unit, Eighth Edition (2014), <https://www.cde.state.co.us/cdesped/options> (“The student has an obligation to self-identify that she or he has a disability and that she or he needs accommodation.”).

³⁷ See discussion *infra*, Item F.1 (Statement of Jason Kapcala).

³⁸ *Id.*

³⁹ See discussion *infra*, Item F.2 (Statement of Anonymous Disability Services Professional).

services, programs, or activities” of their educational institution until they receive their remediated materials.⁴⁰ Likewise, until faculty and staff receive their remediated materials, they are effectively “limit[ed] . . . in a way that adversely affects [the employee’s] opportunities.”⁴¹

Obtaining remediated materials of sufficient quality takes time, and EIUs are overburdened and understaffed, particularly during the pandemic.⁴² EIUs thus struggle to provide individuals with their accommodated materials within an appropriate time to enable students, faculty, and staff complete participation in school and employment.⁴³ Modifying the exemption to endorse the proposition that EIUs can proactively remediate materials would ensure students, faculty, and staff receive their remediated materials as soon as possible—a disability law mandate.

iii. The exemption must require that “accessible versions” be of sufficient quality.

The prohibition also adversely affects EIUs’ ability to provide students, faculty, and staff with disabilities with accessible versions of sufficient quality. EIUs have raised questions about whether the “accessible version” limitation in the existing exemption precludes eligibility for the exemption when an EIU is able to locate with reasonable effort a version of a video, but that version has captions or descriptions with insufficient quality, in the EIU’s judgment, to facilitate equal access to the video.

The current exemption’s use of the term “accessible” does not specify what level of “accessibil[ity]” in an existing version of a video is sufficient to limit the application of the exemption.⁴⁴ Accordingly, EIUs have encountered confusion about whether they can circumvent to remediate videos that are captioned or described but with errors that require further remediation.

To comply with disability law, EIUs must have sufficient leeway under copyright law to remediate a video when a captioned or described version is already available but not of sufficient quality to facilitate access. Aside from compliance with Section 504 of the Rehabilitation Act, the IDEA, and the ADA, many EIUs adhere to specific quality standards for captions and descriptions, such as the Federal Communications Commission’s closed captioning quality standards

⁴⁰ See 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a).

⁴¹ 42 U.S.C. § 12112(b)(1).

⁴² See discussion *infra*, Item F.2 (Statement of Anonymous Disability Services Professional).

⁴³ *Id.*

⁴⁴ See 37 C.F.R. § 201.40(b)(2)(i)(B).

requirements.⁴⁵ Accordingly, EIUs must provide their students, faculty, and staff with remediated versions of sufficient quality to provide these individuals with equal access to materials, and to comply with disability and communications law.

The Acting Register supported this proposition in 2018, noting that “the passage of the ADA, IDEA, and Section 504 demonstrate Congress’s desire to provide meaningful access to students with other types of disabilities.”⁴⁶ The Office has recognized the spirit of disability laws: people with disabilities require *meaningful* access to educational and training resources. If a student, faculty, or staff member with a disability is able to “access” a version of an educational or training resource but the quality of that version’s captions and/or descriptions are so deficient that the version is an inadequate accommodation, the person is being denied meaningful access. Accordingly, the exemption should be modified to limit its application only where an accessible version of sufficient quality can be obtained with a reasonable effort.

iv. The exemption must qualify the commercial availability requirement to clarify the contours of the terms “reasonable effort” and “fair price.”

The prohibition also adversely affects EIUs’ ability to protect themselves against discriminatory practices by publishers in furnishing accessible versions of videos included with digital textbooks. Because the scope of the exemption’s “reasonable effort” requirement is unclear, fears have arisen that publishers may have latitude to deny the application of the exemption by offering to make an accessible version of videos included in a textbook available, but at a price higher than the market rate that the EIU would pay to caption or describe the video itself or at an untenably later date.

In particular, Rule 201.40(b)(2)(i)(B) allows circumvention only after an EIU “has, after a reasonable effort, determined that an accessible version cannot be obtained at a fair price or in a timely manner.”⁴⁷ However, this limitation on the exemption contemplates a market search of mass market offerings like “Amazon.com or Netflix,”⁴⁸ and does not provide guidance on how a market search might occur when an EIU has an ongoing relationship with the video’s copyright holder, as may be the case with an inaccessible video included with a textbook that a student with disabilities has purchased as a bundle.

⁴⁵ See 47 C.F.R. § 79.1(j)(2); see also Recommendation of the Federal Communications Commission Disability Advisory Committee (Oct. 14, 2020), <https://www.fcc.gov/file/19830/download> (laying out preliminary recommendations on quality for audio description).

⁴⁶ 2018 Recommendation at 97.

⁴⁷ 37 C.F.R. § 201.40(b)(2)(i)(B).

⁴⁸ 2018 Recommendation at 110.

As a result, questions have arisen about what an EIU must do to satisfy this “reasonable effort” obligation when no accessible version of a video included with a textbook exists, but upon request a publisher offers to generate an accessible version of the video at extra cost beyond the cost of the textbook itself. While an EIU could pay the additional cost, doing so would effectively allow the publisher a windfall, at the EIU’s expense, for price discriminating against students, faculty, and staff with disabilities on the basis of accessibility, and potentially delay the delivery of captions.

Thus, the exemption should be modified to specify that “accessible versions” must exist at the time an EIU undertakes the “reasonable effort” and be available at no additional cost beyond the cost of the inaccessible version of the work. Qualifying the “reasonable effort” requirement in this manner would motivate publishers to make their original works sufficiently accessible and reduce turnaround time for the remediation of single-source works by allowing disability services professionals to begin remediation upon receipt of materials and confirmation that they lack sufficient accessibility features.

v. EIUs must be able to reuse remediated resources.

Lastly, the prohibition on circumvention adversely affects EIUs’ ability to make noninfringing uses because disability services professionals are unsure if they can reuse remediated materials. The current exemption does not explicitly address reuse, but requires EIUs to “store” their accessible versions “in a manner intended to reasonably prevent unauthorized further dissemination of a work.”⁴⁹

EIUs have questioned whether retaining and reusing remediated resources for future accommodation requests—for example, if different students with disabilities are in the same professor’s class over the course of multiple semesters—is allowed under the terms of the exemption. While some institutions have enacted their own policies affirmatively allowing for reuse of remediated works,⁵⁰ the exemption does not clarify whether this act is officially sanctioned by the Office.⁵¹

This practice forces EIUs to unnecessarily incur the cost of repeating remediation work each time a resource is requested in a future term.⁵² Consequently, students have faced unnecessary delays and complications, and EIUs have wasted resources performing duplicative remediation that has already been completed.⁵³ Reuse of remediated materials would ensure faster and more efficient

⁴⁹ See 37 C.F.R. § 201.40(b)(2)(i)(C).

⁵⁰ See discussion *infra*, Item F.2 (Statement of Anonymous Disability Services Professional).

⁵¹ See discussion *infra*, Item F.1 (Statement of Jason Kapcala).

⁵² See discussion *infra*, Item F.1 (Statement of Jason Kapcala).

⁵³ See discussion *infra*, Item F.1 (Statement of Jason Kapcala) & Item F.3 (Statement of Gretchen Rumsey-Richardson).

remediation and delivery of accessible materials to students, faculty, and staff with disabilities and reduces the amount of time they spend excluded from participation in school and/or work. Thus, reuse of remediated works alleviates the prohibitions adverse effects on EIUs ability to comply with disability law.

3. Making videos accessible through the provision of captions and descriptions remains a quintessentially noninfringing fair use.

As the Acting Register concluded in 2018 and as the Register reaffirmed in the 2020 NPRM in announcing her intent to recommend renewal of the recommendation, making videos accessible for faculty, staff, and students with disabilities in educational contexts remains a quintessentially noninfringing fair use.⁵⁴ The proposed modifications do not alter this core purpose of the exemption or the Register used in 2018. Accordingly, the Library and the Office should again conclude that the exemption, as amended by the proposed modifications, is noninfringing.

Congress and the courts have all but confirmed that making copyrighted works accessible to people with disabilities is a noninfringing use.⁵⁵ As the above-referenced organizations' 2018 comment on the initial exemption explained:

[T]he legislative history of the 1976 Copyright Act makes clear that converting works into formats that are accessible to people with sensory disabilities is a quintessential example of fair use. The House Committee Reports explicitly states:

“Another special instance illustrating the application of the fair use doctrine pertains to making copies or phonorecords of works in special forms for blind persons. These special forms. . . are not usually made by the publishers for commercial distribution. . . the making of a single copy or phonorecord as a free service for a blind person would properly be considered a fair use under section 107.”

The courts have affirmed Congress’s “commitment to ameliorating the hardships faced by” people with sensory disabilities. In *Sony v. Universal City Studios*, the Supreme Court stated that “[m]aking a copy of a copyrighted work for the convenience of people with sensory disabilities is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying.”

⁵⁴ 2018 Recommendation at 101; 2020 NPRM, 85 Fed. Reg. at 65,298.

⁵⁵ 2018 Comment at 9-10.

In *Authors Guild, Inc. v. HathiTrust*, the Second Circuit likewise affirmed that conversion of inaccessible copyrighted works into accessible digital formats for use by people who are blind, visually impaired, or print disabled is a fair use. As the *HathiTrust* court held, “the doctrine of fair use allows [the] provi[sion of] full digital access to copyrighted works to [the] print-disabled.” Copyright jurisprudence has established that making digital works accessible to the print-disabled is non infringing fair use on grounds that are equally applicable to making motion pictures accessible to people who are blind, visually impaired, deaf or hard of hearing, through the provision of closed captions and audio description.⁵⁶

In 2018, the Acting Register echoed Congress and the Courts in agreeing that accessibility uses are typically noninfringing and fair.⁵⁷ Specifically, the Acting Register in 2018 concluded that “[c]iting the legislative history of the 1976 Copyright Act, the Chafee Amendment, the *HathiTrust* decision, and other existing disability laws, [the disability services] exemption proponents offer[ed] credible support for their claim that converting motion pictures into accessible formats for students with disabilities by adding captions and/or audio description [was] a noninfringing fair use.”⁵⁸ The Register reaffirmed this position in announcing her intent to recommend renewal of the exemption in the 2020 NPRM.⁵⁹

The proposed modifications to the exemption fall within the scope of the Register’s 2018 fair use analysis. The proposed modifications do not meaningfully expand the uses for which circumvention can be undertaken, but rather add modest qualifiers that would ensure the exemption aligns with anti-discriminatory spirit and letter of the 1976 Copyright Act, the Chafee Amendment, the *HathiTrust* decision, and other existing disability laws. Analyzing the exemption under the familiar four-factor fair use test confirms this conclusion.⁶⁰

Purpose and Character. The purpose and character of the proposed modifications continue to weigh in favor of fair use. The modifications do not alter the core nature of the uses at issue, but merely when and how such uses will occur. Accordingly, the Acting Register’s 2018 conclusion—that the purpose and character of the existing exemption weighs in favor of fair use—is equally appropriate here.⁶¹

⁵⁶ *Id.* at 9-10 (internal citations and footnotes omitted).

⁵⁷ 2018 Recommendation at 101.

⁵⁸ *Id.*

⁵⁹ 2020 NPRM, 85 Fed. Reg. at 65,298.

⁶⁰ See 17 U.S.C. § 107.

⁶¹ See 2018 Recommendation at 97-98.

The Register reaffirmed this position in announcing her intent to recommend renewal of the exemption in the 2020 NPRM.⁶²

Petitioners' proposed modifications reiterate and strengthen the exemption's purpose. Each modification works to remove one of the many barriers clouding an EIUs ability to prevent discrimination against students, faculty, and staff with disabilities. The purpose of these modifications is to further access that will provide tangible benefits to people with disabilities in educational contexts. Accordingly, the purpose and character of the modifications to the exemption weigh in favor of fair use.

Nature of the Works: The proposed modifications likewise do not alter the nature of the copyrighted works being used from the previous exemption. Thus, the analysis for this second factor is the same.

As the above-signed organizations' 2018 comment explained, "the proposed exemption would cover access to motion pictures, which come in many formats and genres."⁶³ In the words of the *HathiTrust* court, "[t]his does not preclude a finding of fair use, however, given [the] analysis of the other factors."⁶⁴ The Acting Register's recommendation in 2018 echoes this conclusion.⁶⁵ The Register again reaffirmed this position in announcing her intent to recommend renewal of the exemption in the 2020 NPRM.⁶⁶

Amount and Substantiality: Likewise, the proposed modifications do not alter the amount and substantiality of the works used from the 2018 exemption.⁶⁷ EIU professionals will continue to "use only what is necessary to convert motion pictures into an accessible format[—]a partial replication of the original copyrighted work. Adding captions and audio description to a video utilizes only the aural and visual components of that video, respectively."⁶⁸ The Acting Register stated in 2018 that this amount would "not weigh against a finding of fair use."⁶⁹

The proposed modifications to the exemption do not seek to permit the use of any additional portions of a video than were contemplated in the original exemption. As such, the amount copied is "reasonable in relation to the purpose of the copying."⁷⁰ The third factor thus weighs in favor of fair use, consistent with the

⁶² 2020 NPRM, 85 Fed. Reg. at 65,298.

⁶³ 2018 Comment at 11.

⁶⁴ *Authors Guild v. HathiTrust*, 755 F.3d 87, 102. (2d Cir. 2014).

⁶⁵ 2018 Recommendation at 101.

⁶⁶ 2020 NPRM, 85 Fed. Reg. at 65,298.

⁶⁷ *See* 2018 Comment at 11.

⁶⁸ *Id.*

⁶⁹ 2018 Recommendation, at 98-99 (quoting *HathiTrust*, 755 F.3d at 98).

⁷⁰ *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

Acting Register's recommendation in 2018⁷¹ and the Register's announcement of her intent to renew the exemption in the 2020 NPRM.⁷²

Effect on the Market: The proposed modifications to the exemption would not adversely affect the market or value of copyrighted works. The modifications would not expand the type of accessibility uses permitted under the exemption, nor would they meaningfully impact any aspect of the meager market for accessible versions of videos used in educational contexts. The modifications merely seek to enable EIUs to provide individuals with remediated materials only when remediated works of sufficient quality are, as is often the case, unavailable in the market. Accordingly, the fourth factor weighs in favor of fair use.

The Register's 2018 Recommendation found the fourth factor weighed in favor of fair use for the Exemption for two key reasons:

1. "[T]hat the overall market ha[d] not yet adequately met the needs of individuals with disabilities by retroactively offering catalog videos in accessible formats, and that in some cases, new works [were] not being issued in accessible formats;" and
2. "[T]hat the accessible versions would be created from authorized versions of motion pictures and would typically be disseminated through a password-protected mechanism providing accessible materials—as is traditionally done by disability service professionals when—thereby reducing the likelihood of negatively affecting the market for the copyrighted motion pictures."⁷³

The Register's announcement of her intent to recommend renewal of the exemption in the 2020 NPRM affirms that the market does not yet adequately meet the need for accessible versions of motion pictures.⁷⁴ Thus, because the market for accessible works utilized by educational institutions has remained stagnant and EIUs continue to restrict access to remediated works, the adverse market effects continue to weigh in favor of fair use.

Until and unless the market for accessible works meets the demand for these accessible works, the proposed modifications to the exemption will be necessary to ensure fair use. This reality is underscored by the maintenance of the requirement of a reasonable market check, subject to the proposed qualification of the

⁷¹ See 2018 Recommendation at 101.

⁷² 2020 NPRM, 85 Fed. Reg. at 65,298.

⁷³ 2018 Recommendation, at 100-01 (footnotes omitted).

⁷⁴ 2020 NPRM, at 298 ("the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period.").

commercial availability requirement to clarify the contours of the terms “reasonable effort” and “fair price.”⁷⁵

As the Register noted, “[w]hen an accessible version is not available in the marketplace, the proposed use is less likely to interfere with the primary or derivative markets for the motion picture.”⁷⁶ Disability services professionals continue to lament the lack of sufficiently acceptable remediated versions of requested material on the open market,⁷⁷ even though many disability services professionals prefer materials that are “born” accessible in many circumstances because remediation is timely and costly. But as the 2020 Notice of Proposed Rulemaking confirms, the market does not fully serve the need for accessible videos in educational contexts.⁷⁸ Accordingly, the Register’s 2018 determination—that the fourth factor weighs in favor of fair use⁷⁹—is applicable here, too.

4. Section 1201’s statutory factors weigh in favor of the proposed modifications.

Under Section 1201(a)(1)(C), the Librarian examines five factors in considering whether to grant an exemption:

1. The availability for use of copyrighted works;
2. The availability for use of works for nonprofit archival, preservation, and educational purposes;
3. The impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;

⁷⁵ See discussion *supra*, Item E.2.iv. A publisher willing to include a remediated version of a video with the purchase of a textbook at a reasonable market price would meet the demand, for example, while a publisher willing to provide the remediated version only after negotiations with an EIU professional for an additional price would not. A protracted negotiation process would be inefficient and time-consuming, and would therefore impede EIUs’ ability to provide students, faculty, and staff with disabilities with their remediated works as quickly as possible to prevent further discrimination. If a publisher wishes to provide a remediated work of sufficient quality after the fact, the publisher may place it on the open market at that point.

⁷⁶ 2018 Recommendation, at 100.

⁷⁷ See discussion *infra*, Item F.1 (Statement of Jason Kapcala) & Item F.3 (Statement of Gretchen Rumsey-Richardson).

⁷⁸ 2020 NPRM, at 65,298 (“[T]he Office believes that the conditions that led to adoption of the exemption are likely to continue during the next triennial period.”)

⁷⁹ 2018 Recommendation at 100-101.

4. The effect of circumvention of technological measures on the market for or value of copyrighted works;
5. Such other factors as the Librarian considers appropriate.⁸⁰

The Office has consistently found that the Section 1201(a)(1)(C) statutory factors weigh in favor of accessibility-related exemptions for assistive technologies.⁸¹ Likewise, the statutory factors weigh in favor of each of the proposed expansions and revisions to the exemption for motion pictures: allowing remediation for faculty and staff with disabilities; clarifying that the exemption allows disability services professionals to proactively remediate videos; clarifying that “accessible versions” are only accessible if they are of sufficient quality; qualifying the commercial availability requirement to clarify the contours or the terms “reasonable effort” and “fair price;” and clarifying that EIUs can reuse stored accessible versions of videos.

i. Allowing the remediation of videos for faculty and staff would satisfy the statutory factors.

Availability for Use of Copyrighted Works. In the 2020 NPRM, the Office recommended a streamlined renewal of Section 201.40(b)(2)(i)(A), noting that “[n]o oppositions were filed against readoption of this exemption” and that “[t]he petition demonstrated the continuing need and justification for the exemption.”⁸² The Office recommended streamlined renewals for exemptions only after determining “that, due to a lack of legal, marketplace, or technological changes, the factors that led the Office to recommend adoption of the exemption in the prior rulemaking will continue into the forthcoming triennial period.”⁸³ Because faculty and staff with disabilities require access to the same resources as students with disabilities—for comparable reasons—the first factor favors both the baseline exemption and the proposed expansion.

The remediation for faculty and staff expansion is consistent with this analysis because faculty and staff rely on the same educational resources that are made

⁸⁰ 17 U.S.C. § 1201(a)(1)(C).

⁸¹ See 2018 Recommendation at 104 (finding that all of the statutory factors favor an exemption for disability services); 2015 Recommendation at 135-36 (finding that all of the statutory factors strongly favor an exemption to facilitate assistive technologies); Recommendation of the Register of Copyrights at 22 (Oct. 12, 2012), (“2012 Recommendation”) https://cdn.loc.gov/copyright/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf (finding that all of the statutory factors favored an exemption for assistive technologies).

⁸² 2020 NPRM, 58 Fed. Reg. at 65,298.

⁸³ See *id.* at 65,294.

accessible to students via the baseline exemption. Allowing faculty and staff meaningful access to these resources is necessary for EIUs to be able to fulfill their educational and research goals. Expanding the exemption to include faculty and staff would ensure that faculty and staff who are blind, visually impaired, deaf, or hard of hearing are afforded equal access to the materials used in the educational environment that are utilized by nondisabled faculty and staff.

Availability for Use of Works for Nonprofit Archival, Preservation, and Educational Purposes. Although referencing a slightly different context, the Office acknowledged in the 2020 NPRM that “educators and students continue to rely on excerpts from digital media for class presentations and coursework.”⁸⁴ Given the commonplace use of videos in the educational setting, motion picture materials—including excerpts from digital media—must necessarily be made accessible to students, faculty, and staff with disabilities. Faculty and staff with disabilities require meaningful access to educational and training resources in order for EIUs to accomplish their educational purposes. As such, this factor favors both the baseline exemption and the proposed expansion. Expanding the exemption to include faculty and staff would increase availability of educational and training resources with meaningful access for faculty and staff with disabilities.

Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research. This factor favors the proposed expansion to the exemption for substantially the same reasons stated for the first two factors.⁸⁵ Faculty and staff with disabilities require meaningful access to educational and training resources for teaching, scholarship, and research purposes. Expanding the exemption is necessary to provide them with this meaningful access.

Effect on the Market for or Value of Copyrighted Works. As discussed in the context of fair use,⁸⁶ expanding the exemption to include faculty and staff with disabilities would have a negligible effect on the market value for motion pictures.

In the 2018 triennial rulemaking, the Acting Register emphasized a need for the exemption to “take into account and further incentivize the marketplace offerings, including by requiring a reasonable market check for usable copies, while balancing the legitimate needs of disability services offices to create accessible versions.”⁸⁷ By requiring a reasonable market check for the exemption, the Acting Register sought to “prevent copies being made of works already available in accessible formats, while supporting the motion picture industry’s effort to further expand the availability of accessible versions in the marketplace.”⁸⁸ Because the exemption would continue to require a reasonable market check even if it includes

⁸⁴ *Id.* at 65,295.

⁸⁵ See discussion *supra*, Item E.4.i & ii.

⁸⁶ See discussion *supra*, Item E.3.

⁸⁷ 2018 Recommendation at 106.

⁸⁸ *Id.* at 110.

faculty and staff with disabilities, this modification would not have a meaningfully different effect on the market than the existing exemption.

Other Factors. The Office should consider that drawing a distinction between “students with disabilities” and faculty and staff with disabilities is arbitrary and would contradict the overarching logic of the exemption. The Acting Register recommended in 2018 that the exemption be available “for units of an educational institution engaged in and/or responsible for the provision of accessible options.”⁸⁹ The Acting Register in 2018 noted that the proposed petition language was intended to enable the work of “disability services offices, organizations that support *people with disabilities*, libraries, and other units at educational institutions that are responsible for fulfilling those institutions’ legal and ethical obligations to make works accessible to *people with disabilities*.”⁹⁰

As previously discussed, EIUs are obligated under disability laws to make accessibility accommodations for employees with disabilities.⁹¹ The exclusion of faculty and staff with disabilities from the existing exemption was an oversight that should be clarified by expressly covering faculty and staff with disabilities.

ii. Clarifying that the exemption allows disability services professionals to proactively remediate videos would satisfy the statutory factors.

Availability for Use of Copyrighted Works. Much like how the first statutory factor favors the baseline exemption,⁹² the first statutory factor also favors altering the current exemption language as necessary to make clear that EIUs can create accessible versions proactively. Allowing for proactive remediation would create greater availability of accessible copyrighted works and resources for people with disabilities.

Currently, people with disabilities are being forced to wait for their accommodation requests to be completed by disability services offices, even as courses are simultaneously progressing.⁹³ This forces people with disabilities into a position of playing catch-up throughout the semester as they wait for their accessible content, all while juggling their ongoing educational responsibilities.⁹⁴ Allowing disability services offices to make captions and audio descriptions for people with disabilities without requiring that they first submit formal

⁸⁹ *Id.* at 107.

⁹⁰ *Id.* (emphasis added).

⁹¹ See discussion *supra*, Item E.2.i.

⁹² See discussion *supra*, Item E.4.i.

⁹³ See discussion *infra*, Item F.1 (Statement of Jason Kapcala) & Item F.3 (Statement of Gretchen Rumsey-Richardson).

⁹⁴ See discussion *infra*, Item F.3 (Statement of Gretchen Rumsey-Richardson).

accommodation requests would make these necessary resources available sooner, thereby improving their availability.

Availability for Use of Works for Nonprofit Archival, Preservation, and Educational Purposes. Altering the current exemption language to make clear that EIUs can create accessible versions proactively would create greater availability for meaningful access of content for educational purposes. The 2020 NPRM affirmed both that there is a need for the accessibility exemption going forward and that this need is “likely to increase significantly in light of the ongoing COVID–19 pandemic as many educational institutions shift to online learning and the use of digital multimedia by faculty increases.”⁹⁵ As such, it is imperative that unnecessary delays—such as the requirement for formal accommodation requests before disability services offices make captions and audio descriptions—be eliminated so that people with disabilities are not hindered in receiving meaningful access to resources for educational purposes.

Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research. This factor favors the proposed expansion to the exemption for substantially the same reasons stated in the first two factors.⁹⁶ People with disabilities require meaningful access to educational and training resources for teaching, scholarship, and research purposes. To provide them with this meaningful access, it is critical to modify the current exemption language so as to make clear that EIUs can create accessible versions proactively.

Effect on the Market for or Value of Copyrighted Works. As discussed in the context of fair use,⁹⁷ revising the exemption’s language to make clear that EIUs can create accessible versions proactively would have a negligible effect on the market value for motion pictures. Given that the exemption would still require a reasonable market check before disability services offices could proactively make content accessible,⁹⁸ the revised language would not have a negative impact on the market. Proactive remediation would only become necessary if disability services offices determined, after a reasonable market check, that there is no accessible version of the content.

iii. Clarifying that “accessible versions” are only accessible if they are of sufficient quality would satisfy the statutory factors.

Availability for Use of Copyrighted Works. The Register affirmed in the 2020 NPRM that this factor favors the baseline exemption.⁹⁹ Revising the exemption’s

⁹⁵ 2020 NPRM, 85 Fed. Reg. at 65,298.

⁹⁶ See discussion *supra*, Item E.4.ii.

⁹⁷ See discussion *supra*, Item E.3.

⁹⁸ See 37 C.F.R. § 201.40(b)(2)(i)(B).

⁹⁹ See discussion *supra*, Item E.4.i.

language to clarify that “accessible versions” are not accessible unless they are of sufficient quality is consistent with this analysis.

The Acting Register recognized in 2018 that “[a]n exception to promote accessibility ‘is not merely a matter of convenience, but is instead intended to enable individuals [with disabilities] to have meaningful access to the same content that individuals without such impairments are able to perceive.’”¹⁰⁰ Clarifying the exemption’s language would create greater availability of resources with meaningful access for people with disabilities, as it would allow disability services professionals to proceed in efforts to make accessible content without fear of liability when captioned or audio described versions of a video technically exist but are of such haphazard quality that they are functionally inaccessible for people with disabilities.¹⁰¹

Availability for Use of Works for Nonprofit Archival, Preservation, and Educational Purposes. For substantially the same reasons previously discussed regarding access to resources for educational purposes,¹⁰² this factor supports both the baseline exemption and the proposed addition of clarifying language. The same factors that justified an exemption to grant people with disabilities meaningful access to resources are still present, and therefore justify clarifying ambiguous language so as to ensure that people with disabilities still have meaningful access.

Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research. This factor favors clarifying the exemption’s ambiguous language for substantially the same reasons stated with respect to the first two factors.¹⁰³ People with disabilities require meaningful access to educational and training resources for teaching, scholarship, and research purposes. To provide them with this meaningful access, it is necessary to alter the current exemption language so as to make clear that educational and training content is only considered an “accessible version” when it is of sufficient quality.

Effect on the Market for or Value of Copyrighted Works. Revising the exemption’s language to make clear that only versions of sufficient quality are considered “accessible” would have a negligible effect on the market value for videos. Given that the exemption would still require a reasonable market check before disability services offices could circumvent TPMs,¹⁰⁴ the revised language would not have a negative impact on the market. In circumstances where there are already existing versions of educational or training resources but they are functionally inaccessible due to their poor quality, then people with disabilities are unable to access these

¹⁰⁰ 2018 Recommendation at 104 (internal citations omitted).

¹⁰¹ See discussion *supra*, Item E.2.iii.

¹⁰² See discussion *supra*, Item E.4.i.

¹⁰³ See discussion *supra*, Item E.4.iii.

¹⁰⁴ See 37 C.F.R. § 201.40(b)(2)(i)(B).

versions on equal terms.¹⁰⁵ As a result, the remediation of these works does not impact a cognizable market.

Other Factors. Revising the exemption’s language such that “sufficient quality” is required for content to be considered “accessible” is a simple and common-sense way to ensure that people with disabilities are truly receiving the meaningful access to which they are entitled. The baseline exemption itself was created under the assumption that it would allow people with disabilities to receive captions and audio descriptions sufficient to facilitate access to their educational and training content.¹⁰⁶ The Office has historically supported exemptions that provide meaningful access of resources for people with disabilities.¹⁰⁷ Furthermore, by passing several laws specifically centered around providing people with disabilities meaningful access to opportunities and resources, Congress has clearly shown its strong support for meaningful disability accessibility as well.¹⁰⁸ Revising the exemption’s language to resolve its current ambiguity is both rational and necessary in order to fulfill the baseline exemption’s intended purpose and secure meaningful access for people with disabilities.

iv. Qualifying the commercial availability requirement to clarify the terms “reasonable effort” and “fair price” would satisfy the statutory factors.

Availability for Use of Copyrighted Works. In its current form, the exemption’s ambiguous “reasonable effort” and “fair price” requirements raise the possibility that publishers can insist on extra payment to remediate videos included with textbooks.¹⁰⁹ Though publishers may make remediated versions of these works available to disability services professionals and thereby obviate the need for circumvention, disability services professionals and the students, faculty, and staff that they serve should not have to pay a higher price for these works than their non-disabled counterparts. As such, the first factor favors modifying the exemption to clarify that a disability services professional has met the “reasonable effort” requirement when the publisher has not included an accessible version of the materials with a purchased textbook.

¹⁰⁵ See discussion *supra*, Item E.2.iii.

¹⁰⁶ See 2018 Recommendation at 107 (“[T]he Acting Register concludes that the prohibition on circumvention is adversely affecting the ability of educational institutions to offer accessible formats of motion pictures on an equal basis in conformance with their legal responsibilities.”).

¹⁰⁷ See *id.* (“The Acting Register is sensitive to the need to ensure that access controls do not prevent students with disabilities from gaining meaningful access to motion pictures distributed in electronic formats.”).

¹⁰⁸ See discussion *supra*, Item E.2.

¹⁰⁹ See discussion *infra*, Item F.1 (Statement of Jason Kapcala).

Availability for Use of Works for Nonprofit Archival, Preservation, and Educational Purposes. Revising the language in the existing exemption to qualify the commercial availability requirement would self-evidently serve an educational purpose. Revising the exemption’s language would allow for greater availability of accessible resources for people with disabilities to use for educational purposes, as well as discouraging publishers from acting in bad faith by refusing to provide remediated versions of works unless paid extra cost.

Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research. Through the passage of the ADA, Section 504, and IDEA, Congress has evinced a clear intent that educational resources be made accessible for people with disabilities.¹¹⁰ Notably, the 2018 rulemaking recommendation highlighted that the ADA is imbued with “principles against imposing unnecessary costs to improve accessibility for people with disabilities.”¹¹¹ As such, the third factor favors revising the exemption to include language clarifying that an EIU has met the “reasonable effort” requirement when the publisher has not included an accessible version of the materials with a purchased textbook.

Effect on the Market for or Value of Copyrighted Works. In its current form, the ambiguous language in the “reasonable effort” requirement may serve as an incentive for publishers to *withhold* accessible versions of motion pictures from the market.¹¹² By not providing accessible versions of content at the outset, publishers can tack on additional profits by demanding additional fees for generating accessible versions.¹¹³ The fourth factor favors revising the exemption to include language clarifying that an EIU has met the “reasonable effort” requirement when the publisher has not included an accessible version of the materials with a purchased textbook.

v. Clarifying that EIUs can reuse remediated resources would satisfy the statutory factors.

Availability for Use of Copyrighted Works. In its current form, the ambiguous language in Rule 201.40(b)(2)(i)(C)¹¹⁴ has left disability services offices uncertain of whether they are allowed to store accessible versions of videos created such that they may be used for future accommodation requests. In the 2018 rulemaking recommendation, the Acting Register explained that the accessible versions should

¹¹⁰ See discussion *supra*, Item E.2.

¹¹¹ 2018 Recommendation at 103.

¹¹² See discussion *infra*, Item F.1 (Statement of Jason Kapcala).

¹¹³ See discussion *infra*, Item F.1 (Statement of Jason Kapcala).

¹¹⁴ 37 C.F.R. § 201.40(b)(2)(i)(C).

be stored “by the educational institution in a manner that reasonably prevents” unauthorized dissemination of the work.¹¹⁵

Given that courses often utilize the same videos each time that they are taught, certain videos may require accessible versions in multiple semesters. However, some EIUs are currently disposing of accessible versions at the end of semesters, and then creating accessible versions of the same videos in subsequent semesters.¹¹⁶ Revising the language to clarify that EIUs can reuse stored accessible versions would still comport with the Acting Register’s intentions, as the accessible versions would only be distributed to people with disabilities who need accommodations.

Availability for Use of Works for Nonprofit Archival, Preservation, and Educational Purposes. For substantially the same reasons as the first factor, the second factor favors revising the language in the exemption to clarify that EIUs can reuse accessible versions of educational resources for educational purposes.

Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research. The prohibition on the circumvention of technological measures applied to copyrighted works impacts teaching by limiting the tools available for teachers when teaching individuals with disabilities. As a result, students face unnecessary delays and complications while waiting for an accessible version to be created, and EIUs incur the cost of creating subsequent accessible versions of videos that they had already made accessible before.¹¹⁷ The third factor thereby favors revising the exemption to add clarifying language making clear that an EIU can reuse stored accessible versions.

Effect on the Market for or Value of Copyrighted Works. Revising the exemption to clarify the exemption’s ambiguous language would have a negligible effect on the market for and value of motion pictures. People with disabilities are entitled to accessible versions of educational resources as per the ADA, Section 504, and the IDEA.¹¹⁸ As such, providing accessible versions of videos in the educational context to people with disabilities is non-infringing fair use, even if those accessible versions were created in a previous semester. Furthermore, disability service offices will remain bound by the exemption’s reasonable market check requirement to search for accessible versions before circumvention can take place.¹¹⁹ Thus, any accessible versions already in existence will be located during the course of the reasonable market check.

¹¹⁵ 2018 Recommendation at 110.

¹¹⁶ See discussion *infra*, Item F.1 (Statement of Jason Kapcala)

¹¹⁷ See discussion *infra*, Item F.1 (Statement of Jason Kapcala) & Item F.3 (Statement of Gretchen Rumsey-Richardson).

¹¹⁸ See discussion *supra*, Item E.2.

¹¹⁹ See 37 C.F.R. § 201.40(b)(2)(i)(B).

For the foregoing reasons, Section 1201 imposes adverse effects on the ability of disability services professionals to make works accessible to people with disabilities. As such, the Office should recommend, and the Librarian should accept, expanding the language in the current exemption for motion pictures to address the need for remediation for faculty and staff, proactive remediation, “accessible versions” of sufficient quality, qualifying the commercial availability requirement, and reuse of remediated materials.

Item F. Documentary Evidence

1. Statement of Jason Kapcala, Assistant Director of Captioning and Interpreting at West Virginia University

The current exemption to Section 1201 of the DMCA is crucial for providing closed captioning accommodations for students with disabilities. However, much is left to interpretation when it comes to proactively making media accessible for unidentified students with disabilities and other stakeholders. More colleges and universities are adopting ethical principles of Universal Design which make accessibility a standard practice in all classrooms. We know, based on studies conducted by the Office of Communications, that 80% of people who use captioning regularly do not identify as deaf or hard of hearing, while 41% of videos are incomprehensible to them without captioning. We also project that only about 1/3 of students with disabilities on our campus request accommodations. That does not obviate our responsibility to provide equal access for the other 2/3 who choose not to self-identify.

Like many colleges and universities, we require that online courses pass a Quality Matters screening to ensure that content is fully accessible and adherent to the international standard of accessibility, the Web Content Accessibility Guidelines, WCAG 2.1. As a matter of compliance with these standards, videos must have closed captioning, irrespective of whether a formal request has been made by someone with a disability. As the exemption is currently written, it is unclear if a school, wishing to ensure or mandate that *all* video content shown in class be shown with effective captioning, can take proactive steps to create captions.

Additionally, it is unclear if a school, having created closed captions for a class, may securely store that captioned media for reuse in future classes. Most introductory courses use a standard curriculum across all sections. This curriculum is used semester after semester, and the video content infrequently changes. Every semester, we have students enrolled in these courses who are deaf and hard of hearing. The commonsense approach would be to caption these videos once, store the captions, and reuse them, rather than recreating the same captions over and over, which is costly and time-consuming, and which could result in unnecessary delays that expose the University to liability. With an increase in the number of

high-profile Department of Justice Office of Civil Rights complaints being filed over inaccessible media, this is not merely a speculative concern. A more efficient approach would be to ensure that accessible media is shown in every section, every semester, as a standard practice.

Captioning remains a time-consuming process. According to a survey conducted by our office, it takes a trained transcriber approximately seven hours to create a captioned version of a one-hour video. Having media proactively captioned also means that, at the beginning of a semester, when students are changing their schedules, adding and dropping classes before the final deadline, disability service offices would be better equipped to provide accessible media content in a timely manner.

Quality remains another important consideration. We have developed in-house Closed Captioning Quality Guidelines, based on the National Association of the Deaf's Described and Captioned Media Program Captioning Key, to ensure that all captioned media meets a standard necessary for effective accommodation in a higher education classroom. These guidelines cover not only caption accuracy but also matters such as punctuation, speaker identifiers, non-verbals, line breaking, timing, visual contrast, and caption placement/orientation. This is especially important for native sign language users for whom English is a second language. We have yet to encounter a machine-generated or autogenerated caption program that has been able to meet these standards. For example, during recent testing of a new machine-generated captioning product to determine its suitability to the higher-education classroom, we discovered that the product continually took the spoken phrase, "These captions are terrible" and captioned them as "These captions are bearable." Obviously, that changes the entire meaning of the content, and could have severe ramifications for a student in an academic classroom. We encounter similar issues with the auto-captioning provided for the video content available to millions of hearing individuals already on YouTube. Most auto-captions don't even come close to meeting our standards and are largely unusable. As written, the exemption is unclear if a school may establish quality standards and create new captions if/when it finds that existing captions are insufficient.

Finally, just this past semester, we encountered a situation in an advanced Forensics class where an online textbook included video content that was not captioned. We reached out to the publisher, and they were willing to create a captioned version (albeit with some delay, as they did not have any captioning experts on staff). Had this delay persisted, we would have liked the option to caption the media ourselves in order to provide the content to the student in a reasonable time frame. A question has been raised as to whether offices like ours would be willing to pay for a publisher to remediate existing media content to make it accessible at extra cost. This feels like an opportunistic request to profit off the need for accessibility and accommodation. If a student has already purchased the textbook or supplemental material, then there should be no additional charge to make that material accessible.

In closing, it is worth noting that the current COVID-19 pandemic has only intensified captioning needs, with more students requesting accommodation and more classes moving online. At the time of this writing, the demand for media captioning here has gone up 849% compared to pre-pandemic semesters. There is currently a nationwide shortage of speech-to-text service providers, resulting in increased turn-around times for captioning requests and new concerns that caption quality could suffer. The need to meet demand, to respond proactively to the call for accessibility, to create and reuse captions efficiently, to promote timely delivery, and to ensure caption quality and accuracy, is more important now than ever before.

2. Statement of Anonymous Disability Services Professional

I am a disability services professional and I work at a medium sized institution. My job responsibilities include serving a significant number of deaf and hard of hearing students in the student population.

Remediation for Faculty and Staff: We have a lot of deaf and hard of hearing staff at our institution. While another department handles requests for employment-related requests, my department captions and describes videos for faculty intending to use video in class—including in circumstances where the faculty member has a disability. To request captions, the faculty member logs onto our website and checks a box stating the video is for a credit-bearing course and they have to enter in the course number—then we caption it. There has been a significant uptake this year in captioning requests—about four times as much—as a result of the virtual learning requirements of the pandemic.

Proactive Remediation: With the number of deaf or hard of hearing students that attend my school, we must proactively remediate inaccessible video. Generally, the faculty submit a request for any videos they intend to use in their class to be captioned. There is a blanket mandate under our university’s policy that all videos need to be captioned. It would not be possible to caption at the volume that we do if we had to wait for a student accommodation request before remediating classroom materials.

Qualifying the Commercial Availability Requirement: The policies at my school regarding accessibility would prevent the kinds of circumstances where a publisher will only provide an accessible version at extra cost. The faculty know that they can only use audiovisual works that are either already captioned or can be captioned by my office; the Provost sends out a notice to all faculty members that all of their material must be captioned.

Reuse of Remediated Resources: Our library stores the DVDs that have been remediated—we have a separate server that holds that content and it is shared across the faculty. The DVDs themselves are set to be available for a limited time, and they are no longer shared with the faculty member when the faculty member is supposed to be done using them in their class. Instructors request the use of DVD content whenever necessary. We keep captioned videos and reuse them via our library system. Faculty have their own libraries on our server and this is where they store their classroom videos. Faculty members can log into their server, place files, add metadata, and stream. The streams are obfuscated. This is a streaming solution that is integrated so as to limit access. However, many courses use the same content semester after semester, so it would be inefficient to re-remediate every classroom every semester.

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The current exemption was a good first step towards helping students with disabilities have access to necessary resources for their classes. However, three years have shown that the exemption has some flaws that still need to be fixed.

3. Statement of Gretchen Rumsey-Richardson, Deaf and Hard-of-Hearing Services Manager at a Higher Education Institution¹²⁰

I have worked in the field of Deaf and hard-of-hearing equal communication access services for over 15 years and equitable access is extremely important to me. I am continually aware of situations where, despite best efforts on the part of service providers, many D/deaf and hard-of-hearing students *still* do not have equitable access to their education for a variety of reasons. There are institutional barriers to the timely captioning of content already and laws related to captioning present further barriers in making that content accessible. How will our society ever evolve to be more inclusive, accessible, and equitable if there are laws that *prevent* us from making it so?

It is possible for content and the environment to be accessible from the start by following universal design principles. In this way, a student with disabilities does not have to go through extra effort to have access to the material, and they would have access at the same time as their non-disabled peers. This is true equity.

But we do not live in a world that is universally designed, and so students with disabilities at most colleges and universities must go through a litany of steps before they have equitable access: they must see a doctor to get documentation of their disabilities so that they can receive accommodations; they have to meet with the disability service office to explain the barriers they're facing due to their disabilities; they must request the accommodations they want to use in each class they take; they have to check in regularly with their disability services representative and their instructors regarding their accommodations; they have to reach out when a remediated video is not displaying correctly, etc. This is *in addition* to the work all students must do. I think it's possible to live in a world where some, if not all, of these extra steps are reduced or eliminated, and in return, we will have more participation from a diverse population of individuals, which will only benefit academia and society as a whole.

Disability services is inherently very reactive, always scrambling to remediate content so that students have equitable access to the content. The captioning process generally takes at least three times the length of the video, sometimes more depending on the audio quality, accents, terminology, etc. Further, as our university has turned to remote learning due to the COVID-19 pandemic, captioning requests have dramatically increased and most classes have anywhere from 3 to 12 videos *per week*. Being able to proactively caption content would eliminate, or at the very least reduce, the delay the student with disabilities experiences in receiving their accessible content. Whenever possible, students with

¹²⁰ This statement represents Ms. Rumsey-Richardson's personal views and not necessarily those of her employers.

disabilities should have equitable access to the content at the same time as their non-disabled peers, and proactively captioning would help achieve that.

The first step I take when I receive a captioning request is to search for previously captioned versions. However, it is not uncommon for captions to be lacking, inaccurate, or not following captioning standards and best practices. On several occasions I have had to edit closed captions due to inaccuracies and a complete lack of atmospheric. Oftentimes, supposed “closed captions” are actually just subtitles, as they do not include explanations of non-verbal sounds. While I do want to ensure content is compliant, my main concern is that it is *equitable* to the students I was hired to specifically serve. Subtitles are not equitable for students who are D/deaf or hard-of-hearing; they need actual closed captions.¹²¹

A lack of clarity in the law prohibits the storage of captioned content, which generates more work, causes delays in getting the D/deaf or hard-of-hearing student their accessible material, and is yet another structural barrier that impedes equitable access. Instructors tend to reuse content in their courses, especially lower-level general graduation requirement courses. Because of this, service providers often re-caption the same videos quarter after quarter. This wastes time and resources. We are regularly faced with more captioning requests than a small team can coordinate or caption in-house in a work week, and re-captioning videos is inefficient.

People who are D/deaf or hard-of-hearing must constantly transverse an inaccessible world and it is exhausting to have to work so much harder than their peers. While I work tirelessly to address the barriers posed by inaccessible content, it is doubly frustrating that structural barriers ultimately limit genuine efforts towards creating a system of equity. Reforms to Section 1201 would help facilitate progress towards accessibility and equity, which is long overdue.

¹²¹ National Deaf Center, *Why Captions Provide Equal Access*, <https://www.nationaldeafcenter.org/sites/default/files/Why%20Captions%20Provide%20Equal%20Access.pdf> (last visited Dec. 14, 2020).