



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

Item C. Overview

The above-referenced organizations respectfully submit these reply comments in response to comments on the Class 3 proposed modifications to the exemption for disability services professionals to make video programming accessible from the anti-circumvention provisions of Section 1201 of the Digital Millennium Copyright Act (DMCA). Proposed Class 3 would modify the current exemption to allow for:

1. **Remediation for Faculty and Staff.** Expand the language of subsection 201.40(b)(2)(i)(A) of the existing exemption¹ 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)² 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.³
5. **Reuse of Remediated Works.** Clarify that the reuse of previously remediated works is permissible.⁴

The record strongly supports granting the modifications for the disability services exemption. We have met and surpassed our burden of proving that the proposed modifications are not only warranted but necessary. The existing

¹ 37 C.F.R § 201.40(b)(2)(i)(A).

² 37 C.F.R § 201.40(b)(2)(i)(B).

³ *Id.*

⁴ Association of Transcribers and Speech-to-text Providers et al., Class 3 Long Comment at 5 (Dec. 14, 2020) (“Long Comment”), https://www.copyright.gov/1201/2021/comments/Class%2003_InitialComments_Association%20of%20Transcribers%20and%20Speech-to-Text%20Providers,%20Association%20on%20Higher%20Education%20and%20Disability,%20and%20Library%20Copyright%20Alliance.pdf.

exemption was recommended for renewal by the Register in the NPRM.⁵ Additionally, the majority of our proposed expansions to the exemption were either supported by other commenters or faced no direct opposition.

Only two commenters, DVD CCA and AACCS LA and Joint Copyright Holders, submitted comments, and those comments were generally in support of the proposed modifications.⁶ In particular, these comments endorsed the following modifications:

- EIU professionals may remediate works for faculty and staff in addition to students.⁷
- EIU professionals may reuse previously remediated content so long as reasonable efforts are made to prevent further dissemination of the work.⁸

⁵ Notice of Proposed Rulemaking, 85 Fed. Reg. 65,293, 65,298 (Oct. 15, 2020) (“NPRM”), <https://www.govinfo.gov/content/pkg/FR-2020-10-15/pdf/2020-22893.pdf>.

⁶ Comment of DVD CCA and AACCS LA (Feb. 9, 2021) (“DVD CCA and AACCS LA Comment”), https://www.copyright.gov/1201/2021/comments/opposition/Class_3_Opp'n_DV_D%20CCA%20and%20AACCS%20LA.pdf; Comments of MPA, et al. (Feb. 9, 2021) (“Joint Copyright Holders Comment”), https://www.copyright.gov/1201/2021/comments/opposition/Class_3_Opp'n_Join_t%20Creators%20and%20Copyright%20Owners.pdf.

⁷ See DVD CCA and AACCS LA Comment at 3; Joint Copyright Holders Comment at 3.

⁸ See DVD CCA and AACCS LA Comment at 3. Joint Copyright Holders explicitly support the “reuse” modification. See Joint Copyright Holders Comment at 3. Joint Copyright Holders condition their support on the guarantee that “institutions comply with the existing requirement to store copies in a manner intended to reasonably prevent unauthorized further dissemination of a work (which should include encryption/password protection/copy controls where possible).” See *id.* Our formulation of the proposed modification explicitly retains the limitation in the existing exemption that accessible versions must be stored “in a manner intended to reasonably prevent unauthorized further dissemination of a work,” 37 C.F.R. § 201.40(b)(2)(i)(C) and states that accessible versions must be stored **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).” Long Comment at 6 (emphasis added). We note, however, that the existing limitation does not and should not be modified to include the phrase “which should include encryption/password protection/copy controls where possible” or otherwise

- EIU professionals may remediate when accessible versions are not included with the original purchased product at a fair market price.⁹

Generally, commenters also expressed their commitment to removing accessibility barriers for people with disabilities. DVD CCA and AACCS LA stated that “[they] historically have not objected to the creation of reasonable exemptions intended to make copies of motion pictures more accessible to people with disabilities.”¹⁰ Likewise, Joint Copyright Holders noted that “[they] embrace[d] and support[ed] efforts to expand accessibility.”¹¹ Joint Copyright Holders state that “[c]opyright owners and their technology partners will keep working to increase the availability of accessible titles and services,” and “acknowledge[d] that work remain[ed] for the long-term objective of making motion pictures universally accessible to be achieved.”¹²

Commenters only raised narrow concerns about the other proposed modifications regarding the proactive remediation of inaccessible works and about remediating works that do not have captions/audio descriptions of sufficient quality. First, commenters point to increased numbers of captioned and audio-described works to suggest that market availability of accessible works has greatly increased.¹³ Second, commenters hypothesized that the proposed proactive remediation and sufficient quality modifications could create “large databases of ‘in the clear’ motion pictures [that] would pose a disproportionate risk of harm, even if unintentional.”¹⁴ Accordingly, commenters requested:

suggest regulation of the specific means by which an EIU must store remediated video beyond the reasonable prevention requirement.

⁹ See DVD CCA and AACCS LA Comment at 3. Joint Copyright Holders support this modification “under th[e] specific facts” stated in the proposal, and so long as the proposed language does not change in a manner that would address a different factual scenario. Joint Copyright Holders Comment at 4. Indeed, the proposed language merely clarifies that the reasonable market search required under 37 C.F.R. § 201.40(b)(2)(i)(B) is satisfied “where a copyright holder has not included an accessible version of a motion picture included with a digital textbook.” Long Comment at 5-6. We agree that the scenario Joint Copyright Holders raise—where “an institution has an old disc that did not contain audio description, but a disc or transmission with audio description [of sufficient quality] is currently available in the marketplace,” Joint Copyright Holders at 4, is not encompassed by the proposed modification.

¹⁰ DVD CCA and AACCS LA Comment at 3.

¹¹ Joint Copyright Holders Comment at 5.

¹² *Id.* at 3.

¹³ See *id.* at 2-3.

¹⁴ *Id.* at 5.

1. That the Office incorporate some limiting standard, such as “if proactive remediation is intended to relieve students with disabilities from the burden of requesting an accommodation and avoiding the lag time between the accommodation request and delivery of the remediated copy, then . . . remediation should be allowed.”¹⁵
2. The Office include an “objective standard” to measure “not of sufficient quality,” such as “a standard based on actual FCC regulations.”¹⁶

The proactive remediation and “objective standard” modifications will not have the dramatic effects that commenters speculate. These two modest modifications are necessary because of continuing market shortcomings, the related ever-increasing workload of disability services professionals, and to ensure people with disabilities have equitable and equal access to motion pictures. Accordingly, these modifications are formulated to enable disability service professionals to sufficiently remediate materials that they believe, in good faith, will serve people with disabilities’ educational needs.

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

The account of the TPMs and methods of circumvention at issue in our long comment remains largely uncontested.¹⁷ However, DVD CCA and AACS LA argue that video content that is encrypted by AACS2 should be considered beyond the scope of the modified exemption.¹⁸

The existing exemption, which the Office has already indicated it will recommend renewing,¹⁹ is intended to allow for EIUs to flexibly provide access to video, regardless of the format.²⁰ The exemption is intended to permit circumvention of any TPM preventing meaningful access to video content for the purpose of ensuring that people with disabilities can access video on equal terms in educational contexts.²¹ Although the Office rejected expansion of DVD- and Blu-ray focused exemptions to cover AACS2 and Ultra HD during the last triennial review,²² the Office should alter its approach and interpret the scope of the existing

¹⁵ DVD CCA and AACS LA Comment at 4.

¹⁶ Joint Copyright Holders Comment at 4.

¹⁷ *See generally* DVD CCA and AACS LA Comment; Joint Copyright Holders Comment.

¹⁸ *See* DVD CCA and AACS LA Comment at 1-2.

¹⁹ *See* NPRM, 85 Fed. Reg. at 65,298.

²⁰ *See* 37 C.F.R § 201.40(b)(2)(i).

²¹ *Id.*

²² *See* Recommendation of the Acting Register of Copyrights at 40-41 (Oct. 2018) (2018 Recommendation),

exemption's coverage of AACS broadly to cover AACS2 in favor of ensuring that people with disabilities can receive full access to educational video programming over the forthcoming three-year period.

Item E. Asserted Adverse Effects on Noninfringing Uses

1. The market availability of accessible materials remains a concern and would be best remedied by widely adopted universal design principles.

We appreciate commenters' concern for ensuring accessibility for people with disabilities and acknowledge their concerns about the status of marketplace availability of accessible audiovisual works. In an ideal world, people with disabilities would not have to rely on accommodation requests to create accessible versions of audiovisual works in EIUs. Accessible versions should already exist, and when people encounter additional barriers to access, accommodation requests must be met to provide "adaptations that can't be anticipated or standardized."²³

However, people with disabilities still regularly encounter barriers to accessing educational materials, and the proposed modifications to the exemption are necessary. As Joint Copyright Holders note, "work remains for the long-term objective of making motion pictures universally accessible to be achieved."²⁴ Additionally, as the Register noted in the NPRM in recommending to renew the existing exemption, "the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period."²⁵ Accordingly, EIUs must be able to proactively remediate materials when they have a good faith belief that the resources are educational materials to provide access in accordance with governing laws. EIUs must also be able to subjectively determine whether the available remediated work has captions of sufficient quality.

2. The Office should allow proactive remediation when the remediator has a good faith belief that remediation is necessary for a legitimate educational purpose.

Because of the time-sensitive nature of disability accommodation requests that disability services offices receive, the Office should allow proactive remediation. DVD CCA and AACS LA acknowledge that proactive remediation is both appropriate and, in their words, should "of course" be allowed, given that the

https://cdn.loc.gov/copyright/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf.

²³ Martin LaGrow, *From Accommodation to Accessibility: Creating a Culture of Inclusivity*, EDUCAUSE (Mar. 13, 2017), <https://er.educause.edu/articles/2017/3/from-accommodation-to-accessibility-creating-a-culture-of-inclusivity>.

²⁴ Joint Copyright Holders Comment at 3.

²⁵ NPRM, 85 Fed. Reg. at 65,298.

remediation is “intended to relieve students with disabilities from the burden of requesting an accommodation and avoiding the lag time between the accommodation request and delivery of the remediated copy.”²⁶ Similarly, Joint Copyright Holders “embrace and support efforts to expand accessibility” and stress the importance of “ensur[ing] that individuals of all backgrounds are able to enjoy and to learn from copyrighted works.”²⁷ Joint Copyright Holders also “acknowledge that work remains for the long-term objective of making motion pictures universally accessible to be achieved.”²⁸

However, commenters oppose the Office clarifying the exemption to allow disability service professionals to proactively remediate unless there is also an explicit good faith limitation.²⁹ Joint Copyright Holders hypothesize that without such a limitation, disability services professionals would decrypt “copies of thousands of motion pictures lawfully acquired or received by transmissions,” without identifying any legitimate need to do so.³⁰

This bare speculation, accompanied by no supporting evidence, ignores the enormous and time-sensitive responsibilities that disability services professionals are tasked with. As we explained in our long-form comment, captioning and describing videos that were not already made accessible by copyright holders on the front-end “remains a time-consuming process.”³¹ Even for seasoned disability services professionals, it can take several hours to create a high-quality, fully accessible, captioned version of a one-hour video for use in an educational context.³²

Moreover, demand for accessible versions of content in the wake of the COVID-19 pandemic has increased by 849% compared to pre-pandemic semesters.³³ This booming demand has occurred at a time in which there is a nationwide shortage of speech-to-text service providers, which has resulted in further increased turn-around times.³⁴

As one disability services professional notes, “[i]t would not be possible to caption at the volume that we do if we had to wait for a student accommodation

²⁶ DVD CCA and AACCS LA Comment at 4.

²⁷ Joint Copyright Holders Comment at 5.

²⁸ *Id* at 3.

²⁹ *See* DVD CCA and AACCS LA Comment at 4; Joint Copyright Owners at 4.

³⁰ Joint Copyright Owners at 4

³¹ Long Comment at 29.

³² *See id.*

³³ *See id* at 30.

³⁴ *See id.*

request before remediating classroom materials.”³⁵ Proactive remediation is necessary in order to reduce—or ideally, eliminate—the delay that students, faculty, and staff with disabilities experience in obtaining meaningful access to their lawfully acquired content.³⁶

Simply put, disability services offices do not have any spare time or any incentive to create their own accessible versions of videos when there is no legitimate need to do so. They are already extraordinarily busy, working tirelessly to ensure that students, faculty, and staff with disabilities are able to access the content that they need in order to properly participate in their educational and professional responsibilities.

As such, proactive remediation should be allowed when the remediator has a good faith belief that remediation is necessary for a legitimate educational purpose. Possible examples of situations wherein EIUs would have this good faith belief include—but are not limited to—compliance with university captioning policies that require proactive remediation, where an instructor represents that a video will be used in a classroom setting, or where the EIU professional otherwise has good reason to believe that the video will be used for a noninfringing, educational purpose.

The Office should also consider that proactive remediation would remain limited by the contours of the current exception, and could only take place once the disability services office has completed a reasonable market check and determined that an accessible version does not already exist.³⁷ This requirement eliminates the perceived risk that other commenters outline.³⁸ Accordingly, the Office should defer to the good-faith judgment of disability services professionals and decline the invitation to micromanage their practices.

3. Determining whether captions are of a sufficient quality is a subjective determination that cannot be reduced to compliance with a specific law.

While commenters support our goal in ensuring that captions and description are of sufficient quality, they fear the subjectivity inherent in determining sufficiency could lead to unnecessary remediation.³⁹ Joint Creators ask that we include an “objective standard” to measure “not of sufficient quality,” such as “a

³⁵ *Id* at 31.

³⁶ *See* Long Comment at 32.

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

³⁸ *See* Joint Copyright Holders Comment at 4-5.

³⁹ *See* DVD CCA and AACCS LA Comment at 4; Joint Copyright Holders Comment at 3-4.

standard based on actual FCC regulations.”⁴⁰ DVD CCA and AACS likewise request a “meaningful objective criteria” to limit the scope of this provision.⁴¹

The Office should grant the modification as proposed and allow remediation upon a good-faith judgment by an EIU professional that an existing video lacks sufficient quality for the intended educational purpose. An objective measurement for a “sufficient quality” standard is untenable for two reasons. First, determining whether captions are of sufficient quality for a particular educational purpose is subjective. Second, there are no universally applicable standards that govern the specific quality of captions or descriptions in every educational context.

Concluding captions or descriptions are of a sufficient quality is inherently subjective because this determination is based on a variety of factors: a requesting student’s needs, an instructor’s goals, and the circumstances in which a video is being used. EIU professionals make a careful judgment based off these factors about whether an existing version of such a work is captioned or described with sufficient quality.

Moreover, there is no universally applicable federal law or regulation governing the specific quality of a university’s provision of captions or audio description in every circumstance. In our long comment, we referenced the FCC’s television captioning guidelines⁴² and its FCC Disability Advisory Committee’s (DAC) audio description recommendations⁴³ as examples of “quality standards for captions and descriptions” that some EIUs consider as part of internal or university-wide guidelines.⁴⁴

However, the FCC’s captioning guidelines are not fully instructive for the provision of captions in an educational context because they are specifically designed for enforcement in the context of television programming. For example, Rule 79.1(j)(3) allows for “de minimis” captioning errors that are based on determinations about a television programmer’s regular practices.⁴⁵ These factor-

⁴⁰ Joint Copyright Holders Comment at 4.

⁴¹ DVD CCA and AACS LA Comment at 4.

⁴² 47 C.F.R. § 79.1(j)(2).

⁴³ Recommendation of the Federal Communications Commission Disability Advisory Committee (Oct. 14, 2020) (“FCC DAC Rec.”), <https://www.fcc.gov/file/19830/download>.

⁴⁴ See Long Comment at 12-13.

⁴⁵ 47 C.F.R. § 79.1(j)(3).

based errors may not be acceptable for some educational contexts where absolute precision is required for captions of a particular video.⁴⁶

Moreover, the FCC DAC's preliminary recommendations about audio description are not even binding legal requirements. As the recommendations make clear, the FCC has not adopted audio description rules and the recommendations simply describe "best practices" for how to create descriptions.⁴⁷ They do not provide a rubric against which descriptions for a particular program can be evaluated for compliance.⁴⁸

Furthermore, while Section 504, the ADA, and the IDEA together and separately mandate EIUs provide captions of sufficient quality, none provide specific criteria for evaluating whether captions or descriptions are sufficient. This means that it is critical for EIU professionals to retain the ability to make professional judgments about compliance with these laws. For example, Section 504 prohibits public places such as universities from discriminating against people with disabilities by failing to provide them with necessary accommodations.⁴⁹ The ADA specifies that necessary accommodations include the provision of auxiliary aids, such as captioning and audio descriptions.⁵⁰ The IDEA further mandates that

⁴⁶ Another example of a set of non-binding guidelines that some EIUs refer to is the Described and Captioned Media Program (DMCP) Captioning Key. DCMP Captioning Key, <https://dcmp.org/learn/captioningkey> (last visited Mar. 8, 2021).

⁴⁷ FCC DAC Rec. at 3 ("This document is intended to serve as a resource and provide an understanding of the decisions and strategies that are commonly employed in audio description to convey access to visual information. This document is not intended by the DAC to serve as the basis for any rules, directives or requirements on industry for the composition of audio description.").

⁴⁸ *See id.*

⁴⁹ 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..."); 29 U.S.C. § 794(b)(2)(a) ("For the purposes of this section, the term "program or activity" means all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education.").

⁵⁰ 42 U.S.C. § 12181(7)(J) ("The following private entities are considered public accommodations for purposes of this subchapter . . . a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education."); 42 U.S.C. § 12182(b)(2)(A)(iii) (prohibited discrimination includes "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently

K-12 schools provide students with an Individualized Education Plan (IEP), and any necessary accommodation(s) the IEP requires.⁵¹ Accordingly, while these laws do not specifically define “sufficient quality” captions or descriptions, a remediated work with insufficient quality captions or descriptions would undoubtedly violate any of these laws.

Finally, commenters seem to contend that crafting the exemption to allow EIU professionals to make good faith professional judgment will somehow lead them to remediate material even when material with accessibility features of sufficient quality exist on the market.⁵² Similar to commenters’ concerns over proactive remediation, this speculative argument overlooks the reality in which EIU professionals operate.⁵³

An EIU professional remediates material to provide access and limit discrimination against people with disabilities; they do not remediate for the sake of remediating. EIU professionals have neither the desire nor time to caption materials or provide audio descriptions themselves. Thus, if and when an EIU professional is able to efficiently identify a remediated work of sufficient quality, the EIU will choose that work every time over remediating themselves.

Accordingly, the Office should ensure that the exemption allows EIUs to improve the quality of captions when they have a reasonable belief that doing so is necessary to ensure that the work at issue is accessible. EIU professionals’ reasonable beliefs are based on the unique circumstances of a remediation—an inherently subjective measurement—and no governing law provides a specific set of objective criteria against which judgments can be repeatably made. The Office should grant the modification as proposed.

* * *

The proposed modifications are necessary to ensure educational instructions enable access for all and EIUs are able to efficiently provide people with disabilities with sufficient remediated materials. Accordingly, the Register should recommend the adoption of proposed Class 3.

than other individuals because of the absence of auxiliary aids and services.”); 28 C.F.R. § 36.303 (defines “auxiliary aids and services).

⁵¹ See 20 U.S.C. § 1401(9), (14) & (26) (for definitions “Free and Appropriate Public Education,” “Individualized Education Plan,” and “Related Services.”).

⁵² See DVD CCA and AACCS LA Comment at 3-4; Joint Copyright Holders Comment at 4.

⁵³ See discussion *supra*, Part A.2.