

May 14, 2021

via e-mail to regans@copyright.gov and achau@copyright.gov.

Regan A. Smith, General Counsel and Associate Register of Copyrights
Anna Chauvet, Associate General Counsel
U.S. Copyright Office

**Re: Docket No. 2020-11
Exemptions to Prohibition Against Circumvention of Technological
Measures Protecting Copyrighted Works
Class 3 Post-Hearing Question Response**

Dear Ms. Smith and Ms. Chauvet,

On behalf of the below-signed proponents of the pending Class 3 exemption in the above-referenced proceeding, we respectfully respond to your April 16, 2021, post-hearing letter.¹ As you requested, counsel to the Association of Transcribers and Speech-to-Text Professionals and the Library Copyright Alliance discussed with counsel to AACCS LA, DVD CCA, and Joint Creators and Copyright Owners possible consensus and regulatory language on the outstanding issues in the pending exemption of “(1) when proactive remediation may be reasonable and (2) when ostensibly accessible works are not of ‘sufficient quality.’”²

While the discussions were productive, we were not able to reach agreement with our counterparts on specific regulatory language. Nevertheless, we believe there is substantial alignment on several aspects of these outstanding issues and will update the Office on further consensus during the ex parte cycle. We respond separately here with regulatory language that we believe reflects the needs of disability services professionals while substantially acknowledging and reflecting the specific concerns of our counterparts, with notes inline:

- (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:

¹ Letter from Regan A. Smith to Jonathan Band, et al., <https://www.copyright.gov/1201/2021/post-hearing/letters/Class-3-Post-Hearing-Letter-04.16.2021.pdf>.

² See *id.* at 1.

(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 subparagraph (i)(A) 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 included an accessible version of a motion picture included with a textbook; and

(C) The accessible versions are provided and stored by the educational institution unit in subparagraph (i)(A), including storage that allows for future reuse of the accessible versions consistent with the purpose specified in subparagraph (i)(A), in a manner intended to reasonably prevent unauthorized further dissemination of a work.

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

Subparagraphs (i) and (ii) are largely similar to those proposed and explained in our long-form comment,³ except that:

- The term “digital” is removed from the phrase “motion picture included in with a digital textbook” in subparagraph (i)(B) to reflect that motion pictures included with print textbooks should also be included;

³ See Long Comment of Association of Transcribers and Speech-to-Text Providers (ATSP), et al. at 5-6 (Dec. 14, 2020), [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](https://www.copyright.gov/1201/2021/comments/Class%2003%20InitialComments%20of%20Transcribers%20and%20Speech-to-Text%20Providers,%20Association%20on%20Higher%20Education%20and%20Disability,%20and%20Library%20Copyright%20Alliance.pdf).

- Subparagraph (i)(C) is streamlined to clarify that reuse of already-remediated works is permitted consistent with the accessibility purpose required by subparagraph (i)(A).

We additionally propose subparagraph (iii), which is intended to make clear that educational instruction units (EIUs) can proactively remediate content:

(iii) For purposes of this paragraph (b)(2), “creat[ing] accessible versions for students, faculty, or staff with disabilities” includes adding captions and/or description to a motion picture when the educational institution unit in subparagraph (i)(A) has a reasonable belief that the motion picture will be used for a specific future activity of the institution and the addition of captions and/or description occurs promptly after circumvention.

Finally, we propose subparagraph (iv), which is intended to clarify the circumstances under which EIUs can re-caption or re-describe a video because of problems with the quality of included captions or descriptions:

(iv) For purposes of this paragraph (b)(2), “accessible version of sufficient quality” means a version that in the reasonable judgment of the educational institution unit in subparagraph (i)(A) has captions and/or description that are sufficient to meet the access needs of the relevant student[s], faculty, and/or staff member[s] with disabilities and are substantially free of errors that would materially interfere with those needs.

Subparagraph (iv) is intended to leave to the professional judgment of EIUs the determination of whether any errors are material to the needs of the student, faculty member, or staff member to access the video and require correction. Subparagraph (iv)’s articulation of caption quality is specific to the remediative context of this exemption and should not be read to opine on the appropriate contours of caption or description quality requirements under disability or telecommunications laws or associated regulatory proceedings.

Consistent with our long comment, we again urge the Office to consider formulating the exemption in a simpler format like that suggested by the NTIA.⁴ The below language adjusts our initial proposal consistent with the changes above:

⁴ *Id.* at 6-7.

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.

User: 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.

Limitations and Clarifications:

- An eligible 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 textbook.
- An “accessible version of sufficient quality” means a version that in the reasonable judgment of the eligible user has captions and/or description that are sufficient to meet the access needs of the relevant student[s], faculty, and/or staff member[s] with disabilities and are substantially free of errors that would materially interfere with those needs.
- An accessible version must be provided and stored by the eligible user, including storage that allows for future reuse of the accessible version consistent with the purpose of an eligible use, in a manner intended to reasonably prevent unauthorized further dissemination of the work,
- An eligible user must have a reasonable belief that the motion picture will be used for a specific future activity of the institution.
- The addition of captions and/or description must occur promptly after circumvention.

* * *

While we will defer detailed discussion on points of disagreement to the ex parte cycle after we have had the opportunity to review our counterparts' final response to the Office's letter, we were unable to reach consensus on several modifications proposed by our counterparts because:

- Some, in our view, contained unnecessary surplusage and raised the risk of interpretive complexity and difficulties that could require further revisitation of these issues during a future triennial review.
- Some, in our view, addressed issues that are beyond the scope of the Office's post-hearing letter; and
- Some, in our view, would alter aspects of the existing exemption that are not at issue in our proposed modifications and that the Office has already indicated its intent to renew,⁵ which would be procedurally improper at this phase of the rulemaking.

Nevertheless, we have taken seriously the comments and concerns of our counterparts in our proposed regulatory language. We believe that the regulatory language provided in this letter both reflects the needs of disability services professionals while acknowledging the concerns of our counterparts. We respectfully urge the Office to adopt the proposed modifications to the exemption to ensure that EIUs can continue to ensure the accessibility of videos. Please don't hesitate to contact us if you have any questions.

Respectfully submitted,

/s/

Blake E. Reid, Director

Dakotah L. Hamilton, Student Attorney

Samuelson-Glushko Technology Law &
Policy Clinic

*Counsel to the Association of Transcribers
and Speech-to-Text Providers*

blake.reid@colorado.edu

⁵ See *Exemption To Permit Circumvention of Access Controls on Copyrighted Works*, Notice of Proposed Rulemaking, 85 Fed. Reg. 65,293, 65,298 (Oct. 15, 2020).

Association of Transcribers and Speech-to-Text Providers

Alison Nelson Chabot, President

info@atspnetwork.org

Association on Higher Education and Disability

Stephan Smith, Executive Director

stephan@ahead.org

Library Copyright Alliance

Represented by:

Jonathan Band, policybandwidth

jband@policybandwidth.com