

National Association of the Deaf Memo

Re: Action item #6 regarding copyrights and licensing agreements that may be at issue in the process of captioning video programming

First, the Commission's [1997 order](#) addresses arguments about copyrights and rejects such arguments in paras. 25-30 and 181 (enclosed below in Appendix A). In subsequent orders, the Commission has rejected similar arguments (*See, e.g.,* the Commission's [IP Captioning Order](#) at para. 39, enclosed below in Appendix B).

Second, please see the enclosed White Paper in Appendix C (authored by Blake Reid, Assistant Clinical Professor, Colorado Law, and Director, Samuelson-Glushko Technology Law and Policy Clinic) regarding captioning and copyrights. The document has extensive cites and discussion on this issue.

A common thread in the following documentation is that any tension between captioning and copyright can be addressed through an explicit licensing arrangement (see pages 15-16 for examples).

APPENDIX A:

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
Closed Captioning and Video Description
of Video Programming
MM Docket No. 95-176
Implementation of Section 305 of the
Telecommunications Act of 1996

Video Programming Accessibility

REPORT AND ORDER

Adopted: August 7, 1997 Released: August 22, 1997

By the Commission: Chairman Hundt and Commissioner Chong issuing separate statements.

Paragraphs 25-30 below:

25. In addition, several distributors argue that copyright law may prevent them from closed captioning the programming they distribute. United Video maintains that Section 119(a)(4) of the Copyright Act of 1976 "forbids any willful alteration of the content of any satellite broadcast signal secondarily transmitted by a satellite carrier," and argues that any material related to a particular program which a satellite carrier might insert into line 21 would constitute an alteration of the broadcast signal and thus copyright infringement. USSB is concerned that it might violate intellectual property rights if it captions someone else's work. AlphaStar and Bell Atlantic claim that permission from the original author to publish the dialogue of a video program may be needed to avoid copyright infringement issues.

26. Finally, a number of commenters express concern that program owners or producers might not offer captioned programming to all distributors, forcing smaller distributors with less bargaining power to caption programming that is offered to other distributors already captioned. Several commenters urge us to prohibit discrimination against any distributors by requiring program owners and producers or syndicators to offer captioned programming equally to all distributors.

27. Both Section 713 and the legislative history indicate that Congress intended to give us sufficient jurisdiction to ensure the accessibility of video programming. Section 713 refers to the closed captioning of programming by providers and owners of video programming. The legislative history defines the term "providers" to include the specific television station, cable operator, cable network or other service that provides programming to the public. We believe that we should craft our captioning rules in a manner that will increase the availability of video programming with closed captions most expeditiously as well as focus compliance responsibility. In order to accomplish these goals, we believe it desirable to hold video programming distributors, defined as all entities who provide video programming directly to a customer's home, regardless of the distribution technologies employed by such entities, responsible for compliance with our closed captioning rules. Accordingly, broadcasters, cable operators, wireless cable operators, ITFS or LMDS, SMATV operators, DBS providers, DTH providers, HSD providers and OVS operators will be responsible for compliance with our rules. We believe that placing compliance obligations on distributors will allow us to monitor and enforce these rules more efficiently. By holding distributors responsible for captioning, there typically will be a single entity to which complaints must be addressed, and there will be no need for tracking the entities responsible for producing programs alleged to violate the rules. However, as described below, we will measure compliance with our closed captioning on the basis of each channel of video programming provided to consumers.

(Note from NAD: Since then, compliance responsibility has been updated to include programming owners as well – see forthcoming documents from the FCC to the DOT).

28. Although we are placing the ultimate responsibility on program distributors, we expect that distributors will incorporate closed captioning requirements into their contracts with producers and owners, and that parties will negotiate for an efficient allocation of captioning responsibilities. The references to program "owners" in Section 713 reflect Congress' recognition that it is most efficient to caption programming at the production stage, and the assumption that owners and producers will be involved in the captioning process. We therefore

expect that program owners and producers will cooperate with distributors to ensure that nonexempt programming is closed captioned in accordance with our rules. We will allow distributors to demonstrate compliance with these rules by relying on certifications from program sources, such as producers, networks or syndicators, that expressly state that the programming is either captioned or exempt from our closed captioning rules, similar to the rules concerning commercial limits imposed by the Children's Television Act of 1990. Distributors will not be held responsible for situations where a program source falsely certifies that programming delivered to the distributor meets our captioning requirements if the distributor is unaware that the certification is false. We anticipate that it would be reasonable for video programming providers to rely on the accuracy of certifications, and we would take appropriate action if there were deliberate falsifications.

29. In some instances, a program distributor is prohibited by law from exercising editorial control over certain types of programming it offers, such as public, educational and governmental ("PEG") or leased access. In these situations, the distributor shall be exempt from captioning such programming. Thus, for example, a satellite provider that secondarily transmits broadcast signals pursuant to the compulsory copyright licensing provisions of Section 111 and 119 of the Copyright Act will not be required to caption those signals, nor will a distributor be required to caption PEG, leased access or must-carry programming that is delivered to the provider uncaptioned. Distributors will not be penalized for transmitting such programming without captions, and need not refuse to carry such programming due to lack of captions where an addition of captions or refusal to carry could violate the Communications Act or their franchise or retransmission consent agreements. Instead, video program producers and owners will be responsible for captioning in situations where the program distributors may not refuse to carry the programming pursuant to Federal law, to the extent the programming is not otherwise exempt under the rules we adopt in this Report and Order.

30. We believe that commenters' concerns that producers will refuse to caption programming before delivery to the distributor are overstated. The video programming industry, providers and producers alike, must adapt to the changes mandated by Section 713. Cooperation between video programming distributors and producers is necessary if video programming is to be captioned as required by Section 713. Video programming providers may no longer view closed captioning as an option in the production process, but as a requirement, the cost of which must be factored in with the costs and budgets for video programming generally. Our captioning rules will be applied to all distributors, which will prevent producers and program suppliers from "shopping around" for distributors who have no closed captioning obligations. There will be few, if any, outlets for programming that are not captioned as the transition period progresses. The inherent need to increase viewership will create an incentive for many program owners and producers to provide captioning to gain carriage on other systems. Thus, we believe the realities of the marketplace will result in shared responsibility for the closed captioning of video programming, although ultimate responsibility for compliance will generally be on the video programming distributor who distributes the programming to viewers.

181. Finally, we reject the argument raised by some commenters that a broader interpretation is needed to avoid copyright conflicts. Because these requirements are broadly applicable, we believe that the copyright owners will have significant incentives to ensure that their

programming is closed captioned regardless of whether a particular contract calls for the programming to be closed captioned. Thus, if the copyright owner wishes the programming to retain any significant value, the programming will necessarily be captioned.

APPENDIX B:

Before the

**Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
) MB Docket No. 11-154
Closed Captioning of Internet Protocol-)
Delivered Video Programming:)
Implementation of the Twenty-First Century)
Communications and Video Accessibility Act)
of 2010)

REPORT AND ORDER

Adopted: January 12, 2012

Released: January 13, 2012

By the Commission: Commissioner McDowell concurring and issuing a statement;

Commissioner Clyburn issuing a statement.

1. We encourage VPDs to improve caption quality to enhance accessibility, if doing so is not constrained or prohibited by copyright law or private agreement.¹ AT&T expresses concern that “[e]ncouraging VPPs/VPDs to edit captions could create inconsistencies in the quality of programming from one medium to another,” which is not an issue when the VPO handles edits for all media simultaneously.² In the *NPRM*, the Commission explained that it did not intend to *require* VPDs to improve caption quality, but rather, to allow them to do so if they

¹ See Consumer Groups Comments at 11-12; see also NAB Comments at 17.

² See AT&T Comments at 9.

had any necessary permission.³ Some commenters express the view that copyright concerns should not prevent a VPD from improving caption quality.⁴ Some commenters argue that improving caption quality for an IP-delivered video program would be a non-infringing fair use of the video under copyright law.⁵ In contrast, other commenters assert that copyright law generally would prevent a VPD from improving caption quality.⁶ We see no need to determine in this proceeding whether a VPD may, consistent with copyright law, improve caption quality without the consent of a VPO. We expect that VPOs and VPDs will typically agree through their contractual negotiations about the appropriate extent, if any, of VPD improvement to a VPO's caption file.⁷

APPENDIX C:

Third Party Captioning and Copyright

By Blake E. Reid A G3ict Policy White Paper

March 2014

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³ See *NPRM*, 26 FCC Rcd at 13745, ¶ 19.

⁴ See, e.g., Consumer Groups Comments at 12-16; NCRA Comments at 2-3; Reply Comments of Public Knowledge at 1-10 (“PK Reply”); Letter from Andrew S. Phillips, Policy Attorney, National Association of the Deaf, to Marlene H. Dortch, Secretary, FCC, at 1-2 (Sept. 26, 2011) (“Consumer Groups Sept. 26 *Ex Parte* Letter”); Consumer Groups Nov. 10 *Ex Parte* Letter at 2.

⁵ See, e.g., Consumer Groups Comments at 12-15; PK Reply at 2-9; see also 17 U.S.C. § 107.

⁶ See, e.g., AT&T Comments at 8-9; Microsoft Comments at 5 n. 8 (“The Copyright Act grants broad, exclusive rights to owners of copyrights in audiovisual works. A VPP likely would be found to infringe upon many of those exclusive rights, including infringement of reproduction rights, adaptation rights, distribution rights, and public performance rights, if it acted without permission to insert closed captioning for a copyrighted video programming . . . The addition of captioning also is likely to require the VPP to decrypt the digital rights management protections that accompany many video files, leading to a separate violation of the Digital Millennium Copyright Act.”); NAB Comments at 17; Starz Comments at 3-4; AT&T Reply at 5; NAB Reply at 19; TWC Reply at 13.

⁷ In the *NPRM*, the Commission contemplated that a requirement for captions of IP-delivered video programming to be of at least the same quality as captions of television programming would require IP-delivered captions to include the same user tools, such as the ability to change caption font and size. See *NPRM*, 26 FCC Rcd at 13744, ¶ 18. We believe that the issue of user tools is better suited to our discussion of requirements for devices subject to Section 203 of the CVAA than the present discussion of requirements for VPOs and VPDs pursuant to Section 202(b) of the CVAA. See also AT&T Comments at 10 (“[M]any of the quality considerations raised by the Commission, such as the placement, color, opacity, size, and font of captions, are properly considered aspects of the Internet-connected playback apparatus and outside the scope of the requirement for VPPs/VPDs to pass through or render closed captions.”). Accordingly, user tool requirements are discussed in Section IV.C, below.

About the Author

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About G3ict

G3ict – the Global Initiative for Inclusive Information and Communication Technologies – is an advocacy initiative launched in December 2006 in cooperation with the Secretariat for the Convention on the Rights of Persons with Disabilities at UNDESA. Its mission is to facilitate and support the implementation of the dispositions of the Convention on the Rights of Persons with Disabilities promoting digital accessibility and Assistive Technologies. Participating organizations include industry, academia, the public sector and organizations representing persons with disabilities. G3ict relies on an international network of ICT accessibility experts to develop policy papers, practical tools, evaluation methods and benchmarks for States Parties, Disabled Persons Organizations (DPOs) and corporations. G3ict organizes or contributes to awareness-raising and capacity building programs around the world in cooperation with international organizations.

G3ict produces jointly with ITU the *e-Accessibility Policy Toolkit for Persons with Disabilities* - www.e-accessibilitytoolkit.org - as well as specialized reports and model policies with ITU and UNESCO which are widely used around the world by policy makers involved in the implementation of the CRPD. For additional information on G3ict, visit www.g3ict.org.

1. Introduction

In the early 1900s, Americans who were deaf or hard of hearing began enjoying the magic of visual programming when silent movies hit the big screen and television began to take off.⁸ But in the late 1920s, movies and television transitioned to “talkies” with audible dialogue, and the American deaf and hard of hearing community suddenly found itself without full access to programming.⁹

In the late 1940s, Emerson Romero, the deaf cousin of Hollywood actor Cesar Romero began splicing captions—textual transcripts of spoken dialogue—between the frames of movies in an effort to fully experience the movies' soundtrack along with his hearing peers.¹⁰ He created

⁸ Karen Peltz Strauss, *A New Civil Right: Telecommunications for Deaf and Hard of Hearing Americans* at 205; Harry G. Lang & Bonnie Meath-Lang, *Deaf Persons in the Arts and Sciences: A Biographical Dictionary* 302-303 (1995).

⁹ *Id.*; see also NY Times, *Radio Talkies Put On Program Basis*, 26 (April 27, 1931) (“‘Radio talkies’ were officially inaugurated last night in New York by the union of the microphone of WGBS and the television ‘eye’ of W2XCR, an image transmitter at 655 Fifth Avenue, and glimpses of a host of Broadway stars were sent dancing through space in synchronism with the sound of their voices.”).

¹⁰ Strauss at 205; Lang & Meath-Lang at 302-303.

and added these captions himself, without the help of the movies' copyright holders—thus serving as perhaps the first third-party captioner, and foreshadowing the modern captioning movement.¹¹

The past 70 years have brought a renaissance in the delivery of video programming. In addition to movie theaters and broadcast television, Americans now enjoy programming delivered by cable and satellite networks, via optical media formats like DVD and Blu-ray, and increasingly over the Internet. Popular video programming website YouTube, for example, ingests more than 100 hours of video *every minute*.¹²

Captioning, too, has evolved over the past century. Some copyright owners, particularly broadcast, cable, and satellite programmers, now take responsibility for captioning their own programming, in part due to expansive requirements under telecommunications and accessibility laws, enforced by the Federal Communications Commission and the U.S. Department of Justice and through private lawsuits.¹³ However, first-party captioning remains far from ubiquitous online, particularly in light of the increasing amount of video programming uploaded by consumers without access to or knowledge of captioning tools.

Accordingly, the need for third-party captioners in the mold of Emerson Romero is ever growing. From schools and libraries to families and friends of people who are deaf and hard of hearing to Internet video distributors, third parties are increasingly interested in adding captions to video programming to which they don't hold the copyright.

At the same time, advanced technologies promise to fill the demand for accessibility where first-party captioning falls short. For example, the non-profit Amara project enlists volunteers from all over the world to create captions and subtitles for Internet videos—a “crowdsourcing” approach to captioning.¹⁴ In another example, Google has added and refined the ability to automatically generate captions for YouTube videos using text-to-speech technology.¹⁵ New technologies also promise to alter the underlying economics of captioning by

¹¹ The terminology surrounding captioning can be confusing and vary from country to country. In the U.S., captions are delivered in both “closed” and “open” formats. *Closed* captions are delivered with video in a hidden encoded form and can be decoded and displayed, or “opened,” at the viewer’s option. *Open* captions, on the other hand, are displayed for all viewers and may even be painted, or “rasterized,” onto the images of a video. Captions are generally used to display textual transcripts in the same language of the spoken dialogue, while subtitles generally contain translations of the dialogue to a foreign language. *See generally* WGBH, *Captioning FAQ*, <http://main.wgbh.org/wgbh/>

¹² YouTube, *Statistics: Viewership*, <http://www.youtube.com/yt/press/statistics.html> (last visited Mar. 9, 2014); *see also* Vimeo Staff Blog, *Official Year-end Self-Appraisal and Profound Introspection: 2012* (Dec. 20, 2012), <http://vimeo.com/blog/post:542> (noting that over 50 million videos comprising more than 3.2 petabytes of data have been uploaded to the Vimeo video delivery service).

¹³ *See discussion infra*, Part 2.

¹⁴ Amara, *About Amara*, <http://amara.org/en/about> (last visited Mar. 9, 2014).

¹⁵ Google, *Automatic captions*, <https://support.google.com/youtube/answer/3038280?hl=en> (last visited Mar. 9, 2014); *see also* NPR: All Tech Considered, Laura Sydell, *YouTube Launches Auto-Caption: A Boon for Deaf And Hearing-Impaired* (Mar. 4, 2010), http://www.npr.org/blogs/alltechconsidered/2010/03/youtube_launches_autocaption_f.html. Concerns over the quality of the automatic captions abound, however. *E.g.*, Media Access Australia, Michael Lockrey, *Opinion: The Scourge of YouTube's Auto-Captions* (Apr. 10, 2013).

lowering costs and affording potential revenue streams for video by leveraging captions to perform advanced data mining, advertising, and search engine optimization.¹⁶

Over the intersection of these trends in video programming and captioning technology looms the specter of copyright law. Well-meaning third-party captioners striving to improve video accessibility face potential liability for infringing the copyright of video creators.¹⁷

This paper aims to take stock of this critical moment for captioning. It begins with an overview of closed captioning laws and regulations. It then turns to the potential legal conflicts between captioning and copyright law. It considers potential drivers behind the conflict, closing with an analysis of potential solutions including contracts, fair use, and legislation.

2. Captioning Laws and Regulations

Historically, video programmers have often been so reluctant to voluntarily provide closed captions—primarily due to the cost—that Congress has repeatedly stepped in to require the provision of captions through legislation and regulation. As a senior FCC official recently testified before Congress, this phenomenon is just one example of a historical pattern of market failure in the provision of accessible goods and services:

Although the number of people with disabilities in the United States is said to hover around 50 million, each individual disability group—*i.e.*, individuals who are deaf, blind, mobility disabled, etc.—typically has not been large or strong enough to exert the market pressures needed to incentivize industry to include accessibility features in their products and services. . . . Often, when market forces have failed in the past, the government has stepped in with regulatory measures to ensure that people with disabilities have the access that they need.¹⁸

To address the lack of accessibility of video programming, Congress has enacted laws in two primary contexts: telecommunications laws enforced by the Federal Communications Commission (FCC) and general accessibility laws enforced by private lawsuits and the U.S. Department of Justice (DOJ). The telecommunications laws primarily apply to video programming delivered via broadcast, cable, satellite, and the Internet and equipment and software used to view that programming, while the general accessibility laws primarily apply to video provided by places of public accommodation, government entities, and other entities receiving federal funding, notably including schools and libraries.

2.1. Telecommunications Laws and Regulations

In 1990, Congress enacted the first in a series of captioning-specific legislation to be implemented by the FCC, the Television Decoder Circuitry Act (“TDCA”), which required television manufacturers to include built-in decoder circuitry to display closed captions distributed with television programming.¹⁹ Following the TDCA, Congress required television

¹⁶ *E.g.*, SmartInsights, Neil Davidson, *How to use closed captioning for improved video SEO* (June 12, 2012), <http://www.smartinsights.com/digital-marketing-platforms/video-marketing/how-to-use-closed-captioning-for-improved-video-seo/>.

¹⁷ See discussion *infra*, Part 3.

¹⁸ *The ADA and Entertainment Technologies: Hearing Before the Committee on Health, Education, Labor, and Pensions*, 113th Cong. (2013) (statement of Karen Peltz Strauss), available at <http://www.help.senate.gov/imo/media/doc/Strauss.pdf> (last visited Mar. 9, 2014).

¹⁹ Pub. L. No. 101-431, 104 Stat. 960 (codified as amended at scattered sections of the Communications Act of 1934, 47 U.S.C.) (“TDCA”).

programming to actually be closed captioned in the Telecommunications Act of 1996 (“1996 Act”).²⁰ Most recently, Congress enacted the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”), which expanded the 1996 Act’s closed captioning coverage to some Internet-delivered programming.²¹

The FCC’s television captioning regulations, which implement the 1996 Act, are relatively comprehensive, requiring television video programming distributors, including broadcasters and “multichannel video programming distributors,” or “MVPDs”—such as cable and satellite companies—to provide captions for the linear and on-demand programming they deliver, subject to limited exceptions, and at a given level of quality.²² The FCC’s Internet captioning regulations are more limited, covering only programming that has been shown on television with captions, and currently exclude online-exclusive and user-generated content as well as video clips excerpted from full-length programming.²³ The FCC’s regulations also do not cover optical media, such as DVD and Blu-ray discs, although they currently require DVD and Blu-ray players to include closed captioning capability.²⁴

2.1. Accessibility Laws and Regulations

The extent to which general accessibility laws might fill gaps in the coverage of the FCC’s regulations, particularly on the Internet, is somewhat unclear and continually evolving. In 1990, Congress enacted the landmark Americans with Disabilities Act (“ADA”), broadly prohibiting discrimination against people with disabilities including by mandating access to a wide variety of materials and services distributed by governmental and private entities.²⁵ DOJ’s implementing regulations contemplate that certain entities qualifying as “public accommodations” will make their services accessible through “auxiliary aids and services,” which includes captions and captioning equipment.²⁶

The ADA may require more comprehensive captioning of Internet-delivered programming, including user-generated and other programming that has never been shown on

²⁰ Pub. L. No. 104-104 § 305, 110 Stat. 56 (codified as amended at Section 713 of the Communications Act of 1934, 47 U.S.C. § 613).

²¹ Pub. L. No. 111-260 § 202(a)-(b), 124 Stat. 2751 (codified at Section 713 of the Communications Act of 1934, 47 U.S.C. § 613) (“CVAA”).

²² See 47 C.F.R. § 79.1. The FCC recently adopted quality standards for television captions. See generally *Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, CG Docket No. 05-231, PRM-11-CG (Feb. 24, 2014), available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0224/FCC-14-12A1.pdf.

²³ See 47 C.F.R. § 79.4. Deaf and hard of hearing consumer groups petitioned the FCC for reconsideration of its decision not to cover video clips, a petition that remains pending. *Closed Captioning of Internet Protocol-Delivered Video Programming*, Order on Reconsideration and Further Notice of Proposed Rulemaking, MB Docket No. 11-154, 28 FCC Rcd. 8785, 8803-04, ¶ 30 (June 14, 2013) (“*IP Captioning Recon Order*”); *Media Bureau Seeks Comment on Application of the IP Captioning Rules to Video Clips*, Public Notice, MB Docket No. 11-154, 28 FCC Rcd. 16,699 (Dec. 13, 2014).

²⁴ See 47 C.F.R. § 79.103. The rules covering DVD and Blu-ray players are currently in flux. See generally *IP Captioning Recon Order*, 28 FCC Rcd. at 8806-08, ¶¶ 35-37.

²⁵ Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101 et seq. and scattered sections of the Communications Act of 1934, 47 U.S.C.) (“ADA”).

²⁶ 28 C.F.R. §§ 35.104(1)-(2), 36.303(a)-(b).

television, than the FCC's rules.²⁷ The DOJ has generally taken the position that the ADA covers Internet websites.²⁸ Courts, however, are split on the matter. In the specific context of captioning, Internet video delivery service Netflix settled an ADA lawsuit brought by the National Association of the Deaf (NAD) in Massachusetts after the trial court found that the ADA applied to Netflix under First Circuit precedent.²⁹ Netflix defeated a similar lawsuit in California after the trial court held that the ADA did not apply to Netflix under Ninth Circuit precedent.³⁰

The ADA also applies to captioning in other contexts wholly outside the FCC's jurisdiction. While the ADA does not require brick-and-mortar businesses such as video stores to stock captioned videos, courts have held that the ADA requires movie theater owners to enable the display of captions provided by the movies' copyright holders—a requirement bolstered by several out-of-court settlements.³¹

U.S. law additionally requires all governmental entities, educational institutions, and private organizations receiving federal funding to make their programs and activities—including video programming—accessible to people with disabilities under Section 504 of the Rehabilitation Act of 1973.³² Various implementing regulations contemplate that entities receiving federal funding will make video programming accessible—presumably through the provision of captions.³³ For example, the Department of Health and Human Services (“HHS”),

²⁷ See generally Courtney L. Burks, *Improving Access to Commercial Websites Under the Americans with Disabilities Act and the Twenty-First Century Communications and Video Accessibility Act*, 99 Iowa L. Rev. 363 (2013) (note).

²⁸ See generally Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460 (July 26, 2010).

²⁹ *NAD v. Netflix*, 869 F. Supp. 2d 196, 200-202 (D. Mass. 2012) (citing *Carparts Distrib. Ctr. v. Auto. Wholesaler's Assoc.*, 37 F.3d 12, 19 (1st Cir. 1994)); NAD, *Netflix and the National Association of the Deaf Reach Historic Agreement to Provide 100% Closed Captions in On-Demand Streaming Content Within Two Years* (Oct. 9, 2012), <http://www.nad.org/news/2012/10/netflix-and-national-association-deaf-reach-historic-agreement-provide-100-closed-capti>.

³⁰ See *Cullen v. Netflix*, 880 F. Supp. 2d 1017, 1023-24 (N.D. Cal. 2012) (rejecting liability for Netflix under state accessibility statutes premised on ADA liability) (citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000)).

³¹ E.g., *Arizona ex rel. Goddard v. Harkins Amusement Enters.*, 603 F.3d 666 (9th Cir. 2010). In 2010, DOJ proposed ADA regulations that would require captions for copyrighted motion pictures shown in movie theaters. *Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description*, 75 Fed. Reg. 43,467 (July 26, 2010). In 2013, Senator Tom Harkin followed suit by introducing complementary bills that would require captions for video programs shown in theaters and on airplanes. *Captioning and Image Narration to Enhance Movie Accessibility Act (“CINEMA Act”)*, S. 555, 113th Cong. (2013); *Air Carrier Access Amendments Act*, S. 556, 113th Cong. (2013).

³² Pub. L. No. 93-112 § 504, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794). Section 504 was amended in 1978 to require executive agencies to make their own programs and activities accessible. *Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978*, Pub. L. No. 95-602 § 119, 92 Stat. 2955.

³³ HEW promulgated the first Section 504 regulations. See *Implementation of Section 504*, 42 Fed. Reg. 22,676 (May 4, 1977). Oversight responsibility now rests with the Department of Justice (“DOJ”). See Exec. Order No. 12,250, 45 Fed. Reg. 72,995, at 1-201(c) (Nov. 2, 1980). All executive agencies must promulgate Section 504 regulations for their own grantees (“federally assisted” regulations) and their own operations (“federally conducted” regulations), which must be consistent with DOJ's coordinating regulations—28 C.F.R. pt. 41 and 28 C.F.R. pt. 39, respectively.

the Department of Labor (“DOL”), the Department of State (“DOS”), the Department of Justice (“DOJ”), the Department of Education (“DOE”), and other agencies require entities receiving federal funding, as well as the agencies’ own programs and services, to make audiovisual material accessible for people who are deaf or hard of hearing.³⁴

In Section 508 of the Rehabilitation Act, Congress also required that all federally procured, maintained, or used electronic and information technology be accessible.³⁵ The United States Access Board’s regulations under Section 508 now require the federal government to ensure that the audiovisual material it acquires to be accessible through the provision of captions and similar accessibility features.³⁶

In 1975, Congress passed requirements for access to educational video programming and other materials in what later became known as the Individuals with Disabilities Education Act (“IDEA”), enacted to ensure that children with disabilities are afforded a free and appropriate public education.³⁷ IDEA requires the Secretary of Education to support the provision and distribution of captions and audio description of television programs, videos, and “other materials, including programs and materials associated with new and emerging technologies, such as CDs, DVDs, video streaming, and other forms of multimedia” where the producers and distributors of the materials do not already provide captions or description.³⁸

3. The Potential Conflict Between Captioning and Copyright Law

At the same time as Congress has required accessibility through captioning in a variety of contexts, it has vested creators of video programming with substantial rights and protections against copying—protections that may encompass the creation, modification, synchronization, and delivery of captions. Generally speaking, copyright law vests property-like protection in most video programming—in copyright parlance, “motion pictures and other audiovisual works”—designed to incentivize the creation of video programming in exchange for a limited-term monopoly over the exploitation of the programming.³⁹

Determining whether a particular video program is protected under copyright and if so, for how long it is protected and who owns the copyright, involves navigating a complex set of technical and legal considerations.⁴⁰ However, third-party captioners can safely assume as a

³⁴ See, e.g., 45 C.F.R. §§ 84.52(d), 85.3, 85.51(a)(1)(HHS); 29 C.F.R. §§ 32.4(b)(7)(i)-(ii), 33.3, 33.11(a)(1)(DOL); 22 C.F.R. §§ 142.4(e), 144.103, 144.160(a)(1)(DOS); 28 C.F.R. §§ 39.103, 39.160(a)(1), 42.503(f)(DOJ); 34 C.F.R. § 104.44(d)(1)-(2) (DOE).

³⁵ Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506 § 603(a), 100 Stat. 1807 (codified as amended at Section 508 of the Rehabilitation Act of 1973, 29 U.S.C. § 794d).

³⁶ See generally 29 U.S.C. § 794d(a)(2); 36 C.F.R. §§ 1194.21-1194.26. For example, the regulations require the provision of text equivalents for non-text elements of applications, 36 C.F.R. § 1194.21(d), the creation of synchronized alternatives to multimedia presentations, 36 C.F.R. § 1194.22(b), and captioning and audio description for training and informational videos, 36 C.F.R. § 1194.24(c).

³⁷ See generally Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400 et seq.)

³⁸ 20 U.S.C. § 1474(c).

³⁹ See 17 U.S.C. § 102(a)(6). A video need not have an audio component to qualify as a “motion picture” or “audiovisual work.” See *Leadsinger v. BMG Music Publ’g*, 512 F.3d 522, 528 (9th Cir. 2007). However, the scope of the terms expressly includes “accompanying” sounds. 17 U.S.C. § 101.

⁴⁰ For example, motion pictures and audiovisual works must be “fixed in a tangible medium of expression” to be eligible for copyright protection. See 17 U.S.C. § 102(a). While most video programming is “fixed” by recording it

general rule that a significant proportion of the video programming they handle is subject to active copyright protection. How, then, might the creation of captions by a third-party violate the copyright protection in the underlying video program?⁴¹

3.1. Copyright Infringement

The basic argument is that creating captions effectively “copies” the protected dialogue and soundtrack in a video program by transcribing them in a nearly verbatim fashion.⁴² How precisely this maps onto U.S. copyright law is somewhat less clear. Copyright law does not prohibit “copying” in every conceivable sense, but rather vests a copyright holder with several specific exclusive rights “to do and to authorize” certain means of “copying” a copyright work, including:

- The right to reproduce the work (the “reproduction” right);⁴³
- To prepare “derivative works” based on the work (the “adaptation” right);⁴⁴
- To distribute copies of the work (the “distribution” right);⁴⁵ and
- To perform the work publicly (the “public performance” right).⁴⁶

It is possible that the creation of captions constitutes the preparation of a derivative work. A derivative work is any work based on a pre-existing work—such as a video program—including “translations” of the work or “any other form in which a work may be recast, transformed, or adapted.”⁴⁷ While one court has noted that “[a] translation, by definition, uses different language

to film, videotape, digital storage, or some other “medium,” live television broadcasts may potentially remain unfixed and thus ineligible for copyright protection. However, a broadcaster can likely “fix” a broadcast simply by recording it simultaneously with its transmission. *See* 17 U.S.C. § 101 (“A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”); *see also* Nimmer on Copyright § 1.08[C][2]. Motion pictures and audiovisual works must also be sufficiently “original” to be eligible for copyright protection. *See* 17 U.S.C. § 102(a)(6). “Originality,” however, merely requires that a work be independently created—i.e., not copied from elsewhere—and contain a “modicum of creativity.” *See Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

Determining the term of copyright of a copyrighted work involves a particularly complex series of determinations. *See Copyright Term and the Public Domain in the United States*, <http://copyright.cornell.edu/resources/publicdomain.cfm> (last visited Dec. 18, 2013).

⁴¹ The creation of captions by the copyright owner would fall within the scope of the owner’s exclusive rights. It is not clear that captions are sufficiently original to qualify for separate copyright protection on their own, an issue complicated by the unclear relationship between reproductions and adaptations discussed *infra* in Part 3.1.

⁴² *See, e.g., Netflix Motion for Judgment on the Pleadings in NAD v. Netflix*, 2012 WL 1578335, at 8 (D. Mass.) (“*Netflix Motion*”) (arguing that “programming distributors like Netflix lack the legal right to engage in captioning. That ownership and control belongs to the programming owners, who alone hold the exclusive rights necessary to caption content, including reproduction rights, adaptation rights, distribution rights, and public performance rights to copy and modify audiovisual works. To caption video programming . . . is “infringing” if done without the underlying copyright owner’s permission.”) (citations omitted).

⁴³ 17 U.S.C. § 106(1).

⁴⁴ 17 U.S.C. § 106(2).

⁴⁵ 17 U.S.C. § 106(3).

⁴⁶ 17 U.S.C. § 106(4).

⁴⁷ 17 U.S.C. § 101.

than in the original,” courts may nevertheless conclude that captions are so inextricably tied to the source material of the underlying video program that they effectively “recast,” “transform,” or “adapt” it, and that creating them thus infringes the adaptation right.⁴⁸

On the other hand, it is possible that the verbatim transcription involved in the creation of captions instead implicates the reproduction right. Evidence for this possibility is found in the Chafee Amendment to the Copyright Act, which refers to the transformation of printed books into Braille, large-print, or other formats designed to facilitate access for people who are blind or visually impaired as “reproduction . . . in specialized formats.”⁴⁹

The translation of printed text to Braille—a series of raised dimples designed to facilitate reading by touch—does not involve a precise “reproduction” in the colloquial sense of the term, but implicates the reproduction right for the purpose of copyright law. Under this line of reasoning, a court might well determine that captions are a *reproduction* of the audible components of the underlying video rather than an *adaptation* of the video as a whole.

Regardless of whether captions are a reproduction or an adaptation of the underlying video’s soundtrack, their creation isn’t the end of the story. A third-party captioner (or perhaps another third party, such as a video distributor) might take steps to correct errors in existing captions, synchronize captions with the underlying video program, and distribute captions for viewing, each of which could raise additional infringement concerns. The mechanics of the process might vary widely; for example:

- A third-party website might overlay captions on top of a program streaming in a frame from another website;
- A video programming distributor might integrate the captions for synchronization with a program delivered via a proprietary video player; or
- An individual captioner might upload a video to a third-party video delivery service for the purpose of using the service’s captioning functionality.

Each of these acts might constitute a separate or additional infringement of the reproduction, distribution, or performance rights in the video program. Moreover, a separate copyright might subsist in the captions themselves, raising additional potential infringements.

3.2. The DMCA

Additionally, the steps necessary to synchronize and deliver captions could run afoul of the anti-circumvention provisions of the Digital Millennium Copyright Act (“DMCA”). The DMCA bars the circumvention of technological protection measures designed to control access to copyrighted works and the trafficking of tools designed to circumvent these measures.⁵⁰ Much video programming, with the notable exception of broadcast television, is distributed via cable, satellite, Internet, or optical media with some form of encryption or digital rights management

⁴⁸ *Radji v. Khakbaz*, 607 F. Supp. 1296 (D.D.C. 1985) Courts might also be sympathetic to the argument that applying the adaptation right to captions prevents third parties from creating poor-quality captions. However, there would arguably be little impetus to do so for a video for which the owner had already created high-quality captions, which would alter the fair use calculus. See discussion *infra*, Parts 4, 5.3.

⁴⁹ 17 U.S.C. § 121.

⁵⁰ 17 U.S.C. § 1201(a)(1)(A), (a)(2)(A).

(“DRM”).⁵¹ The process of synchronizing and delivering captions with a video program may require circumventing DRM applied to the program through the use of specialized, potentially illegal tools—raising the prospect of additional liability under the DMCA.⁵²

In sum, the process of captioning a video weaves a complex web of potential copyright problems. Untangling the particular strands is complicated by the varying technical nature of different captioning arrangements as well as the substantial overlap between the various rights afforded copyright holders. Nevertheless, it is reasonable for a captioner to worry that the creation, synchronization, and delivery of captions might implicate the exclusive rights of a video’s copyright holder or violate the anti-circumvention measures of the DMCA.

4. Conflict Drivers

Despite the conceptual legal tension between third-party captioning and copyright law, the economic underpinnings of captioning and the video programming industry call into question how the tension might manifest in the real world. U.S. copyright law is intended to serve as an incentive for video programmers and other authors to create new works by protecting their ability to economically exploit the works after the fact. Video programming rightsholders, on the other hand, have historically been resistant to calls from the deaf and hard of hearing community to provide captions on the grounds that doing so is too expensive and uneconomical. This dynamic is likely to continue as the circle of rightsholders expands beyond mainstream video producers to include individuals and small business with *fewer* resources leveraging the Internet to distribute video—individuals and businesses with potentially limited legal captioning requirements.⁵³ Given, then, that copyright effectively protects a market for captions that rightsholders have historically been disinclined to serve, *why* does the tension between captioning and copyright arise, notwithstanding the possibility that it *could*?

First, copyright concerns over captioning have often been invoked not by video programming rightsholders seeking to enjoin captioning by others, but by targets of accessibility laws and regulations that would require them to caption their programming. When laws and regulations target third parties, the third parties often argue that they cannot do so because captioning programs in which they don’t hold a copyright would force them to violate copyright law.⁵⁴

⁵¹ See, e.g., *Comments of Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), et al.*, U.S. Copyright Office Docket No. RM 2011-7, 11-16 (Dec. 1, 2011) (“TDI Comments”) (outlining several basic forms of video DRM), available at http://www.copyright.gov/1201/2011/initial/IPR_TDI_gallaudetU.pdf. But see *American Library Ass’n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (overturning the FCC’s mandate of “broadcast flag” DRM for broadcast television).

⁵² See, e.g., *TDI Comments* (outlining the potential burden of the anti-circumvention measures on several captioning activities); *Netflix Motion*, 2012 WL 1578335 at 9 (arguing that “captioning may also require [video distributors] to decrypt digital rights management protections that accompany video files, a separate violation of the Digital Millennium Copyright Act . . .”).

⁵³ For example, the CVAA excludes “consumer-generated” media from the scope of video programming that must be captioned when delivered via Internet Protocol. See 47 U.S.C. § 613(h)(2).

⁵⁴ See, e.g., *IP Captioning Order*, 27 FCC Rcd. at 800, ¶ 19 (“Commenters argue that . . . ‘the copyright holders [of videos] . . . typically possess the necessary legal rights to modify the content and insert closed captions.’”), 814, ¶ 39 (“[C]ommenters assert that copyright law generally would prevent a VPD from improving caption quality.”) (citations omitted); *Closed Captioning and Video Description and Video Description of Video Programming*, Report and Order, MM Docket No. 95-176, 13 FCC Rcd. 3272, 3285-86, ¶ 25 (1997) (“1997 Captioning Order”)

Second, entities such as schools and libraries whose activities are subject to potential public scrutiny may have a low tolerance for the potential legal risk involved in captioning copyrighted videos, particularly in light of high-profile copyright battles over the creation of alternative formats of other types of copyrighted works like books.⁵⁵ Moreover, even schools and libraries with a higher risk tolerance may have trouble contracting services from outside captioners, who generally have significant business relationships with video rightsholders and may be disinclined to caption programs without rightsholders' permission.

Third, copyright holders may conflate the accessibility goals of captions with the translation to multiple languages afforded by subtitles.⁵⁶ Many copyright holders delay the release of a video in foreign countries to maximize profits in a process known as "release windowing."⁵⁷ Copyright holders' exclusive right to make translations is critical to the success of windowing, and copyright holders may see fan-driven efforts to distribute foreign language subtitles to make movies available in other countries—a phenomenon known as "fansubbing"—as disruptive to their international efforts.⁵⁸

Finally, technological developments are poised not only to lower the cost of captions, but also to allow the extraction of revenue from captions for non-accessibility purposes.⁵⁹ Captions can provide highly detailed, searchable metadata about videos, facilitating search-engine optimizations that funnel more viewers to a video and the inclusion of more accurate—and more profitable—targeted advertising alongside videos. Captions can also be used to facilitate the searching and provision of television news archives for use by journalists, researchers, librarians, students, and others.⁶⁰

This dynamic is poised to add fuel to the fire in long-standing battles over the appropriate allocation of revenues between Internet video distributors and copyright holders—battles that have featured accusations of copyright infringement.⁶¹ Ironically, copyright holders themselves

("[S]everal [video] distributors argue that copyright law may prevent them from closed captioning the programming they distribute.").

⁵⁵ See, e.g., Rochester Institute of Technology, *Guidelines for Captioning Audio-Visual Media*, at 2, 3 https://www.rit.edu/~w-drupal/sites/rit.edu.provost/files/rit_guidelines_for_captioning_audio-visual_media_january_2012_final.pdf (noting the need for faculty members to secure permission from copyright holders to caption certain video materials for classroom use) (last visited Mar. 9, 2014).

⁵⁶ E.g., *Comments of the Motion Picture Association of America (MPAA), et al.*, U.S. Copyright Office Docket No. RM 2011-7, at 46 (Feb. 12, 2012) (expressing concern that a proposal to exempt captioning and video description activities from the anti-circumvention measures of the Digital Millennium Copyright Act was drafted to encompass foreign-language translations), http://www.copyright.gov/1201/2012/comments/Steven_J._Metalitz.pdf.

⁵⁷ See generally Reo Song & Venkatesh Shankar, *International Launch Window and Performance: Analysis of Movies* (Oct. 2012), available at <http://cba.k-state.edu/faculty-and-staff/faculty-documents/Song%20Shankar%20201210%20Movie%20Window.pdf>.

⁵⁸ See generally Sean Leonard, *Progress Against the Law: Fan Distribution, Copyright, and the Explosive Growth of Japanese Animation* (Sep. 12, 2004), available at <http://web.mit.edu/seantek/www/papers/progress-columns.pdf>.

⁵⁹ To whom this revenue might accrue—whether the distributor, the copyright owner, and/or the captioner—is not clear.

⁶⁰ TV News, Internet Archive, <https://archive.org/details/tv> (permitting users to search closed captions to access an archive of recorded broadcasts) (last visited Mar. 9, 2014).

⁶¹ See, e.g., Electronic Frontier Foundation, *Viacom v. YouTube* (outlining the long-running litigation between Viacom and YouTube over the appearance of copyrighted videos on YouTube), available at <https://www.eff.org/cases/viacom-v-youtube> (last visited Mar. 9, 2014).

may utilize captions created for videos of other copyright holders in order to help facilitate parodic and other uses of those videos. For example, popular comedy shows like *The Daily Show* and the *Colbert Report* use industrial-grade digital video recorders (“DVRs”) that record thirty or more broadcast and cable channels at a time, indexing the closed captions to permit writers to search for particular keywords and cue up videos to the proper spot using the timing data included with captions.⁶²

5. Potential Workarounds

Notwithstanding the potential for basic copyright infringement, third-party captioning of videos is not an intractable proposition. Contract law may allow copyright holders and third-party captioners to address any uncertainty through negotiation, and copyright itself has a number of built-in limitations and defenses, including the fair use doctrine, that may take captioning out of the realm of infringement.

5.1. Contract

First, a would-be third-party captioner with a direct contractual relationship with a video program’s copyright holder(s) is well positioned to address any tension between captioning and copyright through an explicit licensing arrangement. These relationships are likely to arise where the captioner is a video distributor (or a captioning agency contracted by the distributor) that must contract with video copyright holders to license the delivery of programs to viewers.⁶³

Many Internet video providers who provide captioning services contractually address captioning in their terms of service by requiring individual video uploaders using the service to license the reproduction, distribution, adaptation, and performance of video programs through clauses that are at least conceivably broad enough to cover the creation, synchronization, and delivery of captions.⁶⁴ Many individualized licensing agreements between more distributors and more sophisticated institutional copyright holders address captioning issues specifically, at least in part because doing so is required under the FCC’s regulations.⁶⁵

⁶² Lee Hutchinson, *Ars Technica*, *With 30 tuners and 30 TB of storage, SnapStream makes TiVos look like toys* (Sept. 14, 2013), <http://arstechnica.com/gadgets/2013/09/with-30-tuners-and-30-tb-of-storage-snapstream-make-tivos-look-like-toys/> (“To provide a quick demonstration, the SnapStream guys logged into one of their lab DVR clusters via its Web interface, then performed a search for ‘Obama.’ The search interface and results are formatted similarly to Google search results, with a quick textual blurb and a link. . . . Clicking on any of the links took us directly to the TV program that contained the term, with the playhead ready to go right at the point in the program where the word was mentioned. The closed captions themselves were displayed to the right of the video.”).

⁶³ Video programmers might also explicitly provide for the downstream provision of captions by unknown third parties through the use of a Creative Commons license. *See* discussion *infra*, Part 5.1.

⁶⁴ For example, YouTube’s Terms of Service require video uploaders to “grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform” uploaded videos—a license arguably broad enough to encompass captioning the videos. *See* YouTube, *Terms of Service*, <http://www.youtube.com/static?template=terms> (last visited Mar. 9, 2014). A similar licensing clause in Vimeo’s Terms of Service is restricted to copying necessary for more limited purposes, including “view[ing] [a] video,” which may be less likely to cover the creation of captions. *See* Vimeo, *Terms of Service*, pt. 9.1, <http://vimeo.com/terms> (last visited Mar. 9, 2014).

⁶⁵ *See, e.g.*, 47 C.F.R. § 79.4(c)(1)(ii), (2)(ii) (requiring video programming distributors and copyright holders to agree upon and implement a “mechanism” to identify video programming that must be captioned pursuant to the FCC’s rules).

It is difficult to articulate a generalized approach to such contracts because the impact of captioning on different entities in the video programming ecosystem can range from a significant cost to a substantial revenue source. For example, providing captioning might be expensive for individual users uploading personal videos directly to the Internet from a dedicated smartphone application without built-in captioning tools. At the same time, the cost of providing captions for Internet video distributors might be offset or exceeded by the revenue from caption-enabled data mining, search, and advertising functions. Efficiently and fairly allocating these costs and revenues is a highly individualized, fact-specific inquiry that depends on the relationships between the parties, their relative technical and economic statures, and relevant regulatory requirements.

At a bare minimum, however, agreements between copyright holders and video distributors should ensure that one of the parties will retain responsibility for creating, synchronizing, and delivering captions for the video that is subject to the agreement—or that members of the public can step in and do so after the fact if neither a video’s copyright holder or its distributor implements captions. One conservative practice might be a system of cascading rights of refusal for captions—that is, permitting a video’s distributor to add captions or improve the quality of existing captions only where the video’s copyright holder declines to do so, and permitting members of the public to add captions or improve quality only where the distributor and the copyright holder decline to do so. A more permissive approach might see the copyright holder make a video available with a permissive license, such as a Creative Commons Attribution license, that freely permits that creation, synchronization, and delivery of captions for accessibility and other purposes.⁶⁶

5.2. Statutory Exemptions

The possibility of resolving the tension between captioning and copyright through contract has led many policymakers, such as the FCC, to avoid definitively addressing the relationship between captioning and copyright.⁶⁷ But as appealing as this workaround may be for situations where copyright holders and video distributors are already in contractual relationships, situations are increasingly likely to arise where contracting between captioners and copyright holders is inefficient or impossible.

For example, schools and libraries often utilize copyrighted materials without a contractual relationship with the copyright owner, and in such volume that even locating the relevant copyright owners, much less negotiating contracts with each of them, may be so logistically impracticable that librarians and teachers either decline to use videos altogether or proceed to do so without permission. Friends and family members of people who are deaf or

⁶⁶ Creative Commons, *Attribution 4.0 International (CC BY 4.0)*, see: <http://creativecommons.org/licenses/by/4.0/> (last visited Mar. 9, 2014).

⁶⁷ *E.g.*, *IP Captioning Order*, 27 FCC Rcd. at 814, ¶ 39 (“We see no need to determine in this proceeding whether a VPD [“video programming distributor”] may, consistent with copyright law, improve caption quality without the consent of a VPO [“video programming owner”]. We expect that VPOs and VPDs will typically agree through their contractual negotiations about the appropriate extent, if any, of VPD improvement to a VPO’s caption file.”); *1997 Captioning Order*, 13 FCC Rcd. at 3357, ¶ 181 (noting, in rejecting distributors’ concerns that requiring them to caption the programming they distribute would be in tension with copyright, that “[t]he inherent need to increase viewership will create an incentive for many program owners and producers to provide captioning to gain carriage on other systems” and that “the realities of the marketplace will result in shared responsibility for the closed captioning of video programming”).

hard of hearing, as well as members of the public, may want to caption videos on an ad hoc—or perhaps systemic—basis, despite having no relationship with any copyright owners. For some so-called “orphan” videos, locating the copyright holder(s) may be impossible. And there may be situations where copyright holders simply refuse to license the creation, synchronization, delivery, and/or improvement of captions, even though the copyright holders do not undertake those activities themselves.

Even where contracts prove impossible, the existence of third-party captioning requirements under accessibility laws such as the 1996 Act, CVAA, ADA, Rehabilitation Act, and IDEA suggests that copyright should not serve as an absolute bar to third-party captioning. If that were the case, many would-be third-party captioners would be faced with the choice of violating either copyright law or accessibility law, placing the two laws in direct conflict. While resolving such a conflict would certainly be possible, the Supreme Court has urged that statutes be harmonized.⁶⁸

Thus, peacefully resolving the tension between captioning and copyright law may be necessary where a third-party captioner is subject to captioning mandates under an accessibility law. Ideally, a harmonization principle might also address situations where captioning is undertaken voluntarily.⁶⁹

While Congress has never explicitly dealt with the potential conflict between captioning mandates and copyright law, copyright law includes a variety of limitations and exceptions that may apply to captioning. These limitations, generally speaking, treat as non-infringing activities that might otherwise infringe a copyright holder’s reproduction, distribution, adaptation, or performance rights.

At the outset, U.S. law has no generally applicable statutory copyright limitation or exception for activities undertaken for accessibility purposes. The Chafee Amendment to the Copyright Act permits certain authorized entities to reproduce and distribute certain copyrighted literary works—i.e., books—in specialized formats, such as Braille, for use by people who are blind or visually impaired.⁷⁰ However, the Chafee Amendment does not extend to video programming or closed captions, and its coverage is restricted to specifically defined “authorized entities.”

There are several more general statutory limitations and exceptions in U.S. copyright law that might exempt captioning activities under specific circumstances. For example:

Section 108 of the Copyright Act exempts certain reproductions and distributions of copyrighted works made by libraries and archives;⁷¹

Sections 110 and 112 exempt certain performances and displays of copyrighted works;⁷² and

⁶⁸ *E.g.*, *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981) (“[W]e decline to read . . . statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress.”). *See generally* 2B Sutherland Statutory Construction § 51:2 (7th ed.).

⁶⁹ *See, e.g.*, *IP Captioning Order*, 27 FCC Rcd. at 814, ¶ 39 (encouraging distributors to voluntarily “improve caption quality to enhance accessibility, if doing so is not constrained or prohibited by copyright law”).

⁷⁰ 17 U.S.C. § 121.

⁷¹ 17 U.S.C. § 108.

⁷² 17 U.S.C. §§ 110, 112.

□ Sections 111, 119, and 122 exempt certain transmissions of video programming by cable and satellite.⁷³

While the complexity of those exemptions renders a detailed analysis of their interaction with captioning beyond the scope of this paper, it should suffice to note that they are unlikely by their terms to afford legal cover to all would-be captioners. This is particularly true given that they focus on specific exclusive rights under Section 106, while third-party captioning activities may implicate a different set of rights—as well as the DMCA’s anti-circumvention measures.⁷⁴

5.3. Fair Use

Perhaps the best hope for resolving the potential tension between copyright and captioning is the fair use doctrine. Codified at Section 107 of the Copyright Act, the doctrine excludes the “fair” use of a copyrighted work from the scope of copyright infringement.⁷⁵

While Section 107 does not explicitly designate captioning as a fair use, the Supreme Court has alluded to support for the fairness of accessibility efforts in the legislative history of the Copyright Act. More specifically, *Sony Corp. v. Universal City Studios, Inc.* notes that “[m]aking a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report [on the Copyright Act] as an example of fair use.”⁷⁶

The House Committee Report explains that a “special instance illustrating the application of the fair use doctrine pertains to the making of copies or phonorecords of works in the special forms needed for the use of blind persons.”⁷⁷

Sony and the House Committee Report highlight two key principles that might support a holding that captioning is a non-infringing fair use, at least under some circumstances. First, *Sony* indicates that transforming a copyrighted work for the “convenience” of a person with a disability requires nothing more than a “purpose to entertain or to inform” to render the transformation fair.⁷⁸ Second, the House Committee Report indicates that accessible transformations are fair because accessible versions of works, “such as copies in Braille and phonorecords of oral readings (talking books), are not usually made by . . . publishers for commercial distribution.”⁷⁹

Under the principles articulated in *Sony* and the House Committee Report, it is reasonably likely that most third-party captioning—at least captioning undertaken strictly for accessibility purposes—constitutes a non-infringing fair use. The principles of *Sony* and the Report map cleanly onto Section 107 and suggest that the fairness of captioning depends primarily on two of the four factors enumerated under Section 107:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; . . . [and]

⁷³ 17 U.S.C. §§ 111, 119, 122.

⁷⁴ See discussion *supra*, Part 3.

⁷⁵ 17 U.S.C. § 107.

⁷⁶ 464 U.S. 417, 455 n.40 (1984).

⁷⁷ H.R. Rep. 94-1476, at 73 (1976).

⁷⁸ See 464 U.S. at 455 n.40.

⁷⁹ H.R. Rep. 94-1476, at 73.

(4) the effect of the use upon the potential market for or value of the copyrighted work.⁸⁰ *Sony* indicates that the first factor—the purpose and character of the use—weighs in favor of fair use where a copyrighted work is transformed for the purpose of facilitating access for a person with a disability.⁸¹ Captioning similarly transforms video for accessibility purposes, likely weighing the first factor in favor of fair use.

Moreover, the fourth, or “market,” factor is likely to weigh in favor of fair use where the use is dedicated to serving a market that the copyright owner has no interest in serving. Congress’s numerous legislative interventions mandating captioning in the face of opposition from copyright holders on economic grounds are strong evidence that the efforts of third-party captioners have had little or no impact on any cognizable market for the underlying video, likely weighing the fourth factor in favor of fair use.⁸²

Two recent federal district court decisions regarding copyright claims over large-scale book-scanning projects—*Authors Guild v. HathiTrust* and *Authors Guild v. Google*—have similarly concluded that transforming copyrighted works for the purpose of serving people with disabilities is a transformative fair use.⁸³ The *HathiTrust* court, in a passage also endorsed by the *Google* court, specifically noted that the accessibility principles enshrined in the ADA supported a holding of fair use.⁸⁴ These holdings support the idea that fair use may serve as a guiding light for harmonizing captioning and copyright where contractual solutions fall short.

However, the use of captions for non-accessibility purposes, such as search engine optimization or ad placement, either exclusively or in addition to accessibility purposes, might alter the fair use calculus by more directly implicating a potential market for the underlying video’s copyright holder. At a bare minimum, third-party captioners seeking to utilize captions for non-accessibility purposes should be wary of the viability of fair use.

It is also worth noting that at least in some jurisdictions fair use provides no protection against liability for violating the DMCA’s anti-circumvention measures, which contain no

⁸⁰ See 17 U.S.C. § 107. The second fair-use factor—the nature of the copyrighted work—generally depends on whether a copyrighted work is factual or creative. *Stewart v. Abend*, 495 U.S. 207, 237 (1990) (citations omitted). In general, captioning efforts may be directed at both factual and creative works without regard to their nature, meaning that the second factor is unlikely to prove dispositive.

The third fair-use factor—the amount and substantiality of the portion used in relation to the copyrighted work as a whole—is likely to weigh slightly in favor of finding captioning fair because while captioning requires using all the transcribable components of the audio track of a video, it does not require the use of any of the video’s visual components.

⁸¹ See 464 U.S. at 455 n.40.

⁸² See discussion *supra*, Part 2.

⁸³ *HathiTrust*, 902 F. Supp. 2d 445, 461 (S.D.N.Y. 2012) (“The use of digital copies to facilitate access for print-disabled persons is also transformative. . . . [The] suggestion that print-disabled individuals could have ‘asked permission’ of all the rights holders whose works [were scanned] borders on ridiculous.”); *Google*, 954 F. Supp. 2d 282, 293 (S.D.N.Y. Nov. 14, 2013) (deeming “mak[ing] copies available to print-disabled individuals, expanding access for them in unprecedented ways” a transformative fair use).

⁸⁴ *HathiTrust*, 902 F. Supp. 2d at 459 (“The ADA also provides strong support for the conclusion that the provision of access to print-disabled persons is a protected fair use.”), at 464 (“I cannot imagine a definition of fair use that would not encompass the transformative uses made by [the book scanning project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the ADA.”), *quoted with approval in Google*, 954 F. Supp. 2d. at 294.

explicit fair use accommodation.⁸⁵ This means that third-party captioners who need to circumvent DRM on a video to accomplish the creation, modification, synchronization, or delivery of captions may face liability under the DMCA even if their activities are a non-infringing fair use.

The DMCA requires the U.S. Library of Congress and Copyright Office to conduct a rulemaking every three years to identify potential exemptions from the ban on circumventing DRM for non-infringing uses.⁸⁶ In 2012, the Librarian of Congress granted a limited exemption for circumvention necessary to research and develop video players with closed captioning and other accessibility features. Specifically, the exemption permits circumventing DRM for uses of the following classes of works:

Motion pictures and other audiovisual works on DVDs that are protected by the Content Scrambling System, or that are distributed by an online service and protected by technological measures that control access to such works, when circumvention is accomplished solely to access the playhead and/or related time code information embedded in copies of such works and solely for the purpose of conducting research and development for the purpose of creating players capable of rendering visual representations of the audible portions of such works and/or audible representations or descriptions of the visual portions of such works to enable an individual who is blind, visually impaired, deaf, or hard of hearing, and who has lawfully obtained a copy of such a work, to perceive the work; provided however, that the resulting player does not require circumvention of technological measures to operate.⁸⁷

As the many caveats in the exemption make clear, however, it does not provide legal cover for most third-party captioning activities. Moreover, it does not excuse violation of the trafficking provisions of the DMCA, which prevents captioners from “manufactur[ing], import[ing], offer[ing] to the public, provid[ing], or otherwise traffic[king]” in technology designed to circumvent DRM.⁸⁸ And even to the extent it provides useful cover for some captioning activities, it will expire unless it is renewed during the next triennial review of exemptions, which is slated to begin in the fall of 2014.

6. Conclusion: A Legislative Fix?

While contract, existing statutory exemptions, and fair use may provide paths forward for third-party captioning, uncertainty about the contours of copyright law may hinder critical accessibility efforts. It is possible, however, that Congress could resolve the uncertainty through legislation.

⁸⁵ See, e.g., *MDY Indus. v. Blizzard Entmt.*, 629 F.3d 928, 950-51 (9th Cir. 2010). But see, e.g., *Storage Technology Corp. v. Custom Hardware Engineering & Consulting*, 421 F.3d 1307, 1319 (Fed. Cir. 2005) (citing *Chamberlain Group v. Skylink Technologies*, 381 F.3d 1178, 1202 (Fed. Cir. 2004) (requiring a nexus with copyright infringement as a precondition for liability under the anti-circumvention measures). While the DMCA contains several built-in exceptions, they are unlikely to cover captioning activities except under very narrow circumstances, if at all. See 17 U.S.C. § 1201(d) (limited evaluation of works by schools and libraries), (e) (law enforcement, intelligence, and other government activities), (f) (reverse engineering), (g) (encryption research), (h) (preventing minors from accessing material on the Internet), (i) (protection of personally identifying information), and (j) (security testing).

⁸⁶ 17 U.S.C. § 1201(a)(1)(B)-(E).

⁸⁷ 37 C.F.R. § 201.40(b)(8) (as of Oct. 28, 2012).

⁸⁸ 17 U.S.C. § 1201(a)(2).

For several decades, Congress has legislated in the areas of captioning and copyright without explicitly articulating how it has intended them to intersect. Congress's ongoing inquiries into comprehensive reform of telecommunications law and copyright law present an opportunity to provide needed clarity for how captioners can navigate the murky waters of copyright.⁸⁹

The contours of an ideal legislative solution are less than clear. The possibility that technological developments will enable the extraction of revenue streams from captions calls into question the long-standing assumption that captioning will impose costs on video programmers. But if that possibility comes to fruition, Congress must consider how far to open the doors for third-party captioners to enter the market by creating exemptions to copyright law and the DMCA's anti-circumvention measures for captioning activities.

However it might act, Congress should proceed with the goal of ensuring that the civil right of Americans who are deaf and hard of hearing to access video programming on equal terms to their hearing peers—a right codified in the TDCA, the 1996 Act, and the CVAA—is vindicated to the fullest extent possible. To reach that goal, Congress should, at a bare minimum, make clear that third-party efforts to caption a video left uncaptioned by its copyright owner—whether undertaken pursuant to a statutory or regulatory obligation or as a voluntary effort for accessibility purposes—do not constitute copyright infringement or violate the DMCA's anti-circumvention measures. To do so would codify the balance contemplated by application of the fair use—eliminating the legal uncertainty faced by third-party captioners acting in good faith while requiring copyright owners to take affirmative steps to make their video programming accessible to take advantage of the potential alternative revenue streams afforded by advanced captioning technology.

⁸⁹ See The Hill, Hilicon Valley, Julian Hattem, *Congress looks to revamp telecom law* (Jan. 15, 2014), see: <http://thehill.com/blogs/hilicon-valley/technology/195545-congress-looks-to-revamp-telecom-law-for-internet-age>; and The Verge, Sean Hollister, *House Judiciary Chairman plans comprehensive review of US copyright law* (Apr. 24, 2013):<http://www.theverge.com/2013/4/24/4263212/house-judiciary-bob-goodlatte-wants-to-review-copyright-law>.