

Before the
United States Copyright Office
The Library of Congress
Washington, DC

In the Matter of:)
)
Exemption to Prohibition on)
Circumvention of Copyright)
Protection Systems for Access) Docket No. RM 2011-7
Control Technologies)
)
Notice of Proposed Rulemaking)

REPLY COMMENTS OF
Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)
Gallaudet University
Participatory Culture Foundation

Filed: March 2, 2012

Blake E. Reid, Esq.
*Counsel for Telecommunications for the
Deaf and Hard of Hearing, Inc.*

Raffi Melanson, Student Clinician

Institute for Public Representation
Georgetown Law
600 New Jersey Ave. NW
Washington, DC 20001
202.662.9545
ipr-efiling@law.georgetown.edu

SUMMARY OF ARGUMENT

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Gallaudet University, and the Participatory Culture Foundation respectfully submit these reply comments pursuant to the Copyright Office's December 20, 2011 Notice of Proposed Rulemaking.¹ Earlier in this proceeding, we asked the Office to recommend, and the Librarian to grant, four exemptions from the anti-circumvention measures of the Digital Millennium Copyright Act ("DMCA") for motion pictures and audiovisual works delivered via Internet protocol ("IP") or fixed disc-based media for the purpose of improving accessibility (Proposed Classes 9A, 9B, 9C, and 9D), or in the alternative, a broader accessibility-oriented exemption for several classes of works.

Three comments on our proposal – one by the Association of American Publishers, the American Society of Media Photographers, the Business Software Alliance, the Entertainment Software Association, the Motion Picture Association of America ("MPAA"), the Picture Archive Council of America, and the Recording Industry Association of America (collectively, the "Joint Copyright Holders" – Comment 12), and two by the Advanced Access Content System Licensing Administrator, LLC ("AACSLA" – Comment 4), and the DVD Copy Control Association ("DVD CCA" – Comment 8) (collectively, the "License Administrators") – variously contend that the proposed accessibility exemptions are unnecessary because accessible video programming is already available, because circumvention is unnecessary to achieve our proposed activities, and because the activities implicate copyright infringement. The Joint Copyright Holders also argue that our broader exemption proposal is unacceptable.

In these reply comments, we address these unwarranted contentions by discussing the extent of inaccessible video programming, the need to circumvent to accomplish our proposed accessibility activities, the noninfringing nature of our proposed uses, and the utility of granting our broader accessibility exemption proposal. Accordingly, we reiterate our request that the Office recommend, and Librarian grant, our proposed exemptions.

¹ *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Notice of Proposed Rulemaking, United States Copyright Office Docket No. RM 2011-7, 76 Fed. Reg. 78,866 (Dec. 20, 2011) (to be codified at 37 C.F.R. pt. 201) [hereinafter NPRM].

TABLE OF CONTENTS

I.	Many audiovisual works remain inaccessible to consumers who are deaf, hard of hearing, blind, or visually impaired.	4
A.	The FCC’s new rules do not require ubiquitous accessibility for IP-delivered or fixed-media video programming.....	5
B.	Voluntary efforts by creators and distributors have not succeeded in making programming universally accessible.....	7
C.	Poor-quality accessibility efforts are a denial of equal access, not a “mere inconvenience.”	10
II.	Technologists and researchers often must circumvent access controls to add and improve video programming accessibility.	12
III.	Adding and improving accessibility features for video programming are noninfringing uses.....	14
IV.	The disparate impact of the anti-circumvention measures on consumers who are deaf, hard of hearing, blind, or visually impaired warrants a broader accessibility exemption.....	16
V.	Conclusion.....	16

I. Many audiovisual works remain inaccessible to consumers who are deaf, hard of hearing, blind, or visually impaired.

The Joint Copyright Holders and the Licensing Administrators claim that an exemption for video programming accessibility is unnecessary in light of the wide availability of accessible video programming. Specifically, they imply that the rules promulgated by the Federal Communication Commission (“FCC”) under the Twenty-First Century Communications and Video Accessibility Act (“CVAA”) effectively guarantee that most video programming will be accessible.² Additionally, they claim that the CVAA will reinforce market pressures on copyright owners to voluntarily include captioning and video descriptions on all video programming.³ The Joint Copyright Holders also argue that existing problems with video programming accessibility are at most a “mere inconvenience.”⁴ Finally, the Licensing Administrators argue that the availability of access control licenses would be a viable alternative to circumvention.⁵

Despite these contentions, a large portion of IP-delivered and fixed-media video programming is not accessible and will remain so over the next three years unless an exemption is granted. The FCC’s new captioning and video description rules simply do not cover a significant amount of video programming, and many video programming owners and distributors refuse to make their unregulated programming accessible. And even where video programming includes captions or video descriptions, the lack of enforceable quality standards means that the programming may still not be accessible to consumers who are deaf, hard of hearing, blind, or visually impaired. Finally, neither subtitles nor subtitles for the deaf and hard of hearing included with uncaptioned video programming on DVDs are sufficient to make that programming accessible under the FCC’s new rules.

² See Comments of Joint Copyright Holders, Docket No. RM 2011-7, at 43, 45; Comments of AACSLA, Docket No. RM 2011-7, at 29; Comments of DVD CCA, Docket No. RM 2011-7, at 21.

³ See Comments of Joint Copyright Holders at 45, Comments of AACSLA at 29; Comments of DVD CCA at 21.

⁴ See Comments of Joint Copyright Holders at 29.

⁵ See Comments of AACSLA at 31-32; Comments of DVD CCA at 22.

A. The FCC’s new rules do not require ubiquitous accessibility for IP-delivered or fixed-media video programming.

Title II of the CVAA imposes new requirements for video programming owners, providers, and distributors to make programming accessible through the inclusion of captions and video descriptions.⁶ The FCC adopted new regulations implementing the CVAA’s video description requirements on August 25, 2011 and regulations implementing the CVAA’s captioning requirements for IP-delivered video on January 12, 2012.⁷

Unfortunately, the CVAA and associated FCC rules impose no accessibility requirements on a substantial amount of IP-delivered and fixed-media video programming. In particular, the CVAA does not require any fixed-media programming to include captions or video descriptions.⁸

The CVAA also does not require video descriptions for any IP-delivered programming. Rather, it merely requires the FCC to report to Congress on “[t]he technical and operational issues, costs, and benefits of providing video descriptions for video programming that is delivered using Internet protocol” by 2014.⁹

The CVAA does require IP-delivered video programming to be captioned – but only where the programming has first been “published or

⁶ See Pub. L. No. 111-260, 124 Stat. 2751 (2011) [hereinafter CVAA].

⁷ See *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43 (2011), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-126A1_Rcd.pdf; [hereinafter *Video Description Order*]; *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154 (2012), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0130/FCC-12-9A1.pdf [hereinafter *IP Captioning Order*].

⁸ Although the FCC’s rules require fixed-media playback apparatuses such as DVD and Blu-ray players to be capable of displaying closed captions where they are included on DVDs and Blu-ray discs, the Commission notes that DVDs and Blu-ray discs are not required to include captions. *IP Captioning Order*, *supra* note 7, ¶ 99.

⁹ CVAA § 202(a)(3) (requiring the FCC to report to Congress no later than two year after the completion of the phase-in of the new rules); *Video Description Order*, *supra* note 7, ¶ 34 (phasing in the new rules beginning on July 1, 2012).

exhibited on television.”¹⁰ As we noted in our initial filing, an increasing amount of video programming content is exclusively available via IP and is excluded from the CVAA’s requirements because it has never been shown on television.¹¹ And many popular new video programs are distributed exclusively via IP. For example, as of March 2, 2012, Hulu featured 75 episodes of IP-exclusive programming, fewer than half of which were captioned.¹² Netflix has also begun U.S. distribution of the highly anticipated crime drama *Lilyhammer* exclusively via IP streaming,¹³ And Netflix recently announced plans to offer IP-exclusive delivery of the political drama *House of Cards* and the long-awaited fourth season of *Arrested Development*,¹⁴ and is reportedly considering an order for two additional IP-exclusive series, *Orange is the New Black* and *Hemlock Grove*.¹⁵ All these titles will be excluded from the FCC’s rules and may lack captions or subtitles.

In addition to IP-exclusive content, the FCC’s IP captioning rules exempt “video clips” that have been published or exhibited on television with captions.¹⁶ As the National Association of the Deaf notes in its comments here, “there is an enormous amount of video content online in this form such as at CNN.com and other news websites”¹⁷ As we noted in our initial proposal, nearly two-thirds of Americans now report that they get their news online.¹⁸ An increasing percentage of news programming is only available online, and several major

¹⁰ CVAA § 202(b).

¹¹ Comments of TDI, Gallaudet University, and Participatory Culture Foundation, RM 2011-7 at 28-31 [hereinafter Comments of TDI].

¹² Hulu,

<http://www.hulu.com/search?query=type%3Aepisode+network%3A%22Hulu+Exclusives%22>.

¹³ Jason Gilbert, ‘Orange Is The New Black’ On Netflix? Bloomberg Reports On Netflix’s Possible New Show, Huffington Post (Feb. 15, 2012, 8:27 AM),

http://www.huffingtonpost.com/2012/02/14/orange-is-the-new-black-netflix-show-rumor_n_1277575.html.

¹⁴ See *id.*

¹⁵ *Id.*

¹⁶ *IP Captioning Order*, *supra* note 7, ¶ 44.

¹⁷ Comments of National Association for the Deaf, Docket No. RM 2011-7, at 2-3.

¹⁸ Comments of TDI, *supra* note 11, at 29 (citing Doug Gross, *Survey: More Americans Get News from Internet than Newspapers or Radio*, CNN.com (Mar. 1, 2010), http://articles.cnn.com/2010-03-01/tech/social.network.news_1_social-networking-sites-social-media-social-experience?s=PM:TECH)

political shows now offer online-exclusive clips of video programming.¹⁹ And news programming is merely one example of media that will fall within this exemption; many popular sports and entertainment programs now include exclusive online content, such as extended or deleted scenes, previews, and behind-the-scenes features.²⁰

B. Voluntary efforts by creators and distributors have not succeeded in making programming universally accessible.

As the Joint Copyright Holders and Licensing Administrators note, accessibility gaps in regulatory coverage could be filled by voluntary efforts on the part of video programming creators and distributors.²¹ Unfortunately, those commenters present little evidence that voluntary efforts have succeeded in filling those gaps.

At the outset, no commenter indicates that video descriptions have been included on any IP-delivered programming. The American Council of the Blind (“ACB”) notes that no major IP delivery service currently offers video descriptions of any of their programming.²² And Zediva, the only IP delivery service recognized by ACB to offer video description, was forced to shut down in the face of a copyright lawsuit by the members of the MPAA, one of the Joint Copyright Holders. MPAA Senior Vice President and Associate General Counsel Dan Robbins celebrated the “important victory,” noting that “[t]oday there exist myriad ways for customers to watch movies legally over the Internet, from iTunes to Hulu to NetFlix to Vudu to Amazon to cable and satellite video-on-demand services, and many, many others.”²³ Unfortunately, those “myriad”

¹⁹ See, e.g., NBC Press Pass, <http://presspass.msnbc.msn.com/> (last visited Mar. 1, 2012); ABC Green Room, <http://abcnews.go.com/ThisWeek/video/green-room-romneys-bailout-blunder-15794738?tab=9482930§ion=1206874&playlist=8257591> (last visited Mar. 1, 2012).

²⁰ See, e.g., The Rookie, <http://sports.espn.go.com/espn/therookie> (last visited Mar. 2, 2012); The Daily Show with Jon Stewart Green Room, <http://www.thedailyshow.com/guests> (last visited Mar. 2, 2012).

²¹ Comments of Joint Copyright Holders at 45; Comments of AACCS LA at 27-30; Comments of DVD CCA at 19-22.

²² *DVDs and Blu-ray Discs with Audio Description*, American Council of the Blind, <http://www.acb.org/adp/dvds.html> (last visited Mar. 1, 2012).

²³ Press Release, Motion Picture Association of America, Inc., Motion Picture Studios Successfully Conclude Case Against Zediva (Oct. 28, 2011), *available at*

options remain largely inaccessible to consumers who are blind or visually impaired.

Fixed-media video programming remains similarly inaccessible to consumers who are blind and visually impaired. The ACB notes that only 175 of the tens of thousands of movies released since 2000 have included video descriptions.²⁴ And even for those few movies, studios sometimes omit descriptions from rental versions, directors' cuts, and unrated versions.²⁵

Moreover, the Joint Copyright Holders offer no specific evidence of voluntary efforts to caption IP-delivered programming not covered under the FCC's rules. In fact, the MPAA proposed to the FCC in December voluntary standards for captioning IP video programming that made no mention of IP-exclusive content or video clips.²⁶ And contrary to the rosy picture of "steady improvement" painted by the Joint Copyright Holders,²⁷ the MPAA insisted that voluntarily captioning a limited amount of programming would require *eight years* to phase in.²⁸

Moreover, gathering specific statistics about the precise scope of available video programming is difficult because industry representatives frequently obfuscate or simply do not offer statistics about the availability of captions. For example, a February 29, 2012 Netflix blog post notes that "more than 80% of the *hours streamed* in the US were of content with captions or subtitles available," but offers no information about what proportion of programming actually includes captions or subtitles.²⁹ Contrary to the implication that a significant majority of Netflix's content is accessible, Netflix subscribers as of March 1, 2012 could enable captions or subtitles on fewer than 5,000 out of its nearly 12,000 available

<http://mpaa.org/resources/49fd7f41-55a5-4d04-85e3-2c6e81ccb8b5.pdf>.

²⁴ *DVDs and Blu-ray Discs with Audio Description*, American Council of the Blind, <http://www.acb.org/adp/dvds.html> (last visited Mar. 1, 2012).

²⁵ *Id.*

²⁶ See Letter from Jared S. Sher, Counsel to MPAA, to Marlene H. Dortch, Secretary, FCC (Dec. 15, 2011), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7021750864>.

²⁷ Comments of Joint Copyright Holders at 45.

²⁸ See Letter from Jared S. Sher, *supra* note 24.

²⁹ *An Update on Captioning for our Members*, Netflix (Feb. 29, 12:01 AM), <http://blog.netflix.com/2012/02/update-on-captioning-for-our-members.html> (emphasis added).

top-level titles.³⁰ Hulu similarly notes that it “is committed to expanding [its] library of closed-captioned content,” but admits that it captions only “some” of its shows and provides no statistics.³¹

Worse, some IP-delivery services for video programming refuse to provide captions altogether. For example, CNN recently argued in response to a California lawsuit that it would not caption clips on CNN.com because using “current sub-par closed-captioning technology” would “violate its editorial practices.”³² And, as we noted in our original proposal, industry comments submitted to the FCC during its IP captioning rulemaking indicate that voluntary captioning efforts will not soon be forthcoming – if ever.³³

Finally, the Joint Copyright Holders insist that “nearly 100% of DVDs” are captioned, but provide no citations for the proposition.³⁴ Similarly, the Licensing Administrators note that “[c]ontent providers are releasing many DVDs and [Blu-ray Discs] with . . . audio captions,” but cite primarily to statistics regarding captioning in movie theaters.³⁵ Although few reliable statistics are available regarding captioned or subtitled DVDs, the practice of removing audio descriptions from rental versions of DVDs appears to extend to captions and subtitles. For example, Disney apparently removed subtitles from the rental version of the movie *Up*, forcing consumers who are deaf or hard of hearing to purchase the retail version to view subtitles.³⁶

³⁰ See Netflix Statistics, Phlixie, <http://www.phlixie.com/about> (last visited Mar. 2, 2012).

³¹ Hulu, <http://www.hulu.com/support/article/166516> (last visited Mar. 1, 2012).

³² Defendant Cable News Network, Inc.’s Supplemental Brief in Support of Special Motion to Strike Plaintiff’s Complaint at 13, *Greater Los Angeles Agency on Deafness v. Time Warner, Inc.* (N.D. Cal. Feb. 2, 2012) (CV 11-03458-LB).

³³ Comments of TDI, *supra* note 11 at 5-6, n.14.

³⁴ Comments of Joint Copyright Holders at 43.

³⁵ See Comments of AACCS LA at 27-30; Comments of DVD CCA at 19-22.

³⁶ Laura Northrop, *Disney Removes Closed Captioning From ‘Up’ Rental Release*, THE CONSUMERIST (Nov. 5, 2009, 8:00 PM), <http://con.st/5405145>. Several motion picture producers and distributors also settled a class action lawsuit alleging that they misled consumers by including “captioning,” “captioned,” “subtitled” or “subtitling” labels on DVD packaging when some or all of the DVD’s special features lacked captions or subtitles. See DVD “CC” Labeling Class Settlement, <http://www.hearinglossweb.com/Issues/Access/Captioning/dvd.htm> (last

C. Poor-quality accessibility efforts are a denial of equal access, not a “mere inconvenience.”

Even where video programming includes captions, subtitles, or video descriptions, quality problems with these accessibility features can render the programming effectively inaccessible. Yet the Joint Copyright Holders insist that such problems “are at most a ‘mere inconvenience.’”³⁷ They and the Licensing Administrators suggest that any exemptions be limited to programming that lacks captions or video descriptions altogether.³⁸

While we agree in principle that an exemption for circumvention is unnecessary for video programming that is truly accessible, we reject the notion that programming with erroneous captions or video descriptions could qualify as accessible. Even seemingly minor quality problems such as misspelled words or incomplete descriptions can prevent consumers who are deaf, hard of hearing, blind, or visually impaired from perceiving and understanding the content of video programming. For example, NAD notes that a news anchor might say that the United States is going to war with Iraq; a simple misspelling of the captioned version of the statement, however, could indicate to a deaf or hard of hearing consumer that the U.S. is in fact going to war with Iran, leading the consumer to be seriously misinformed about the situation.³⁹ NAD also notes that timing and synchronization errors frequently cause captions to appear before or after the relevant on-screen event, potentially making it unclear which character is speaking and rendering the dialogue incomprehensible.⁴⁰ And programming may be only partially captioned or riddled with garbled or missing text and other mistakes.⁴¹

We also note that, contrary to the Joint Copyright Holders’ and Licensing Administrators’ contentions, subtitles are not a panacea for accessibility. As the FCC noted in its IP captioning order, subtitles “often do not also identify speakers and background noises, such as sound effects, or the existence of music and laughter, information that is often critically important to understanding a

visited Mar. 2, 2012).

³⁷ Comments of Joint Copyright Holders at 45.

³⁸ See Comments of Joint Copyright Holders at 45; Comments of AACCS LA at 27; Comments of DVD CCA at 19.

³⁹ Comments of National Association of the Deaf at 3-4.

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

program's content."⁴² The FCC also noted that the use of subtitles instead of captions can deny "consumers the user controls available when closed captions are provided in accordance with the EIA-708 technical standard," such as the ability to control font, color, opacity, and other features that may be particularly important to consumers who are deaf-blind.⁴³ For some consumers, a video program with subtitles rather than captions is no more accessible than the same program would be to a hearing consumer on a television with no volume control.⁴⁴ Moreover, subtitles, unlike captions, cannot be converted for use by screen readers or Braille outputs.⁴⁵

Contrary to the Joint Copyright Holders' contention, the ability for consumers who are deaf, hard of hearing, blind, or visually impaired to fully perceive and understand video programming on equal terms to their hearing peers is not a trivial measure of "convenience," but a fundamental matter of civil rights. Accordingly, we urge the Librarian to reject any limitation of our requested exemptions to works that simply include captions, subtitles or video descriptions. Such a limitation would hamper efforts to make programming accessible by fixing errors in captions or video descriptions or converting subtitles to captions that prevent consumers from fully perceiving and understanding the programming.

⁴² *IP Captioning Order*, *supra* note 7, ¶ 100. Some subtitles also omit the lyrics of songs, simply substituting the word "music" and leaving consumers who are deaf and hard of hearing with no clear indication of whether lyrics have been sung and if so, what they are.

⁴³ *Id.* ¶¶ 100, 111.

⁴⁴ Comments of National Association of the Deaf at 4 ("[B]eing able to customize the appearance of captions is similar to a hearing person being able to adjust volume, bass and treble in a program.").

⁴⁵ See, e.g., *Equipment for Deafblind People, A-Z to Deafblindness*, <http://www.deafblind.com/dbequipm.html> (last accessed Mar. 2, 2012) ("Mr Nelson Dew has developed a television closed caption to braille computer system which allows a deaf-blind person to read, in braille, televised closed captioning programs.")

II. Technologists and researchers often must circumvent access controls to add and improve video programming accessibility.

The Joint Copyright Holders argue that the creation of captions or video descriptions does not require circumventing access controls.⁴⁶ The noninfringing activities described in our initial proposal, however, plainly go beyond simply “watching or listening to a work and transcribing what is said or vocalizing what is shown.”⁴⁷ Our initial proposal contains detailed descriptions of why it is necessary to circumvent access controls on video programs to overlay visible and audible transcriptions and to extract existing transcription data for the purposes of correcting errors or improving rendering.⁴⁸ Because the Joint Copyright Holders neither explain with any specificity how these activities would be possible without circumvention nor attempt to refute our specific arguments to the contrary, we urge the Copyright Office and the Librarian to reject this nonspecific and cursory line of argument.

In contrast, AACCS LA does not argue that circumvention is unnecessary to accomplish the proposed activities, but rather that circumvention should be avoided because it could “stunt the growth of marketplace solutions” such as BD Live.⁴⁹ This argument is, at best, purely speculative. As Google’s lead captioning engineer Ken Harrenstien notes:

[U]ltimately I think technology will advance to the point where it’s not only easy to create captions, it’s also possible for technology to accurately transcribe, describe and translate what’s going on in a video, offering universal accessibility not just for the deaf but for the blind and anyone using a different language. We don’t know how far off that star is, but it’s out there.⁵⁰

We fully agree that video programming owners and distributors should play an important and, indeed, central role in ensuring that video programming

⁴⁶ See Comments of Joint Copyright Holders at 45.

⁴⁷ *Id.*

⁴⁸ Comments of TDI, *supra* note 11, at 16-23.

⁴⁹ Comments of AACCS LA at 30-31.

⁵⁰ Michael Humphrey, *YouTube's Closed Caption 'Jedi': On cc Upgrades, Searchability And Why It's Personal*, at 3 (Feb. 29, 2012, 10:20 AM), available at <http://www.forbes.com/sites/michaelhumphrey/2012/02/29/youtubes-closed-caption-jedi-on-cc-upgrades-searchability-and-why-its-personal/3/>.

is accessible. We seek the proposed exemptions to aid accessibility efforts where industry is unable or unwilling of its own accord to make programming accessible. These independent efforts should be viewed as complementary, not adverse, to industry efforts.

The Licensing Administrators' true concerns about the impact of our proposed circumvention exemptions appear to center not on accessibility efforts, but rather the market for circumvention technology. In lieu of circumvention, the Administrators suggest that accessibility technologists and researchers should license their DVD and Blu-ray Disc access control technologies – presumably at substantial cost.⁵¹ Our proposed exemptions are already limited to improving the accessibility of video programming for users who have already obtained lawful access to the programming – presumably by paying the programming's copyright owner or the owner's agent. Accordingly, we reject the notion that these individuals should absorb the additional cost of developing tools simply to give them the equal access to which they are already entitled.

While an exemption may affect the Licensing Administrators' potential markets for access control technology, those markets are far outside the scope of this proceeding. The DMCA was not intended to afford manufacturers of access control technologies the opportunity to profit from the failure of copyright owners to make their works accessible. Were it not for the inclusion of the Licensing Administrators' access controls technology on DVDs and Blu-ray Discs, researchers and technologists could engage in noninfringing efforts to improve accessibility without impediment and at no additional cost. But because the technology is included, researchers and technologists cannot freely engage in those activities without violating the circumvention ban. And even if the Licensing Administrators were willing to offer licenses at no cost, it is our understanding that such licenses would be incompatible with freely available open-source video playback technologies, forcing technologists and researchers to engage in the costly and time-consuming task of recreating these technologies from scratch.

The purpose of this proceeding is to recognize instances where the prohibition on circumventing access controls adversely affects users of a copyrighted work from making noninfringing uses of works.⁵² That a user could

⁵¹ See Comments of AACCS LA at 31-32; Comments of DVD CCA at 22.

⁵² 17 U.S.C. § 1201(a)(1)(A), (C).

theoretically pay a copyright holder or access control manufacturer for permission to engage in a noninfringing use of an access control-encumbered work does not change the fact that the user's otherwise lawful ability to do so for free is adversely impacted by the anticircumvention measures. Otherwise, copyright holders and access control manufacturers could defeat all exemption proposals simply by making empty offers of permission to engage in the desired use of the work at a price that the would-be user or users could not afford. Such an absurd result would render this entire proceeding moot in flat contravention of Congress's intent.

III. Adding and improving accessibility features for video programming are noninfringing uses.

The Joint Copyright Holders contend that adding or improving accessibility features to video programming raises the specter of copyright infringement.⁵³ In particular, they speculate that researchers or technologists might "copy works after engaging in circumvention and then make copies available to crowdsourcing volunteers for the purpose of creating captions or audible descriptions, or to consumers after inserting overlaid captions or audible descriptions."⁵⁴ They then assert that creating or modifying captions and video descriptions implicate copyright owners' reproduction and adaptation rights.⁵⁵ Finally, they complain that the proposed exemptions, as drafted, may implicate the unauthorized translation of video programming.⁵⁶

With respect to the bizarre video distribution scheme the Joint Copyright Holders allude to, we can only respond that it appears nowhere in our initial proposal. Moreover, the Joint Copyright Holders do not explain, nor is it otherwise clear, how such a scheme would be permitted under our proposed exemptions.

With respect to the contentions that creating or improving captions and video descriptions would constitute infringement of copyright owners' reproduction or adaptation rights, the Joint Copyright Holders offer only a cursory theory of infringement. Moreover, the Joint Copyright Holders fail to explain how reproduction or adaptation rights could subsist in closed captions or

⁵³ Comments of Joint Copyright Holders at 45.

⁵⁴ *Id.*

⁵⁵ *Id.* at 45-46.

⁵⁶ *Id.* at 46.

video descriptions of video programming in light of Congress's likely preemption of those rights under the Telecommunications Act of 1996 and the CVAA.⁵⁷ Finally, the Joint Copyright Holders fail to address that the creation or improvement of captions for accessibility purposes is an exemplary noninfringing fair use, as we explained in detail in our original comments.⁵⁸

Instead, the Joint Copyright Holders argue that exemptions can only be granted in instances of "a specific factual record that a particular use is a fair use under existing legal precedents."⁵⁹ The Joint Copyright Holders offer no support for this proposition, and worse, ignore the plain language of 17 U.S.C. § 1201(a)(1)(C), which plainly contemplates that exemptions are appropriate where users "are, or *are likely to be* . . . adversely affected . . . in their ability to make noninfringing uses" (emphasis added). Where a proposed use is *likely* to be noninfringing, such as where a standard fair use analysis strongly indicates that a use is likely to be fair, the would-be user is likely to be adversely affected in her ability to make a noninfringing use, and thus is entitled to an exemption. Proponents must simply demonstrate, as we have in our original proposal, that a finding of fair use "is or is likely."⁶⁰

⁵⁷ Comments of TDI, *supra* note 11, at 27-28.

⁵⁸ *See id.* at 23-28.

⁵⁹ Comments of Joint Copyright Holders at 5-6.

⁶⁰ Letter from Marybeth Peters, Register of Copyrights, to James H. Billington, the Librarian of Congress, Recommendation of the Register of Copyrights in RM 2008-8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, at 12 (June 11, 2010) ("That does not mean that unless there is a controlling precedent directly on point, the Register and the Librarian must conclude that a particular use is an infringing use. If, for example, based on a review and application of the statutory factors set forth in Section 107 and a review and analysis of judicial precedents, the Register and Librarian conclude that a particular use, although never before adjudicated in the courts, is a fair use, the Librarian may designate a class of works based upon the conclusion that the use in question is fair if all the other requirements for designating the class have been satisfied.").

IV. The disparate impact of the anti-circumvention measures on consumers who are deaf, hard of hearing, blind, or visually impaired warrants a broader accessibility exemption.

In addition to our proposed video programming exemptions, we also encourage the Librarian to consider our broader proposed accessibility exemption. Contrary to the Joint Copyright Holders assertions, this proposal does not contemplate a sweeping use-based exemption.⁶¹ Rather, it merely attempts to unify the numerous specific accessibility-related exemption proposals – including our proposed video programming exemptions and the literary works exemption proposed by the American Council for the Blind and the American Foundation for the Blind⁶² – into a single proposal that recognizes the tremendous potential for the anticircumvention measures to hinder the accessibility of copyrighted works.

V. Conclusion

Equal access to copyrighted works is a goal that requires intensive efforts by content creators, technologists, researchers, and citizens alike to succeed. While we understand and respect the important role that the Joint Copyright Holders and the Licensing Administrators play in these efforts, their objections cannot overshadow the reality that industry promises to achieve ubiquitous accessibility have simply not come to fruition. Accordingly, we urge the Register to recommend, and the Librarian to grant, our four proposed video programming exemptions, or in the alternative, a broader accessibility-oriented exemption for several classes of works.

⁶¹ Comments of Joint Copyright Holders at 47.

⁶² See Comments of American Council of the Blind and American Foundation of the Blind, Docket No. RM 2011-7, at 1.

Filed: March 2, 2012

Respectfully submitted,

/s/

Blake E. Reid, Esq.

*Counsel for Telecommunications for the
Deaf and Hard of Hearing, Inc.*

Raffi Melanson, Student Clinician

Institute for Public Representation

Georgetown Law

600 New Jersey Ave. NW

Washington, DC 20001

202.662.9545

ipr-efiling@law.georgetown.edu

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)

Claude Stout, Executive Director • cstout@TDIforAccess.org

Contact: Jim House, CEPIN Outreach/Public Relations

jhouse@TDIforAccess.org • 301.589.3786

8630 Fenton Street, Suite 604, Silver Spring, MD 20910

www.TDIforAccess.org

Gallaudet University

Dr. T. Alan Hurwitz, President

Contacts:

Dr. Christian Vogler, Ph. D.

Associate Professor and Director, Technology Access Program (TAP)

christian.vogler@gallaudet.edu • 202.250.2795

Fred Weiner, Executive Director of Program Development

fred.weiner@gallaudet.edu • 202.250.2250

800 Florida Ave NE, Washington DC 20002

www.gallaudet.edu

Participatory Culture Foundation

Nicholas Reville, Co-Founder and Executive Director

Contact: Dean Jansen, Outreach and Business Development Director

dean@pculture.org • 978.928.3706

PO Box 55071, #20335, Boston, MA 02205-5071

www.pculture.org