



UNITED STATES COPYRIGHT OFFICE

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

**Although we will not be providing multimedia evidence in connection with this comment, we provide in-text hyperlinks throughout the comment (represented as blue, underlined words) that link to documentary evidence and/or some cited documents.**

### **ITEM A. COMMENTER INFORMATION**

These comments are submitted on behalf of the Motion Picture Association of America, Inc. (“MPAA”), the Recording Industry Association of America (“RIAA”), and the Association of American Publishers (“AAP”). They are collectively referred to herein as the “Joint Creators and Copyright Owners.” They may be contacted through their counsel at Mitchell Silberberg & Knupp LLP, J. Matthew Williams, 202-355-7904, mxw@msk.com, 1818 N. Street, NW, 8th Floor, Washington, D.C. 20036.

**The Motion Picture Association of America, Inc. (“MPAA”)** is a trade association representing some of the world’s largest producers and distributors of motion pictures and other audiovisual entertainment material for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. The MPAA’s members are: Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

**The Recording Industry Association of America (“RIAA”)** is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all recorded music produced in the United States.

**The Association of American Publishers (“AAP”)** represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. As essential participants in local markets and the global economy, our members invest in and inspire the exchange of ideas, transforming the world we live in one word at a time.

The Joint Creators and Copyright Owners all rely on technological protection measures to offer innovative products and licensed access to consumers. Access controls make it possible (i) for consumers to enjoy recorded music through subscription services like SiriusXM, Spotify, Amazon Music Unlimited, YouTube Red, Apple Music and Pandora, including on mobile devices, through in-home voice assistants, and in their vehicles; (ii) for consumers to view motion pictures at home or on the go via discs, downloadable copies, digital rental options, cloud storage platforms, TV Everywhere, video game consoles, and subscription streaming services; and (iii) for consumers to enjoy and learn from books, journals, poems and stories (including through subscription, lending, and rental options) on dedicated e-book readers, such as the Kindle and the Nook, on tablets and smartphones, and via personal computers. As the Register concluded in the recent Section 1201 Study, “[t]he dramatic growth of streaming services like Netflix, Spotify, Hulu, and many others suggests that for both copyright owners and consumers, the offering of access—whether through subscriptions, *à la carte* purchases, or ad-supported services—has become a preferred method of delivering copyrighted content. . . . [T]he law should continue to foster the development of such models.” U.S. Copyright Office, [\*Section 1201 of Title 17: A Report of the Register of Copyrights\*](#) 45-46 (2017) (“1201 Study”).

## **ITEM B. PROPOSED CLASS ADDRESSED**

Proposed Class 2: Audiovisual Works – Accessibility

## **ITEM C. OVERVIEW**

The Joint Creators and Copyright Owners understand that accessibility is an important issue and their members have made significant investments to improve the quantity of content that is available in accessible formats. Since 2011, nearly all digital releases by MPAA members have been captioned and audio described. Music videos disseminated by RIAA members on websites like YouTube are also almost always captioned.

Despite the Joint Creators and Copyright Owners' commitment to improving the accessibility of their works, they cannot support the exemption proposed by the Association of Transcribers and Speech-to-Text Providers ("ATSP"), *et al.* because it is far too broad—its current drafting would allow circumvention even where a work is already available in accessible formats and it contains no limitations on the methods by which works could be disseminated after circumvention takes place. Moreover, as the Register concluded in the 2012 rulemaking, there is no authority holding that unauthorized captions or audio descriptions would satisfy the threshold requirement that a proposed use that would be enabled by an exemption from the prohibition on circumvention be noninfringing. Finally, the petitioners have not demonstrated that circumvention is necessary to accomplish their objectives; they do not explain the technical processes by which they currently create accessible copies or transmissions of works, nor do they explain the technical processes in which they seek to engage if they obtain an exemption. The lack of detail in the petition and comments makes it impossible to fully assess the legality of the conduct at issue or to fully analyze the issues presented by the § 1201(a)(1)C factors.

#### **ITEM D. TECHNOLOGICAL PROTECTION MEASURE(S) AND METHOD(S) OF CIRCUMVENTION**

The petitioners appear to include every type of access control used in connection with the dissemination of motion pictures within the scope of the proposed class. However, they do not articulate how any specific access control prevents them from captioning or audio describing motion pictures. They also offer no evidence of a need to circumvent technological measures to copy motion pictures in formats with higher quality than Blu-ray. The proponents have certainly not demonstrated a substantial adverse impact due to the inability to circumvent AACS2 on protected Ultra HD discs, nor do they demonstrate that content is exclusively available on such discs.<sup>1</sup>

#### **ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES**

##### **1. The Joint Creators And Copyright Owners Strive To Provide Accessibility.**

Although not every motion picture is available in accessible formats, much progress has been made since the Register last considered the issue, during the 2012 rulemaking cycle. Since that time, the availability of accessible versions of motion pictures has improved substantially. Indeed, the Department of Justice has commended the efforts undertaken by MPAA and its members to make their films more accessible to persons with disabilities. [\*Nondiscrimination on the Basis of Disability by Public Accommodations – Movie Theatres; Movie Captioning and Audio Description; Notice of Proposed Rulemaking\*](#), 79 Fed. Reg. 44,976, 44,989 (Aug. 1, 2014) (“[M]ovie studios appear committed to making their movies accessible to individuals who are deaf or hard of hearing or blind or have low vision, and the Department commends their

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<sup>1</sup> No one has released a universal hack to all Ultra HD films protected by AACS2. The integrity of the AACS2 and Ultra HD technology is an especially important component of the ecosystem that has increased the availability of motion pictures and will continue to do so in the future. The Register and the Librarian should not undermine this integrity by authorizing widespread hacking, which could negatively impact “the market for or value of” some of the industry’s most exciting products. 17 U.S.C. § 1201(a)(1)(C)(iv).

efforts.”); [\*Nondiscrimination on the Basis of Disability by Public Accommodations – Movie Theatres; Movie Captioning and Audio Description; Final Rule\*](#), 81 Fed. Reg. 87,348, 87,354 (Dec. 2, 2016) (“As early as 2010, the movie industry indicated its commitment to provide closed movie captioning and audio description for almost all movies released in digital format. ...[M]ovie studios and distributors regularly include the accessibility features ... at no extra charge.”).

(a) *Captioning*

Nearly all optical disc media (DVD, Blu-ray, and Ultra HD) released by MPAA members are distributed with captions. Non-exempt television content produced or transmitted by MPAA members and their affiliates is also captioned, per FCC regulations. 47 C.F.R. § 79.1. Online video, when it has previously appeared on U.S. television with captions, is also captioned, per FCC regulations. See Report and Order, *In the Matter of Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010* (Jan. 12, 2012)); see also 47 C.F.R. § 79.4. In fact, MPAA members frequently go beyond those regulations and caption online video without regard to whether it previously appeared on television. Nearly 100% of content streamed by Hulu, Netflix, Amazon Video, and other online services that publicly perform MPAA members’ works is captioned. See, e.g., Press Release, Hulu, [\*The National Association of the Deaf and Hulu Reach Agreement\*](#) (Sept. 6, 2016). And music videos are captioned on websites like YouTube.

(b) *Audio Description*<sup>2</sup>

In the words of the Department of Justice, “[a]udio description ... enables individuals who are blind or have low vision to hear a spoken narration of a movie’s key visual elements, including, but not limited to, the action, settings, facial expressions, costumes, and scene changes. It requires specially trained writers to create a separate script that is then recorded and synchronized with the [motion picture].” 81 Fed. Reg. at 87,354. Audio description was described by the D.C. Circuit as follows: “[Audio] descriptions provide aural descriptions of a television program’s key visual elements (such as the movement of a person in a scene) that are inserted during pauses in the program dialogue. [Audio] descriptions change program content because they require the creation of new script to convey program details, whereas closed captions present a verbatim transcription of the program’s spoken words.” *MPAA v. FCC*, 309 F.3d 796, 798 (D.C. Cir. 2002). This is a complex undertaking that requires significant coordination, authorship, planning and innovation to be successful, and is much more challenging than captioning. Nevertheless, many motion pictures are now available with audio descriptions.

The American Council for the Blind (“ACB”), through its Audio Description Project, provides a list, updated weekly, of titles available with audio descriptions. See ACB, [The Audio Description Project](#). The list is extensive, and includes many titles from the catalogs of MPAA members, both for movies and television shows. With respect to movies, theatres are now required to provide access to both captioning and audio description, when available. 81 Fed. Reg. at 87,348. Progress is also being made with respect to online streaming services. For

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<sup>2</sup> Although “audio description” and “video description” are both used to refer to the same process of rendering a motion picture accessible to an individual who is blind or has low vision, for consistency these comments will use the term “audio description.”

example, the ACB reports that “iTunes now offers over 600 movies with audio description tracks” and “Netflix offers description for over 500 original shows, documentaries, TV series, and children’s programming.” See ACB, [Online Described Movies Sources](#); see also ACB, [Streaming Video Services Offering Audio Description](#). In addition, the “Watch ABC” app offers access to live content and select previous episodes of shows broadcasted by the network on mobile devices in select markets, for free. The app frequently enables audio description and received the 2017 “Achievement in Audio Description – Media” award from the Audio Description Project.

While audio description would ideally be available for nearly all motion pictures, these marketplace improvements in access reflect a strong trend toward content being increasingly produced and disseminated in accessible formats.

## **2. The Register’s 2012 Recommendation Provides Relevant Context.**

During the 2012 rulemaking, Telecommunications for the Deaf and Hard of Hearing, Gallaudet University, and the Participatory Culture Foundation requested exemptions covering the following classes of works:

Motion pictures and other audiovisual works delivered via Internet protocol (IP) [or on fixed disc based media] protected by technological measures that control access to such works when circumvention is accomplished to facilitate the creation, improvement, or rendering of audible representations or descriptions of visual portions of such works, [or to facilitate the creation, improvement or rendering of visual representations or descriptions of audible portions of such works,] for the purpose of improving the ability of individuals who may lawfully access such works to perceive such works.

U.S. Copyright Office, [Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights](#) 143 (2012) (“2012 Rec.”).

The Register did not recommend the exemptions requested by the petitioners because they did not build an adequate record to support such broad language.

Both the Register and the Librarian have consistently supported universal accessibility, and are sympathetic to the needs of blind, visually impaired, deaf and hard of hearing communities. As a matter of policy, access to copyrighted works for individuals with such disabilities is to be encouraged. The Register has not hesitated to recommend classes aimed at improving accessibility previously when the record has supported such a recommendation. However, unless the burden of showing a *prima facie* case is met, the statutory standard established for the rulemaking does not permit the designation of a class of works. Presenting strong arguments in favor of exempting a class of works from the prohibition on circumvention is only one part of the process; a proponent must also provide sufficient facts to justify a finding that the prohibition is actually having or is likely to have an adverse effect on noninfringing uses.

*Id.* at 155.

Nevertheless, the Register did recommend, and the Librarian granted, a narrower exemption. That exemption covered the following class 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.

*Id.* at 156.

The Register described her reasoning for granting the narrowed exemption as follows:

The scope of proponents' intended uses is difficult to discern from proponents' original request. The papers are fraught with broad generalizations as to how certain technologies might be adapted to accommodate the needs of the blind, visually impaired, deaf, and hard of hearing. Beyond a few scattered examples, however, it is very difficult to discern what, precisely, proponents seek to do with their proposed exemption. Proponents articulate three broad categories of conduct: (1) conducting research and development on accessible technologies to

develop a player capable of presenting or manipulating captions or descriptive audio; (2) creating such captions or descriptive audio or corrections thereto; and (3) presenting such captions or descriptive audio along with the underlying lawfully acquired work so that individuals with disabilities may perceive them. Still, the precise contours of certain aspects of the proponents' intended exploitation of the proposed exemption remain elusive. The record is clear that proponents would like to conduct research with the objective of developing a player capable of presenting and, in some cases, manipulating or customizing captions and/or descriptive audio. But with respect to the creation of such captions or descriptive audio, the record contains only generalized representations about how they would intend to proceed, were the exemption to be granted.

Proponents assert that each of the broadly defined intended uses is fair, citing to *Sony Corporation of America v. Universal Studios, Inc.*, and a sole footnote therein, which they acknowledge is merely dicta. However, fair use analyses are, by statute, necessarily fact specific; moreover, courts have cautioned that “[t]he task is not to be simplified with bright-line rules,” but rather, must be analyzed on a case-by-case basis. Most of the uses relating to the creation of captions and descriptive audio proposed by the proponents are so general that it is impossible to evaluate whether such uses would be noninfringing. For example, proponents have discussed creating captions for content that is uncaptioned, as well as fixing incorrect or poorly implemented captions – each of these distinct endeavors could well have a different outcome under a traditional fair use analysis. But absent any specific facts pertaining to particularized uses, such an analysis is not possible.

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With respect to research and development, however, the record is more developed. Dr. Christian Vogler of Gallaudet University demonstrated a software development effort aimed at creating a player to combine captions or descriptive audio with commercially available motion picture and audiovisual content. That demonstration, coupled with the extensive discussion of the intended uses, provides a sufficient basis upon which to proceed with the analysis. In this regard, the Register need not perform a comprehensive fair use analysis. Having limited the scope of the evaluation to research and development of a player capable of rendering captions or descriptive audio alongside lawfully acquired content, the Register finds that the underlying purported use does not implicate the work itself, but rather, only certain nonprotectable information about the work – i.e., the timecode information accessible only through the protected “playhead.”

There do not appear to be any reasonable alternatives to circumvention with respect to the proponents' intended research and player development.

2012 Rec. at 148-50 (citations omitted).

The Register’s approach in 2012 provides a roadmap for how to analyze the proposal in the current proceeding. First, the Register must ask whether the proponents have provided sufficient facts to justify a finding that the prohibition is actually having or is likely to have an adverse effect on noninfringing uses. To do so, the Register must be able to discern the scope of the proponents’ intended uses. A proposal that is too broad to realistically evaluate whether the proposed uses are noninfringing and whether alternatives to circumvention exist cannot serve as the basis for an exemption. As explained more fully below, the current petitioners have not provided sufficient detail to justify the broadly worded exemption they requested.

**3. The Proposed Exemption Is Inadequately Supported And Overbroad.**

The ATSP petition proposed “an exemption for disability services offices, organizations that support people with disabilities, libraries, and other units at educational institutions that are responsible for fulfilling those institutions’ legal and ethical obligations to make works accessible to people with disabilities to circumvent technological protection measures for motion pictures (including television shows and videos), where circumvention is undertaken for the purpose of making a motion picture accessible to people with disabilities, including through the provision of closed and open captions and audio description.” ATSP, [Class 2 Petition](#) at 3 (Sept. 13, 2017) (“ATSP 2017 Petition”).

(a) *The Conduct At Issue Is Not Described With Sufficient Detail To Conduct A Proper Fair Use Analysis.*

The petitioners do not explain precisely the conduct in which they seek to engage. It is therefore impossible to apply the case-by-case fair use factors to the activities covered by the proposed exemption. The NPRM requires that the requisite level of detail be provided in the proponents’ opening comments. [Exemptions To Permit Circumvention of Access Controls on](#)

*Copyrighted Works: Notice of Proposed Rulemaking*, 82 Fed. Reg. 49,550, 49,558 (Oct. 26, 2017) (“NPRM”) (“Proponents of exemptions should present their complete affirmative case for an exemption during the initial round of public comment, including all legal and evidentiary support for the proposal.”). Accordingly, the petitioners have failed to make a *prima facie* case in support of the exemption.

To properly assess the proposed exemption, the following information, and likely more, would be required:

- The petitioners seek permission to circumvent to gain access to motion pictures to provide students with accessible copies. It is unclear whether the students would purchase the copies that are made accessible, or whether they would be available to loan. Whether a library that created an accessible copy of a movie to loan to a student would require the student to return the copy would necessarily impact the fair use analysis.
- The proposed class is not expressly limited to making *lawfully acquired* copies accessible or to digital transmissions to which users have *lawful* access. Providing accessible versions of copies to individuals without prior, lawful access to the works would be unlikely to survive fair use scrutiny.
- The petitioners do not address whether the exemption would allow permanent copies of motion pictures to be made from streaming subscription services that typically do not allow for permanent downloads. The ability to obtain a complete copy of a work when the user purchased only temporary access would impact the fair use analysis.
- The petitioners do not describe the scope of the dissemination of works in which they seek to engage, which would impact the fair use analysis. For example, creating a publicly available online database of captioned works or works with audio description

would be infringing. To the extent the Register recommends that an exemption should be granted, such conduct should be categorically prohibited. In 2012, the proponents expressly disavowed any desire to “distribute [works] to lots of people.” 2012 Rec. at 153. The current petitioners have not made the same representation in their present proposal and the exemption as crafted would appear to allow widespread dissemination.

- The comments focus on providing accessible copies of works that are assigned by teachers for courses. It is unclear whether the exemption would be limited to such copying. For example, it is unclear whether, under the proposed exemption, a student who personally purchased a copy of a DVD to view for its entertainment value would be permitted to bring the disc to the library and request that the work be copied to add audio description.
- It is unclear whether the copies that would be created and distributed pursuant to the exemption would have any form of technological protection measures attached to them. Distributing unprotected copies would, of course, have the potential to cause significant market harm to copyright owners.
- It is unclear whether the exemption would allow the petitioners to create accessible copies of works even if the works are already made available by copyright owners in accessible formats. Creating market substitutes for products that are already readily available would impact a fair use analysis.
- It is unclear whether the petitioners have developed any set of guidelines or best practices to apply to determine when accessible copies may be lawfully made. Reviewing a set of guidelines would enable the Register to assess whether the uses at issue are likely to be noninfringing.

This is not a comprehensive list of the facts that would be required to assess whether the exemption proposed by the petitioners would cover only conduct that is likely to be noninfringing. This list is only representative of the kinds of details that should have been provided in the December 18, 2017 comments. Moreover, as discussed below, there are specific issues raised by the creation of audio description for motion pictures that render suspect the petitioners' claim that all conduct in furtherance of audio describing a work is fair use.

*(b) The Proponents Cite No Authority Holding That Captioning Or Audio Describing Motion Pictures Qualifies As A Noninfringing Use.*

As the Register concluded in 2012, neither *Sony-Betamax* nor the Copyright Act's legislative history suggests a rule that all reproduction, adaptation and distribution for the purpose of accessibility is fair use. 2012 Rec. at 146, 149. The Register only recommended an exemption in 2012 because she determined that she could do so without finding that creating captions or descriptions was lawful – she only exempted circumvention to access playhead information for the purpose of developing “players capable of rendering captions and descriptive audio during the playback of lawfully acquired motion pictures.” 2012 Rec at 155.<sup>3</sup>

Indeed, the Register expressly stated that she was not concluding that captioning or audio describing a motion picture qualifies as a fair use.

The Register notes that this exemption does not extend to the creation of derivative works, which, as discussed above, may or may not infringe the copyright on the underlying works depending on the circumstances surrounding their creation. The Register notes that, to the extent proponents seek to create captions, audio descriptions, or related derivatives as part of their research efforts, they may use works that are not subject to copyright protection (e.g., those that are in the public domain, government works, and the like), or works for which proponents have secured appropriate permission from the copyright owner.

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<sup>3</sup> As discussed more *infra*, such players were not allowed to themselves be circumvention tools.

2012 Rec. at 156 n. 864. The Register was correct not to “break new ground on the scope of fair use” by concluding that captioning or audio describing works is always lawful. U.S. Copyright Office, [\*Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights\*](#) 109 (2015) (“2015 Rec.”).

(c) *Audio Description Raises Specific Issues That Impact The Fair Use Analysis.*

As discussed above, audio description, in particular, involves creating “a second script” that requires numerous creative decisions about how to interpret the imagery of the original work. In a case involving a challenge by the MPAA to regulations issued by the FCC, the D.C. Circuit described the creative endeavor of audio description as follows:

There is no doubt that the [audio] description rules regulate programming content. [Audio] description is not a regulation of television transmission that only incidentally and minimally affects program content; it is a direct and significant regulation of program content. The rules require programmers to create a second script. As Chairman Powell noted in his dissent, “[audio] description is a creative work. It requires a producer to evaluate a program, write a script, select actors, decide what to describe, decide how to describe it and choose what style or what pace. In contrast, closed captioning is a straight translation of dialogue into text.” Ultimately, [audio] descriptions require a writer to amend a script to fill in audio pauses that were not originally intended to be filled. Not only will producers and script writers be required to decide on what to describe, how to characterize it, and the style and pace of video descriptions, but script writers will have to describe subtleties in movements and mood that may not translate easily. And many movements in a scene admit of several interpretations, or their meaning is purposely left vague to enhance the program content. In short, it is clear that the implementation of [audio] descriptions invariably would entail subjective and artistic judgments that concern and affect program content. . . . [T]he Commission is wrong in its claim that [audio] descriptions are the same as closed captioning. One is a simple transcript, a precise repetition of the spoken words. The other requires an interpretation of visual scenes. They are not the same.

MPAA, 309 F.3d at 803.<sup>4</sup>

Although there does not appear to be any case directly analyzing whether audio describing a work is a fair use, cases involving foreign language translations are instructive. Those cases have held that copyright owners possess the exclusive right to adapt works by translating them. *See, e.g., Radji v. Khakbaz*, 607 F. Supp. 1296, 1300 (D.D.C. 1985) (“A translation, by definition, uses different language than that in the original. That, however, does not exempt translations from the provisions of the Copyright Act. To the contrary, the Act gives the copyright holder the exclusive right to prepare derivative works, which includes the right to make translations.”); *see also* 17 U.S.C. § 101 (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a ‘derivative work.’”); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 101 (2d Cir. 2014) (“[P]aradigmatic examples of derivative works include translations of the original into a different language, or adaptations of the original

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<sup>4</sup> The D.C. Circuit held that the FCC exceeded its authority by attempting to require audio description on television. Later, Congress amended the Communications Act to allow the FCC to issue such rules. *See* 47 U.S.C. § 613(f). The rules currently require local TV station affiliates of ABC, CBS, Fox and NBC located in the top 60 TV markets to provide 50 hours per calendar quarter (about 4 hours per week) of video-described prime time and/or children’s programming. The top five non-broadcast networks - Disney Channel, History, TBS, TNT and USA – also must provide 50 hours per calendar quarter (about 4 hours per week) of video-described prime time and/or children’s programming. *See* [FCC Video Description Information Page](#). The hours requirement will increase to 87.5 per calendar quarter, effective July 1, 2018, with the additional 37.5 hours to be provided at any time between 6 AM and midnight, local time. FCC Report and Order, *In the Matter of Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, July 12, 2017.

into different forms or media.”); 2 M.B. Nimmer & D. Nimmer, *Nimmer On Copyright* § 8.09[B][1] (2017) (“[A] translation may not lawfully come into being without the consent of the copyright owner of the work to be translated.”).

(d) *None Of The Petitioners’ Arguments Establishes That Captions Or Audio Descriptions Are Fair Uses.*

The petitioners make four primary arguments to support the conclusion that creating accessible copies qualifies as a fair use. First, they argue that the Second Circuit’s *HathiTrust* opinion holds that all copying for the purpose of accessibility is fair use. ATSP, [Class 2 Long Comment](#) at 9-13 (Dec. 18, 2017) (“ATSP 2017 Comment”). In *HathiTrust*, defendants were, among other things, making “text-to-speech” versions of literary works so that they would be accessible to the print disabled. *HathiTrust*, 755 F.3d at 91 (“Through the HDL, a print-disabled user can obtain access to the contents of works in the digital library using adaptive technologies such as software that converts the text into spoken words, or that magnifies the text.”). Altering motion pictures is a significantly different undertaking, the result of which is likely a derivative work that involves a creative interpretation of the underlying work. Thus, the proponents’ reliance on *HathiTrust* is misplaced.

Second, the petitioners argue that the Register should conclude that captioning and audio describing motion pictures is noninfringing because she concluded that using text-to-speech software to render a work accessible was lawful while recommending the existing exemption related to accessing e-books. ATSP 2017 Comment at 2-3. Again, for the reason described above, such activity is distinguishable, even if copying is involved (as it was in *HathiTrust*). Moreover, exercising the existing exemption need not involve copying – using text-to-speech software to render a lawfully acquired e-book audible is a private performance. The petitioners

cite to the Section 1201 Study’s recommendation to make the e-books exemption permanent, ATSP 2017 Comment at 3, but that recommendation did not apply to audiovisual works. *See* 1201 Study at 87-88 (“The Office does not currently recommend a broader exemption to facilitate the use of assistive technology for non-literary works. . . . The Office agrees with some commenters that ‘outside the narrow context of literary works’ there has been ‘very little in the records from prior rulemaking proceedings regarding other entertainment products’ . . . ”).

Third, the petitioners assert that the Copyright Act’s legislative history states that all copying for accessibility purposes constitutes fair use. ATSP 2017 Comment at 9. However, the Register previously concluded that the cited language from the legislative history “addressed much more limited circumstances.” 2012 Rec. at 149, n. 840.

Fourth, the petitioners argue that, “[i]n the Americans with Disabilities Act, Congress declared the goal of ‘assur[ing] equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.’ Congress reaffirmed this commitment with the Chafee Amendment, which ‘illustrates Congress’s intent that copyright law make appropriate accommodations for the blind, visually impaired, or print disabled.’” ATSP 2017 Comment at 10 (citations omitted). However, the Chafee Amendment, which established § 121 following extensive discussion and a careful balancing of equities, applies only to non-dramatic literary works. 17 U.S.C. § 121(a) (“Notwithstanding the provisions of § 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.”). It also has other built-in limitations that the proposed exemption lacks, including that copies be made and distributed under § 121 “exclusively for use by blind or other persons

with disabilities;” that copies only be made and distributed in specialized formats; that copies “bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement;” and that copies “include a copyright notice identifying the copyright owner and the date of the original publication.” 17 U.S.C. § 121(a), (b).

In sum, the petitioners have not established that creating unauthorized audio descriptions or captions of motion pictures qualifies as a fair use. This is especially true where a market for authorized, accessible versions already exists. In such cases, creating unauthorized copies would undermine the market for the authorized versions. *See Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 110 (2d Cir. 1998) (internal quotation marks omitted) (the fourth factor is “concerned with secondary uses [of works] that, by offering a substitute for the original, usurp a market that properly belongs to the copyright-holder”); *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 584 (1994) (“the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) (“Even copying for noncommercial purposes may impair the copyright holder’s ability to obtain the rewards that Congress intended him to have.”).

(e) *It Appears That Alternatives To Circumvention Exist.*

As discussed above, if a work is already available in an accessible format, circumvention is unnecessary. The Joint Creators and Copyright Owners do not believe that the petitioners have established a record sufficient to justify granting an exemption. However, if the Register recommends an exemption related to Proposed Class 2, any such exemption should clearly state in the regulations that the exemption applies only if accessible versions are not available.

In addition, it is by no means clear that circumvention is required to prepare captions or audio descriptions. That process can be accomplished while simply watching the motion

pictures. It is the method by which the commenters seek to overlay the captions or descriptions that would determine whether circumvention is necessary. Because the petitioners have not explained how they intend to do so, the record does not support a conclusion that circumvention is necessary. The petitioners simply assert that “[o]ften, accessibility requires the circumvention of TPMs that interfere with accessibility technology,” without explaining how or to which technology they are referring.<sup>5</sup> ATSP 2017 Comment at 15.

In 2012, different petitioners stated that they needed to access the playhead time information for properly synching the captions and descriptions. They planned to develop a player that would achieve this purpose. The exemption was granted, but the petitioners did not seek renewal of the exemption in 2015. The current petition does not include any information about whether the research conducted was fruitful. Although the comments refer to “common tools for adding accessibility features,” they do not identify these tools. ATSP 2017 Comment at 1. Again, the record before the Register fails to establish a need for the proposed exemption. *See* NPRM at 49,558 (“Proponents of exemptions should present their complete affirmative case for an exemption during the initial round of public comment . . .”).

*(f) The Register Must Be Mindful Of Whether The Petition Seeks A Trafficking Exemption.*

The exemption granted in 2012 did not allow for the development of circumvention tools or cover circumvention services. The exemption was limited to research where “the resulting player does not require circumvention of technological measures to operate.” 2012 Rec. at 156.

The Register explained her reasoning as follows:

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<sup>5</sup> The comments contain some quotations from educators indicating that creating accessible options for students might be achievable without circumvention, but that the process is more time consuming. ATSP 2017 Comment at 17-19.

Opponents note that there is an “extremely fine line” between the development of players capable of rendering certain accessible content, and trafficking in circumvention devices, which is prohibited under 17 U.S.C. § 1201(a)(2). The Register acknowledges the potential conflict with the anti-trafficking provisions of the statute, but does not view those provisions as an impediment to the development of players that do not require circumvention in order to render captions or audio descriptions (for example, such a player might work alongside a player containing a decryption key licensed by AACSLA or DVDCCA). That is, to the extent that the need to circumvent is essential only to the research and development of such players by individual researchers or institutions, then the antitrafficking provisions do not appear to be implicated. The Register believes that appropriately limiting the language in an exemption can ensure that such an exemption would not be interpreted to permit or encourage trafficking, which is not only a violation of 17 U.S.C. § 1201(a)(2), but also beyond the scope of this rulemaking.

2012 Rec. at 150, n. 843 (citation omitted).

The petitioners’ proposed class clearly extends beyond the targeted 2012 exemption to cover the provision of circumvention services and, perhaps, the creation and circulation of circumvention tools. Such exemptions are beyond the scope of that which is permissible under the triennial rulemaking procedure. *See* 1201 Study at 56 (“Subsections (a)(2) and (b) make it unlawful to ‘offer to the public, provide, or otherwise traffic in any . . . service . . . or part thereof’ that is primarily designed for the purpose of circumvention, has only limited commercially significant purpose other than circumvention, or is marketed for use in circumvention. The Librarian is not authorized to adopt exemptions to those provisions.”).

Moreover, the existing exemption for circumvention to render e-books accessible, which is the only current exemption related to accessibility issues, is limited to “authorized entities,” as defined in § 121. An “authorized entity” is “a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities.”<sup>6</sup> 17

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<sup>6</sup> As discussed *supra*, § 121 does not apply to motion pictures.

U.S.C. § 121(d)(1). The petitioners’ proposal would apply to “disability services offices, organizations that support people with disabilities, libraries, and other units at educational institutions that are responsible for fulfilling those institutions’ legal and ethical obligations to make works accessible to people with disabilities.” ATSP 2017 Petition at 3. This list of users clearly goes beyond nonprofit organizations or governmental agencies with a primary mission related to assisting persons with disabilities. Although the Joint Creators and Copyright Owners do not believe that the petitioners have adequately supported their proposal, if the Register nevertheless considers recommending an exemption related to Proposed Class 2, she should carefully identify exactly who is authorized to make use of the exemption and keep in mind that this proceeding does not extend to granting exemptions to § 1201’s anti-trafficking prohibitions.

#### **DOCUMENTARY EVIDENCE**

The Joint Creators and Copyright Owners are not submitting any exhibits for this proposed class. Throughout the comment, links are provided for documentary evidence.

DATE: February 12, 2018

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