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Abstract

There are many videos that could be used for instruction and research but are inaccessible to those who need closed captions. Academic libraries could play an important role in supporting captioning, but they are hampered by misinformation and misunderstanding about copyright law and unnecessary fear of repercussions. With a better understanding of the current state of the law and how documented practices and community norms have the power to shift the law over time, library workers can be empowered to support captioning, share resources and workflows, and document their activity openly, in collaboration with instructors and with disability services and information technology offices. This article reviews current literature on closed captioning, copyright law, disability law, and accessibility in higher education to illuminate the possibilities for library workers to support video captioning for accessibility purposes, even in cases where permission cannot be obtained from the copyright holder. The research shows an unequivocal fair use protection for educational captioning, a right that is best protected when it is actively asserted and used.

Keywords: academic libraries, accessibility, audiovisual media, copyright, closed captions, deaf students, disability services, fair use, film, video

Copyright and Closed Captioning in Higher Education

Higher education institutions (HEIs) are under pressure to meet the requirements of both copyright law and disability law while minimizing the risk of lawsuits and meeting the needs of students with disabilities. This is not an easy task when the two areas of law address and acknowledge one another to only a limited degree; when copyright, accessibility, acquisition of materials, and teaching are handled by different branches of the HEI that may or may not communicate with each other; and when neither case law nor documented practice offer clear standards for proceeding. This situation is especially murky regarding the captioning of videos and other audiovisual materials. When video creators and distributors do not provide captions for content used in teaching, HEIs may be obligated to do so (see, for example, *U.S. v. Regents of the University of California*, 2022). However, copyright sometimes provides a convenient excuse for content producers and HEIs to shift blame when they fail to provide materials in an accessible format (Stanton, 2015). Ambiguity, risk-aversion, and misinformation about the law combine to discourage HEI personnel—in libraries as well as in disability services—from proactively remediating videos in their collections and openly sharing information and policies about remediation (Peacock & Vecchione, 2020; Wood et al., 2017). Such caution is understandable, but not justified by the facts, and does not serve the interests of students, teachers, libraries, or people with disabilities.

In this paper I will argue that despite the legal confusion surrounding copyright and unauthorized accessibility remediation for non-text materials, libraries can and should play a role in such remediation, in collaboration with disability services and information technology offices. In doing so, HEI staff need not depend on permission from rightsholders to reproduce materials, but must document their practices and the legal reasons for them. For reasons outlined below, the copyright landscape for audiovisual accessibility differs from that for text accessibility. The approach I recommend relies on an explicit prioritization of accessibility as an institutional value, along with a fair use interpretation crucially documented in the Digital Millennium Copyright Act (DMCA) Rulemakings (U.S. Copyright Office, 2018, pp. 89-111; 2021, pp. 64-79), discussed below.

Students who are deaf or hard of hearing require closed captions for equitable access to videos, audio recordings, and other media with an audio component. Closed captions are also widely preferred by viewers and instructors regardless of hearing. In a study of streaming video databases, faculty noted that captions were an important or even essential feature in videos for teaching purposes, with pedagogical uses beyond accessibility (Beisler et al., 2019). Due to federal mandates, most commercially released video in streaming formats is captioned by the producer or distributor (Telecommunications Act of 1996;

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Twenty-first Century Communications and Video Accessibility Act of 2010 [CVAA], 2010; and see Reid, 2021). However, there is an immense amount of other video, held in libraries, repositories, and the open web, that either lacks captions or has only software-generated "automatic" captions with numerous errors and no punctuation. In many cases the copyright holders for such works cannot be reached or are unwilling to provide captions (Peacock & Vecchione, 2020; Wood et al., 2017). Instructors rely on a wide variety of such videos for a broad range of teaching purposes, including user-created streaming content on sites such as YouTube, and also independent and archival media in physical formats such as film, VHS, and DVD (Lohmann & Frederiksen, 2018). Institutions need a way to remediate these materials if they are not available in a viable captioned format, but uncertainty about copyright has created a barrier and prevented captions and resources from being proactively shared. Focus group and survey studies by Laura C. Wood et al. (2017) and by Rebeca Peacock and Amy Vecchione (2020) show awareness of this problem at many institutions, with a variety of responses but little consensus, transparency, or public documentation.

Historically, copyright has often impeded accessibility and continues to do so (Reid, 2021). The past decade has brought considerable progress, with both international treaties and legal cases codifying accessibility as a protected purpose for reproducing and creating derivative versions of texts for readers with documented print disabilities (for example, *Authors Guild, Inc. v. HathiTrust*, 2014; Chafee Amendment, 1996; Marrakesh Treaty Implementation Act, 2018). However, copyright legislation and court decisions are lacking with regard to audiovisual materials and accessibility for users who are deaf or hard of hearing (for historical background, see Reid, 2021). The one significant exception is the discussion of fair use in connection with a DMCA exemption rulemaking from the U.S. Copyright Office (2018), renewed and expanded in the 2021 rulemaking currently in effect. While much remains unclear and vulnerable to reversal, I will argue that these Copyright Office rules under the Digital Millennium Copyright Act (DMCA, 1998), referred to below as the 2018 and 2021 DMCA Exemptions, provide hope and a clear path forward for disability services offices, libraries, and other parts of HEIs that have traditionally taken a cautious or secretive approach to unauthorized copying of audiovisual materials for accessibility remediation. Caution and secrecy about remediation practices by HEIs are largely unnecessary and probably counterproductive.

Many in the library community have embraced accessibility as a legal and ethical imperative and produced important publications to clarify concepts and document practice around accessible print and copyright, relying on both the Marrakesh Treaty and (in US contexts) fair use (for example, Association of Research Libraries [ARL], 2012; Butler et al., 2019; Coates et al., 2018). In contrast,

library scholarship on copyright and video captioning has been far less robust, leaving important questions. In the absence of clear legal guidelines, how can practice be guided by the missions of HEIs and especially of academic libraries? How can academic librarians collaborate with disability services offices to create practical solutions? In this article I review relevant literature on copyright and accessibility, with special attention to video captioning and to gaps in the existing literature and legal framework. The existing evidence makes a strong case for accessibility remediation through captioning and audio description as a fair use, even in the absence of specific legislation or court decisions on copyright and accessible audiovisual materials.

This fair use interpretation, spelled out most clearly and authoritatively in the 2018 DMCA Exemption, enables HEIs to meet the needs of people with disabilities in accordance with the law. By incorporating this interpretation in practice and documenting that practice and its results, HEIs (and bodies within HEIs such as libraries and disability services offices) can support the solidification of this practice as customary and usual and help prevent further restrictions from being added through legislation. Like much of disability rights law and fair use law, this practice of unauthorized remediation began as unlegislated, informal activity and has gradually found its way into written law in the form of court rulings, copyright office rulemakings, and (to a very limited degree) legislation.

Law is reflected, shaped, and indeed made through the practices of communities, including informal and undocumented practices (Cover, 1983; Reid, 2021). While it is tempting to view law as a set of clear and logically consistent rules verbally codified by the state (that is, by Congress, courts, the U.S. Copyright Office, and so on), the intersection of audiovisual accessibility and copyright is an area where written law is largely silent or incoherent. Where legal questions arise, actual practices in response to the needs of communities (such as those described by Wood et al., 2017, and Peacock & Vecchione, 2020) could provide significant guidance. Further, if progress has been made in reconciling legal tensions in the name of equal (or at least improved) access, we do not have Congress, the courts, or the Register of Copyrights to thank. Important as they may be, texts like the DMCA Exemptions (U.S. Copyright Office, 2018, 2021) or the Chafee Amendment (1996) have come about only because of the activity of teachers, disability services workers, and library workers, often initiated with little or no legal authorization regarding copyright. The exemption rulemakings rely on statements of interest that document common practices (discussed in U.S. Copyright Office, 2018, pp. 90–91). Copyright exceptions are founded on existing practices and technologies for remediation, developed to meet a demand for accessibility long before the existence of any legal mandate (Reid, 2021). And, of course, these institutional accessibility practices, like the Americans with Disabilities Act of 1990 (ADA) itself, came about only due to the

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individual and collective self-advocacy of people with disabilities, who applied relentless pressure not only to influence government and written law, but to shape—and often to disrupt—the everyday and unofficial practices of institutions, communities, and classrooms. With a better understanding of the current state of the law and how documented real-life practices have the power to shift it over time, HEIs and library workers can be empowered to support proactive captioning and other audiovisual remediation and to document their activity openly, sharing information and workflows to conserve resources and develop best practices. The risk involved to institutions is minimal and outweighed by the benefits, at least while the current DMCA Exemption (U.S. Copyright Office, 2021) is in effect.

Copyright and Accessible Text

Existing publications on accessibility and copyright in libraries, and in the education field in general, focus almost exclusively on the accessibility of text materials such as books and articles. There is a considerable body of research on web accessibility in library contexts, but a literature search suggests that it rarely deals with copyright concerns. While legal and technological issues require audiovisual media to be considered separately from textual media, I will begin with the print-centered library literature on accessibility and copyright.

In U.S. law, sections 107 and 121 of the Copyright Act—fair use and the Chafee Amendment (1996), respectively—are especially relevant to the interaction of copyright and accessibility. Section 107 broadly defines a wide range of non-infringing uses and has many applications to educational and research materials. Section 121 creates, for the first time in U.S. copyright law, a specific exception to protect the non-infringing use of non-dramatic textual works for readers with print disabilities. Section 1201, part of the DMCA, is also relevant since it empowers the Copyright Office to make triennial rulemakings, temporarily defining exceptions to the prohibition on technological protection measures (TPM) circumvention. Since 2000, the Copyright Office has used this rulemaking process to define important exceptions supporting accessibility and other purposes (U.S. Copyright Office, n.d.). In addition to these federal laws, the precedent set by *Authors Guild, Inc. v. HathiTrust* (2014) is crucial for defining protections, based on fair use, for reproduction and distribution of materials in accessible formats. The AIM Commission Report (Advisory Commission on Accessible Instructional Materials [AIM] in Postsecondary Education for Students with Disabilities, 2011) is another important document, as it describes in detail the barriers to the creation of accessible instructional materials in higher education and makes important policy recommendations (although these have not been implemented at a national level). Finally, the Marrakesh Treaty (2013), to which the United States is a signatory,

codifies an international agreement to suspend any copyright restrictions that would prevent or discourage the creation of accessible books for the blind or visually impaired. Jessica Coates et al. (2018) provide a thorough summary of this agreement and its implications for libraries, with suggestions for implementation in library services.

The ARL *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012) provides a significant foundation for fair-used based practices in research libraries, many (though not all) of which can be extended to education institutions more broadly. Section Five of the *Code* addresses "reproducing material for use by disabled students, staff, faculty, and other appropriate users" (ARL, 2012, pp. 21–22). While articulating the important principle that "true accommodation" means providing accessible materials for users with disabilities for any purpose, just as they would be provided to other library users, this section reflects the prioritization of print resources based on a cautious interpretation of Section 121 and case law. The authors note that "no specific exception to copyright even arguably addresses the needs of patrons with disabilities related to media other than print" (ARL, 2012, p. 21), a narrow reading that could be justified by caution in 2012 but not in 2023. Given the important fair use discussion in the 2018 DMCA Exemption and the impact of *Authors Guild, Inc. v. HathiTrust* (2014) and *National Association of the Deaf v. Netflix Inc.* (2012; both cited in U.S. Copyright Office, 2018, and discussed in further detail below), this section of the *Code* is in serious need of revision.

In the context of print remediation, the Chafee Amendment (1996) codifies exceptions for copying print materials in accessible formats, in some cases well beyond the provisions of fair use. The Marrakesh Treaty (2013) also creates a broad exception for unauthorized copying for the purpose of creating accessible versions of text. DMCA Exemptions from the Copyright Office allow TPM circumvention for remediation of texts for print-disabled readers. Given these clear exceptions, fair use may be a moot point with regard to most text remediation in educational contexts. However, it is worth considering because it provides a foundation for a fair use argument supporting remediation of non-print materials. Text remediation for readers who are blind is the only type of accessibility remediation mentioned in U.S. copyright legislation, and legal cases related to copyright and accessibility have primarily focused on text. For remediation of materials other than text, fair use remains an essential consideration.

Jamie Axelrod (2018) offers a broad overview of common practices and major barriers to the provision of accessible education materials from an educational administration perspective. Although the article focuses on accessible print materials—including an extensive list of resources—and does not discuss copyright concerns in detail, it provides a useful description of the tension between publishers and HEIs, which are generally seen as having different legal obligations and

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conflicting interests regarding accessibility. Axelrod calls for publishers to "publicly recognize the obligation that HEIs have to provide accessible versions of materials to students with disabilities" (p. 43), a step that would involve no cost or additional work on their part and would reduce the (generally inaccurate) perception of legal risk for HEIs in remediating materials.

Wood et al. (2017) provide a valuable, detailed, and pragmatic discussion of the current and potential role of libraries in the provision of accessible materials for higher education. Drawing on the AIM Commission Report (2011) and focus group research with disability services professionals, they illuminate the current state of practice and the perspectives of stakeholders including librarians, disability service professionals, publishers, and students. Further, they advocate for an expanded role for libraries in providing infrastructure and expertise to build less secretive, more efficient shared tools, including interinstitutional repositories of remediated works. Their focus group research provides evidence of widespread fear that remediation puts the institution at risk, uncertainty about what the law permits, and "a high level of self-policing" around remediation practices (p. 20). They note that publishers' cooperation is limited, often comes with restrictive user agreements that do not acknowledge the legal protections for unauthorized remediation, and sometimes requires proof that a student purchased an inaccessible copy of the required text. The discussion is largely focused on print but addresses other media as well and documents specific issues with video captioning, including difficulty obtaining rights and lack of clarity about the law. The article does not analyze copyright issues but documents practitioners' attitude of apprehensiveness about copyright and identifies it as a barrier. Together with the report on the same study by Katrina Fenlon et al. (2016), Wood et al. (2017) provide an exemplary description of the state of educational accessibility. They note that the barriers to effective collaboration and full accessibility are serious, and that little has changed since the AIM Commission submitted its recommendations to Congress in 2011.

Text and Audiovisual Accessibility: Divergent Histories and Ableist Legacies

Brandon Butler et al. (2019) provide a more detailed copyright analysis of print remediation for educational materials. They note that the apparent conflict between copyright and accessibility stems from early decisions to assign responsibility for accessibility to third parties (libraries and educational institutions) rather than to copyright holders. As a result, legal decisions have been shaped by the responsibilities of these third parties, circumventing both the rights and the responsibilities of publishers and other rightsholders. Given these exceptions, the authors show that "copyright law provides HEIs with broad, clear authority to create accessible copies of in-copyright works […], to distribute

accessible texts to qualified users, and to retain and share remediated texts in secure repositories for use in serving future qualifying requests" (p. 7). They stress the extent to which "copyright defers to accessibility and not the other way around" in existing U.S. law, attributing this tendency to what they call "a hierarchy of legal interests, arrayed under the general heading of the First Amendment" (p. 42).

This conclusion contrasts with that of Blake E. Reid (2021), whose broader historical analysis shows how contingent this hierarchy is, how differently it has played out in print and audiovisual media, and how little First Amendment values can be expected to harmonize with implicitly ableist and market-driven systems of information production and distribution. In a groundbreaking article, Reid outlines the divergent histories of print and audiovisual remediation in U.S. disability and copyright law, highlighting the unnecessary intrusion of what he calls copyright's ableist tradition, which has been more thoroughly imposed in the case of print. This imposition, which Reid traces to the early involvement of the Library of Congress in programs to provide Braille and recorded books for the blind, led to a need for legislated exceptions to copyright protection for the provision of accessible print. With audiovisual materials (specifically television), creators were mandated to provide captions, so there was no need for a permissions process and far less intrusion from the ableist tradition of copyright. Due to this combination of a strong mandate for accessible materials (provided by content creators rather than by a third party) with neglect of the ostensible copyright barriers, closed captioning has become nearly universal in major motion pictures and broadcast television, despite the absence of specific copyright exceptions for closed captioning in U.S. law. Reid suggests that this model, if applied to text and other media, could revolutionize accessibility and render the cumbersome copyright exceptions for print remediation unnecessary.

Ironically, this situation does very little to encourage or enable captioning of older audiovisual materials held in libraries and archives, not to mention the immense proliferation of online video on platforms like YouTube and Vimeo, where viewers are most likely to encounter inadequate software-generated captions or none at all. When instructors, library workers, and disability services staff at HEIs face the wide array of print and audiovisual materials that remain inaccessible, the situation (however dismal) is far more clear-cut with regard to copyright for print materials than for videos. Fortunately, recent legal developments and research point to a strong case for remediation by third parties as required by the Rehabilitation Act (1998) and permitted by fair use.

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Copyright and Accessible Audiovisual Media

Library literature relating to both copyright and accessible audiovisual media is remarkably scarce. However, there is a small and important body of case law relating to copyright and closed captioning more broadly, including one important case in a higher education context. The legal histories of copyright and accessibility are quite different for captioned media and for accessible print, primarily because federal mandates in the Telecommunications Act (1996) and CVAA (2010) placed the responsibility for television captioning with content creators rather than (as in early talking book legislation) with a governmental body or other third party. This mandate has meant that most commercial films and television programs after the late 1990s were available upon release in a captioned format authorized, paid for, and sold by the copyright owner. Copyright questions have arisen around formats and situations not explicitly covered by this mandate, such as DVD, subscription streaming video, instructional video produced by educational institutions, and music played at sporting events. The situation is complicated by the fact that audiovisual works are often produced in multiple formats and may have multiple "layers" of rights held by different parties, including, for example, rights for the script, music, and performances.

National Association for the Deaf v. Netflix, Inc. (2012) was an important case that brought to light the convergence of disability law, telecommunications law, and copyright law. The National Association for the Deaf (NAD) sued under the ADA to compel Netflix to provide captions for streaming videos on its website as a public accommodation. Although the case was settled out of court through a consent decree before a final ruling, the Massachusetts District Court's decision to allow it to proceed supports a broad interpretation of the mandate for content providers to provide captioning for online video under the ADA and CVAA. The decision also rejects the argument that copyright is a barrier to captioning. Virginia Wooten (2012) reflects on the broader outcomes of the case, noting that it might lead to broad requirements for online video sites to provide captions but does not clarify rights and responsibilities for captioning in cases where the distributor or website owner does not hold the copyright for the video. Wooten's comments suggest that a fair use interpretation might depend on whether the addition of captions can be considered transformative, although the later DMCA rulemakings appear to settle this question.

John F. Stanton (2015) discusses the frequent failure of DVD producers to include captions for song lyrics even when all speech on the DVD is captioned, and shows that copyright is not so much a legal barrier as a convenient excuse for producers who wish to avoid risk and reduce their captioning costs, at the expense of deaf viewers and others who rely on captions for access. Stanton finds this "copyright defense" untenable in light of *Feldman v. Pro Football*, *Inc.* (2008) and

Authors Guild, Inc. v. Hathitrust (2014). *Feldman* found that a football stadium was obligated, under the ADA, to provide captions for music and announcements amplified by its public address system as an essential part of the "planned and synchronized promotional experience" provided (*Feldman v. Pro Football*, 2008, p. 384). *Authors Guild* found that fair use protected the conversion of text to an accessible format for purposes of academic instruction and scholarship. Stanton's scholarly opinion has not been tested in court but is affirmed by the 2018 and 2021 DMCA Exemptions.

There have been few legal cases involving captioning in higher education. One of the most significant is *NAD v. Harvard University* (2019), in which suit was brought under the Rehabilitation Act of 1973 and the ADA against Harvard for "failure to provide equal access for deaf and hard of hearing individuals to much of the audio and audiovisual content that Harvard makes available online to the general public for free by not providing captioning" (*NAD v. Harvard University*, 2016, p. 3). The case was settled in favor of the plaintiffs in 2019. The Department of Justice filed statements of interest in this suit and a similar suit against the Massachusetts Institute of Technology, contending that the ADA Title III mandate for accessibility applies to online video content provided by private universities. More recently, the Department filed a consent decree requiring the University of California at Berkeley to make all publicly available materials on its websites accessible, including the addition of captions and audio description for all videos (*U.S. v. Regents of the University of California*, 2022). Although the courts have not settled the issue, there is clearly a strong case for accessibility as a federal imperative applying to video at HEIs (Burke et al., 2016, pp. 148–150). Unlike Netflix, Harvard did not raise the issue of copyright as a barrier or excuse for failing to caption materials.

To date, no legal cases have explored the interaction of copyright and accessibility law as they relate to videos held by academic libraries. Indeed, there is little scholarship on this topic, apart from a significant case study by Teressa M. Keenan (2018, discussed in "Roles for Academic Libraries" below). However, the topic is mentioned in discussions of streaming video collections (Adams & Holland, 2017; Tanasse, 2021) and in published guidelines from ARL (2012) and Association of College & Research Libraries (2018). Tina M. Adams and Claudia C. Holland (2017) provide a detailed description of policies and workflows for handling streaming media requests at George Mason University, including a fair use analysis of digital transmission of materials owned by the library in non-streaming formats. Given the obligation under the Rehabilitation Act (1998) for an institution receiving federal funds to provide accommodations and the university's commitment to following the Web Content Accessibility Guidelines 2.0 best practices, they developed a legal rationale with university counsel to support remediation of

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audiovisual material without requiring permission from rightsholders, based on fair use and risk assessment (Adams & Holland, 2017, pp. 14–15). This article concerns fair use and educational streaming media but does not go into detail about the legal issues surrounding accessibility. Gisèle Tanasse (2021), reporting a survey of library workers on streaming video issues, found that 20% of institutions surveyed were required by policy to obtain materials in captioned formats, that a majority preferred captioned formats, and that a small minority had funds for "as-needed" captioning. She does not address copyright implications of captioning but notes that most streaming media in library collections are subject to license agreements which generally supersede the doctrine of first sale. The ACRL *Guidelines for Media Resources* (2018, sec. 6.0) make a similar point about license agreements but do nothing to clarify the copyright issues. The authors do note that some libraries produce audio descriptions or captions for materials in their collections and interestingly recommend that remediated versions be made available to independent filmmakers and distributors when possible. This is not much of an improvement on the ARL *Best Practices* (2012), which outline the accessibility protections for text under the Chafee Amendment but advise caution with regard to audiovisual media, stopping just short of implying that audiovisual remediation is not protected by fair use. Both documents need revision in light of cases brought by the NAD, research by Stanton (2015) and Burke et al. (2016), and especially the important 2018 and 2021 DMCA Exemptions from the U.S. Copyright Office.

The Impact of 2018 and 2021 DMCA Exemptions

Although buried in a discussion of technical protection measures and not widely cited, the DMCA Exemptions provide a robust and authoritative fair use analysis in favor of remediating video (U.S. Copyright Office, 2018; 2021). The 2018 Exemption is the closest thing available to legislation or precedent on the issue of copying for captioning or audio description as a fair use. Audiovisual remediation has lagged far behind text remediation in U.S. copyright law, enabling opponents of this type of use to characterize it as a straightforward copyright violation, even when an analogous practice applied to text would be clearly protected. Reid (2021) traces the historical reasons for this in detail, the most important being that government bodies have sought to promote accessible text through copyright exceptions and third-party remediation but have mandated film and video remediation by the copyright holders themselves. Even the authors of the ARL *Best Practices*, who are proponents of expansive fair use in support of accessibility, felt compelled to note in 2012 that current law did not "even arguably" provide an exception for accessibility remediation of audiovisual materials (p. 21).

What changed between 2012 and 2018? One factor is litigation by disability advocates such as NAD, which demonstrated that market pressure would not be enough to force major providers to adopt accessibility practices (see Wooten, 2012). A record was also presented as evidence to the Copyright Office showing how frequently disability service offices needed to make copies to meet an accessibility request, and demonstrating that reliance on permissions, existing market availability, and non-circumventing methods would not be sufficient (U.S. Copyright Office, 2018, pp. 90–91). In other words, this change was the result of advocacy, lawsuits, and documented, proactive remediation by people with disabilities and by institutions.

The fair use determination in the 2018 Recommendation relies substantially on the first factor, the purpose of the use, but addresses all four factors while noting that not all weigh in favor of fair use. Because the Exemption would apply to all forms of audiovisual works including dramatic and documentary motion pictures, which are "generally creative" (U.S. Copyright Office, 2015, p. 70), the second factor, the nature of the copyrighted work, weighs against fair use. However, the 2018 Recommendation notes that fair use could still be found in cases where there is a valid purpose for copying and no evidence of market harm (U.S. Copyright Office, 2018, p. 98). On the third factor, the amount used, the Acting Register notes that in many cases it is necessary to copy a work in its entirety to achieve the valid purpose of remediation, and that the extent of the portion should not weigh against a finding of fair use in such a case (citing *Authors Guild, Inc. v. HathiTrust*, 2014). The Acting Register concludes an interesting discussion of the then-current market availability of captioned media by finding that the fourth factor, market impact, weighs in favor of fair use. While it is true, as opponents of the exemption argued, that most new commercial DVDs and most streaming feature films and series from major platforms such as Amazon and Netflix already include captions as required by the ADA and CVAA, there remains a large body of older features and series, independently produced films, and user-generated content on internet platforms that do not include accurate captions, and neither market demand nor the ADA mandate for broadcasters can remedy this. The recommendation also notes that audio description is far less widespread than captioning, andthat the successful lawsuits by disability advocacy groups against Netflix and Hulu (see *NAD v. Netflix*, 2012, and NAD, 2016) show that market pressure—that is, a simple calculation of profit—was not enough to force content distributors to provide captions. Furthermore, the recommendation notes that the institutions represented in the record had established means of posting remediated copies on password-protected platforms, usually in a streaming format, to prevent unauthorized viewing or downloading for further dissemination, thus preventing any significant market harm. The argument for fair use emphasizes and supports an analogy with existing case law and

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legislation protecting text remediation, combined with an interpretation of Congress's intentions and "commitment to individuals with disabilities" (U.S. Copyright Office, 2018, p. 96) in contexts ranging from the 1976 copyright hearings to the ADA, Individuals with Disabilities Education Act (1990), and Chafee Amendment.

Any future revision of the ARL *Best Practices* (2012) should take this argument into account, as should institutional policies on remediation for audiovisual works. In the absence of legislation or court decisions specifically addressing this issue, the recommendation from the Acting Register of Copyrights, approved by the Librarian of Congress, is perhaps the most significant official decision on this issue. The Recommendation includes some important limitations, as it specifies that the exemption only applies when an institution has "after a reasonable effort, determined that an accessible version cannot be obtained at a fair price or in a timely manner" (U.S. Copyright Office, 2018, p. 111). However, it also discusses and acknowledges implications that extend far beyond a narrow ruling on TPM circumvention for audiovisual media. The recommendation explicitly points out that this interpretation of fair use should be read as applying to disability accommodations and remediation for accessibility in general, regardless of the medium, even though the context is a requested exemption for educational use of audiovisual materials only. Given the legislative history, which shows a consistent intent to support and mandate equal access for people with disabilities, the recommendation argues against a narrow reading of laws that refer to textual works and print disabilities exclusively.

The 2018 Exemption notes that copying could be done by individuals and departments (including libraries) outside of a disability services office in an educational institution. It does not specify that the material must be shown in a classroom or as part of a class assignment in order to qualify as having an educational purpose. It also emphasizes that the purpose of copyright exceptions related to accessibility is to promote equity through equal access, not merely to create convenience for people with disabilities (or for service providers, for that matter). The 2021 Recommendation affirms these points briefly and adds—a significant point for library services—that remediation may be done in advance and not only when there is an immediate need, as long as it is done to provide an accessible material for a specific purpose (U.S. Copyright Office, 2021).

This clarification suggests that libraries have the right to remediate audiovisual materials held in their collections by adding captions or audio description when these are not made available by the creator. In cases where a specific item is needed in an accessible format by a specific student or library user, copyright concerns should no longer impede such remediation. The Exemption is, of course, temporary and could be reversed by a future rulemaking in 2024 or after, or

by new legislation or federal court decisions. While it clarifies important rights under fair use and the DMCA for the time being, it does not settle any of the open questions about who is responsible for providing captioned video or other accessible materials. The federal mandate for broadcast media under the CVAA is clear, and cases like *NAD v. Harvard* (2016) and *NAD v. Netflix* (2012) give preliminary indications that streaming video platforms and educational institutions may bear similar responsibilities under the ADA and the Rehabilitation Act (1998), but no existing mandate from the courts or legislature facilitates captioning for all instructional video. Since HEIs are clearly responsible for providing all necessary accommodations for students with disabilities to complete courses, this leaves it up to HEI personnel (disability service workers, library workers, instructors, and so on)—with or without the help of content creators and distributors—to figure out how to meet the needs of viewers. In concluding, I would like to look at some ways for that to happen.

Conclusion: From Understanding to Action

Advocacy, Activism, and Praxis: The Work of People with Disabilities Shapes Disability Law

Law is subject to continuous change, reinterpretation, and adaptation over time, manifested in the practices of states, institutions, people, and communities, as well as in formal documents such as constitutions, laws, and court decisions. Law is often discussed as if it were made and remade exclusively by functionaries of the state or indirectly by voters through the medium of elections. Historical analysis, on the other hand, shows that court decisions are swayed by established practices and by the actions of private persons and communities, including actions considered illegal or subject to state violence and repression such as strikes, mass demonstrations, boycotts, or prohibited religious ceremonies. In the influential essay "*Nomos* and Narrative," the legal scholar Robert Cover (1983) uses examples from religious communities and U.S. constitutional law to show the plural, agonistic, processual nature of law in practice, describing the "jurisgenerative" power of communities (religious or not) to produce and elaborate norms, and the "jurispathic" power of courts to forcibly overrule or negate those norms. The history of disability law yields many examples of jurisgenerative planning, organization, and resistance by people with disabilities and the communities they belong to.

Major legislation such as the ADA and Rehabilitation Act came about only through decades of grassroots work by the disability rights movement, which often faced (and still faces) powerful opposition from political, educational, medical, and

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business establishments (Fleischer & Zames, 2011, pp. 71–109). In the realm of accessible texts and motion pictures, the putative interests of copyright holders have often been foundational in the state's opposition to disability rights. Reid's (2021) landmark essay on copyright and disability shows how innovative accessibility remediation practices—from Braille and talking books to captioning and audio description to contemporary electronic text formats such as DAISY—led to changes in law over time, with the "ableist tradition" (p. 2174) of copyright law often constituting an unnecessary impediment or complication. None of these practices were developed with the goal of complying with existing copyright or disability law. Rather, they were developed to meet the needs and demands of people with disabilities—usually with their input and collaboration, and always as a result of their organized self-advocacy. Libraries have contributed to the effort in various ways, including documenting accessibility practices and petitioning the Register of Copyrights to renew or update relevant DMCA exemptions, but usually only following legal changes brought about by disability activism.

As an example of this process, the origins of closed captioning can be traced from Deaf schools' and communities' response to the advent of sound films or "talkies" in the early 1930s, which effectively killed the accessible medium of silent film and ended the careers of many Deaf actors. The development of film captions by Deaf actor Emerson Romero, and the formation of the Captioned Films for the Deaf project by two directors of Deaf schools in the late 1940s, laid the groundwork for laws beginning with the Captioned Films Act of 1958, for innovations in television in the 1970s, and eventually for the television captioning mandate in the 1990s under the CVAA (Reid, 2021; Stanton, 2015). It was largely a matter of happenstance that captioning law developed a mandate for producers rather than a program of third-party remediation as was seen with print, thus avoiding many copyright concerns and lessening the need for copyright exceptions. Of course, in the era of online video and user-generated content, this mandate is not at all adequate to the needs of deaf viewers or of educators. Though the 2021 Rulemaking provides a provisional exception under fair use, a real solution would require disability law to explicitly override the copyright regime that, in Reid's words, "subordinates the actual interests of people with disabilities to access copyrighted works to the hypothetical interests of copyright holders who may withhold access without reason" (2021, p. 2174).

In the 21st century, the jurisgenerative power of people with disabilities is in evidence in the important *Authors Guild, Inc. v. HathiTrust* precedent (2014), in accessibility lawsuits such as *NAD v. Netflix* (2012) and *NAD v. Harvard* (2016), and in ongoing advocacy and organizing by disability rights groups. Since the COVID-19 pandemic, students and workers with disabilities have responded to an urgent need to organize for accessibility, not only for those with print or auditory

disabilities but for those kept out of the in-person classroom by medical vulnerabilities and ableist policies. A new wave of disabled student unions in higher education has been organizing to demand greater accessibility and force HEIs to meet the requirements of the law and their responsibilities to students with disabilities (Carrasco, 2021). Clearly there is a continued need for advocacy, proactive accessibility work, and documented practice to meet the needs and demands of people with disabilities, always moving beyond the scope of written law to establish needed norms and structures in service of care, accessibility, and disability justice.

Of course, the jurisgenerative capacity of established practice is important to copyright law as well. Fair use, as defined in U.S. law, is such a broad exception that it requires courts to investigate and understand the accepted practices around each of its four factors in a specific context in order to decide a case. As technologies and community norms change, the meaning of fair use changes. Many industry organizations have made efforts to document established or "best" practices in fair use, to guide their own practice but also in the hope of influencing court decisions and legal precedent over time (for examples, see Center for Media & Social Impact, n.d.). Apart from a glancing and outdated reference in the ACRL *Best Practices* (2012), no such document exists for fair use related to captioning or audio description in higher education. Captioning remediation practices in higher education, although likely widespread, remain poorly documented for a variety of reasons. As discussed below, this is a missed opportunity to build efficient collaborative structures and to push the law in the right direction through established practices.

Roles for Academic Libraries

US disability law has successfully mandated captioning by broadcast and cable television companies and most major consumer streaming platforms, without the complicating factor of permissions or a copyright exception for captioning by a third party (Reid, 2021). Although the CVAA can be interpreted to mandate captioning for all online video as a "public accommodation," universal captioning is very far from being a reality (see *NAD v. Netflix, Inc.*, 2012; Wooten, 2012; and more recently *U.S. v. Regents of the University of California*, 2022). A huge and constantly growing amount of video is hosted on user-generated content platforms such as YouTube and on personal and institutional online repositories, much of it completely uncaptioned or with software-generated automatic captions only. Library collections, even when they strive to collect video only in captioned formats, often hold uncaptioned video in various formats (some of them obsolete like VHS, or nearly so, like DVD). Instructors often rely on these sources for teaching, especially

on the convenience of free online videos that can be found easily through a search engine (see Lohmann & Frederiksen, 2018). Thus, workers at HEIs—including instructors, disability services staff, information technology staff, and library workers—are often tasked with captioning in an ad hoc manner, and often in a hurry, to provide "just in time" accommodation for a specific teaching or research purpose. (Though the 2021 Recommendation explicitly permits preemptive captioning in anticipation of future use, I have found no evidence for this as a systematic practice.) Judging by the focus group comments documented by Wood et al. (2017), my own experience in this field, and the general paucity of documentation in scholarly or gray literature, HEIs rarely publicize or share their unauthorized (non-infringing) remediations outside of the institution. This is likely due to uncertainty about the law, fear of a lawsuit from a copyright holder, and the absence of up-to-date best practices documents related to captioning.

Of course, there are other barriers preventing academic libraries from taking a more active role in captioning. Most tend to focus their budgets and staff time on textual media. Captioning can be expensive in terms of both staff time and money, in a time when few budgets have kept pace with inflation and subscription costs have increased sharply (Bosch et al., 2023). A survey of Northwest libraries found that 30% of institutions responding had budgets or funding to purchase captions (Peacock & Vechhione, 2020). A national survey indicates a number closer to 5% (Tanasse, 2021). At the same time, respondents to both surveys indicated that captioned resources are a priority.

Actual practices are likely to vary widely. Libraries can be involved in supporting captioning in a number of ways. A librarian can search for a captioned version of a title, work with vendors to get titles captioned, and help instructors and staff navigate the requirements of getting materials captioned. At the Washington State University campus where I work, a librarian has taken on this role to some extent, communicating with faculty when the Access Center sends out notifications, sometimes checking lists of videos to verify that they are adequately captioned, and searching for alternative captioned sources for specific videos and topics. Although the library is not directly involved in captioning, the librarian maintains communication with the IT department that handles captioning requests and occasionally offers advice on copyright as it applies to copying or digitizing materials for captioning. In many cases, videos are "ripped" or downloaded from YouTube or Vimeo and uploaded to a password-protected online course environment before being shared with a vendor for captioning. Until very recently there was no consistent or sufficient funding to caption materials that were not immediately needed for a specific course accommodation, so captioning of other materials was rarely prioritized. At present, there is only very limited coordination with the larger university system of which our library is a part, and no coordination

or resource sharing outside of the institution. Processes are often ad hoc and not publicly documented.

As reported by Wood et al. (2017), similar approaches seem to be widespread, with materials being captioned as needed in separate institutions with very little long-term planning, organization, preservation, or communication among institutions. This approach is adequate to the immediate and pressing needs of instructors and students but does little to advance a legal agenda of accessibility or to build long-term accessible collections. If such approaches are used at hundreds of different institutions, probably captioning many of the same videos over the years, the lack of coordination will result in significant inefficiency and waste. Not only will multiple institutions be paying to caption the same works, but, because the captioned versions are often hidden within course spaces and not documented elsewhere, people seeking the captioned video—whether teachers, students, researchers, or support staff—will be unlikely to find them. Instructors may assume that captions are unavailable and either use non-accessible versions of their chosen videos or choose alternatives that do not fully meet their teaching need.

Accessibility and equity would be better served by well-organized and publicly documented practices informed by a clear understanding of the law and the strong support for captioning and fair use to be found, at least for the time being, in the 2021 Rulemaking. One well-documented and exemplary case study exists from Keenan (2018) at the University of Montana Library, showing a possible workflow involving librarians, instructors, IT staff, and accessibility service staff within a single institution. Keenan provides a flow chart showing how different scenarios are dealt with depending on type of need, availability of materials, copyright status, and other factors. If efforts are made to document captioning and other accessibility practices under the fair use exception, it will strengthen and clarify the fair use arguments to be made should legal challenges arise. This would be an important contribution to documents on best practices in educational fair use, including any future revision of the ACRL *Best Practices.* It would also provide evidence in favor of renewing the provisions of the current Rulemaking. Aside from legal concerns, transparent documentation creates the conditions for more effective collaboration between, as well as within, institutions. The past decade has seen major innovation in the sharing of files and metadata among libraries that have digitized their holdings under the protection of the First Sale doctrine and Section 108 of the Copyright Act. For instance, Academic Libraries Video Trust (ALVT) has created a shared database of video files digitized from VHS, which does not involve any unauthorized copying or distribution but saves time and resources for libraries seeking digital preservation copies of VHS tapes in their own collections (Video Trust, n.d.) A similar database could be created to share captioned videos, or caption text files in formats like .srt, reducing the costs of redundant digitization and

captioning. Finally, transparent documentation would create opportunities for collaboration with instructors, students with disabilities, video creators and distributors, and disability advocacy organizations.

These suggestions are not meant to diminish the important work done by disability services offices on most university campuses to support video accessibility, or to imply that libraries do not already play a role in captioning efforts. At my own institution, the Access Center (disability services office) works closely with IT services to have videos captioned when needed as an accommodation. This is a typical responsibility of disability services offices at many HEIs, and a web search shows that many have public pages explaining how they handle captioning requests (for example, University of Alabama at Birmingham, 2022) or providing instructions for self-captioning using software such as MovieCaptioner (CUNY Assistive Technology Services, n.d.). Others describe partnerships with the library, where the library will either obtain captioned materials upon request or allow remediated copies to be made from their materials (for example, University of California Berkeley, n.d.; University of Illinois Urbana-Champaign, n.d.). When captions are required as an accommodation, HEIs generally find ways to meet the need. What is missing is evidence of collaboration between institutions or units to share resources, build collections of remediated materials for long-term use, or document policies and practices based on a broader embrace of fair use and of accessibility (including universal design).

As Keenan's (2018) article demonstrates, and my own experience confirms, libraries and library workers can play a unique role in a collaborative workflow for educational captioning. We cannot do it alone, but we can extend and supplement the work of teachers, students, support staff, and disability advocates. As experts in institutional memory and interinstitutional sharing, we are well placed to preserve videos, caption files, metadata, fair use analyses, and other relevant information, *and* to create collaborative tools like ALVT (or interlibrary loan, for that matter) to reduce costs and redundancy. We are responsible for collections that often include numerous uncaptioned films and videos, and we may also be able to quickly locate captioned versions from library collections, licensed streaming collections, or the open web. Since many basic functions of libraries rely on copyright exceptions such as fair use, the doctrine of first sale, and the specific provisions for libraries under section 108, library workers often hold unique applied and contextual expertise on copyright issues within an educational institution. Professional organizations such as ACRL have developed and published "best practices" documents that serve as a standard for practice and as evidence of fair use norms within a given professional community. While these documents have not always done a good job of framing libraries' responsibilities and rights regarding the provision of accessible materials,

they have great potential to do so, especially given an up-to-date understanding of copyright within the context of disability law.

Such an understanding would affirm the important point, illuminated by Reid (2021), that barriers to accessibility should be resolved through disability law without creating new barriers by attempting to appease the real or imagined interests of copyright holders. Ultimately, responsibility for captioning should lie with video creators and video streaming platforms, not with third parties such as HEIs or libraries. This seems to be the intent of the past 20 years of legislation around captioning, but it is far from a reality now. Most major commercial films and television shows are released with captions, but a huge and expanding number of other videos—including user-generated online videos, social media content, independent films, and videos produced within institutions for teaching purposes—are not. Given the current state of the law, and the demonstrated ability of communities of practice and justice advocates to shift law over time, HEIs must be prepared to fight and organize with people with disabilities for legal freedom to fill this gap through captioning. To do this, they need a clear understanding of the law and the historical vagaries that have led to the differences between accessible text and accessible video law (see Reid, 2021), as well as transparent and public structures and procedures to support captioning as a form of accessibility remediation. Academic libraries and library workers can play a unique role in this type of support. To do so we must be clear, informed, organized, and working together.

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