

Submission on behalf of Joint Creators and Copyright Owners
Class 3: Audiovisual Works – Accessibility



[] **Check here if multimedia evidence is being provided in connection with this comment**

ITEM A. COMMENTER INFORMATION

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

Alliance for Recorded Music (“ARM”) is a nonprofit coalition comprising the many artists and record labels who together perform, create, and/or distribute nearly all of the sound recordings commercially released in the United States. Members include the American Association of Independent Music (“A2IM”), the Music Artists Coalition (“MAC”), the Recording Industry Association of America, Inc. (“RIAA”), hundreds of recording artists, the major record companies, and more than 600 independently owned U.S. music labels.

The Entertainment Software Association (“ESA”) is the United States trade association serving companies that publish computer and video games for video game consoles, handheld video game devices, personal computers, and the internet. It represents nearly all of the major video game publishers and major video game platform providers in the United States.

Represented By:
J. Matthew Williams (mxw@msk.com)
Sofia Castillo (szc@msk.com)
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street, NW, 7th Floor
Washington, D.C. 20036
202-355-7904

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 3: Audiovisual Works – Accessibility

ITEM C. OVERVIEW

MPA, ARM and ESA (“the Joint Creators and Copyright Owners”) understand that accessibility is an extremely important issue and did not oppose renewal of the existing exemption covering

circumvention to create accessible copies of motion pictures for students.¹ Their members continue to make significant investments to improve the quantity of content that is available in accessible formats, and to work in close partnership with various organizations in the accessibility community to improve the availability of universally accessible content. We would welcome the opportunity to voluntarily work in a cooperative manner with the accessibility community on the issues identified in the comments.

Three years ago, the Joint Creators and Copyright Owners provided detailed information on the marketplace availability of motion pictures in accessible formats.² As further discussed below, that availability has only increased with time.

In these comments, we only oppose the proposed expansion to allow “proactive remediation” requested by the Association of Transcribers and Speech-to-Text Providers, Association on Higher Education and Disability, and Library Copyright Alliance (“ATSP *et al.*”).³ We do not oppose in their entirety any other proposed expansions.

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

Petitioners seek to circumvent access controls on Digital Versatile Discs (“DVDs”) protected by the Content Scramble System (“CSS”), on Blu-ray discs protected by the Advanced Access Content System (“AACS”), and via digital transmissions protected by technological measures.⁴ The proposed class would not include video games or Ultra HD discs.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

1. Marketplace Update

Since 2011, nearly all digital releases by MPA members have been captioned and audio-described. And the Audio Description Project (“ADP”) of the American Council of the Blind (“ACB”) reports that at least 5,000 movie and TV show titles are available with audio description, a number that increases by roughly 100 titles per month.⁵ Broadcasters and networks, including affiliates of MPA members, often exceed FCC requirements for audio description.⁶

New streaming services continue to launch, and existing streaming services continue to increase accessible titles.⁷ MPA member Netflix, which won ADP’s 2015 “Achievement in Audio Description – Media” award, as well as the American Foundation for the Blind’s 2017 “Helen

¹ The Joint Creators and Copyright Owners disagree with aspects of the Acting Register’s 2018 legal analysis, especially with respect to audio description, but are not contesting that analysis in these comments.

² Joint Creators and Copyright Owners, [Class 2 Opposition](#) (2018).

³ ATSP *et al.*, [Class 3 Long Comment](#), at 5 (“ATSP 2020 Comment”).

⁴ *Id.* at 7.

⁵ ACB, [AUDIO DESCRIPTION PROJECT](#) (last visited Feb. 1, 2021).

⁶ See, e.g., [CBS Video Description](#).

⁷ See ACB, [Streaming Media Players for TV](#), AUDIO DESCRIPTION PROJECT (last visited Feb. 1, 2021).

Keller Achievement Award,” has almost 1,500 audio-described TV series, documentaries, originals, and children’s shows on its U.S. service.⁸ Moreover, since its launch in 2019, Disney + has made almost 700 audio-described titles available, earning the ADP’s 2020 “Achievement in Audio Description – Media” award.⁹

Accessibility in movie theatres has also continued to improve since the previous cycle. Audio description is available for nearly all first-run movies; newly built theaters have the necessary equipment to make audio description available; and many older theatres have been renovated to do so.¹⁰

Copyright owners and their technology partners will keep working to increase the availability of accessible titles and services. However, we acknowledge that work remains for the long-term objective of making motion pictures universally accessible to be achieved.

2. Comments on Proposed Exemption Expansions

We do not oppose most of Petitioners’ proposed expansions/clarifications:

- **Faculty and staff:** Petitioners propose to expand the language of the existing exemption to allow for the remediation of motion pictures for faculty and staff with disabilities in addition to the exemption’s current coverage of remediation for *students* with disabilities.¹¹ We do not oppose this proposed expansion.
- **Reuse of previously remediated copies:** Petitioners seek exemption language that more clearly allows a beneficiary institution to retain and reuse a remediated copy of a motion picture when such a copy has already been created pursuant to the exemption.¹² If institutions comply with the existing requirement to store copies in a manner intended to reasonably prevent unauthorized further dissemination of a work (which should include encryption/password protection/copy controls where possible), we do not oppose this request. Disability services departments should not have to repeat the effort of remediating the same work within the same institution multiple times.
- **Sufficient quality:** Petitioners propose that persons exercising the exemption should be allowed to circumvent to decrypt a title that is available in an accessible format but where the captioning or audio description is “not of sufficient quality.”¹³ We do not oppose this

⁸ *Id.*; AMERICAN FOUNDATION FOR THE BLIND, [21st Annual Helen Keller Achievement Awards](#) (“The Helen Keller Achievement Awards were established by AFB in 1994 to acknowledge Keller’s extraordinary efforts and to promote the notable achievements of individuals and organizations that are leaders in improving the lives of people with disabilities.”).

⁹ ACB, *Streaming Media Players for TV*.

¹⁰ See, e.g., AMC, [ASSISTIVE MOVIEGOING](#) (last visited Feb. 2, 2021) (“Assistive Listening Devices (ALDs) are available for all movies at AMC locations.”).

¹¹ ATSP 2020 Comment at 10.

¹² *Id.* at 14.

¹³ *Id.* at 12.

expansion in principle. However, “not of sufficient quality” is a subjective standard that is difficult to measure. It is important for exemptions resulting from this rulemaking to be based on measurable, objective standards. Petitioners point to FCC requirements on closed captioning, 47 C.F.R. § 79.1(j)(2). They also point to recent, preliminary FCC recommendations on audio description, which have not been adopted as regulations.¹⁴ In order to ensure that the “sufficient quality” standard has meaning, we suggest that the Office only recommend an exemption that incorporates such a standard based on actual FCC regulations. In other words, the exemption should not allow for circumvention to audio describe works that are already available with audio description based on a determination by a beneficiary that the description is not of sufficient quality until FCC standards have been adopted.

- **Textbook associated videos:** Petitioners request that the “reasonable effort” and “fair price” aspects of the existing exemption be altered to state that a beneficiary institution need not pay an extra fee to a textbook publisher that has distributed a textbook with an associated motion picture to obtain an accessible copy of the motion picture after purchase and delivery of the textbook bundle.¹⁵ Under those specific facts, we do not oppose the proposal. However, we ask that any alteration to the exemption language adhere closely to the factual scenario presented. For instance, if an institution has an old disc that did not contain audio description, but a disc or transmission with audio description is currently available in the marketplace, acquiring that disc or transmission is a viable alternative to circumvention under those facts, and should remain excluded from the exemption.

Petitioners propose one expansion that we do oppose. They request that the exemption allow for “**proactive remediation**” of motion pictures in addition to remediation in response to an accommodation request.¹⁶ It appears this proposal would allow for the decryption of copies of thousands of motion pictures lawfully acquired or received by transmissions to create databases that *may* be used to create accessible copies in the future when the need *may* arise.

The current exemption does not cover such circumvention. Rather, it covers circumvention “as a *necessary accommodation ...*”.¹⁷ As stated in Petitioners’ comments, “accommodation” is a term of art that refers to *responses* to requests.¹⁸ In addition, the exemption requires that no marketplace alternative be available at a fair price. Given that motion pictures are increasingly being made available in accessible formats, as explained above, the proposed expansion would result in many motion pictures being decrypted that very well may be available in an accessible format by the time it becomes necessary to accommodate a student or faculty member who needs an accessible copy of a motion picture for a class. Moreover, because the exemption covers

¹⁴ See [Recommendation of the Federal Communications Commission Disability Advisory Committee](#) (Oct. 14, 2020).

¹⁵ ATSP 2020 Comment at 13.

¹⁶ *Id.* at 11.

¹⁷ 37 C.F.R. § 201.40 (b) (2) (i) (a).

¹⁸ ATSP 2020 Comment at 11.

transmissions from subscription streaming services, the expansion would result in permanent copies of works being acquired by numerous institutions when only temporary access has been purchased. Finally, large databases of “in the clear” motion pictures would pose a disproportionate risk of harm, even if unintentional.

We reiterate that the Joint Creators and Copyright Owners embrace and support efforts to expand accessibility, and we continue to welcome collaboration with groups to ensure that individuals of all backgrounds are able to enjoy and to learn from copyrighted works.

ITEM F. DOCUMENTARY EVIDENCE

We have included hyperlinks to webpages/documents within the body of this document. We are not submitting any other documentary evidence.

Respectfully submitted:

/s/ J. Matthew Williams
J. Matthew Williams (mxw@msk.com)
Sofia Castillo (szc@msk.com)
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street, NW, 7th Floor
Washington, D.C. 20036
202-355-7904