

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

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

MB Docket No. 11-154

REPLY COMMENTS OF PUBLIC KNOWLEDGE

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Public Knowledge (“PK”) submits these reply comments in response to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking, released September 19, 2011, implementing the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”),¹ particularly regarding the effect of copyright law on video programming providers’ (“VPP”), video programming distributors’ (“VPD”), and users’ ability to add, improve, or alter the presentation of captions.²

I. VPPS/VPDS WOULD NOT INFRINGE COPYRIGHT BY ADDING OR IMPROVING CAPTIONS.

In its Notice of Proposed Rulemaking, the Commission noted that certain VPPs/VPDs had expressed concern they could not improve the quality of captions delivered over Internet protocols (“IP”), as compared to television broadcast captions, without infringing the copyright in the programming.³ The Commission’s proposed requirement that the accuracy of captions delivered over IP be “equal to or greater than the accuracy of captions shown on television”⁴ would not cause VPPs/VPDs to infringe the copyright in the underlying video programming. Indeed, despite the claims of several

¹ *In re Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, MB Docket No. 11-154 (rel. Sept. 19, 2011) (“Captioning NPRM”).

² Captioning NPRM ¶ 19.

³ Captioning NPRM ¶ 19.

⁴ First Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: Closed Captioning of Video Programming Delivered Using Internet Protocol, at 14, July 12, 2011, *available at* http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf (“VPAAC Report”).

commentors,⁵ VPPs/VPDs would even be able to add captions to programming without violating copyright law.

A use of a work does not violate the copyright in that work if the use is a “fair use.”⁶ Whether a use is a fair use depends upon a number of factors, including:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁷

The precise application of these factors depends upon the facts of each case, and for that reason alone the Commission should avoid discouraging an entire category of uses through telecommunications regulations simply because they *might* fail a fair use analysis under copyright law. In general, however, the fair use factors strongly suggest that a VPP/VPD adding or improving captions would be making a fair use and thus not infringe copyright. Captioning works to make them accessible for persons with disabilities fits nicely within the fair use doctrine, and it is difficult to imagine that a content creator would actually threaten a lawsuit because someone else made their work

⁵ See Comments of AT&T, *In re Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154 (Oct. 18, 2011), 8-9; Comments of Microsoft Corp., *In re Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154 (Oct. 18, 2011), 4-5; Comments of the National Association of Broadcasters, *In re Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154 (Oct. 18, 2011), 17; Comments of Starz Entertainment, LL, *In re Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154 (Oct. 18, 2011), 4.

⁶ 17 U.S.C. § 107.

⁷ *Id.*

accessible to a customer who happened to be deaf. Tellingly, only video programming intermediaries have contended that captioning would constitute an infringement in this proceeding; no studios or other content creators have joined in their refrain.

For captioning, three of the four statutory fair use factors weigh heavily in favor of fair use. When adding or altering captions, the purpose and character of the use is somewhat unique in that the captions are ultimately used *alongside* the original copyrighted work. Essentially, video captioning is best understood, not as creating a new work or creating new copies of a work, but as enabling audiences to access the original work in a meaningful way. Even if the VPP/VPD distributes video programming commercially—which may not always be the case—the purpose of the captions is to make the video programming accessible and to comply with the statutory obligations of the CVAA, not to distribute the captions themselves for a profit.

Although a significant number of the works subject to captioning are likely highly protectable under copyright law as dramatic audio-visual programming, the remaining three factors are strongly in favor of fair use. The amount and substantiality of the use is only enough to serve the purpose of making the work accessible to individuals with hearing disabilities. This requires presenting all of the words spoken in the audio portion of the video programming, but that is the bare minimum that must be done to accommodate a person who cannot hear the words being spoken.

The fourth factor, “undoubtedly the single most important element of fair use,”⁸ examines the market effect of the allegedly infringing use. Adding or improving captions to video programming only improves the market value of the work, because video

⁸ *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 566 (1985).

programming with captions is more attractive to millions of paying customers who use captions to experience video programming. Captions make video programming more valuable, so captioning a program actually increases the work's market for the copyright owner. Claims that fair use captioning would impair the market for licensing the right to caption videos simply engage in circular reasoning: that captioning should not be a fair use because it could be licensed, while captioning must be licensed because is not a fair use. Moreover, as other civil rights groups have pointed out,⁹ distributing the programming without captions would be illegal under the CVAA,¹⁰ and so the copyright owner can have no legitimate market interest at all in distributing programming without captions. Even if the VPP/VPD improves existing captions, this does not harm the copyright owner's market interest if the VPP/VPD's use "fill[s] a market niche that the plaintiff simply had no interest in occupying."¹¹

This interpretation of fair use comports with the overall purpose of copyright law. Copyright law was established to "promote the Progress of Science,"¹² and fair use is vital to serving that purpose, balancing the need to motivate authors to create new works with the need to permit reasonable uses by the public without fear of overreach by copyright owners.¹³ Copyright law could not encourage the progress of knowledge if it

⁹ Comments of Telecommunications for the Deaf and Hard of Hearing et al., *In re Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154 (Oct. 18, 2011), 14.

¹⁰ See Pub. L. No. 111-260, 124 Stat. 2751, § 202(b) (2010). See also Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

¹¹ See *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993).

¹² U.S. Const., art. I, § 8, cl. 8.

¹³ *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003).

did not permit members of the public to engage with creative works in a meaningful way. Fair use is not an anomaly in the Copyright Act; it is a key part of the architecture of copyright law and embodies one side of a thoughtfully-struck balance between competing interests. Allowing the threat of copyright overreach to stand in the way of accessibility requirements would stymie progress and act against the entire purpose of the copyright system. It would also have a discriminatory effect on persons with hearing disabilities, making them procure an additional license that nobody else must obtain simply to enjoy video programming.

Under the fair use exception a VPP/VPD would not infringe copyright by adding or improving captions to video programming, and the Commission should not preemptively discourage such activity through its implementation of the CVAA, which is meant to *improve* access to communications for persons with disabilities. Indeed, both the CVAA and the fair use exception serve the purpose of increasing legitimate access to works,¹⁴ and the Commission should act to support that purpose.

II. USERS WOULD NOT INFRINGE COPYRIGHT BY USING PERSONAL CONTROLS TO ALTER THE PRESENTATION OF CAPTIONS.

As strong as the fair use argument for a VPP/VPD would be, a user altering captions to enable his or her own personal access to video programming would have an even more convincing fair use defense. In its report, the Video Programming Accessibility Advisory Committee (“VPAAC”) recommended that Internet-connected players allow users to alter the “character color, opacity, size, font, background color and

¹⁴ See *Sony Corp. v. Univ. City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) (citing H.R. Rep. No. 094-1476, at 73 (1976) (noting the application of the fair use doctrine to the noncommercial creation of Braille and audio recordings of books for use by those with vision disabilities).

opacity, character edge attributes, window color, and language.”¹⁵ The VPAAC also noted that user-controlled placement of captions must be provided as part of the user experience.¹⁶ These tools enable fair uses of the video programming and so would not lead users to infringe copyright.

In its NPRM the Commission noted its effort to balance individuals’ needs for certain user controls with copyright protection,¹⁷ but as discussed above the copyright owner does not have a legitimate copyright interest in preventing the addition or improvement of captions for his or her programming. If the actual user is the one modifying the presentation of the captions to make them more effective, the fair use factors weigh even more heavily toward a finding of fair use, because the user is not transmitting the programming to others and the user is only taking the steps necessary for him or her to experience the programming.

Indeed, as the Commission noted, its current rules already require user controls for captions’ color, opacity, size, font, background, character edge attributes, and window color.¹⁸ It may be helpful for the Commission to consider user-controlled captioning options not as the creation of a new or altered work, but rather as the process by which a person with a hearing disability experiences an audio-visual work. Improving the content or presentation of captions simply helps the individual view the programming, much like adjusting the volume or brightness on a television set. The right to personally and

¹⁵ Captioning NPRM ¶¶ 17, 56; VPAAC Report at 15-16.

¹⁶ Captioning NPRM ¶ 56; VPAAC Report at 34, Appendix C.

¹⁷ Captioning NPRM ¶ 19.

¹⁸ 47 C.F.R. § 15.122.

privately access the work is not among the exclusive rights granted to copyright owners,¹⁹ and even if user controls did implicate one of the rights, that use would be a fair use.

III. THE CVAA GIVES THE COMMISSION AUTHORITY TO ESTABLISH THE NECESSARY RULES TO UPDATE THE CLOSED CAPTIONING SYSTEM.

Even if adding or improving captions implicates the copyright in video programming, copyright protections do not trump the Commission’s statutory authority and mandate to implement closed captioning obligations for IP-delivered video programming. Congress is aware of the “interplay between copyright and communications law,”²⁰ and this is not the first time that Congress has created a regime that “allows the FCC’s communications policy decisions to affect copyright liability.”²¹ Here, Congress gave the Commission a specific and explicit direction, and copyright protections cannot bar the Commission from fulfilling its statutory obligations.

Section 202(b) of the CVAA mandates that the Commission “revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol. . . .”²² This statutory requirement gives the Commission broad authority to implement an effective IP-delivered captioning system. Section 202(b) grants clear and explicit authority for the Commission to implement the CVAA, and to the extent that captioning implicates copyright the Commission’s authority must include limiting copyright protections for the specific purpose of this statute. The Copyright Act does not create a shield against obligations established by communications law, as confirmed by the Commission’s own previous rulemakings.

¹⁹ See 17 U.S.C. § 106.

²⁰ *United Video, Inc. v. FCC*, 890 F. 2d 1173, 1186 (D.C. Cir. 1989).

²¹ *Id.*

²² Pub. L. No. 111-260, 124 Stat. 2751, § 202(b) (2010).

Copyright law creates a set of legal rights belonging to the copyright owner,²³ which, like any other private statutory right, are subject to regulation by statute and authorized agency action. Accordingly, the Commission has previously imposed obligations on broadcast and cable programming without triggering copyright liability. For example, Congress and the Commission have required cable operators to make copyright-protected programming available to competitors under the program access rules,²⁴ implicitly rejecting the same copyright claims raised in the instant proceeding. Just as the program access regulations adopted pursuant to section 628 of the Communications Act provide a limited exception to the exclusive rights of copyright owners, so too does the explicit authority delegated to the Commission by the CVAA permit the Commission to provide a limited copyright exception for the purpose of establishing a viable closed captioning system.

The Commission holds authority to establish a limited exception to copyright protections for the purpose of implementing the CVAA, if such an exception is necessary. To find otherwise would elevate copyright protections above the CVAA and even above the protections granted to real property. Even in the unlikely event that adding or improving captions is found to be an infringement of copyright, the Commission possesses authority to create an exception for the purposes of implementing the statutory mandate of the CVAA.

IV. CONCLUSION

PK applauds the Commission's timely implementation of the CVAA, and urges the Commission not to avoid captioning rules that are otherwise in the public interest for

²³ 17 U.S.C. § 107.

²⁴ 47 U.S.C. § 548; 47 C.F.R. § 76.1000 *et seq.*

fear that those captions would infringe copyright. Adding or improving captions to programming is very likely a fair use, whether done by VPPs/VPDs or users. Both the CVAA and the fair use doctrine are intended to increase and encourage legitimate uses of works, and the Commission should not on the basis of copyright law hesitate to fulfill its congressional mandate to improve video programming accessibility for persons with disabilities. Even in the unlikely event that closed captioning does infringe copyright, the Commission retains authority to create limited exceptions for copyright protection in order to implement the CVAA.

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