Charting a Course for Video Accessibility through the First Amendment and Copyright Law
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Abstract
This article argues that requiring video creators and distributors to make videos accessible to people with disabilities by providing closed captions and video descriptions does not violate the First Amendment or implicate United States copyright law. More specifically, the article analyzes economic and philosophical strains of argument made by video programmers challenging contemporary video accessibility mandates under telecommunications laws and the Americans with Disabilities Act. The article concludes that those video accessibility mandates are unlikely to implicate any cognizable economic or philosophical First Amendment interests and are likely to satisfy the appropriate level of judicial scrutiny in any case. The article also concludes that compliance with video accessibility mandates is unlikely to violate copyright law, both because accessibility statutes impliedly repeal copyright law to the extent necessary for compliance and because compliance arguably constitutes a noninfringing fair use.

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Since the late 1970s, efforts have emerged to require creators and distributors of video programming to make it accessible to people who are deaf, hard of hearing, blind, or visually impaired. These efforts have primarily sought to require mandate accessibility through the inclusion of:

- Captions, which are overlaid transcriptions of spoken dialogue and textual representations of sound effects and other aural events on top of a video, conveying the aural information to people who cannot hear it.\(^1\) Captions can either be “closed” — permitting a viewer to toggle their display on or off at their preference—or “open”—where they are shown to all viewers regardless of their preferences, sometimes as a result of being embedded or imprinted on the video itself.\(^2\) The following example shows a caption of comedian Conan O’Brien’s monologue announcing the acquittal of President Clinton’s following his impeachment:\(^3\)

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Video description—sometimes called “narrative description,” “audio description,” or merely “description”\(^4\)—which is an overlaid, audible, narrative description of visual events during gaps in the dialogue of a video, conveying visual information in the video to people who cannot see it.\(^5\) Like captions, description can be “closed” or “open.” For example, the opening of the children’s show *Sesame Street* includes the following descriptions interleaved in the audio:

[Elmo]: That’s Elmo’s World!

[Description]: Elmo stands beside Dorothy’s fishbowl.

[Elmo]: Hi! This is Elmo’s World! Elmo’s so very happy to see you, ooh, and so is Dorothy! Say hello, Dorothy!

[Description]: An orange goldfish.\(^6\)

Advocates initially sought accessibility mandates for video programming delivered on regulated platforms, mainly television services such as broadcast, cable, and satellite—under the umbrella of federal telecommunications laws—and movie theaters—under state and federal accessibility laws. More recently, accessibility advocates have turned their attention to accessibility mandates for video delivered via traditionally unregulated platforms, including the Internet.

Video programmers have historically opposed these accessibility mandates primarily on the grounds that courts and administrative agencies lack the authority to implement them under the basic terms of telecommunications and accessibility statutes. But as federal and state legislators, regulators, and courts have expressed an ever-increasing willingness to recognize comprehensive video

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accessibility as a civil right for Americans with disabilities under existing and new statutes, opponents have sought more fundamental means with which to challenge accessibility mandates.

In particular, video programmers have frequently turned to interrelated arguments that accessibility mandates violate the First Amendment and impermissibly implicate copyright law. At least at an instrumental level, it is not difficult to see the appeal of these arguments; there is no doubt that video programs constitute both speech protected by the First Amendment and creative works of authorship protected under copyright law.

More ideologically, video programmers have collectively made First Amendment and copyright arguments to suggest that accessibility mandates impinge on their creative and distributive autonomy by requiring them to make content accessible through means by which they might not approve. Indeed, the historic interrelationship between the First Amendment and copyright, embodied in the Supreme Court’s oft-repeated maxim that “copyright is the engine of free expression,” gives significant purchase to the notion that the government ought to incentivize the creation and dissemination of works through copyright but otherwise should avoid tinkering in the affairs of creators and distributors to avoid offending their First Amendment rights.

But policymakers have sought to impose captioning and video description mandates precisely because of serious and demonstrable failures by the video programming industry, fully incentivized by the copyright system, to offer anything approaching ubiquitous video accessibility absent government intervention. Moreover, video programmers’ First Amendment and copyright arguments do not withstand serious scrutiny. In general, video accessibility mandates are functional, content-neutral mandates that implicate video programmers’ First

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8 See, e.g., KAREN PELTZ STRAUSS, A NEW CIVIL RIGHT: TELECOMMUNICATIONS EQUALITY FOR DEAF AND HARD OF HEARING AMERICANS 246 (2006) (noting that closed captioning rates for basic cable television shows remained between 5 and 10 percent notwithstanding legislation requiring closed captioning decoders to be included in all televisions).
Amendment interests only incidentally, if at all. And any implication of copyright law is arguably obviated by application of implied repeal and fair use doctrines.

Yet First Amendment and copyright challenges to video accessibility mandates have never been authoritatively addressed by courts. Instead, video programmers have subtly positioned the First Amendment and copyright law as legal boogeymen, attempting to convince legislators, regulators, and judges to strike down or narrow accessibility mandates out of the often-unfounded fear that free speech or intellectual property interests might be lurking just around the corner.

Programmers and their trade associations have variously raised First Amendment and copyright challenges to accessibility efforts in at least four major court cases, during nearly a dozen administrative rulemakings and adjudications before the Federal Communications Commission (“FCC”), the U.S. Department of Justice (“DOJ”), and the U.S. Copyright Office, and even before Congress.

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11 Nondiscrimination on the Basis of Disability; Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460 (July 26, 2010) (“2010 Web Accessibility ANPRM”); Nondiscrimination on the Basis of Disability; Movie Captioning and
In perhaps the most egregious example, the Motion Picture Association of America (“MPAA”), the National Association of Broadcasters (“NAB”), and the National Cable & Telecommunications Association (“NCTA”) persuaded the D.C. Circuit to strike down the FCC’s video description requirements for television programmers in *MPAA v. FCC* on the grounds that the FCC lacked the authority to promulgate them. But the court based its narrow interpretation of the FCC’s authority on the mere possibility that a video description mandate *might* implicate the First Amendment or copyright law—even though the court never analyzed whether the mandate *would actually do so.*

*MPAA v. FCC* stalled the progress of video accessibility for Americans who are blind or visually impaired for more than a decade until Congress finally ordered the FCC to reinstate its original video description regulations. And when the FCC did so, it received relatively few First Amendment and copyright arguments from the parties that had maintained ten years earlier that such arguments warranted completely scuttling the same regulations.

I do not intend in this article to stake out a normative position on accessibility policy more generally or comprehensively address the viability of every aspect of video accessibility mandates. But to the

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14 309 F.3d at 807.

15 See id. at 805, 807 (citing…)

16 See 47 U.S.C. § 613(f)(1); need P.L. cite / legislative history.

17 See 2011 Video Description Order; need pincite / cites to comments.
extent that other political and legal barriers to video accessibility can be overcome, I argue that ill-founded arguments about the First Amendment and copyright law should not serve to undermine policymakers’ efforts to recognize video accessibility as a civil right for Americans with disabilities.

In this article, I endeavor to analyze First Amendment and copyright arguments against accessibility mandates with specific reference to the text and content of the Constitution and telecommunications, accessibility, and copyright statutes. In doing so, I hope to offer a starting point for more broadly evaluating the interactions between accessibility and the First Amendment and copyright law. I begin with a survey of existing accessibility frameworks, then turn to the First Amendment and copyright law.

I. Video Accessibility Frameworks

Although this article is not intended as a comprehensive treatment of laws and regulations mandating captioning and video description, it is worth briefly surveying the two primary accessibility frameworks governing mainstream video distribution mechanisms in the United States, including broadcast, cable, satellite, Internet, and movie theaters, and their various shortcomings. These frameworks include telecommunications regulations promulgated and enforced by the FCC and prohibitions on discrimination against people with disabilities in state and federal accessibility laws.

A. Telecommunications Regulations by the Federal Communications Commission

The primary framework regulating video accessibility is a series of telecommunications regulations promulgated and enforced by the FCC pursuant to the Television Decoder Circuitry Act of 1990 (“TDCA”), Section 305 of the Telecommunications Act of 1996 (“1996 Act”), and the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”). The FCC’s regulations implementing the TDCA, Section 305, and the CVAA are codified in part 79 of the FCC’s rules.

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18 P.L. No. 101-431, 104 Stat. 960 (codified at 47 U.S.C. § 303(u), 330(b)).
• Section 79.1 of the rules sets out closed captioning obligations for television video programming distributors (“VPDs”), including television broadcast stations and multichannel video programming distributors (“MVPDs”), primarily cable and satellite companies, and other entities subject to the FCC’s jurisdiction.22

• Section 79.2 requires VPDs to make emergency information about tornados, hurricanes, floods, etc. to be accessible to people with hearing or visual disabilities through closed captioning, video description, or other means.23

• Section 79.3 requires certain VPDs—including broadcasters affiliated with ABC, CBS, Fox, and NBC and MVPDs serving at least 50,000 people—to provide 50 hours of video description per quarter.24

• Section 79.4, separately from Section 79.1, requires closed captioning for full-length video programming delivered via Internet-protocol that has first been published or exhibited on television, either voluntarily or pursuant to section 79.1.25 Unlike the television captioning rules, Section 79.4 divides responsibility between videos’ copyright owners, who must provide captions, and distributors, who must render or pass through the captions.

• Sections 79.100-79.104 require analog and digital television receivers, converter boxes, and video playback and recording apparatuses to include captioning capability.

While the scope of the FCC’s rules covers a significant quantity of video, it is worth highlighting the major gaps that remain, because advocates will no doubt seek to fill them in efforts, such as leveraging the ADA (see below). First, although television VPDs are ostensibly obliged to provide closed captioning for 100% of the post-1997 programming they distribute,26 the FCC’s rules exempt more than a dozen categories of programming from captioning requirements, including:

22 47 C.F.R. §§ 79.1(a)(2), (b), 76.1000(e).
23 47 C.F.R. § 79.2(b).
24 47 C.F.R. § 79.3(b).
25 47 C.F.R. § 79.4(b); see 2012 IP Captioning Order at ** (discussing videos voluntarily captioned on television)
26 See 47 C.F.R. § 79.1…
While the exemptions are predicated on the FCC’s *ex ante* prediction that the categories of programming would be economically burdensome to determine, the FCC has not revisited the categories of programming in nearly 15 years, despite significant changes in the video programming marketplace. The FCC’s rules also permit VPDs and video programming owners (“VPOs”) to petition for exemptions of channels, categories or types, or individual video services, providers, or programs where captioning programming would be economically burdensome.

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28 47 C.F.R. § 79.1(d)(3).
29 47 C.F.R. § 79.1(d)(5).
30 47 C.F.R. § 79.1(d)(6).
31 47 C.F.R. § 79.1(d)(8).
32 47 C.F.R. § 79.1(d)(9).
33 47 C.F.R. § 79.1(d)(11).
34 47 C.F.R. § 79.1(d)(12).
37 47 C.F.R. § 79.1(f).
Second, the FCC’s rules for IP-delivered programming are statutorily limited to full-length programming that has first been published or exhibited on television, and notably exclude the growing pool of online-exclusive video, “video clips” and “outtakes” of full-length programming, and consumer-generated media. The FCC’s rules also permit VPDs and VPOs to petition for exemption on the grounds of undue economic burden.

Third, the FCC’s video description requirements are even more limited, requiring only the largest television VPDs to distribute a tiny fraction of their programming each quarter—50 hours—with video description. The FCC’s video description rules again permit petitions for exemption on the grounds of undue economic burden. And the rules do not require any video description for IP-delivered programming.

Fourth, the FCC’s rules do not require captioning or video description at movie theaters or on video distributed on fixed-media formats such as DVD and Blu-ray. The FCC’s rules do, however, require DVD and Blu-ray players to be manufactured with the capability of rendering closed captions.

Finally, the FCC retains sole jurisdiction to enforce its rules, and no private right of action exists.

B. Accessibility Regulations under the Americans with Disabilities Act and State Accessibility Laws

The second major framework governing video accessibility is rooted in Title III of the Americans with Disabilities Act of 1990 (“ADA”). The ADA also runs in parallel with similar state laws.

38 See 47 C.F.R. § 79.4(b).
40 47 C.F.R. § 79.4(a)(1).
41 47 C.F.R. § 79.4(d).
42 47 C.F.R. § 79.3(b).
43 47 C.F.R. § 79.3(d).
44 47 C.F.R. § 79.103(a); 2012 IP Captioning Order at ¶ *, **; but see CEA Recon Petition.
46 P.L. No. 101-336, 104 Stat. 327, Title III (July 26, 1990) (codified at 42 U.S.C. § 12181 et seq.) (“ADA”). Title IV of the ADA also requires that all televised public service announcements created or funded by the federal government include closed captions. ADA § 402 (codified at 47 U.S.C. § 611).
Title III prohibits discrimination against individuals on the basis of disability in the "full and equal enjoyment" of "places of public accommodation."47 In relevant part, discrimination under Title III includes denying people with disabilities the opportunity or provide an unequal or separate opportunity to participate in or benefit from goods, services, facilities, privileges, advantages, or accommodations.48 Discrimination also includes screening out people with disabilities or failing to provide modifications or auxiliary aids and services necessary to afford accessibility.49

Unlike the FCC’s rules, the ADA can be enforced by both the U.S. Department of Justice ("DOJ")50 and private citizens through civil action in federal court.51 The ADA also requires the DOJ to promulgate regulations to carry out the ADA’s provisions.52

Because of potentially broad coverage and private rights of action, advocates have increasingly turned to the ADA and related state laws to fill in the holes in the FCC’s accessibility mandates. Although this article is not intended to comprehensively address the applicability of the ADA to video content,53 it is worth briefly mentioning two contexts in which advocates have sought video accessibility mandates under the ADA that have inspired First Amendment and copyright challenges from video programmers: movie theaters and Internet video-delivery services.

First, the DOJ’s current regulations include closed caption decoders, other open and closed captioning systems, and secondary audio programs (SAP) used to deliver video description as

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50 42 U.S.C. § 12188(b).
52 42 U.S.C. § 12186(b).
auxiliary aids that must be provided by public accommodations unless they fundamentally alter the nature of the accommodation or impose an undue burden.\textsuperscript{54} Courts, most recently the 9th Circuit in \textit{Arizona v. Harkins}, have begun to recognize that movie theaters may be required under Title III to allow patrons to view captioning and listen to video description, at least when captions or descriptions are provided by movie studios.\textsuperscript{55} Additionally, the DOJ has recently warmed to the possibility of requiring movie theaters and other public accommodations to show movies with captions and video description, though it has not yet issued rules to that effect.\textsuperscript{56}

Second, advocates have recently sued Internet-based video programmers under the ADA and related state laws to require closed captioning above and beyond the FCC's regulations.\textsuperscript{57} The DOJ has taken the position that websites are places of public accommodation governed by Title III of the ADA,\textsuperscript{58} though federal appellate courts have split over this issue.\textsuperscript{59} The DOJ has also specifically proposed requiring websites to caption their videos, though it again has not yet issued rules to that effect.\textsuperscript{60}

\textsuperscript{54} 28 C.F.R. § 36.303(a)-(b).


\textsuperscript{58} \textit{See} 2010 ADA Guidance.


\textsuperscript{60} 2010 Web Accessibility ANPRM, 75 Fed. Reg. at ** 43467.
II. Video Accessibility Mandates and First Amendment Challenges

It may seem somewhat convoluted to conceptualize a captioning or description mandate designed to expand the viewing audience of a video as an impermissible incursion on the First Amendment freedoms of the video programmer. Nevertheless, I begin this section with a brief review of the trio of court decisions that have addressed the issue, proceed to consider the First Amendment interests that might be implicated by accessibility mandates, and conclude by analyzing whether those interests are actually infringed under relevant precedent.

A. Judicial Review of First Amendment Challenges

Although video programmers have pursued First Amendment challenges to video accessibility mandates for more than three decades, they have been specifically addressed by appellate courts only twice—in Gottfried v. FCC and MPAA v. FCC. Nevertheless, it is worth surveying each case in some depth, as well as GLAD v. CNN, an ongoing case where the First Amendment looms large, before proceeding to a more general consideration of the interaction between video accessibility mandates and the First Amendment.

1. Gottfried v. FCC

The most direct consideration of First Amendment challenges to video accessibility mandates came during a decade-long effort during the 1970s and 1980s by Sue Gottfried, a deaf Los Angeles citizen, to require the FCC to impose a closed captioning mandate on television broadcasters.61 Along with the Greater Los Angeles Council on Deafness, Inc. (“GLAD”) and other citizens and organizations, Gottfried petitioned the FCC to deny the 1977 license renewal applications of eight Los Angeles television broadcasters who had failed to provide accessible programming, and filed a pair of related class action lawsuits seeking to require various federal agencies to promulgate accessibility regulations and to halt federal funding to noncompliant broadcasters.62

61 STRAUSS at 212.
While Gottfried’s and GLAD’s efforts to compel video accessibility requirements were largely rejected by the FCC and the courts for want of statutory authority, the D.C. Circuit briefly considered the interaction between the First Amendment and closed captioning in its rejection of Gottfried’s appeal of the FCC’s denial of her license renewal petition. In a footnote in Gottfried v. FCC, the D.C. Circuit rejected the television broadcasters’ argument that FCC-mandated closed captioning would violate the broadcasters’ First Amendment rights by “regulating the ‘content’ of their programming.” The court found the argument to be “without merit,” concluding without explanation that “a captioning requirement would not significantly interfere with program content.”

2. MPAA v. FCC

Like Gottfried, the only other appellate decision to directly address the interaction of accessibility mandates and the First Amendment centered on the FCC’s authority to grant accessibility mandates. In late 1999, the FCC proposed to require some broadcasters and MVPDs to start including closed video description with their programming. Although the FCC lacked any statutory mandate to promulgate description rules, it analogized its new description rules to the closed captioning rules it had recently promulgated pursuant to the requirements of the 1996 Act, which required closed captioning but required only a report, and not a rulemaking, on video description.

During a tumultuous comment period, a variety of programmers insisted that a video description mandate would unconstitutionally compel speech in violation of their First Amendment rights. Some programmers argued that a description mandate would be an impermissible content-based regulation. Finally, some

U.S. 498 (1983); GLAD v. Cmty. Television, 719 F.2d 1017 (9th Cir. 1983); GLAD v. Baldridge, 827 F.2d 1353 (9th Cir. 1987).

63 See generally STRAUSS at 212-16.

64 Gottfried, 655 F.2d at 311, n.54

65 Id.


67 Id.

68 A&E at 12-13; C-SPAN at 5-8; Lifetime at 3; MPAA at 8-16; NAB at 10-13; NCTA at 6-7; RTNDA at 5-6.

69 C-SPAN at 5-8; Lifetime at 3; MPAA at 10-16; RTNDA at 5-6.
programmers argued that distributors could not add video description to programming without either receiving consent from the copyright owner or committing copyright infringement.70

Unpersuaded, the FCC ordered certain broadcasters and MVPDs to begin providing limited video description.71 The FCC directly rejected the programmers’ First Amendment challenges, concluding that its video description mandate was a content-neutral regulation72 that satisfied intermediate First Amendment scrutiny under the Supreme Court’s then-recent decision in *Turner Broadcasting Systems, Inc. v. FCC* (“Turner II”).73 The FCC punted on copyright law, concluding that the market would sort out any copyright-related issues.74 The FCC envisioned that video distributors could insist that copyright owners provide video descriptions themselves or give distributors consent to provide descriptions instead.75

Writing separately, Republican Commissioners Harold Furchtgott-Roth and Michael Powell argued that the FCC had no statutory authority to promulgate video description rules.76 Commissioner Furchtgott-Roth also pointed to comments of the National Federation of the Blind (NFB), which had opposed the imposition of video description on the grounds that the blind community was “ambivalent” about video description.77 Commissioner Furchtgott-Roth concluded that the video description mandate’s “nonfurtherance of the interests of the primary beneficiaries of the rules [was] a vexing problem” under the First Amendment.78

Emboldened by the dissents, video programmers pressed their First Amendment and copyright arguments in petitions for

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70 Lifetime at 3-4; MPAA at 16-22; NAB at 23-24.
72 Id. at 15,254-55, ¶ 62 & n.158 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
73 Id. at 15,255, ¶ 64 (citing 520 U.S. 180, 189 (1997)).
74 Id. at 15,256, ¶ 66.
75 See id.
76 Id. at 15,268-69 (Furchtgott-Roth, Commissioner, concurring in part and dissenting in part); id. at 15,272-74 (Powell, Commissioner, concurring in part and dissenting in part).
77 Id. (citing Comments of NFB, at I).
78 Id.
reconsideration of the order.\textsuperscript{79} The FCC summarily dismissed the arguments and affirmed the mandate.\textsuperscript{80}

The MPAA, NAB, and the NCTA sued the FCC in the D.C. Circuit. The video programmers took political cover in the schism that had erupted the blind community over the mandate and were joined in opposition by the NFB, although other accessibility organizations, including the American Council of the Blind (ACB), sought to uphold the mandate.

The programmers largely reiterated the same First Amendment and copyright arguments they had made to the FCC.\textsuperscript{81} In one notable twist, the programmers explicitly linked their copyright and First Amendment arguments, arguing that the video description mandates unconstitutionally required programmers to exercise their exclusive right to create derivative works.\textsuperscript{82} The programmers argued that the Copyright Act granted them the exclusive prerogative to choose whether to translate their speech into other mediums, and that government-compelled exercise of that right would violate the First Amendment.\textsuperscript{83}

The D.C. Circuit overturned the FCC’s video description mandate in \textit{MPAA v. FCC}, concluding that the FCC lacked the necessary authority from Congress to enact the mandate.\textsuperscript{84} Judge Harry T. Edwards, writing for the court, refused to address whether the mandate was content-neutral or whether it violated the First Amendment, and did not acknowledge the programmers’ copyright arguments.\textsuperscript{85}

Judge Edwards concluded, however, that “[v]ideo descriptions change program content because they require the creation of new script to convey program details.”\textsuperscript{86} Judge Edwards distinguished video descriptions from closed captions, which he concluded

\begin{itemize}
\item \textsuperscript{79} DIRECTV Petition at 7; DIRECTV Reply at 8; MPAA Petition at 7-8; A&E Comments at 8-12; NCTA Petition at 4-6; MPAA Reply at 2.
\item \textsuperscript{80} Implementation of Video Description of Video Programming, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd. 1251, 1271, ¶ 46 (Jan. 18, 2001).
\item \textsuperscript{81} MPAA, et al. brief at 40-43.
\item \textsuperscript{82} See id. at 41-42 (citation omitted).
\item \textsuperscript{83} See id. at 42-43 (citing Yniguez v. Arizona for Official English, 69 F.3d 920, 937-38 (9th Cir. 1995)).
\item \textsuperscript{84} 309 F.3d at 807 (D.C. Cir. 2002).
\item \textsuperscript{85} See id.
\item \textsuperscript{86} Id. at 798.
\end{itemize}
simply “present a verbatim transcription of the program’s spoken words.”  

Because Judge Edwards concluded that the FCC’s video description mandate “significantly implicate[d] program content,” he held that the FCC needed specific statutory authorization from Congress to implement the mandate and could not do so under its general authority to regulate wire and radio communications.  

Judge Edwards concluded that the FCC’s general authority was insufficient to permit the FCC to regulate programming content “because such regulations invariably raise First Amendment concerns.”  

Judge Karen LeCraft Henderson concurred with Judge Edwards’s conclusion that the FCC lacked the necessary statutory authority to mandate video description, but disagreed that the mandate “constitute[d] a ‘direct and significant regulation of program content.’”  

Judge Henderson “fail[ed] to see how video description need consist of anything more than spoken stage directions,” and noted that “if so, video description . . . does not regulate program content.” Nevertheless, the FCC’s video description mandate fell by the wayside until it was resuscitated by Congress nearly a decade later under the CVAA. 

3. **GLAD v. CNN**

Because both *Gottfried* and *MPAA v. FCC* were primarily resolved on grounds that the FCC lacked statutory authority to promulgate video accessibility mandates, neither case rested on whether video accessibility mandates were permissible under the First Amendment. But an ongoing case in the Ninth Circuit, *GLAD v. CNN*, may offer a more direct treatment of the First Amendment question.

GLAD (now the Greater Los Angeles Agency on Deafness) sued CNN under California disability laws for failing to caption the

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87 Id.
88 Id. at 800, 807 (citing 47 U.S.C. § 151).
90 Id. at 807 (Henderson, J. concurring) (quoting id. at 803).
91 See 47 U.S.C. § 613(f)(1); see also discussion supra note 16.
videos on CNN.com. CNN moved to dismiss GLAD’s lawsuit under California’s anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, alleging that its decision not to caption its content was in furtherance of First Amendment-protected speech. CNN argued that all of its activities, including its decision not to include closed captioning, implicated its news-reporting activities. It also noted that errors inherent in modern captioning technology violated its editorial standards, and that requiring captioning would unconstitutionally compel erroneous speech. The Northern District of California rejected CNN’s anti-SLAPP motion, concluding that CNN’s decision not to caption its content was not conduct in furtherance of First Amendment-protected speech. CNN is currently pursuing an interlocutory appeal.

B. Speech Interests Implicated by Video Accessibility Mandates

In relevant part, the First Amendment bars Congress—and state governments, through the due process clause of the Fourteenth Amendment—from passing laws that abridge the freedom of speech, freedom of the press, or the free exercise of religion. So how might video accessibility mandates implicate these freedoms? Although programmers have set forth a wide variety of theories of how video accessibility mandates implicate the First Amendment, they can be roughly divided into two categories of objections: economic and philosophical. If a programmer’s objection to a mandate would disappear if complying with the mandate had no cost, then it is economic; otherwise, it is philosophical. As I describe below, this division eases the process of parsing out the precise First Amendment interests at play. But neither category of objections appears, upon closer inspection, to hold water.

1. Economic Theories

Under economic theories of First Amendment infringement, a programmer might not object to a video accessibility mandate in principle. Rather, the programmer argues that the cost of complying with the mandate will be sufficiently high that the programmer will simply refrain from creating or distributing a

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93 2012 WL 994647.
94 Id.
95 Id. at *4-*5.
96 Id.
97 Id. at *13.
particular program rather than making it accessible, or that the programmer will divert resources from creating or distributing some programming to make other programming accessible. As the argument goes, then, the accessibility mandate will unconstitutionally chill the programmer’s freedom of speech, and possibly the freedom of the press or the free exercise of religion if the suppressed programming is journalistic or religious in nature.

Perhaps the earliest example of an economic objection came during the development of the National Communications Competition and Information Infrastructure Act ("NCCI Act"), an early version of what eventually became the 1996 Act, when accessibility advocates lobbied Congress to include closed captioning and video description requirements for broadcast, cable, and satellite television providers. 98

In response to the lobbying efforts, the President of the conservative Media Institute, Patrick D. Maines, sent letters to members of the subcommittee insisting that mandating closed captioning and video description would violate the First Amendment rights of both video creators and distributors. 99 The Media Institute found an unlikely ally in the American Civil Liberties Union ("ACLU"), whose Legislative Counsel, Robert Peck, sent a similar letter questioning the constitutionality of captioning and description mandates. 100

The Maines and Peck letters led to a lengthy hearing on the constitutionality of video accessibility mandates before the Senate Committee on Commerce, Science, and Transportation. 101 Senator Fritz Hollings (D-South Carolina), the Committee Chairman, and

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98 H.R. 3636, 103rd Cong. (1994); STRAUSS at 248 & n.9.
100 STRAUSS at 252; letter on file with author. The ACLU later partially reversed its objection to captioning mandates following a speech by Gallaudet University Professor Paul Siegel at its convention the following year.
101 NCCI Act Hearing at 597 (May 24, 1994)
Senator John Danforth (D-Missouri), a ranking Democrat, were skeptical of the ACLU’s constitutional concerns and interrogated Peck at length on the First Amendment. In the midst of the cross-examination, Senator Hollings permitted Gallaudet University’s Mark Goldfarb to enter into the record a letter from First Amendment scholars and law professors Angela Campbell (Georgetown) and Steven Shiffrin (Cornell) concluding that video accessibility mandates would not violate the First Amendment.

With respect to the economic theory of First Amendment infringement, both Maines and Peck argued that the expense of implementing closed captioning and video description would lead some broadcasters to choose not to show programming rather than making it accessible, thereby creating an unconstitutional chilling effect.

This line of argument posed a difficult theoretical dilemma: if it is economically impossible to create and distribute a program in an accessible form, it is it preferable for the purposes of the First Amendment to permit the program to be distributed in an inaccessible form, or not at all? What if the program is being distributed over a scarce medium like broadcast television, such that its displacement might result in the distribution of a different, accessible program?

Regardless of whether the First Amendment might theoretically tolerate banning the distribution of a program whose creator or distributor cannot afford to make it accessible, the countervailing concerns about the impact of such a ban on the programmers’ First Amendment interests are obviated in practice by the “undue burden” provisions of both the FCC’s accessibility rules and Title III of the ADA.

In particular, Section 713 of the Communications Act of 1934 permits the FCC to categorically exempt programs, classes of programs, or services from its closed captioning and video description rules on the grounds that captioning or video description would be economically burdensome to the providers of

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102 See id. at 643-57; STRAUSS at 254.
103 NCCIIA Hearing at 651 (Letter from Angela J. Campbell and Steven H. Shiffrin to Senator Fritz Hollings).
104 NCCIIA Hearing at 792 (citing Minneapolis Star and Tribune Co. v. Minneapolis Com’r of Revenue, 460 U.S. 575, 585 (1983)); see also Peck Letter at 3.
programming in the category.\textsuperscript{105} It also permits programming providers and owners to petition the FCC for individual exemptions from the rules upon a showing that complying with the rules would be economically burdensome.\textsuperscript{106} Compliance is economically burdensome to a programmer if it would impose “significant difficulty or expense,” as determined by the nature and cost of compliance, the impact of compliance on the programmer’s operation, the programmer’s financial resources, and the type of operations of the programmer.\textsuperscript{107}

The ADA similarly exempts public accommodations from providing auxiliary aids or services where doing so would result in an undue burden.\textsuperscript{108} Just like the FCC’s rules, the DOJ’s regulations define undue burden as “significant difficulty or expense,” similarly determined by the nature and cost of compliance with the rules and the public accommodation’s financial resources.\textsuperscript{109}

The presence of these exemption processes is designed to eliminate the possibility that a programmer unable to afford compliance with an accessibility mandate will nevertheless be compelled to comply. Thus, it is difficult to conceive of what sort of economic First Amendment interest a video programmer might assert against an accessibility mandate with an undue burden provision.

Maines and Peck argued, however, that the application of an exemption process might implicate its own constitutional problems. While Maines and Peck did not object to the idea of exempting program on the basis of economic burden to the programmer, they argued that vesting an administrative agency such as the FCC with the authority to exempt certain videos from accessibility mandates would unconstitutionally extend the agency the freedom to give favorable treatment to its preferred programs and impose untenable burdens on other programs.\textsuperscript{110}

Of course, as Campbell and Shiffrin conceded, the FCC could potentially exercise its authority unconstitutionally.\textsuperscript{111} But, as they

\textsuperscript{105} 47 U.S.C. § 613(d)(1).
\textsuperscript{106} 47 U.S.C. § 613(d)(1); see also 47 C.F.R. 79.1(f).
\textsuperscript{107} 47 U.S.C. § 613(e); see also Interpretation of Economically Burdensome Standard, CG Docket No. 11-175, 2012 WL 2952530.
\textsuperscript{109} 28 C.F.R. §§ 36.104, 36.303(a).
\textsuperscript{110} NCCIA Hearing, at 792 (citing Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988)). ACLU letter at 5-6 (citing …).
\textsuperscript{111} Id. at 651.
pointed out, the Supreme Court in *Ward v. Rock Against Racism* dispensed with the notion that the government must afford officials discretion with perfect clarity or precise guidance.\textsuperscript{112} If an official exercised discretion unconstitutionally, they argued, the impermissible exercise could be overturned on judicial review without disturbing the statute.\textsuperscript{113}

In 2006, Maines’s and Peck’s concerns came to fruition, albeit in an unexpected fashion. The FCC’s Consumer and Governmental Affairs Bureau (“CGB”), under the supervision of Republican FCC Chairman Kevin Martin, granted two churches’ petitions for permanent exemptions to the television closed captioning rules for their religious programming (the “Anglers Order”).\textsuperscript{114} Although the CGB purported to grant the Anglers Order exemptions based on the petitioners’ non-profit status and not because of the religious nature of the petitioners’ programming, the CGB noted that it would be “favorably inclined” to grant similar petitions,\textsuperscript{115} and summarily granted more than 300 petitions for permanent exemptions by other churches based on the Anglers Order.\textsuperscript{116}

Despite Maines’s and Peck’s concerns that the FCC’s exemption authority would prejudice other video programmers, no programmers ever challenged the Anglers exemptions. Instead, deaf and hard of hearing consumer groups applied for review of the

\textsuperscript{112} *Id.* (citing *Ward*, 491 U.S., 794)

\textsuperscript{113} *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 190 (1991)).


\textsuperscript{115} See *Anglers 2006* at 10,097, ¶ 11.

\textsuperscript{116} See *Anglers for Christ Ministries, Inc. New Beginning Ministries; Petitioners Identified in Appendix A; Interpretation of Economically Burdensome Standard; Amendment of Section 79.1(f) of the Commission’s Rules; Video Programming Accessibility*, 26 FCC Rcd. 14,941, 14,948, ¶ 11 (Oct. 20, 2011).
exemptions on the grounds that the FCC’s actions violated the Establishment Clause of the First Amendment.  

Campbell’s and Shiffrin’s predictions of targeted resolution proved correct. In 2011, the FCC overturned the Anglers Order and reversed all the subsequently granted exemptions, declining to reach the Establishment Clause challenge but concluding that the CGB had not properly evaluated the petitions pursuant to the FCC’s exemption rules. In particular, the FCC criticized the CGB’s failure to consider the individual financial circumstances of the churches that had applied for an exemption to determine whether providing captioning would in fact impose an untenable financial burden.

Beyond the Anglers saga, there is little evidence that the FCC’s application of the rules has ever resulted in the FCC favoring some programmers at the expense of others. And because entities that cannot afford to make their programming accessible can effectively escape any burden imposed by the video accessibility mandates, economic theories of First Amendment infringement appear to hold little water with respect to mainstream modern accessibility regulations.

2. Philosophical Theories

Presuming that any economic First Amendment concerns can be addressed by exempting programmers from the regulations, any remaining First Amendment concerns must be philosophical in nature. Under philosophical theories of First Amendment infringement, a programmer specifically objects to the substance of a video accessibility mandate.

In other words, the philosophically-objecting programmer asserts some specific political, artistic, journalistic, or religious interest in not engaging in the actions required to comply with an accessibility mandate, even if complying with the mandate would be costless (or sufficiently inexpensive that compliance would not be economically burdensome). In this case, the argument is that the mandate unconstitutionally compels the programmer to create or distribute speech with which it does not agree or which is contrary to its desired expression—or to forebear from creating or distributing its program altogether.

117 Cite to petition for review.
118 Id. at 14,947-49, ¶¶ 12, 16.
119 Id. at 14,950, ¶ 17.
In France, these arguments might implicate suite of non-economic intellectual property rights of the auteur (creator) in his or her creative works, collectively known as droits moraux, and in particular, le droit moral (roughly translated as “moral rights”). These rights include le droit au respect de l’oeuvre (the right of integrity), le droit de divulgation (the right of disclosure—the choice whether or not to publish a work), and le droit de repentir or de retrait (the right of withdrawal). These rights generally do not exist in American copyright law, but might nevertheless be vindicated to some degree by the First Amendment. Assessing this theory, however, requires a closer examination of philosophical arguments against video accessibility mandates and the nature and operation of video accessibility measures themselves.

a. Viewer Interference

One common concern raised by programmers is that the inclusion of captions or description will disrupt the viewing or listening experiences of viewers who would prefer to see a video in its original form without captions or descriptions. In particular, the argument is that the display of captions might distract from a filmmaker’s deliberate cinematography choice or other visual aspects of a video, while the playback of description during pauses in dialogue might interfere with other aural aspects of the video, such as music or sound effects, or disrupt intentional pauses in the dialogue with additional sound.

It is important to note, however, that most contemporary accessibility mandates require only “closed,” as opposed to “open,” captions and video descriptions. Closed captions and video description can be displayed or played back (or not) at the viewer’s

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121 Id. at 70. For a fanciful example, see J.K. Rowling, Harry Potter and the Deathly Hallows, ch. 25 (2007) (goblin weaponsmiths merely authorize the use of swords, and expect to retain control when the user dies).

122 C.f. 17 U.S.C. §§ 101, 106A (providing a limited set of “moral rights” to individual or limited edition of certain paintings, drawings, prints, sculptures, and photographs).


124 Need cite to comments in DOJ proceedings, early captioning / VD, NCCIIA hearings.

125 Kuo, 23 J. MARSHALL J. COMPUTER & INFO. L. at 171.
option, generally at the touch of a button.\textsuperscript{126} At least with respect to situations where the programming is viewed in the privacy of the viewer’s home or another location where he or she has exclusive control over video playback, this obviates any concern that original content will have to be permanently modified.

Of course, the situation becomes more complicated in a shared viewing space, such as a movie theater. But technological solutions have significantly obviated these problems. Video descriptions can be played back through wireless headsets without being heard by other viewers.\textsuperscript{127} And “rear window” captions displayed in LEDs on the back wall of the theater can be viewed via a small, semi-transparent mirror placed in a viewer’s armrest, effectively overlaying the captions on the screen in the viewer’s field of vision without displaying them to others in the audience. Newer technologies transmit captions to glasses and wireless personal displays. And even open captions and description can be effectively “closed” by only displaying them for certain showings of a movie and using individual technology for the other showings.\textsuperscript{128}

Because viewers can choose whether or not to view captions or listen to description, they can individually weigh the benefits of the accessibility measures against the desire to view the video in its original form. For many viewers with disabilities, the ability to understand spoken dialogue that they cannot hear or visual events that they cannot see obviously outweighs the incidental impact of captions and description on their ability to enjoy the other visual and aural content of the movie. Even many hearing viewers may arrive at the same decision when viewing a video in an environment where it is too noisy or too quiet to listen to the audio, such as public transportation, the gym, libraries, and offices.\textsuperscript{129}

In short, the closed nature of accessibility mandates guarantees that captions and description will never alter the viewing experience of viewers who do not want to see or hear them. Thus, video


\textsuperscript{128} Waldo at 1056-59.

\textsuperscript{129} E.g., STRAUSS at 237-38.
programmers cannot reasonably assert any vicarious First Amendment interest in maintaining the integrity of the experience of their viewers, given that viewers who turn on accessibility measures are presumably doing so voluntarily.

b. Compelled Speech

Any remaining First Amendment interest of a programmer in not complying with an accessibility mandate, then, must stem from a specific expressive conduct or speech that would be contradicted or thwarted by creating captions or description. Mechanically, the argument appears to be a standard form of the compelled speech doctrine, under which the Supreme Court has recognized a right to avoid being compelled to express speech with which one disagrees, or wishes not to express. The Court has even held that certain expressive public accommodations can discriminate against classes of people when accommodating those people would require altering the content of the accommodations’ expression.

But in what cases might a programmer actually disagree with the expression embodied in captions or video description? In contrast to most compelled speech cases, where a speaker is or might conceivably be compelled to express something with which he or she disagrees, the expression being compelled by captioning and description mandates is entirely a programmer’s own speech, which the programmer has already voluntarily distributed to the public. A programmer cannot reasonably assert any interest in not expressing the portions of its own speech encapsulated in captioning or video description of a video when it already plans to

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130 E.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 579 (1995) (“Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says.”); Turner I, 512 U.S. at 641 (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”); Wooley v. Maynard, 430 U.S. 705, 715 (1977) (“The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.”); W. Va. State Bd. Of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

131 Hurley, 515 U.S. at 573.
express those same portions of its speech to those same viewers by showing them the video itself.

To be more specific: video accessibility mandates require programmers to supplement the aural and visual components of their videos with corresponding visible and audible translations that represent the programmers’ underlying creative choices as faithfully, accurately, and completely as possible, so that people with disabilities can perceive and enjoy the creative choices on equal terms to their hearing and seeing counterparts.

Ideally, a video accessibility measure would translate every creative choice that a programmer made in the aural or visual medium of the video in the corresponding medium so completely that it would convey the programmer’s speech in its entirety. In other words, mandating an ideal accessibility measure would simply compel the programmer to express its own speech in accessible form, in its entirety, and nothing more or less, contemporaneously with the expression of the same speech in inaccessible form.

Any First Amendment interest the programmer could have in not complying with an ideal accessibility mandate, then, would be no greater than the programmer’s interest in not distributing the programming itself. And because accessibility mandates only apply to programs that are actually and voluntarily distributed, either on television, via the Internet, or in movie theaters, programmers demonstrably reject any interest in not distributing the programming subject to the mandates. Programmers, then, would have no conceivable First Amendment interest in noncompliance with an ideal accessibility mandate.

Of course, idealized accessibility measures don’t exist in the real world, and captions and video description can’t provide perfectly complete translations of every aspect of a video’s aural and visible content. But to the extent that captioning faithfully and accurately transcribes the dialogue and describes the sound effects and music playing on the audio track of a movie, and video description faithfully and accurately describes the visual events that are occurring on screen, the accessibility measures are simply reciting the core of the programmer’s own speech. The programmer, again, can have no First Amendment interest in not expressing the core of its own already-expressed speech.

A brief tangent: it is not a given that the programmers’ core speech will be transcribed or described accurately. For example, some
programmers have argued that inaccuracies in closed captions would violate their editorial integrity. Of course, programmers have also contested accessibility advocates’ push for quality standard that would prohibit inaccuracies, sometimes on First Amendment grounds.

But the potential for inaccuracies is of little relevance to the First Amendment, because accessibility mandates do not even promote, much less require inaccuracy. Instead, programmers are generally responsible for creating captions and description themselves, and can (and should) do so accurately to comply with the spirit, if not the letter, of the accessibility mandates. To the extent programmers have an interest in the accurate expression of their core speech, the First Amendment cannot take offense if programmer expresses its own speech inaccurately as a result of a government mandate clearly aimed at requiring the accurate expression of the speech.

But what of the speech embodied in a video beyond the core that is captured in captions or description? There exist two possibilities for conceptualizing the peripheral differences in the programmer’s original video and captions or descriptions: omission and alteration.

c. Omission of Nuance

The functional limitations of captioning and description preclude the possibility that every nuance of visual and aural content, such as vocal timbre or camera depth of field, can be translated into a corresponding visible or audible form, which may necessitate their omission from captions or video description. A programmer might argue that the failure of captioning or description to include those nuances violates the artistic integrity of a video by presenting less than the original content to a person with disabilities.

But those nuances are already inaccessible to people with disabilities, regardless of whether a video is captioned or described. The creation of captions or description that omit these nuances cannot possibly make the nuances any less accessible; it is the aural or visible nature of the nuances themselves that makes them inaccessible to people with disabilities in the first place. Thus, a programmer can have no greater First Amendment interest in not expressing captions due to their omission of nuance than the programmer has in excluding people with disabilities from viewing

\[132 \text{ GLAD, 2012 WL 994647 at *11-*12.} \]
\[133 \text{ cite to comments against video description and closed captioning quality} \]
the movie altogether. And because video accessibility mandates apply only to publicly distributed videos that anyone, including people with disabilities, can generally access, a programmer necessarily waives any interest in expressing the video only in its most complete form by voluntarily distributing it to the public.

d. Alteration of Content

Beyond simply omitting nuances of content, there is also an argument that captioning or description might require the alteration of content. Alteration might occur on two levels of abstraction.

First, there is the possibility that the very use of captions or description could be fundamentally incompatible with a video creator’s desired political or religious expression. One can imagine a political or religious video opposing accessibility laws, and the ironic controversy that might ensue from requiring the video’s creator to caption or describe it. Such concerns, however, are largely hypothetical.

A second argument is that the choice to use spoken word rather than written captions or visual images rather than spoken video description is an expressive choice protected by the First Amendment. These arguments often invoke the Supreme Court’s holding in Cohen v. California that Paul Cohen could wear a jacket with the words “Fuck the Draft” on it, notwithstanding the other means by which he might convey his objection to the draft without saying the word “fuck.”¹³⁴ The Ninth Circuit elaborated on Cohen in Yniguez v. Arizonans for Official English, noting that a speaker’s choice to use Spanish rather than English to convey the same message might be a crucially expressive choice.¹³⁵

There is no doubt that a video creator’s choice to communicate some elements of a video in aural and not visible form, and vice versa, is a form of expressive speech, no less protectable under the First Amendment than Cohen’s choice to wear a jacket that said “Fuck the Draft” rather than one that said, “I Object to the Draft.”

But this choice is not implicated by video accessibility mandates. The government has never sought, for example, to ban a video creator from using audio in favor of captioning (in part, of course, because doing so would make the video less accessible to people who are blind or visually impaired). Rather, video accessibility mandates merely require captioning and video description in

¹³⁵ 69 F.3d 920, 935-36, overturned on other grounds, 520 U.S. 43 (1997).
addition to the video’s original aural and visible components. A video accessibility mandate, then, is more effectively a bilingual mandate, such as the requirement in the Voting Rights Act of 1964 that candidate announcements be made available in English and Spanish.\textsuperscript{136}

A third argument is that the functional limitations of captioning and video description might require characterizations or alterations of specific content, which a programmer might argue interfere with its expression. On this point, courts and programmers have attempted to draw a distinction between captioning and video description. The ACLU’s Peck, who staunchly opposed mandatory video description, noted at the beginning of the NCCIIA hearing:

[T]here is a considerable difference in magnitude between [a closed captioning] requirement and [a] video description mandate. Closed captioning does not require new and different speech; it requires that the words already spoken be written. Thus, it does not require a speaker to alter the content or the words used to convey the message in any way. On the other hand, video description requires characterization of images and the incorporation of new vocabulary that was not a part of the original message, even if it is aimed at conveying the same or similar thoughts.\textsuperscript{137}

The D.C. Circuit’s decisions \textit{Gottfried} and \textit{MPAA v. FCC} support the conclusion that any peripheral alteration implicit in captioning is \textit{de minimis} with respect to any infringement on a programmer’s First Amendment rights. In \textit{Gottfried}, the court specifically held that “a captioning requirement would not significantly interfere with program content.”\textsuperscript{138} In \textit{MPAA v. FCC}, the court elaborated further, noting that captions present no more than “a \textit{verbatim} transcription of the program’s spoken words.”\textsuperscript{139} While the court’s analyses were cursory, its logic was sound: captions may convey \textit{less} than the entirety of a video’s aural component, but nothing \textit{different}.

What about video description? Concerns about alteration are more acute because a describer necessarily must characterize the visual content of a scene in order to translate it to spoken description. Relying an imprecise but helpful old adage, a picture might be

\textsuperscript{137} \textit{NCCIIA Hearing} at 623 (citing United States v. O’Brien, 391 U.S. 367, 377 (1968)).
\textsuperscript{138} 655 F.2d at 311, n.54.
\textsuperscript{139} 309 F.3d at 798.
worth a thousand words, but a video constitutes twenty-four pictures (or frames) shown every second. So, a video might convey somewhere in the neighborhood of 24,000 words worth of information every second. Even master debate team members, who practice speaking at up to 600 words per minute—five times more than the average human—could only convey a tiny fraction of the information on-screen at any given time. Setting aside this imprecise calculation, a video describer will likely have to make choices about how to characterize the visual content of the video in a spoken description.

The D.C. Circuit at least acknowledged the possibility that having to make these choices might implicate the First Amendment, holding in MPAA v. FCC that “[v]ideo descriptions change program content because they require the creation of new script to convey program details.” But Judge Henderson disagreed in a concurrence, “fail[ing] to see how video description need consist of anything more than spoken stage directions,” and noting that “if so, video description . . . does not regulate program content.”

Judge Henderson arguably has the better of the two analyses. Of course, as with captioning, video description undoubtedly conveys less than the entirety of a video’s visual component—roughly equivalent to the stage directions—and generally does not convey the complex cinematographic, motion, color, and artistic subtleties that inhere in the visible content of video. But does description convey something different?

141 309 F.3d at 798.
142 Id. at 807 (Henderson, J. concurring) (quoting id. at 803).
Consider, for example, the sample video description provided at the footnoted link of the infamous scene in *The Empire Strikes Back* where Jedi Knight Luke Skywalker attempts to free himself from the snowy depths of the Wampa monster’s cave (link in the footnote).  

The video descriptor says, “[Luke] stretches his hand towards the weapon’s handle; closes his eyes, reaches out again; it moves a bit more.” After an audible roar from the Wampa, the descriptor continues: “The beast rises and lumbers towards him. The weapon leaps into his hand, and a long, smooth shaft of light grows from its tip.” Accompanied by the sounds of the lightsaber swinging and striking, the descriptor continues: “[Luke] frees his feet and drops down, then slashes out at the beast, severing its arm.” The beast roars, and the descriptor concludes: “[Luke] runs out of the cave into the storm, scrambling up a ridge and tumbling down the far side, a tiny figure struggling through the snow.”

Even the most ardent of Star Wars fans would be hard-pressed to deem the description inaccurate. Some details are obviously missing, such as what Luke or the Wampa look like, or what color Luke’s lightsaber is. But there is nothing in the description that conveys something fundamentally different than the scene itself. If you had to describe the scene to a friend, you might arrive at a very similar result. As a comment to the FCC from a professional video descriptor’s association noted, six different describers would be very likely to describe the same scene in precisely, or at least very

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nearly, the same way because the content of the description is
directly dictated by the visual content of the video.\footnote{Comment from early proceeding}

Indeed, the fundamental mistake made by the majority in \textit{MPAA v. FCC} was presuming that the creation of video description is a
creative endeavor rather than a functional one. Description is not
intended to be a separate piece of expressive content from the
underlying visual elements of the video; as the name implies, it is
simply trying to describe those elements as accurately and
completely as possible given the functional limitations of the
medium of vocal speech, just as closed captioning aims to describe
the aural elements of a video given the limitations of the textual
medium. The difference between the two, if any, is only that
description is capable of representing comparatively less of a
video’s content than captioning.

Most importantly, neither captioning nor description contemplates
any meaningful \textit{alteration} to the content. And any interest in
avoiding sins of \textit{omission} is impliedly waived by a programmer’s
willingness to distribute an uncaptioned video with audio content
inaccessible to people who are deaf or hard of hearing or an
undescribed video with visual content inaccessible to people who
are blind or visually impaired. Because programmers generally
have no obviously identifiable general philosophical interest in
avoiding captioning and description obligations, and because any
economic objection likely will be vindicated through the undue
burden process, it is simply not clear that imposing captioning or
description obligations will ever infringe on programmers’ First
Amendment interests.

\textbf{C. First Amendment Doctrine}

To this point, my analysis has proceeded without reference to
whether video accessibility mandates actually violate the First
Amendment. This is because, based on the foregoing discussion, it
is difficult, if not impossible, to identify any First Amendment
interests that are actually implicated by accessibility mandates. But
I will presume here for the sake of argument that a video
accessibility mandate might in fact implicate some First
Amendment interest.

The first question in evaluating whether a regulation impossibly
infringes on a First Amendment interest is whether the regulation
is neutral with respect to the content of the regulated expression.
The Supreme Court’s decision in *United States v. O’Brien* laid out the now-familiar four-prong test for content neutrality:

1. The governmental entity enacting the law must be constitutionally empowered to pass the legislation at issue;
2. The regulation must be “unrelated to the suppression of free expression”; and
3. The government must have an “important or substantial” interest in enacting the regulation;
4. Any “incidental restriction” on First Amendment interests must be no greater than is essential to further the government’s interest.  

At the outset, there is little serious doubt that Congress has the authority to regulate the applicable mediums of video delivery under the interstate commerce clause.  

a. Expression Suppression and Content Neutrality

There also can be little question that video accessibility mandates are unrelated to the suppression of free expression. To the contrary: video accessibility mandates are designed to disseminate the core expression of videos to a greater audience than might otherwise understand them. And while non-suppressive aims of a regulation might be problematic if its impact is suppressive, video mandates generally include undue burden safety valves to ensure that the mandates do not apply if their application would actually result in the suppression of expression.

Of course, if a video creator’s desire not to caption or describe its programming were rooted in a desire to make some sort of political, religious, or other First Amendment-protected expression, a mandate might result in incidental suppression of that expression. But there is little documented evidence of any programmer expressing such an interest. Rather, video programmers that raise First Amendment challenges to accessibility mandates generally do so either based on (a) economic complaints that will be addressed by the undue burden system or (b) general complaints about government interference with creative

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148 Cite examples.
and distributive autonomy that lack any particular reference point in First Amendment jurisprudence.\textsuperscript{149}

Moreover, programmers tend to preface their objections with venerations of the importance of accessibility,\textsuperscript{150} emphasize their own voluntary efforts to provide accessibility,\textsuperscript{151} and urge free market solutions to facilitate accessibility.\textsuperscript{152} And even in the unlikely case that any programmer truly sought to express itself through the act of not complying with an accessibility mandate, any impact on that expressive act would undoubtedly be an incidental side effect unrelated to the mandate’s broader purpose of expanding accessibility.

The “suppression” prong of the O’Brien also begs the core inquiry of the content neutrality determination—namely, “whether the government has adopted a regulation of speech because of disagreement with the message it conveys,” or whether it can be “justified without reference to the content of the regulated speech.”\textsuperscript{153} More specifically, video regulations will be deemed content-neutral if they “are not activated by any particular message spoken by [a programmer] and thus exact no content-based penalty.”\textsuperscript{154} Because the video accessibility mandates under the ADA and the FCC’s rules are generally applicable without regard to the message of the underlying programs,\textsuperscript{155} there is little doubt that they are content-neutral regulations of the manner of underlying video.

\textbf{b. Governmental Interest}

Finally, there are the closely related questions of whether the government has a substantial or important interest in enacting accessibility mandates, whether the mandates effectively serve that government interest, and whether the mandates are narrowly tailored toward that end.

There is little doubt that the government has a substantial, well-documented interest in promulgating video accessibility mandates. The basic purpose of the FCC is “to make available, so far as

\begin{footnotes}
\footnote{149} Cite examples.
\footnote{150} Cite examples.
\footnote{151} Cite examples.
\footnote{152} Cite examples.
\footnote{153} Ward, 491 U.S. at 791-92 (quoting...)
\footnote{154} Turner I, 512 U.S. at 655.
\footnote{155} Caveat about video description and children’s programming.
\end{footnotes}
possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities.”\textsuperscript{156} Toward this end, Congress has passed numerous pieces of legislation designed to increase the accessibility of communications services, including the delivery of video programming, to people with disabilities, routinely describing in detail the particular difficulties faced by people with disabilities in accessing those services.\textsuperscript{157} Congress similarly designed the ADA to overcome historical societal “isolat\textsuperscript{ion} and segregat\textsuperscript{ion}” of people with disabilities and the “discriminatory effects of . . . communications barriers.”\textsuperscript{158}

One court has specifically doubted the efficacy of video accessibility mandates in serving the ADA’s requirement of “full and equal enjoyment” of public accommodations for people with disabilities. In \textit{McNeil v. Time Insurance}, an ADA case unrelated to captioning or video description, Fifth Circuit Judge E. Grady Jolly noted in dicta:

\begin{quote}
The unvarnished and sober truth is that in many, if not most, cases, the disabled simply will not have the capacity or ability to enjoy the goods and services of an establishment “fully” and “equally” compared to the non-disabled. The blind may surely enjoy attending a movie or even a tennis match. But it seems indisputable that the blind will not fully and equally enjoy the “good” or “service” of those places of public accommodation when visual elements of that experience are, by circumstance, denied them. Similarly, the deaf sometimes enjoy symphonies because they can sense the vibrations of the music. But their enjoyment cannot be full or equal compared to one with hearing, because they are not privy to the full range of sounds that one with hearing is. It is a flawed and unreasonable construction of any statute to read it in a manner that demands the impossible.\textsuperscript{159}
\end{quote}

Judge Jolly’s logic, however, mistakes the ADA’s requirement of “full and equal” \textit{enjoyment} of creative content as being one of “full and equal” \textit{perception}. Of course, as discussed at length above, it is often impossible to convey the full array of visual and aural nuance of a video in captions and description to the point that people with

\begin{itemize}
\item \textsuperscript{156}47 U.S.C. § 151.
\item \textsuperscript{157}Fill in with examples.
\item \textsuperscript{158}42 U.S.C. § 12101(a).
\item \textsuperscript{159}McNeil v. Time Ins. Co., 205 F.3d 179, 187 (5th Cir. 2000).
\end{itemize}
disabilities can fully perceive every aspect of a video. But this reality does not preclude the reality that captions and video descriptions facilitate sufficient enjoyment to satisfy the purpose of the ADA or the FCC’s accessibility rules.

Indeed, there is widespread consensus among organizations representing deaf and blind communities that requiring captioning and video description advances these goals. As the National Association of the Deaf notes, “[c]losed captioning is an integral and crucial part of a deaf and hard of hearing person’s daily life and personal safety.”\(^\text{160}\) John Waldo, the Director of the Washington State and Oregon Communication Access Project, argues that the Ninth Circuit’s decision in \textit{Harkins} recognizing captioning and description obligations under the ADA “promise[s] to be the tipping point in the quest for meaningful access to the movies.”\(^\text{161}\) The American Foundation for the Blind similarly notes: “Video description helps people who are blind or visually impaired to gain more complete access to the content of TV programs and movies and thereby more fully participate in society.”\(^\text{162}\) The American Council of the Blind takes the position that mandatory video description serves the “important need” of “bring[ing] children and adults who are blind or have low vision into the mainstream of society” and “participate fully in popular culture.”\(^\text{163}\) And even the National Federation of the Blind, who objected to the FCC’s video description mandates in \textit{MPAA v. FCC} on the grounds that free-market solutions would be preferable to mandates,\(^\text{164}\) has recently softened its position, noting that the quantity of video description available on television decreased in the years following \textit{MPAA v. FCC}.\(^\text{165}\)


\(^{161}\) Waldo at 1034.


c. Tailoring and Perceptibility

The premise that perfect perceptibility is not necessary to achieve the aims of a video accessibility mandate begs the question of whether a mandate is sufficiently “narrowly tailored” to meet the goals of the underlying statute. Video programmers who complain that captioning and description afford an incomplete or altered translation of their creative expression often argue, sometimes simultaneously, that requiring objective improvements to perceptibility would also violate the First Amendment.\textsuperscript{166} For example, programmers have fought initiatives to eliminate the use of the Electronic Newsroom (“ENR”) captioning method—where teleprompter text is used as a captioning feed, omitting any unscripted moments from the captions—and quality standards, such as bans on spelling mistakes and missing or garbled words.\textsuperscript{167}

I presume that the root of these arguments is not a desire to introduce inaccuracies into captions and video description, but rather an objection that an accessibility mandate is overbroad. In terms of the \textit{O'Brien} test, then, is it possible for an accessibility mandate to require so much perceptibility that it is no longer sufficiently “narrowly tailored” to serve the goal of facilitating the enjoyment of video programming by people with disabilities?

The Ninth Circuit’s decision in \textit{Baughman v. Walt Disney World} suggests that the answer has a temporal component rooted in the evolution of accessibility technology.\textsuperscript{168} In an opinion by Chief Judge Alex Kozinski, the \textit{Baughman} court concluded that Disneyland might have to update its rules to permit patrons to use Segways in the park in addition to wheelchairs and motorized scooters.\textsuperscript{169} In determining whether a particular accessibility

\textsuperscript{166}Cite examples.

\textsuperscript{167}Cite examples.


\textsuperscript{169}Id. at *1 (“Segways at Disneyland? Could happen.”).
measure is reasonable, Judge Kozinski noted the importance of considering “evolving technology that might make it cheaper and easier to ameliorate the plight of the disabled.” As new technology becomes available, regulated entities “must consider using or adapting [it] to help disabled guests have an experience more akin to that of non-disabled guests.”

The evolution of captioning and video description technologies highlights this dynamic. For example, television closed captions were originally encoded rather cleverly but crudely through an invisible scan line at the bottom of each frame of televised video, then decoded by a specialized chip included in the television. The functional limitations of the technology precluded anything more than the clunky display of captions in the now-familiar block-style font with white text on a black background, with a limited palette of alphanumeric characters. Today, advanced closed captioning standards permit significantly advanced features such as different colors, fonts, and positioning that permit more complete and visible representations of the transcribed aural content.

But even if stricter captioning and video description standards are not absolutely necessary to increase perceptibility to the minimum level necessary to facilitate the enjoyment of video for people with disabilities, absolute necessity is not the keystone of O’Brien’s “narrowly tailored” requirement. Indeed, as the Supreme Court held in Ward, content-neutral regulations of the manner of speech need not be the “least restrictive or least intrusive means” of serving a governmental purpose to be narrowly tailored, but must merely “promot[e] a substantial government interest that would be achieved less effectively absent the regulation.” And there is no doubt in light of the demonstrable market failure for accessible video content that government interests in promoting accessibility would be substantially less well-served without captioning and video description mandates.

170 Id. at *4.
171 Id.
172 Need a technical cite.
174 Id.
175 491 U.S. at 798-99 (citing)
d. First Amendment Rights of People with Disabilities

At least in general, it seems clear that content accessibility mandates should overcome negative-liberty First Amendment challenges as permissible, content-neutral regulations on the manner of speech. But even if not, it is essential to weigh the countervailing First Amendment interests of people with disabilities in access to the speech that occurs on television, cable, the Internet, and in movie theaters.

In Marvin Ammori’s recent discussion of First Amendment architecture, he explores five judicial principles “that either require or permit government to ensure spaces for speech—in order to promote particular, substantive speech goals.”\(^ {176}\) He identifies one of these principles as “universal access to speech spaces,” tying the public right to access speech, including through the provision of video accessibility, to government use of public property to subsidize speech mediums such as newspapers (investment in postal roads and post offices), telegraphs, telephone, and cable systems (free access to public rights of way), and television and wireless service (allocation of spectrum).\(^ {177}\) With respect to movies shown in theaters, states frequently grant lucrative tax credits to lure moviemakers to shoot movies in their states.\(^ {178}\)

In addition to its consideration of broadcasters’ negative-liberty challenge, the D.C. Circuit explicitly acknowledged a positive conception of the First Amendment in *Gottfried* as support for requiring closed captions, holding that “the First Amendment [might entitle] the hearing impaired to have access to some minimum of programming over the airwaves.”\(^ {179}\) While the court refused to “accept that [the First Amendment] requires all stations to make their programming accessible to all deaf persons all of the time,” and noted that “the First Amendment . . . sweeps no more broadly than the public interest standard of the Communications Act [of 1934],” the court presumed that the FCC could constitutionally condition a broadcast television license on the


\(^ {177}\) Id. at 52.


\(^ {179}\) *Gottfried*, 655 F.2d at 311, n.54
broadcaster’s compliance with “more limited” closed captioning regulations under its authority to require programming in the public interest. In particular, the Gottfried court explicitly presumed that the FCC could premise captioning regulations on the Supreme Court’s seminal holding in Red Lion Broadcasting v. FCC that the FCC could compel particular types of speech in order to ensure that broadcasters served the public interest in exchange for the use of public spectrum.\textsuperscript{180}

While the public interest exchange acknowledged in Red Lion is specific to broadcast television and not extensible, for example, to the Internet under Reno v. ACLU,\textsuperscript{181} a broader, technology-neutral theory of exchange might come from copyright law. As Rebecca Tushnet has described in depth, copyright is frequently theorized as an incentive structure, granting the creator of copyrightable expression a monopoly over the distribution in the hope that the resulting market structure will result in the creation and distribution of more expression overall than might have occurred had others been able to distribute the creator’s expression without his permission.\textsuperscript{182}

Tushnet argues that copyright is “properly described as a market failure theory that enlists government to achieve a better balance of speech,” sacrificing some First Amendment rights of would-be users of copyrighted works in order to serve the broader goal of ensuring that creative works are more broadly created and distributed and fostering a more robust marketplace of ideas.\textsuperscript{183} In this light, copyright might fit into Ammori’s universal access principle—the government relinquishes some of the public’s First Amendment interests in reusing copyrighted expression in

\textsuperscript{180} See id. (citing Red Lion, 395 U.S. 367, 390-92 (1969); NBC v. United States, 319 U.S. 190, 226-27 (1943)).

also, red lion at 385-386? While Red Lion has come under attack by broadcasters in recent years, it remains good law...


\textsuperscript{182} See generally Tushnet, 42 B.C. L. Rev. 1.

\textsuperscript{183} Id. at 38 More recently, Lateef Mtima has described copyright as a “social engineering mechanism for advancing and shaping American culture.” Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship, 112 W. Va. L. Rev. 97, 102 (2009).
exchange for a market that ensures that public will have robust access to more creative expression and means of distribution that might otherwise, thereby promoting the overall aims of the First Amendment.

Tushnet expresses concern about this calculus, noting that the negative impact of copyright on the speech rights of would-be downstream users “poses a serious First Amendment problem.”

She points out that copyright’s only “saving grace is that it is better for free speech than its absence would be.”

Others have explored in-depth the serious implications of copyright on the First Amendment rights of would-be users of copyrighted works, largely in criticizing the shortcomings of the fair use doctrine. But fewer have explored the extent to which the distributive half of the copyright exchange is a success. Lateef Mtima poses the question succinctly from the perspective of social justice:

Some legal scholars and commentators have questioned whether the copyright law can truly be said to fulfill its function of social utility if in advancing the societal culture, it fails to also achieve an adequate measure of social justice. Does a civilization genuinely advance when significant segments of its populace remain bereft of the benefits of societal progress and achievements?

In this context, the question might be asked in terms of the impact of copyright on the First Amendment rights of the public—and people with disabilities in particular—to access copyrighted speech. Does copyright actually vindicate the First Amendment rights of consumers of copyrighted videos, and consumers with disabilities in particular, by fostering the distribution of videos in accessible form?

There is little doubt that Congress has prescribed video accessibility mandates as an explicit remedy for failures in the market for accessible video, which video programmers have not addressed of their own accord despite the incentives offered by copyright. Video accessibility mandates can be viewed, then, as a superseding attempt to remedy new market failures in the dissemination of

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184 Tushnet, 42 B.C. L. Rev. at 78.
185 Id.
186 Need to fill in here.
187 112 W. Va. L. Rev. at 120 (citing)
188 Video accessibility report, TDCA.
accessible speech introduced by copyright’s attempt to remedy old market failures in the creation and dissemination of speech more generally. From this perspective, video programmers’ arguments that copyright law should derail the implementation of video access would require copyright law to seriously implicate the First Amendment rights of people with disabilities. In the following section, I turn to the nature of these arguments and consider how policymakers might reconcile the tension between copyright law and accessibility mandates.

III. Video Accessibility Mandates and Copyright Law Challenges

It is important at the outset of discussing video accessibility and copyright law to recognize the peculiar procedural contexts in which copyright arguments have been raised against video accessibility mandates. Rather than video copyright owners asserting serious claims of infringement against named infringers, video distributors have generally asserted that complying with accessibility obligations might require them to commit copyright infringement, an excuse frequently offered in accessibility rulemakings before the FCC. The posture of these arguments gives video distributors little incentive to delve into the specifics of copyright law, which might undermine the arguments.

Regardless, these arguments have made accessibility obligations a regulatory “hot potato,” leading to a dynamic where video distributors argue that they cannot be obliged to implement video accessibility measures without infringing copyright while video creators simultaneously argue that imposing accessibility obligations on them would violate the First Amendment. Where an administrative agency has some discretion to apportion responsibility between creators and distributors, as the FCC did during its rulemaking implementing the IP captioning requirements of the CVAA, video creators and distributors may even turn on each other, specifically arguing that the other group should bear the brunt of the accessibility obligations.

Taken together and to their logical conclusion, these arguments would lead to the result that no one other than a video’s copyright owner could ever caption or describe the video, and the copyright

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189 Cite examples.
190 Cite examples
191 IP captioning comments.
owner could never be compelled to do so without violating the First Amendment. In effect, the ability of people with disabilities to fully enjoy any video would be entirely contingent on the whim of the video’s copyright holder being willing to make the video accessible of the owner’s own accord, or willingly granting someone else permission to do the same. This state of affairs would make the market failure for video accessibility effectively permanent, depriving people with disabilities of the right to participate in the economic, social, and democratic benefits of viewing video programming on equal terms.

Presuming I have correctly argued that the First Amendment does not impose any barrier to accessibility mandates, the resolution of copyright challenges to the mandates is of comparatively lesser importance. In that case, copyright holders themselves can be required to make their videos accessible, or obligations can be placed on distributors under the assumption, frequently made by the FCC, that distributors and creators will collectively resolve any accessibility mandates via private contract. There is no benefit to people with disabilities if accessibility advocates are caught in the crossfire of the copyright wars.

Nevertheless, I think the resolution of copyright arguments is important to accessibility advocates for two reasons. First, copyright arguments may undermine the sound implementation of accessibility mandates when they are applied by administrative agencies like the FCC or courts, even when accessibility laws provide clear statutory authority. For example, the FCC pondered the possibility of requiring Internet video distributors to improve the quality of captions from their television versions, but shied away because distributors raised copyright concerns. The FCC also imposed responsibility to create captions for Internet-distributed video on creators rather than distributors in part because it believed the creators held the exclusive legal rights to insert closed captions, despite the fact that enforcing noncompliance with the rules would be more difficult to enforce against obviously identifiable distributors rather than unknown copyright holders. And at least one court has held that the applicability of the ADA to Internet video distributors may hinge on whether copyright law prevents them from exercising sufficient

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192 Cite orders in earlier proceedings.
193 2011 IP Captioning Order at **
194 Id. at **
control over the videos they distribute to include captions and description.\footnote{195}{See NAD v. Netflix, Inc., 2012 WL 2343666 at *4-*5.}

Second, the legislature may be unable or unwilling to require ubiquitous accessibility mandates, either for want of political will or concerns about the First Amendment. Where a video is not covered by accessibility mandates and its creator will not voluntarily caption or describe it, the only hope for people with disabilities is to rely on third-party captioners and describers or advanced auto-captioning\footnote{196}{See Automatic captions in YouTube, GOOGLE OFFICIAL BLOG (Nov. 19, 2009), http://googleblog.blogspot.com/2009/11/automatic-captions-in-youtube.html.} and crowdsourcing technology.\footnote{197}{See AMARA (formerly UNIVERSAL SUBTITLES), http://www.universalsubtitles.org/en/ (last visited Aug. 1, 2012).} Yet few third-party accessibility providers or video distributors will provide captions or description without copyright clearances, and worries about copyright liability may chill the development and rollout of new accessibility technology. If these activities do not in fact implicate copyright, then it is important to dispel false arguments to the contrary to relieve the chilling effect on people with disabilities and sympathetic third parties that seek to make videos accessible.

\section*{A. Conflicts Between Copyright and Accessibility Law}

The first argument frequently raised by distributors is that cable and satellite providers cannot be forced to add accessibility measures to broadcast programs because doing so would violate the prohibitions on alteration in 17 U.S.C. \S\ 111 and 119.\footnote{198}{Cite examples.} Regardless of whether the addition of captions or description in fact would constitute an actionable alteration, this argument is a non-sequitur, practically speaking. In relevant situations where cable and satellite providers are retransmitting broadcast content, the FCC specifically places responsibility on the broadcasters to implement accessibility measures.\footnote{199}{47 C.F.R. \S\ 79.1(e)(9).}

The second and more prominent argument frequently raised by video programmers is that creating captions and descriptions violates video copyright holders’ exclusive rights to prepare derivative works under 17 U.S.C. \S\ 106(2).\footnote{200}{Cite examples.} With respect to a \textit{prima}
facie case for infringement under the derivative work right, videos are generally protectable as motion pictures or other audiovisual works under 17 U.S.C. § 102(a)(6), and there are no pervasive issues of originality or fixation.

Of course, “the principles governing derivative works have replaced fair use as the ‘most troublesome’ doctrine in copyright.”201 There are serious questions of originality and the idea/expression dichotomy that may arise over the separate protectability of captions and descriptions themselves as derivative works under 17 U.S.C. § 103(a). And those questions may become more important as video distributors are increasingly able to utilize captions and descriptions as searchable metadata and use them to optimize the appearance of videos in search engines and targeted advertisements that appear alongside the videos.202

Although those issues will no doubt warrant further exploration in the future, I assume for the argument that video programmers will be able enjoy copyright protection in the captions and video descriptions they create and distribute. I further assume that programmers will be able to exploit the captions and video descriptions they create for non-accessibility purposes like search engine optimization and targeted advertising with the full complement of exclusive rights under 17 U.S.C. § 106. And I also assume programmers will be able to sue others for creating unauthorized captions and video descriptions under the derivative work right, or perhaps even the reproduction right, when the programmers have already created their own captions and video descriptions.

The much more important question in this context, however, is whether video copyright holders and their distribution partners who do not voluntarily implement accessibility measures can assert copyright either as an excuse to avoid accessibility obligations or to prevent third parties from stepping in to fill the gaps.

As I described in the previous section, at least some theories of the U.S. copyright system presume that granting creators monopoly control over their works will lead to a more robust marketplace for works overall and outweigh any infringement that the monopoly

201 William Patry, 2 PATRY ON COPYRIGHT 3:46.
will impose on the First Amendment rights of users and consumers of works.\textsuperscript{203} When that presumption breaks down to the serious detriment of people with disabilities, it seems obvious that Congress should be able to step in and offer targeted remedies. Presuming that the 1996 Act, the CVAA, and the ADA are just such remedies, it is unclear precisely how copyright law might serve to undercut their requirements.

Consider a hypothetical television broadcaster required to include closed captions on every video it distributes pursuant to the FCC’s rules under the 1996 Act. Creating those closed captions would presumably infringe the videos’ copyright holders’ exclusive rights to prepare derivative works. While the copyright owners might grant the distributor a license pursuant to a contractual negotiation, there is no general compulsory license in the 1976 Copyright Act, so the copyright owners could withhold approval. The distributor, then, would be faced with either infringing the derivative work right or the FCC’s rules, placing the Copyright Act and the 1996 Act in direct conflict.

Though copyright law is sacrosanct in many circles, its existence is not a constitutional requirement. Like its other enumerated powers, Congress’s authority to promulgate copyright law under the Progress Clause of the Constitution is permissive and not mandatory.\textsuperscript{204} To the contrary, the Progress Clause limits Congress’s authority to copyright measures that “further the progress of science and useful arts.” While the Supreme Court has been particularly deferential to Congress’s authority to determine precisely what might “further progress,”\textsuperscript{205} it is reasonable to assume that Congress might determine that copyright law needs to be contracted to satisfy the Progress Clause.\textsuperscript{206} There should be no assumption, then, that copyright law especially trumps other laws that conflict with it.

Rather, any conflict between video accessibility mandates and copyright law should be resolved by the presumption recognized by the D.C. Circuit that Congress is well “aware of the interplay

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\textsuperscript{203} See discussion \textit{supra}.

\textsuperscript{204} Wendy J. Gordon, \textit{An Inquiry into the Merits of Copyright: the Challenges of Consistency, Consent, and Encouragement Theory}, 41 STAN. L. REV. 1343, 1403 (1989).

\textsuperscript{205} Golan \textit{v.} Holder, 132 S. Ct. 873, 889 (2012) (deferring to Congress’s “rational judgment” in determining how best to serve the objectives of the Progress Clause).

\textsuperscript{206} See, \textit{e.g.}, 17 U.S.C. \textsection 121.
between copyright and communications law” and knows that the agencies implementing communications regulations have “a role to play” in determining the scope of copyright regulations.\textsuperscript{207} Although the legislative histories of the ADA, the 1996 Act, and the CVAA are largely devoid of references to copyright law in the context of accessibility, Congress presumably understood that captioning and video description might implicate derivative works when it enacted those laws fourteen, twenty and thirty-five years, respectively, after it enacted the version of the derivative work right codified in 17 U.S.C. § 106.

To avoid irreconcilable conflict between accessibility and copyright statutes, it is most reasonable to assume that Congress impliedly abrogated or repealed the derivative work right to the extent necessary for video programmers to comply with the FCC’s accessibility regulations. It is simply inconceivable that Congress would have passed accessibility legislation to specifically address market failures in a video industry so pervasively intertwined with copyright law while leaving open the possibility that the accessibility regulations could be thwarted at will by the regulated entities by simple reference to copyright law. And if the statutes must truly read to be in conflict, the general principle that “the more recent of two irreconcilably conflicting statutes governs.”\textsuperscript{208} Given that all major accessibility statutes post-date the relevant portions of the Copyright Act by more than a decade, they should prevail in any dispute.

**B. Resolving Copyright and Accessibility Conflicts with First Amendment Accommodations**

While simple statutory construction might suffice to avoid reading conflicts between existing copyright and accessibility laws, more generally-applicable principles are necessary to address situations where third parties other than copyright holders want to implement accessibility features to fill gaps in the statutory and regulatory frameworks of accessibility law by adding new captions or descriptions or improving the quality of existing captions and description. Where copyright law fails to foster accessibility, the First Amendment rights of people with disabilities should come back into focus. As the Supreme Court made clear in *Eldred v. Ashcroft*, “copyright law contains built-in First Amendment

\textsuperscript{207} United Video Inc. v. FCC, 890 F.2d 1173, 1184 (D.C. Cir. 1989).

accommodations” in the form of the idea/expression dichotomy and fair use.209

The idea/expression limitation is contained in 17 U.S.C. § 102(b), which provides “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” Because captions and video descriptions strive to convey the expression of the work they transcribe or describe and not merely the ideas embodied therein, Section 102(b) is a poor fit for vindicating the First Amendment rights of people with disabilities, even though it may be impossible for people with disabilities to understand the ideas conveyed in the movie without captions or video description.

Fair use, however, is a better fit. The test codified in 17 U.S.C. § 107 states that the fair use of a copyrighted work is not infringing, notwithstanding the provisions of 17 U.S.C. § 106. In determining whether a use is fair, the factors to be considered include:

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.

The Supreme Court noted following the enactment of the 1976 Copyright Act that “[m]aking a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report [on the Copyright Act] as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying.”210 Despite the favorable acknowledgement of implementing accessibility measures as a core fair use, the words “fair use” did not make an appearance in nearly fifteen years of accessibility rulemakings at the FCC until public

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209 537 U.S. at 219
interest advocates recently pushed the issue during the CVAA IP captioning rulemaking in 2011.\textsuperscript{211}

As the Supreme Court’s reference to the Committee Report makes clear, captioning or describing a video for the purpose of making it more accessible to people with disabilities, with the motivation of informing or entertaining, weighs in favor of fair use under the first factor. With respect to the second factor, the use of factual works is more likely to be fair than the use of fictional works,\textsuperscript{212} but videos can be either factual, fictional, or both, so the second factor is arguably neutral. The third factor counsels in favor of fair use, as captions and video description each make use of only as much of the original material is necessary—i.e., the corresponding aural and visual components of the video—to achieve the goal of the use, and no more.

The Supreme Court has famously proclaimed, of course, that the fourth factor—the effect on the potential market for the copyrighted work—is “undoubtedly the single most important element of fair use.”\textsuperscript{213} The relevant potential markets for copyrighted works implicated by captioning and description are the market for the underlying video itself, and the potential derivative works market for the captions and video descriptions.

Captions and video description of a video are far more likely to enhance the market for an underlying video rather than undercut it. It is difficult to imagine a video customer who would forgo the rich multimedia experience of the video itself in favor of simply reading the closed captions of what is being spoken without the benefit of any corresponding visual reference to the actors that are speaking, or listening to the description without the corresponding audible events like dialogue, music, and sound effects. Moreover, any inaccessible video has a potentially untapped market of some 54 million people who are deaf or hard of hearing and 25 million people who are blind or visually impaired, who are far more likely to purchase the video if they can fully enjoy it with captions or description.\textsuperscript{214}

There is also little or no market for standalone captions and video description. In this respect, captions and description stand in contrast, for example, with audio transcriptions of books, which

\textsuperscript{211} Cite to PK and consumer groups comments.
\textsuperscript{213} Harper & Row, 471 U.S. at 566.
\textsuperscript{214} Cite to Johns Hopkins study; AFB FCC comments.
compete directly with an entirely separate product distributed by book copyright holders—audio books. Captions and descriptions also differ from foreign language translations in this respect, because it can be reasonably presumed that a copyright owner will actually create and distribute separate versions of films for relevant foreign language markets.

Moreover, any separate market for captions and video description would require video copyright owners to engage in the practice of charging paying customers with disabilities extra simply to enjoy them on the same terms as other customers. Such discriminatory treatment would violate the spirit, if not the letter, of the ADA.

Furthermore, in specifically regulating television and Internet-delivered video programming through the 1996 Act and the CVAA, Congress has made clear that exemptions from the mandates are only to be made for programming that would be economically burdensome to make accessible. It would be untenably inconsistent for the FCC to conclude that it is economically unfeasible for a programmer to make particular programming accessible, only for the programmer to turn around and insist that a third-party attempting to caption or describe the program is infringing on a viable market for captions or description. While it is possible that the value of captions and description will increase in light of the aforementioned search engine optimization and advertising applications, that increased value may well lead to a corresponding expansion of video accessibility mandates, after which consideration of fair use will be a non-sequitur.

Finally, to whatever extent a programmer raises either an economic or philosophical First Amendment challenge to a requirement to caption or describe a particular program, that programmer implicitly disclaims any interest in exploiting a potential market for captions or video description, lest the challenge be moot. Given Congress’s demonstrated inclination to require video accessibility absent the possibility of an undue economic burden, it seems unlikely that any video could both escape video accessibility mandates and simultaneously foster a cognizable market for captions or descriptions. And although some have argued that the importance of the market factor is overstated in many fair use determinations,215 a demonstrable market failure of the copyright system to vindicate the First Amendment interests of people with

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disabilities should dispositively support a finding of fair use in any challenge to captioning or description activity.

IV. Conclusion

While this article has primarily attempted to resolve First Amendment and copyright challenges to accessibility mandates under existing statutes and precedent, it is my hope that it also highlights the troubling tension between creative autonomy and distributive justice that has fostered the seesaw-like development of First Amendment jurisprudence, copyright law, and content accessibility mandates. In this light, Congress should re-evaluate its approach to copyright with distributive objectives in mind. If the First Amendment’s marketplace of ideas is to be realized, it is essential that the copyright system properly incentivize the distribution of creative works in accessible form to people with disabilities and, for that matter, to the public as a whole.

Congress should not turn away from the reality that the copyright owners to whom it grants a monopoly at the expense of the public’s First Amendment rights are simultaneously opposing Congress’s attempts to ensure that the public’s First Amendment rights are vindicated through accessibility mandates and other distributive measures. In a future article, I hope to explore the merits and shortcomings of various means through which Congress might more holistically embed the distributive goals of accessibility mandates in copyright law itself, including compulsory licenses, permissive exceptions like the Chafee Amendment, and more drastic measures like conditioning copyright protection on compliance with accessibility measures and other distributive goals.