

**LILY BOND:** Welcome, everyone, and thank you for joining this webinar, entitled "How Copyright and Fair Use Impact Third Party Captioning for Educational Video." I'm Lily Bond from 3Play Media, and I'll be moderating today. I'm really excited to be joined by Blake Reid, who is an assistant clinical professor in technology policy and telecom law at Colorado Law. He has a great presentation prepared for you. I'm sure you'll really enjoy it. We have about 45 minutes slated for the presentation. Blake's presentation should take about 25 minutes, and then we'll leave 15-20 minutes for questions at the end.

We're working with OLC, the Online Learning Consortium, on this webinar, and we wanted to alert you to a two part workshop that they're holding on copyright and fair use. Part one will be on May 5 and part two will be on July 21, and you can register for these workshops on their website.

And before I hand it off to Blake, we have a poll for you to answer. So the question is, have you experienced an issue with copyright law in the course of making video accessible? And you can answer yes, no, no, but I'm concerned that I will, or not sure. I'll give you a second to answer that and then we'll share the results.

So that's really interesting. It looks like a lot of you have had some issue with copyright law, and also that a lot of you are really concerned about it. I'm sure that Blake will address these issues and give a really comprehensive view of what to look out for shortly. So with that, I am going to hand it off to Blake. So Blake, you should be able to share your screen now.

**BLAKE REID:** All right. So let's get started. I have the unenviable task of talking to you guys about copyright law during your lunch hour, but I'm so delighted and heartened to see that there's so much interest in this issue.

So my name is Blake Reid, again. I'm an assistant clinical professor at Colorado Law, and among the work that I do, I do a lot of work with the deaf and hard of hearing consumer groups at the Federal Communications Commission on closed captioning issue, but one of my real loves is copyright law. So one of the things that I've gotten to think about a lot over the course of doing this work is how copyright and accessibility intersect. From the poll that we just saw, it looks like many of you guys have either faced copyright law issues or are worried that you might face them in the future. And I want to make the case to you today that I hope

copyright law shouldn't be a barrier to accessibility, and to give you some of the tools that you need to make sure that it doesn't become a barrier for accessibility, and that you have the knowledge that you need to go talk to folks back at your communities and your general counsel's office and so forth to be able to make the case to do the accessible work that gives folks, vindicates their civil right to equal access to education.

So let's get started. I have to give you a little bit of a disclaimer upfront. I'll just say I'm a lawyer but not your lawyer. To quote the great Mark Lemley, if this were legal advice, it would be accompanied by a bill. So I'm going to try to talk in general terms today, but I want to underscore to the extent that you are relying on any of the things I've said today, I hope this is a prompt to have a conversation with folks at your general counsel's office, and please do make sure that you talk to them before you rely on anything that I have to say. And the last thing I have to say here is my opinions are my own. I'm not speaking on behalf of any of my clients or of my clinic or of my employer, so please take it with the appropriate grain of salt.

So here's a scenario that we're going to talk about today. We're going to talk about adding captions to a video to be used in class, and it turns out that there's going to be a relatively similar analysis and similar results if we're talking about video descriptions, and maybe even alternate formats of books. Now, there are some scenarios I'm not going to talk about but I'd be happy to get into in the questions if we're thinking about foreign language translation and that sort of thing. There's some different issues that come up here, but I'm primarily going to be talking about captioning.

So if you take nothing else away from the presentation today, the message I want to give you is to caption it. I'll try to elaborate why that's the case, but the short version is it's arguably fair use. And then there's a little bit of a caveat here, so here is the caveat. Fair use is complicated, so you want to make sure that university counsel has got your back.

So I'm going to run through a list of questions here. First is, should I caption the video, and why should I caption the video? The second is, is the video copyrighted, and if so, does someone else hold the copyright or does the university perhaps hold the copyright? If the video is copyrighted, can you get permission to caption, and if so, is that easy to do or is that impractical? If you can't get permission, does captioning infringe the copyright holder's exclusive rights? And if it does, are there any defenses? So I'm going to walk through these one at a time.

And I won't spend a lot of time on this first point, which is why caption, or why should I caption the video, but I want to motivate this discussion by pointing out there's a lot of good reasons to caption, and one is that it's the law. So under federal disability law, under the Americans with Disabilities Act, the Rehabilitation Act of 1973, IDEA and various other accessibility laws, your university or your institution may actually face obligations to caption a video that are required by law and that may be enforced in a lawsuit.

To the extent that you're showing video over the internet or on television, you may be subject to federal telecommunications law and regulations. These are under the Telecommunications Act of 1996 and the 21st Century Communications and Video Accessibility Act. And then finally, depending on where you are, you might be subject to state disability law that imposes additional obligations.

So there's lots of complexities to all of that, and I won't get into it except to say that it might be the law and it's also not a hypothetical that the law will be enforced. So I wanted to mention the National Association of the Deaf, which has recently filed lawsuits against Harvard and MIT for not captioning their online video library. So folks in the deaf and hard of hearing community are taking this very seriously.

But more importantly, I think the reason behind this, it's the right thing to do, and the reason is that students with disabilities have a civil right to access education on equal terms. They're customers of the institution. They're there to learn, and if there's any way that you can afford them that equal access, then it really is worthwhile and it's really important to do. So hopefully, that's all we need to say about that, so let's get to the second question.

When we're talking about a video, is the video copyrighted? So the short answer here is probably. Most contemporary videos and sound recordings are protected by copyright law, and it's worth noting copyright vests automatically when a video gets created. There's no need to register it.

This used to be the case. If you've been at this a long time, you may remember the days when you needed to put copyright notice on something and you needed to ship it off to the Copyright Office to get it registered. That's no longer the case. Those formalities are no longer required.

Now, there's an exception here. Some videos are in the public domain, so there may be situations where you've got a video where you actually don't need to worry about copyright at all because the video isn't copyrighted. The problem is that the public domain is complicated to

determine.

So if you don't believe me about that, and I'm sure you might not, I want to show you this chart. I'm not going to go through this chart except to say this is how you figure out whether a video is in the public domain or not. And as you can see, it's very, very complicated it depends on when the video was created, when it was published, whether notice was included or not.

If you really want to dig into this, there's some calculators online. So the Public Domain Sherpa. There's a website called Limited Times with a wizard that will help you walk through figuring out whether a video is copyrighted. But in general, it's probably safe to assume that if the video was created in the last decade or two, that it's under copyright. At the very least, you're going to run across videos out of the many that you deal with captioning that are copyrighted.

So let's move on to the next question, which is, does someone else hold the copyright? And here's why we want to ask that question. If the video was created by university faculty, staff, or students, it might be the case that the university has already got a copyright to it. So in fact, you may hold the copyright, or the university may hold a license to the video itself. So this means that you may not actually have a copyright problem at all.

Now, this is complicated, and it depends on what your university's IP policy is and whether the university retains a license, whether it assigns intellectual property in things that the faculty, staff, and students are creating. So this is something that again underscores the need to go talk to your general counsel about. So that's that question.

That brings us to the next one, which is, if the video is under copyright-- and it's pretty likely that you're going to find some videos that are-- can you get permission? So this is the first place to start, to say, maybe the video is under copyright, but can I ask someone's permission to do it?

The first point here is that there is probably no copyright problem if you get permission. The copyright owner can say, yes, that's totally fine, and this may be especially easy, or you may not even need to ask. If the copyright holder is faculty, staff, or students, you may say, hey, we're going to caption this for your class. Is that OK? And they may well say yes.

And some copyright holders that are outside of the university may well be willing to do that. They may say, of course, we'd be happy to have you caption our video. Please do a good job

with it.

On the flip side, the copyright holder might say no, and if that happens, the question you want to ask yourself is why not? One thing might be that they already make the video available in an accessible form, so they might include captions with it already. If they don't do that, that might actually aid in our fair use analysis, which we'll get to in a little bit.

If they do include captions, you've got to ask yourself, why are you trying to re-caption? And there may be legitimate reasons to do that if the quality of the captions is not great. But one of the things you might ask yourself is, why might a copyright owner say no, or is a copyright owner going to object to this?

Of course, you might be saying there might be some cases where it's totally impractical to get permission, for example, where you can't identify the copyright holder, where there are multiple copyright holders, or where you're trying to caption a whole library of videos, where tracking down who owns the copyright for every single one of them, or who holds the copyright, and asking for their permission is just so onerous that it would make the difference between doing the project or not. And so there are many reasons that you might not want to get permission.

So let's assume that we're in a situation where we can't get permission. We're going to move on to the question here, which is, does captioning infringe the copyright holder's exclusive rights if they won't give you permission? So we're going to get into some copyright law lingo here.

So what are exclusive rights? So copyright is limited in scope, and it's actually limited by the US Constitution. And so Congress has articulated very specific rights that a copyright holder has. There are several of these for video programs. I'm going to walk through each of them.

Turns out they're pretty easy to understand. So the first one is reproduction, and this is what you think of as copying. So making a copy of a video, that's an exclusive right of the copyright holder. There's a second one. A lot of people ask, how does captioning possibly implicate copyright law? So it turns out that the copyright holder on a video has the right to make adaptations of copyrighted works, or what the Copyright Act calls derivative works. And so there's some likelihood, or some possibility, at least, that creating captions for the video, because they're based on the underlying content of the video, might be considered a derivative work.

There are also some other exclusive rights that matter. So one is distribution. The copyright holder has the right to distribute a video and to make a public performance of the video. These are all exclusive rights of the copyright holder, and if you infringe those rights, then the copyright holder may be able to hold you liable for it.

So how does captioning factor in here? This is a complicated question. So which of these rights the process of captioning might implicate is complex, but I think it's safe to say that it may implicate one or more. So we may actually implicate some of the copyright holder's exclusive rights.

But-- and there's a big but-- stay tuned for the defenses. So just because it implicates the exclusive rights of the copyright holder doesn't mean that there's actually liability that we would have to worry about. We're about to get to that. So the final question we're going to ask, and this is where all the action is, are there any defenses if you've implicated a copyright holder's exclusive rights? And there are, but it's worth dispelling some misconceptions first.

So the first misconception is about accessibility in general. There is no accessibility-specific exemption or limitation in US law for video. I'm sure many of you have heard of the Chafee Amendment. So the Chafee Amendment is one accessibility-specific exemption, but it limits exclusive rights only for certain types of books, for certain types of entities, and for certain types of disabilities. It's primarily aimed at people with print disabilities and making books available in alternate formats. So at the beginning, I mentioned the analyses here are much the same. If we're talking about books, the Chafee Amendment may provide some additional cover, but when we're talking about video, it probably doesn't help much.

There are also some special exemptions available for schools and libraries to do all sorts of stuff. This is a conversation you can have with your university general counsel. The punchline is it's unclear that any of these exemptions are going to apply to the process of creating closed captions. They may well, but it's pretty rare that they've been tested for that use.

But there's good news. We have a defense called fair use, and I want to make the argument that fair use saves the day. So what is fair use? Fair use is the idea that you can make certain types of uses of a copyrighted work without infringing the exclusive rights of the copyright holder, and there's some really nice attributes of fair use.

So the first one is you don't need to ask permission to engage in fair use. So if you're in a

circumstance where you've decided it's too difficult to track down copyright holders, or we feel like that's impractical in the circumstances we're facing, you don't have to ask permission. Second thing. Remember that whole complicated bit I just went through about which rights captioning might implicate? Doesn't matter for fair use. You can make use of any of those exclusive rights so long as your use is fair. So all that complicated legal analysis that will give your general counsel heartburn doesn't matter if it's fair use.

There's a big caveat about fair use that I have to mention, and I'm going to quote the famous copyright lawyer Larry Lessig. He's a copyright law professor, and he says, "Fair use in America means the right to hire a lawyer." This is a big downside of fair use. Fair use is not always a sure thing. It's a multi-factor test, and it generally has to get proven out in court first, and so people are always a little bit reluctant to rely on fair use. And there's no case directly on point for captions. No one's ever sued anybody for making closed captions and said, hey, that's copyright infringement and had a court litigate whether there's a fair use defense.

But-- I know not saying "but" a lot today-- there's a very strong case to be made, and I'm going to go through that case. This is why you need to have a conversation with your university counsel and let them know what you're doing and let them know why you think it's fair use, and I'm going to give you the ammunition that I think you need.

So the first thing about fair use. Teaching is an exemplary fair use in the Copyright Act. So the Copyright Act says "the fair use of a copyrighted work for purposes such as teaching, including multiple copies for classroom use, scholarship, or research is not an infringement of copyright." So that's right in the copyright law. It says that using a copyrighted work for teaching, as many of you are trying to do here by creating captions of a video, is not an infringement of copyright. That's pretty strong language right there.

Accessibility is also cited as an exemplary fair use in the Copyright Act's legislative history. So when Congress was writing the current copyright law way back in 1975 that was enacted in 1976, they actually wrote about this in the legislative history in the reports they put out. So they said, "The making of alternative format books for people who are blind and are visually impaired as a free service for blind persons would properly be considered a fair use." So again, they're talking about books. They weren't quite so far ahead on video. The concept of closed captions was pretty nascent in those days, but they recognize that making stuff accessible was going to be at the core of fair use.

The Supreme Court agreed with Congress when they interpreted the legislative history of the Copyright Act. They said, "Making a copy of a copyrighted work for the convenience of a blind person"-- of course, they were talking about books and blind people, but we make the same arguments for people who are deaf or hard of hearing or who otherwise would benefit from captions-- "is expressly identified by the legislative history as an example of fair use with no suggestion that anything more than a purpose to entertain or to inform, which is what we're all about, need motivate the copying. So we've got strong support from the law, the legislative history, and the Supreme Court.

We now have this great case out of the Second Circuit that was just decided this last year, the *Authors Guild v. HathiTrust*. In this case, the Second Circuit held that digitization of more than 10 million books that were stored across member institutions for accessibility purposes, among other things, was fair use. And so this was a pretty controversial deal. Universities were basically scanning in their entire library collections and digitizing them for, among other things, to make them accessible to people who were print disabled to serve their obligations under the ADA, and the court thought that that was fair use. And so I think there's an even stronger argument that captioning of video is fair use, and I want to walk through what the court had to say and explain why that is.

So we're going to talk about this multi-factor test. Fair use is a multi-factor test. The most important factors. The first factor, "the purpose and character of the use, including whether such use is of a commercial nature or rather, as it is here, for non-profit educational purposes." So obviously, Congress is again thinking here about educational purposes, and the *HathiTrust* court focused on that as well.

The fourth factor is the other really important factor, "the effect of the use upon the potential market for or value of the copyrighted work." So in other words, they're saying, is this something that copyright owners want to do anyway? And if it's not, then maybe we'll find that fair use. So we'll go into each of these.

And by the way, it's worth mentioning the second and third factor, which are not on the slides, tend not to be as important. The second factor is all about the nature of the work, whether it's a fictional work or a nonfictional work. When you're dealing with videos in an educational context, you may deal with both of those things. The second factor tends not to be real determinative.

The third factor is all about the amount and substantiality of the work that you use. This just means, did you have to copy the entire work? And I think there's a pretty argument with captions that you're only using the audio of the video so that you don't have to use the entire work. That might weigh the third factor in favor of fair use, but the second and third factors tend not to be all that important. The first and fourth factors do.

So the *HathiTrust* court took a look at these factors and found some very positive results when they apply to accessibility. The first factor is the purpose and character of fair use. Under the *HathiTrust* case, accessibility purposes are fair even though they're not transformative. So transformativity has long in copyright law been the key to this first factor, and the *HathiTrust* court said, you know, you're not really transforming books into something different by putting them in alternate formats, but we still think that the purpose, which is to make books accessible to people, counsels in favor of fair use. So the *HathiTrust* court cited the Supreme Court, they cited to the legislative history of the Copyright Act, and they also cited to the existence of the Americans with Disabilities Act, and the Chafee Amendment is evidence that Congress really wants copyrighted works to be accessible.

And so one of the things here, and the reason I started talking about federal accessibility law, the Americans with Disabilities Act, is that that actually counsels strongly in favor of fair use. If you're an institution that's subject to the Americans with Disabilities Act, that really strengthens your argument that adding captions to a video is fair use.

So that's the first factor, and then the fourth factor is another important one. The fourth factor is the effect of market. Generally speaking, there is not a market in closed captions that copyright holders are interested in serving. We probably all would not be on this webinar today if every video that you got from a copyright holder came in with captions intact. In other words, if you didn't have to add captions, if this was a market that copyright holders were strongly compelled to serve and felt like they wanted to do that anyway, you probably wouldn't be needing to think about copyright law in the first place because you'd just say, hey, these are captioned.

But the fact that they're not, if you get a video where the copyright holder has shipped it to you without captions, suggests that it's something that they're not really interested in doing. Closed captioning has been around for a very long time, and the fact that they've decided not to do it weighs very heavily in favor that there's not an impact on the market. Even if a video does come with captions, it's arguably still the case that the copyright holder is not interested in

serving the market if the existing captions are not of sufficient quality to meet your accessibility obligations under the ADA.

So in other words, if a video comes with really lousy quality captions and you feel like you need to address the quality problems by adding your own captions or fixing the existing captions, you've still got a pretty strong argument under the fourth factor of fair use. So if you've glazed over during all of that discussion, remember one thing about fair use. The long story short here, there's a very strong argument that captioning is fair use.

One big caveat, and we're almost done here, the anti-circumvention measures of Section 1201 of the Digital Millennium Copyright Act. That's a mouthful. So what is that all about? All you've got to ask yourself is, do you have to break Digital Rights Management on the video? Does the video come on a DVD, or does it come on Blu-ray, or does it come on some sort of online streamed platform where it's locked down in a way that the copyright holder has tried to prevent people from copying it and that sort of thing?

Now generally, the Digital Rights Management protections that they include are not intended to block accessibility purposes but they might serve to do that. The video might be locked down in a way that you've got to strip off the DRM or break the DRM to add captions, and if so, there's a circuit split in the courts on whether fair use applies, and so this gets to be a much closer case. And it's also worth mentioning there's a complicated process to get an exemption at the US Copyright Office for this sort of use. So if you've got to break DRM, the story gets a little bit more complicated. You might be a little bit more concerned if you're having to break DRM in order to add captions to the video, but in many cases, you won't have to do that, and then the fair use analysis we just talked about applies.

So I like to close with this slide anytime I talk about copyright laws, one of my favorite web comics, XKCD. You have the guy sitting outside. He says, "Sometimes, I just can't get outraged over copyright law." But sometimes, unfortunately, it gets in the way of important accessibility goals like we're talking about today.

So I've been happy to go through this with all of you and I really look forward to your questions. Thanks for tuning in, and Lily, let's turn to questions.

**LILY BOND:**

Great. Thank you so much, Blake. That was a really fabulous presentation, and people are already sending out a lot of questions asking for the recording and slide deck. So I just want to reiterate that we will send out an email with a link to the recording and the slide deck shortly

after the webinar, most likely tomorrow.

**BLAKE REID:** Yeah, and I'm happy to do that. I wanted to reiterate, too, that we'll be putting out the recording and the slides under a Creative Commons license, so you should feel free to pass these around, feel free to forward them along to others at your institution, and we really hope that you'll share them widely. Just wanted to mention that.

**LILY BOND:** So before we start questions, we have one more poll for everyone, which I'm going to launch right now. The question is, what copyright problems have you run into? And you can answer memo from the university, call from publisher, concerns from professors, other, or none, and I'll give you a second to answer that. Then we'll share the results.

**BLAKE REID:** Interesting. So it looks like a lot of folks are encountering concerns from professors, and I'm curious if folks who are answering that question might chime in in the questions what sort of concerns you're getting from professors. I'd be interested to know about that.

**LILY BOND:** Yeah, definitely. We would all be interested to see that, so feel free to ask some questions about that and we can address those in the questions. So as we get started with Q&A, I wanted to mention that you should feel free to continue to ask questions by typing directly into the Questions box in your control panel.

I also wanted to mention a couple of upcoming webinars that you might be interested in. One is about the future of video player accessibility with speakers from Google, JW Player, and other video players. And on April 30, we have a webinar on creating accessible PDFs.

We have a couple of other resources on the screen. One is a white paper written by Blake, which is fantastic, about third party captioning and copyright, which I highly recommend you take a look at. The link is on the screen, and I'll also include that in the resources of the email that we send along. We also have a link to our captions plug-in, which maybe I'll just jump right into.

A lot of the questions are asking about YouTube videos and how can caption a YouTube video that you don't own. So our Captions plug-in allows you to basically just enter a link to the YouTube video you want to caption, and we'll actually provide captions as an overlay for the video so that you don't have to republish it or anything, but you would still be able to have captions for the video.

Blake, maybe you want to answer some of these questions about YouTube. There's people asking about captioning YouTube videos you don't own, if you can't find the producer for the video for permission, if you can still caption it. I believe that's combining a lot of the YouTube questions into one.

**BLAKE REID:**

Sure. So let me break this down in a couple ways. One, it's worth mentioning the work that YouTube is doing on captions. For anybody that uploads a video to YouTube in the first instance, they now have a lot of options for adding their own captions, and so to the extent that folks are using videos from YouTube, it's never a terrible idea to drop the person a note who created the video and say, hey, why don't you think about adding captions? YouTube makes it very easy to do now.

But let's assume you're in the situation that many of you are in, where you've got a professor who has decided to use a YouTube video, and the question they have is whether they can legally add captions. And obviously, there are tools. As Lily mentioned, I assume 3Play Media has one. There's another called Universal Subtitles, which has now been renamed Amara, I think, that will allow you basically to overlay captions on top of a YouTube video.

So the first question you should ask is, is it OK to show the YouTube video in class? Is it OK to display it in class? And there's very good arguments under both the fair use doctrine and under the educational exceptions that that's a permissible thing to do. And then you have to ask yourself, well, is adding closed captions over the top of that going to be an additional copyright law problem?

And I think in general, unless you are doing something like selling the captions or using them for some other purpose other than education, or you're making them widely available potentially for people to sell, that otherwise, some money is going to go to somebody as a result of you captioning it that would otherwise go to the poster of the video on YouTube, and that's very rare, then I think you're still in good shape under fair use. I think the copyright problem there is pretty nominal, and I think it's also worth considering the risk there.

So if you are making your captions available through a service like 3Play Media, there are often ways to make the captions just available to the folks in the class. So you might direct them to a page that just overlays the captions and is only available for folks in the class. In that case, you've got to ask yourself, who is going to track down the fact that you captioned the video for the class and get so mad about that that they're going to file a lawsuit against you?

Now, that doesn't mean that nobody will ever do that, but in that case, you've got a very, very good argument that what you're doing is fair use and a very low likelihood that anyone is going to care about it.

I want to motivate the idea that the person who's going to care the most about the video not being captioned is the student who is in your class who's paying the university a lot of money to be a student there and who's entitled under federal law to get access to the captions. So I always think there's no certainties in this area, but if you balance those two things and say, what's more important, the theoretical risk that someone could get upset about the copyright or the very real risk that a student with disabilities could be denied access to the video, at least from my perspective, I lean in the latter direction every time.

So I hope that's responsive to that question. And again, it's a tricky issue, but I think if you're making the move to add captions, you're doing the right thing and you've got good legal arguments to back it up. So I encourage folks to do that, of course, with the caveat that you want to talk to your general counsel about it first. Does that help, Lily?

**LILY BOND:**

Yeah, that was a great response. I'm sure that that will be very helpful to the people wondering. So we have a bunch of questions about fair use, and I'm going to try to compile a few of them into one that maybe you can answer more comprehensively. There's a bunch of questions wondering about the time limit for fair use, whether it exists for a semester or a year, and also whether you can caption the entire video or whether it has to be less than 10% or less than three minutes of the video. Maybe that's a good place to stop for that, and then there are a couple of other fair use ones that we can get to next.

**BLAKE REID:**

So first, I want to dispel something that's out there. So a lot of you have probably heard things like it's only OK to make fair use of a few seconds of a video, or it's only OK to use a really limited slice of the video. Now, for certain purposes, that may be the case. You may have heard of fair use cases around sampling where somebody samples a line of music in their own song, or where they're using fair use to engage in criticism, where they want to post a little clip of a video or a little excerpt of a book and in their movie review or their book review, they want to criticize it.

There's a strong argument that in a lot of those cases, you can't post the entire thing because you can make do, for the purpose that you're trying to use it for, with just a few seconds. So there's some case law around that when your purpose is to do something like criticism or

commentary or you're doing remix, where if you sample too much or you take too much, you take the entire video, you might run into a problem because then you're just re-appropriating the entire work. And again, that's a very complicated area of law, but this is a different context when we're talking about captioning.

So when we're talking about captioning, the whole reason you're doing it is to make the video accessible to a student with disabilities. So would you be able to successfully do that if you captioned 30 seconds of a five minute video the professor is showing? Of course not. That's not equal access for that student, and the whole reason that you're trying to caption it is to give the student access to the video.

So this is exactly what one of the fair use factors is about, is the amount that you've used and its relationship to what you needed to use. And there's a very strong argument that when you're making an accessible transformation, that whatever portion of the video the students without disabilities are getting access to, students with disabilities should get access to that same portion.

So there may actually be some fair use concerns about publicly performing videos in general to all students, although there are many educational exemptions, so there may be reasons why professors decide they're not going to show an entire video to a class. Your university will probably have policies about how much of an article you copy before you have to have the students buy the book and that sort of thing. But whatever you arrive at for your students in general, your students with disabilities ought to get access to the same amount of it. So if that means you've got to caption an entire video because you provide access to that entire video to students with disabilities, then that's what you've got to do.

So please don't ever say, oh, we can only caption 30 seconds of this video because that's how fair use works. If it's OK to show five minutes of the video to the rest of the class, it's OK to caption five minutes of the video for your students with disabilities.

Now, to the second part of the question about the temporal element. So how long does this last for? Can you host these captions forever? Can they live forever? This gets a little more complicated because the question is, are you making the captions available in order to serve an accessibility purpose, or are you just doing it for the heck of it?

I think if you can make the argument that you are adding the captions as part of your university's accessibility policy, that you caption videos in order to accommodate the many

students that you have with disabilities who, from time to time, need access, I think you've still got a strong argument that you can keep the captions live so long as they are not getting used for some other purpose, so long as they're not being used to give people who wouldn't otherwise have access to the video access, who are not part of the university, not part of the class. But I think in general, if the purpose that you're keeping the captions around for is to facilitate accessibility, again, there's a really strong argument that doing that is fair use.

**LILY BOND:**

Great. Thank you, Blake. And along those lines, a couple of other questions about fair use, maybe starting with whether there's a difference between fair use when you're teaching online versus in a classroom.

**BLAKE REID:**

Good question. This is where, again, you want to have a conversation with your counsel, but it gets, to me, back to what's the purpose of the captions? Is the captions in order to meet your obligations to your students under federal accessibility law, and if the answer is yes, then I think you still have got a pretty strong argument in those cases.

The only thing you've got to be careful of in those cases, and this applies whether you're thinking about captioning or not, if you're showing videos in online courses, if you're, say, teaching a film class and you're showing an entire movie and you're streaming it online, well, that can be a little bit tricky if you don't restrict access to the video to people who are, say, students in the class. So I think that area gets a little bit more complicated for videos in general because you have to ask yourself, are there copyright problems with displaying this video that I don't own to my students in general, whether they're disabled or not?

But I think if you arrive at the decision that you're going to show video and that that's OK, and that don't have copyright problems in general showing the video, the nominal additional risk of adding captions to it is generally speaking, again, unless you've got some ulterior motive for using captions that's not related to accessibility, that's going to be the kind of purpose that generally qualifies as fair use. So just to say it one more time, you got to be careful about hosting videos online that you don't own in general and making them accessible to everyone, but if you're going to make them accessible to your students, I think it adds pretty limited risk to make them accessible to all of your students, including your students with disabilities. Does that make sense?

**LILY BOND:**

Yeah. That's a really helpful response. Another fair use question here is, how would fair use be used or argued for online videos posted from another country, AKA outside of the US but

still used for educational purposes?

**BLAKE REID:**

That's another complicated question. So just to make sure I understand the scenario, so the idea is a video is hosted on a streaming service, say, somewhere in Europe or in Canada or in Japan or China or something like that, and you're streaming it in your class as part of your class, and you want to add captions to it. Two tricky aspects to that. One is if your university has some sort of presence or is teaching students in those countries in a way that it might be subject to lawsuits in those countries, countries across the world have very different copyright laws than the United States and not every country in the world has fair use, and it doesn't always work out exactly the same as it does in the US.

So the short answer there is it depends a little bit on what countries you're talking about and what the classroom situation is. In other words, are you teaching to students in that country? And in that case, it may be worth getting familiar with the copyright laws in that country. I guess I should have said this upfront. My presentation today is entirely focused on US law. So again, this comes out differently in other countries.

The other thing that brings up, and I mentioned this at the beginning of the hour, is translations. So a lot of folks will say, OK, I'm adding closed captions, and by the way, while I'm at it, why don't I convert the video so that it has Spanish subtitles if I've got students that speak Spanish as a first language, or why don't I convert the video to French, or why don't I convert the video to Chinese, and there may be lots of good reasons to do that. That gets a little bit trickier as far as copyright law goes, and in particular, copyright owners tend to get a little bit more nervous about the translations because a lot of the strategies around selling videos involve selling them in other countries a couple of weeks later or a couple of months later, or maybe even several months later, with the foreign language subtitles, or maybe they're dubbed in another language.

So if you are captioning a video and translating it into another language, you have to say, OK, we're getting out of a strictly accessibility oriented purpose and we're looking at foreign language translation. And then the question gets a little more complicated and you have to ask yourself, are we doing this to a video that we think the copyright holder is going to get upset about it? Is this a mainstream movie or a TV show? Is this something that we've got to be worried about?

On the other hand, it might be a video that a professor at a foreign institution has created that

might be totally fine with you doing that. So I think in general, when foreign countries or international stuff gets into the mix, you've got to be a little bit more careful. That analysis is a little bit less clean and a little bit more complicated. So I guess I'll leave it at that.

**LILY BOND:** Thank you. So on a different note, there are a bunch of questions about transcripts, so I'm going to condense those into whether a transcript as a separate document from the video is safer or more risky than captioning the video.

**BLAKE REID:** That's a great question. I guess I would start, before I get to the copyright law issues, with transcripts and say think about your obligations under accessibility law. If you were saying, we're going to provide a transcript to a student who is deaf or hard of hearing as an accommodation to view the video, you need to be concerned in that case about whether that's actually a sufficient accommodation or not. For many students, it's not going to be. They're going to say, no, we want to be able to view the captions on the video because sitting there and looking down at the transcript that we have to hold and then looking up at the video and trying to follow along is not the same as having the captions on the screen with everybody else. So I would start from that prospect and say, from an accessibility perspective, transcripts are often a pretty inferior solution for the student who needs the accommodation.

Now, the question is under copyright law, whether that makes any difference. I have to admit I haven't thought about this all that hard because I think the argument for using a transcript is generally a little bit problematic from an accessibility perspective, but I'll say you actually run some higher risks there because you're creating a document and giving it to the student in a way that it could be much more easily shared with someone else. You might run into more concerns with abuse where a student could say, oh hey, I've got the transcript of the video. I'm going to send it to everybody else in class, or I'm going to post it to the internet, I'm going to post it to Drop Box and share it with people, that sort of thing, and that might be the kind of thing that a copyright holder is actually unhappy with because they don't want the script of a video to be circulated.

And you can avoid a little bit of that when you're using captions and they're actually baked into the video. Now obviously, on the back end, there's a separate caption file and a separate video file, but it's a little bit harder to distribute them separately. And so my inclination is that it's nominally more risky from a copyright law perspective to use a transcript, but before you even get there, you've got to think about whether a transcript is really serving the accessibility purposes that you want it to.

**LILY BOND:** That's a great response, Blake. Thank you. A question here about DRM. Actually, there are a bunch of them. Does it matter if a video has DRM, and do streaming videos ever have DRM?

**BLAKE REID:** So the answer to the question is yes, lots of forms of video have DRM. What DRM actually means for the purposes of the Digital Millennium Copyright Act is a pretty complicated question, but the most important question to ask yourself is-- and Lily, you might actually be a better person to answer this question-- do you need to circumvent the DRM in order to add the captions or do you have access to a captioning solution that can add the videos over the top? Now, hopefully in many cases, if you're talking about YouTube videos, hopefully you can overlay the captions over the top of the video without having to circumvent the DRM. Then you don't have to worry about it all.

But you may run into instances, like if you're talking about video on a DVD, many commercial DVDs have digital rights management on them that you can't extract clips of the video without having to break the DVD. So then it can get a little bit more complicated. Now, it's worth noting that there's an exemption process of the Copyright Office, and there are many exemptions for different types of uses of DVDs and streaming video and that sort of thing, including for educational purposes.

And the reason it's a little complicated to answer this question right now is the Copyright Office is actually in the midst of a proceeding considering a whole new batch of exceptions, so the law is in flux here. Sorry this is going to be a vague answer, but if you've got to break digital rights management, if you find yourself downloading a tool to break digital rights management in order to add captions, you might want to stop at that moment and say, OK, this is a more serious issue than just fair use. This is me having to break DRM. I might want to go talk to my university counsel about whether I qualify for one of the exemptions or not. Sorry for the vague answer, but it's kind of a tough question.

**LILY BOND:** I think that's a really good point, though, about taking that step once you hit DRM and going to ask the university counsel.

**BLAKE REID:** And really quick, it's worth noting you will know if you hit DRM. So in other words, if you're trying to feed it through your captioning software and it says, oh, we can't deal with this video because of the DRM, then you're going to know. So if you don't ever encounter that problem, it's fairly likely that you're not running into it.

So please don't walk away thinking, oh my gosh, everything has DRM and this is something I always have to worry about. In many cases, there's not going to be a DRM problem either because the video doesn't have it in the first place or because your captioning solutions can accommodate adding captions to it without having to break the DRM. But there are circumstances out there where you have to, and it's worth being aware if you find yourself saying, oh, there is DRM here and it's causing a problem. Before you break it, pause at that moment and go talk to the general counsel.

**LILY BOND:** Great. So I think at this point, maybe we'll do two more questions. We've already run over, but there are a lot more questions coming in. So maybe we can get to some of those by email separately, but Blake, if you have time for two more, shall we do it?

**BLAKE REID:** Yeah. I'm happy to stay on.

**LILY BOND:** Great. So this is a related question to the end of your last answer. Do you have any practical advice for disability services offices for making sure that fair use gets preserved?

**BLAKE REID:** So in terms of practical advice, I think one thing is to the extent that you belong to trade organizations, and so I'm not sure what the associations of disability services professionals, I don't know the names of them, but if you are involved in professional circles with folks who take these issues on, one great example of folks who do take these issues on are the groups of librarians. They take these issues very seriously. Make sure to raise this as an issue with them and let them know how it's interfering with your work.

The reason for this is as we do policy advocacy around this, it's hard to know without stories of what's happening in disability services offices. You guys are really on the ground dealing with all of the requests that come in and dealing with all the videos and dealing with all the caption vendors and dealing with all the DRM and dealing with all that stuff. If you can help get your stories out, and whether that's through trade associations or other circles and folks that you run with, so that policymakers, when they're considering what to do with copyright policy, understand how the uncertainty is affecting your ability to work, that's really important to get that out there.

So in other words, make sure that other folks in your circle know about the troubles that you're having. And by the way, I hope everyone's OK. I'm going to take this list of questions that folks have sent along, and it's really going to be invaluable in a lot of the policy making work that we do. So that's one thing.

And then I think the other thing is as you're working with folks internally, whether it's your colleagues in disability services, whether it's at faculty working groups, whether it's meeting with the general counsels when you have an opportunity to do that, take this slide deck to them and talk to them about it and say, hey, we're getting a lot of questions about copyright law and we think there's a strong argument that we ought to be able to do our jobs, that accessibility really ought to be treated as fair use, and that we ought to take a position as a university or as a disability services office or as a group of librarians and disability services folks and faculty members that are concerned about these issues, that we take the position that this is fair use and that we don't want copyright to become a barrier to making sure our students all get equal access to the education that we're providing them.

I think that that's my most practical suggestion for it is just to make sure you talk about it and make sure that the myths about fair use, like the 30 second thing or that sort of thing, don't get perpetuated. Look, captioning, video description, making sure that books are available in accessible formats is a really important part of our mission and we should do everything we can to make sure that copyright law doesn't stand in the way of that.

And by the way, I want to say this at the end. I hope this doesn't come off as an anti-copyright message. Many copyright holders are doing really wonderful work to make their works accessible, and I hope you are seeing a lot more videos online being captioned these days, and that's in part due to the hard work of copyright owners. So this is not an anti-copyright message at all.

This is just saying, hey, there's a lot of video out there that doesn't get captioned, that doesn't get described, and you guys have an obligation as universities to make sure it gets accessible, and when it comes to you in an inaccessible form, you ought to be able to make sure that you're able to make it accessible for your students. So I just wanted to make sure I include that in there.

**LILY BOND:**

Thanks, Blake. So maybe to sum it up, I'll ask, given all of these factors, what do you recommend that people do?

**BLAKE REID:**

I'd just reiterate the message that I answered in the last question, which is make a relationship with folks at your general counsel's office. Drop them a line and say, hey, by the way, this is the approach that we are taking to accessibility. We're going to treat adding captions as fair use, and if you have any concerns about it, please come meet with us. And really do engage

about it and really talk with them about their concerns, but let them know why you think accessibility is important and get them on your side. And if you can do that, then do what you do. Make the videos accessible. Make captions available.

And I guess the last message, which has nothing to do with copyright law. It's really more about accessibility. Make sure you reach out to faculty members about this as someone who's on university faculty. There are a lot of questions that come up for faculty members. People say, gosh, I don't really know anything about captioning. Captioning seems hard to do. Is this really a problem that I have to grapple with? Are you sure I have to do that?

Being proactive in getting the message out to faculty members and saying, this is really important. You guys have students that rely on this. This is part of what we do as an institution. And by the way, here are the resources for you to help make your class accessible and design it to be accessible from the get go.

Faculty members are incredibly creative about how to approach these problems. For example, I have a colleague here at Colorado Law who does a lot of stuff on the screen that's not just video, and it's not just PowerPoints, but it's a lot of interactive stuff. And so when he had a student with low vision in his class this last semester, he worked up a solution around sharing his screen with the student and magnifying it in a way that the student could access it.

And so I think if people understand the needs that are out there, and they understand the solutions that are available to them, and they understand the tools that are available, the copyright stuff is going to be an afterthought to them. I think the biggest thing is saying, hey, look, you guys need to do this and it's not that hard. Go out and do it. And if you can carry that message, then all the copyright stuff will fall into place.

Thank you for all the hard work you do, and I really appreciate you guys taking the time to tune in. This has been really insightful for me, and I hope it was at least a little bit helpful for you, too.

**LILY BOND:**

Well Blake, just based on the number of questions coming in, it's obvious that people are thirsty for this information and that they're very appreciative of your expertise and your presentation, so thank you so much for joining us today.

**BLAKE REID:**

Of course. I'm happy to do it.

**LILY BOND:**

And thank you, everyone, for joining. Again, just to reiterate, we will be sending out a recording with captions, as well as a slide deck tomorrow, and I hope everyone has a wonderful day.