

**WAITING AND WATCHING IN SILENCE: CLOSED CAPTIONING
REQUIREMENTS FOR ONLINE STREAMING UNDER *NATIONAL
ASSOCIATION FOR THE DEAF V. NETFLIX, INC.* AND THE CVAA**

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In 2010, Congress enacted the Twenty-First Century Communications and Video Accessibility Act requiring video program owners to provide closed captioning for television programming streamed online. Although broad, these regulations do not apply to all video content streamed through online distributors, leaving the deaf and hearing-impaired without full accessibility to online programming. The Massachusetts District Court in National Association for the Deaf v. Netflix, Inc. found that the Americans with Disability Act applies to Netflix “Watch Instantly” as an online video distributor, requiring it to provide closed captioning in conjunction with Twenty-First Century Communications and Video Accessibility Act regulations. In response to a possible captioning requirement, Netflix argued that it does not have control over the content and copyrights to comply. This Recent Development examines the new captioning requirements and analyzes the role of copyright law in deciding who will bear the burden of producing closed captioning.

I. INTRODUCTION

Imagine watching your favorite movies or television shows in silence. Could you understand them fully without closed captioning? Over the past few years, the deaf¹ and hearing-impaired have had

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¹ Deaf is intentionally not capitalized. The capitalized word “Deaf” refers to the community of individuals who use American Sign Language as their primary means of communication. See CAROL PADDEN & TOM HUMPHRIES, DEAF IN AMERICA: VOICES FROM A CULTURE 2, 39 (1988). The use of the

to interpret many shows and movies without closed captioning while watching content through Netflix's "Watch Instantly"² online streaming program.³ Recently, in *National Association for the Deaf v. Netflix, Inc.*,⁴ the National Association for the Deaf brought a complaint against Netflix to include closed captioning on all of its content. In the summer of 2012, the Massachusetts Federal District Court issued an order finding that Netflix "Watch Instantly" can qualify as a "public accommodation"⁵ under the Americans with Disabilities Act of 1990 ("ADA").⁶

As a "public accommodation"⁷ under the ADA, Netflix must comply with the ADA's requirements to provide auxiliary aids, such as closed captioning, for the deaf and hearing-impaired.⁸ Furthermore, with the issuance of federal regulations under the Twenty-First Century Communications and Video Accessibility Act ("CVAA"),⁹ the court found that the ADA and CVAA work in conjunction without irreconcilable conflict.¹⁰ Therefore, the CVAA regulation requiring video content producers to provide closed captioning does not pre-empt the ADA's requirement of public accommodations, like online streaming providers, to provide closed captioning for the deaf and hearing-impaired. If the court's interpretation is adopted by other courts, then online streaming

word "deaf" throughout this piece simply refers to the condition of not being able to hear. *See id.*

² Netflix permits "subscribers to stream available videos through the Internet on a computer, television, or other device." Nat'l Ass'n for the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 199 (D. Mass. 2012).

³ NETFLIX, <http://www.netflix.com> (last visited Oct. 17, 2012).

⁴ 869 F. Supp. 2d 196 (D. Mass. 2012).

⁵ *Id.* at 202. The law and federal regulations define public accommodations as including, but not limited to, places of "exhibition or entertainment" and other places of "recreation." *See* 42 U.S.C. § 12181 (2006); 28 C.F.R. § 36.104 (2012).

⁶ Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (2006)).

⁷ *See supra* note 5 and accompanying text.

⁸ *See* 42 U.S.C. § 12182 (2006).

⁹ *See* Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 202, 124 Stat. 2751, 2767 (2010) (codified at 47 U.S.C. § 613 (2006 & Supp. IV 2010)).

¹⁰ *Netflix*, 869 F. Supp. 2d at 204.

providers like Netflix and Hulu¹¹ will likely be required to provide closed captioning for all of their video content.

The question remains whether Netflix has enough control over the content and copyright of its video programming to provide captioning.¹² This Recent Development examines the issue of requiring closed captioning for all online video streaming and the copyright effects of such a captioning requirement. Part II offers background information on the interpretation of ADA public accommodations and the CVAA regulations for video content producers. Part III examines the 2012 order in *National Association for the Deaf v. Netflix*. Part IV discusses the copyright implications of requiring closed captioning for all programming streamed online and whether video programming producers or distributors should bear the burden of completing the closed captioning.

II. RELEVANT STATUTES: THE ADA AND THE CVAA

Through the ADA and the CVAA, Congress illustrated the intent to provide opportunity for the deaf and hearing-impaired to participate fully within society.¹³ The purpose of the ADA was to prevent physical or mental disabilities from diminishing “a person’s right to fully participate in all aspects of society”¹⁴ In 2012, when the CVAA was enacted, Congress updated past legislation to ensure that specific programming viewed through online streaming would have the same closed captioning requirements as programming seen through the television.¹⁵ Both acts aim to expand accessibility for the deaf and hearing-impaired, but vary in the approach and scale of the entities and material covered.

¹¹ HULU, www.hulu.com (last visited Sept. 24, 2012).

¹² *Netflix*, 869 F. Supp 2d at 202–03.

¹³ See 42 U.S.C. § 12101(a)(1) (Supp. II 2008); *Netflix*, 869 F. Supp. 2d at 199 (quoting S. REP. No. 111-386, at 1 (2010)).

¹⁴ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(2), 122 Stat. 3553, 3553 (2008) (codified at 42 U.S.C. § 12101(a)(1)).

¹⁵ See 47 U.S.C. § 613 (2006 & Supp. IV 2010).

A. *The ADA*

1. *General Background*

In 1990, when the ADA was enacted, Congress found that discrimination against the disabled was a “serious and pervasive social problem.”¹⁶ By enacting the ADA, Congress intended to provide opportunities for disabled individuals, like the deaf¹⁷ and hearing-impaired, to function fully within society.¹⁸ To accomplish the goal of complete integration, the Act prohibited discrimination against individuals with disabilities in areas of “public accommodations.”¹⁹ Congress defines a public accommodation as “a facility operated by a private entity whose operations affect commerce” and come within one of a variety of categories, including places of entertainment or recreation.²⁰ At the time of the ADA’s enactment, the Internet was essentially nonexistent. Therefore, Congress did not include any explicit reference to online entities.²¹ Now, with the prevalence of websites and online resources, courts are deciding the applicability of the ADA to

¹⁶ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(2), 104 Stat. 327, 328 (1990) (codified at 42 U.S.C. § 12101(a)(2) (2006)).

¹⁷ Deaf individuals do not necessarily consider themselves disabled. PADDEN & HUMPHRIES, *supra* note 1, at 44.

¹⁸ See Americans with Disabilities Act of 1990 § 2(b) (codified at 42 U.S.C. § 12101(b) (2006)).

¹⁹ *Id.* § 302 (codified at 42 U.S.C. § 12182 (2006)).

²⁰ 42 U.S.C. § 12181(7) (2006). Congress additionally states that facilities owned by a private entity and that fall into any of the categories of hotels, restaurants, convention centers, grocery stores, laundromats, libraries, parks, zoos, schools, homeless shelters, gymnasiums, golf courses, and certain other examples can qualify as public accommodations. *See id.*

²¹ See Haley M. Koteen, Note, *Ending the Disconnect for the Deaf Community: How Amendments to the Federal Regulations Can Realign the ADA with Its Purpose*, 29 CARDOZO ARTS & ENT. L.J. 425, 428 (2011) (explaining that the ADA was passed before the Internet was commonly used and does not mandate private websites must be accessible to those with disabilities); *see also* 42 U.S.C. §§ 12181–12182 (making no reference to online entities being public accommodations).

online entities, such as Netflix, and determining whether these entities qualify as public accommodations.²²

2. *Interpretation of Public Accommodation*

Because the ADA does not explicitly address whether online entities are public accommodations, courts continue to disagree over whether the ADA is applicable to online streaming programs.²³ Courts have interpreted public accommodations using three different variations.²⁴ The Ninth Circuit provides the narrowest interpretation of public accommodation.²⁵ In *Weyer v. Twentieth*

²² To prevail on a discrimination claim under Title III of the ADA, a plaintiff must show “(1) he is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied a public accommodation by the defendant because of his disability.” *Cullen v. Netflix, Inc.*, No. 5:11-cv-01199-EJD, 2012 U.S. Dist. LEXIS 97884, at *9–10 (N.D. Cal. July 13, 2012) (quoting *Ariz. ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 670 (9th Cir. 2010)); *see also* 42 U.S.C. § 12182(a)–(b) (explaining that no disabled individual should be discriminated against because of their disability and denied benefits of a public accommodation).

²³ *See Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002) (finding that the ADA covered “intangible barriers” that restricted “a disabled person’s ability to enjoy the defendant entity’s goods, services, and privileges”); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) (holding public accommodations are only “actual, physical places where goods and services are open to the public”); *Palozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 33 (2nd Cir. 2000) (ruling that the ADA extends to insurance underwriting even though this may not take place in the actual insurance office); *Stoutenborough v. Nat’l Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995) (holding that a televised broadcast of a football game does not involve a public accommodation); *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (holding that a public accommodation does not necessarily need a connection to a physical place).

²⁴ *See Rendon*, 294 F.3d at 1282–84; *Weyer*, 198 F.3d at 1114; *Carparts*, 37 F.3d at 19.

²⁵ *See Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115–16 (N.D. Cal. 2011) (explaining that Facebook cannot be a place of public accommodation because it operates only in cyberspace); *Earll v. eBay, Inc.*, No. 5-11-cv-00262-JF (HRL), 2011 U.S. Dist. LEXIS 100360, at *5–6 (N.D. Cal. Sep. 6, 2011) (dismissing a claim against eBay because the website is not a public accommodation under the ADA); *see also Weyer*, 198 F.3d at 1114; *Cullen*,

Century Fox Film Corp.,²⁶ a Ninth Circuit decision, the court held that public accommodations are only “actual, physical places where goods and services are open to the public.”²⁷ In the recent case of *Cullen v. Netflix, Inc.*,²⁸ a Ninth Circuit District Court continued to follow this precedent by finding that “websites are not places of public accommodation.”²⁹

However, some District Courts in the Ninth Circuit have broadened the definition of public accommodation. In *National Federation of the Blind v. Target Corp.*,³⁰ the Ninth Circuit ruled that Target’s website was a public accommodation under the ADA because the “inaccessibility of Target.com denie[d] the blind the ability to enjoy . . . Target stores.”³¹ *Target* demonstrates the nexus approach to connect the physical and web locations in a situation where a physical store location is in existence. Furthermore, the Eleventh Circuit has also employed the nexus approach.³²

2012 U.S. Dist. LEXIS 97884, at *12 (holding that a website is not a place of public accommodation).

²⁶ 198 F.3d 1104 (9th Cir. 2000).

²⁷ *Id.* at 1114.

²⁸ No. 5:11-cv-01199-EJD, 2012 U.S. Dist. LEXIS 97884 (N.D. Cal. July 13, 2012).

²⁹ *Id.* at *12; *see also Earll*, 2011 U.S. Dist. LEXIS 100360, *5–6 (dismissing a claim against eBay because the website is not a public accommodation under the ADA); *Young*, 790 F. Supp. 2d 1110, 1115–16 (explaining that Facebook cannot be a place of public accommodation because it operates only in cyberspace).

³⁰ 452 F. Supp. 2d 946 (N.D. Cal. 2006).

³¹ *Id.* at 955. The court held that the inaccessibility of the Target website for blind customers also affected the ability of blind customers to access the brick and mortar Target stores, which are public accommodations. *Id.* Therefore, the website’s inaccessibility was a hindrance to customers accessing the physical stores and a violation of the ADA. *Id.*

³² *See Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1282–84 (11th Cir. 2002). The court found that that the ADA covered “intangible barriers” that restricted “a disabled person’s ability to enjoy the defendant entity’s goods, services, and privileges” provided at the place of public accommodation. *Id.* In that particular case, the place of public accommodation was the studio for “Who Wants to Be a Millionaire,” and the selection process for the show was deemed to discriminate against the disabled. *Id.*

In contrast to narrow interpretation taken in the Ninth Circuit, the First and Second Circuits have established broader standards.³³ In *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*,³⁴ the First Circuit held that a website does not necessarily need a connection to a physical place to qualify as a public accommodation.³⁵ Under this interpretation, services that “do not require a person to physically enter an actual physical structure” can qualify as a public accommodation under the ADA.³⁶ The decision in *Netflix*, discussed in the next Part, expands on this First Circuit interpretation of the ADA as seen in *Carparts*.

B. *The CVAA*

Congress enacted the Twenty-First Century Communications and Video Accessibility Act of 2010 to ensure “persons with disabilities are able to utilize communications services and equipment and to better access video programming.”³⁷ The CVAA specifically requires the Federal Communications Commission (“FCC”) to enact regulations requiring video programming to be “fully accessible through the provision of closed captions” at the effective date of the Act.³⁸ Congress accomplished this by requiring the video programming owners³⁹ to “send program files to [the

³³ See *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 33 (2nd Cir. 2000) (ruling that the ADA extends to insurance underwriting, even though this may not take place in the actual insurance office, because the ADA was not intended to be interpreted so narrowly as to include activities in only the physical place); *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).

³⁴ 37 F.3d 12 (1st Cir. 1994).

³⁵ *Id.* at 19.

³⁶ *Id.*; see also *Pallozzi*, 198 F.3d 28, 33 (ruling that the ADA extends to insurance underwriting even though this may not take place in the actual insurance office because the ADA was not intended to be interpreted so narrowly as to only include activities in the physical place).

³⁷ *Nat'l Ass'n for the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 199 (D. Mass. 2012) (quoting S. REP. No. 111-386, at 1 (2010)).

³⁸ 47 U.S.C. § 613(b)(1)–(2) (2006).

³⁹ See *Closed Captioning of Internet-Protocol Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 27 FCC Rcd. 787, 792–94 (2012) (explaining that

video programming distributors] with all required captions.”⁴⁰ In other words, excluding some exceptions, the Act requires all companies to distribute video programming, produced after the enactment of the CVAA regulations, with closed captioning files or capabilities.⁴¹ Because the CVAA is not retroactive,⁴² however, the question remains whether video programming producers or distributors should be responsible for the closed captioning of video content produced prior to the CVAA regulations. If courts find that the ADA is applicable to distributors providing video content through online streaming, courts must also determine if the video producers or distributors ought to bear the burden of closed captioning.

Moreover, the CVAA allows the FCC to “delay or waive” the regulations on closed captioning for video programming providers if such regulations are “economically burdensome.”⁴³ Thus, video programming producers can forgo CVAA requirements if they use four statutory factors to show that providing closed captioning “would result in an undue economic burden.”⁴⁴ Overall, the CVAA is only applicable to material produced for television after the date of enactment,⁴⁵ leaving the deaf and hearing-impaired dependent upon the ADA to cover the remaining video content.

III. NATIONAL ASSOCIATION FOR THE DEAF V. NETFLIX, INC.

In *Netflix*, the National Association for the Deaf and others sought injunctive and declaratory relief to require Netflix, Inc. to

“video programming owners” are the entities who license the video content to third-party providers).

⁴⁰ *Id.* at 798.

⁴¹ *See* 47 U.S.C. § 613(b).

⁴² *See id.* § 613(c)(2)(A) (Supp. IV 2010) (“[T]he Commission shall revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions *after* the effective date of such regulations.” (emphasis added)).

⁴³ *See id.* § 613(c)(2)(C).

⁴⁴ *See id.* § 613(e) (2006). The four factors are “(1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.” *Id.* § 613(e)(1)–(4).

⁴⁵ *See id.* § 613(c)(2)(A) (Supp. IV 2010).

provide closed captioning for all of its Watch Instantly content.⁴⁶ In rejecting Netflix's Motion for Judgment on the Pleadings, the Massachusetts District Court found that Netflix can qualify as an ADA public accommodation and that the CVAA and ADA can work in conjunction without irreconcilable conflict.⁴⁷ Classifying Netflix as a public accommodation under the ADA, the court could have required Netflix to provide closed captioning for all material depending on Netflix's control of the content.⁴⁸ However, before the court issued a final ruling on this matter, Netflix agreed to a consent decree, voluntarily adopting a deadline of 2014 to provide closed captioning for all of its video content.⁴⁹ Despite an agreement being reached, this case has important implications for future application of the ADA to websites.

In the case, the plaintiffs argued that Netflix violated the ADA's prohibition of discrimination by providing closed captioning for only a limited number of its television shows and movies.⁵⁰ Plaintiffs also alleged that other services are not accessible to deaf and hearing-impaired individuals, as seen by the failure of Netflix to categorize captioned films in the same manner as other films.⁵¹ After the court earlier denied Netflix's motion to dismiss, Netflix filed a motion for judgment on the pleadings arguing that the plaintiffs failed to establish Netflix Watch Instantly as a place

⁴⁶ Nat'l Ass'n for the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 198–99 (D. Mass. 2012).

⁴⁷ See *id.* at 201–03.

⁴⁸ See 42 U.S.C. § 12182(b)(2)(A)(iii) (2006) (explaining the prohibition on discrimination by a public accommodation under the ADA by failing to provide auxiliary aids and services for the disabled unless the public accommodation can show that providing these services would cause an undue burden).

⁴⁹ See Consent Decree, Nat'l Ass'n for the Deaf v. Netflix, Inc., No. 11-30168-MAP (D. Mass. Oct. 9, 2012), available at <http://dredf.org/captioning/netflix-consent-decree-10-10-12.pdf>. In October of 2012, Plaintiffs and Defendants in the *Netflix* case voluntarily agreed to a Consent Decree in which Netflix will provide closed captioning for all its content provided through Watch Instantly. See *id.*

⁵⁰ See *Netflix*, 869 F. Supp. 2d at 199.

⁵¹ *Id.* (explaining that Netflix does not organize closed captioned films or shows into a group such as it does for genres of films into dramas, comedies, and documentaries).

of public accommodation.⁵² Further, Netflix argued that it does not have control over the copyright to provide the captioning sought by the plaintiffs, and that the plaintiffs' ADA interpretation is precluded by CVAA regulations.⁵³

A. *Public Accommodations*

In response to this motion, the court held that Netflix's Watch Instantly could fall under three separate examples of public accommodations listed in the ADA. First, it could be deemed a service establishment because Watch Instantly allows customers to stream video programming.⁵⁴ Second, it could be considered a place of exhibition or entertainment because Netflix displays movies and television programming along with other content.⁵⁵ Or, third, Watch Instantly may be considered a rental establishment because customers pay for the rental of the video programming.⁵⁶ The court seems to have accepted the plaintiff's contention that Netflix was "analogous to a brick-and-mortar . . . video rental store."⁵⁷ In comparison to earlier cases like *Target*, where the court ruled that website inaccessibility was a hindrance to the public accommodation of brick and mortar stores,⁵⁸ the court is now viewing programs like Netflix Watch Instantly as analogous to the actual brick and mortar stores.⁵⁹ If more courts employ this

⁵² See *id.* at 199–200

⁵³ *Id.* at 200.

⁵⁴ *Id.* at 201; see also 28 C.F.R. § 36.104 (2012) (providing examples of other service establishments including, but not limited to, gas stations, insurance offices, travel services, and banks).

⁵⁵ *Netflix*, 869 F. Supp. 2d at 201.

⁵⁶ *Id.*

⁵⁷ *Id.* at 200.

⁵⁸ *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 955 (N.D. Cal. 2006) (holding that the inaccessibility of the Target website for blind customers also affected the ability of blind customers to access the brick and mortar Target stores, which are public accommodations, therefore, the website's inaccessibility was a hindrance to customers accessing the physical stores and in violation of the ADA).

⁵⁹ *Netflix*, 869 F. Supp. 2d at 200–01 (citing *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc.*, 37 F.3d 12, 19 (1994)) (explaining that Netflix Watch Instantly, a website providing services online, should be considered a public accommodation the same as some offices that sell services).

view and treat websites as public accommodations, then establishing a nexus between the website and brick and mortar location will not be necessary. Instead, courts may find that the website service is analogous to a service offered in brick and mortar stores thereby qualifying it as a public accommodation.

B. *Copyright Control and CVAA Conflict*

The *Netflix* court denied Netflix's motion for summary judgment, which was based on Netflix's lack of control over the captioning of streaming video content.⁶⁰ Although the court did not find that Netflix lacked control over the captioning of its content, the issue was left open for a motion for summary judgment in case further discovery revealed that Netflix "[did] not have the power to provide the captioning."⁶¹ If Netflix and other online video distributors do not have the ability to control the video content they distribute, then they would be unable to comply with a court order requiring them to provide closed captioning.⁶²

Finally, the court in *Netflix* found that the ADA provisions did not form an irreconcilable conflict with the new regulations promulgated under the CVAA, which requires video content owners to provide captioning.⁶³ Defendants argued that Plaintiffs' interpretation of the ADA was precluded by the CVAA and new regulations issued by the FCC.⁶⁴ However, the court decided that some of the video content on Netflix would not be covered by the CVAA because the CVAA does not apply to content that was produced prior to enactment or content that was not published on television.⁶⁵ The court additionally found that although the CVAA

⁶⁰ See *id.* at 202. It is important to note that the parties in this case have agreed to a Consent Decree so this motion issue will not be determined.

⁶¹ See *id.* at 202–03. If the parties had not reached an agreement, the court would have examined the contracts Netflix had with copyright owners to see whether these owners have provided permission to caption their works.

⁶² Copyright implications will be further discussed in Part IV.

⁶³ See *Netflix*, 869 F. Supp. 2d at 203–04 (“While it is true that Plaintiffs seek to impose a duty on Defendant under the ADA that may not exist under the CVAA, this difference does not constitute an irreconcilable conflict.”).

⁶⁴ *Id.* at 199.

⁶⁵ See *id.* at 207–08.

charges the video content producers, not the online providers, with the primary responsibility of providing captioning, this requirement “may make it easier for [Netflix Watch Instantly] to comply with its alleged duties under the ADA.”⁶⁶ The court’s interpretation may be worrisome to video programming distributors that show video content not covered under the CVAA regulations because the distributor may now be forced to take on the task of captioning the material not covered under the CVAA.

IV. PUBLIC ACCOMMODATIONS, COPYRIGHT IMPLICATIONS, AND THE PRODUCTION OF CLOSED CAPTIONING

Although there is no consensus on whether the ADA is applicable to online streaming providers, the increasing discussion on this issue reflects the developing trend of courts including websites within the scope of the ADA, as seen in *Netflix*. Between *Netflix* and the newly issued federal regulations under the CVAA, if the broad approach used by the *Netflix* court becomes widely adopted, closed captioning could then be required for any video content streamed through the internet. With the closed captioning requirement a real possibility for online video programming distributors, the issues regarding the handling of captioning without violating copyright law and the compliance with such requirements without unfairly burdening companies will become problematic.

In complying with such a requirement, video program distributors will face copyright obstacles.⁶⁷ Because closed captioning alters content, distributors would need permission from the owner of the copyright to offer the captioning to customers.⁶⁸ Still, there is a fair use argument for allowing Netflix and other distributors to alter video content for the specific purpose of closed captioning, which makes the works accessible to the deaf and hearing-impaired.⁶⁹

⁶⁶ *See id.* at 204.

⁶⁷ *See id.* at 202 (explaining that video programming owners “hold the exclusive copyrights necessary to caption content”).

⁶⁸ *Id.*

⁶⁹ *See* Reply Comments of Public Knowledge, In the Matter of Closed Captioning of Internet-Protocol Delivered Video Programming: Implementation

However, in regards to captioning, video program distributors have a strong argument based on the CVAA regulations that video program producers should be required to provide captioning for the purposes of ease and practicality.⁷⁰ Overall, while there are difficulties in implementing a requirement for closed captioning of all online streaming, Congress and courts continue to work towards greater accessibility for the deaf and hearing-impaired.

A. *Websites as Public Accommodations*

Although Netflix argued that websites are not included in the ADA language and therefore could not be a public accommodation, the *Netflix* court made it clear that Congress “intended the ADA to adapt to changes in technology.”⁷¹ The ADA was enacted in a period when online sources did not exist, which the court observed as one reason for the exclusion of web-based services in the Act.⁷² Nevertheless, Congress did not intend to expressly exclude websites from the ADA.⁷³ In reaching this decision, the court relied on precedent in the *Carparts* decision to qualify Watch Instantly as a public accommodation.⁷⁴

The court in *Carparts* reasoned that Congress could not have intended to protect people who enter a brick and mortar store to purchase services and not protect people who purchase the same services through means such as mail or telephone.⁷⁵ Following this

of the Twenty-First Century Communications and Video Accessibility Act of 2010, FCC MB Docket No. 11-154, at 3 (Nov. 1, 2011), *available at* <http://publicknowledge.org/files/PKCaptioningReply.pdf> (suggesting that captioning of video content would be a fair use and avoid violating copyright law).

⁷⁰ See Closed Captioning of Internet-Protocol Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, 27 FCC Rcd. 787, 800 (2012) (explaining that video programming producers often have the control over the material and ownership of copyrights making it easier for them to caption material).

⁷¹ See *Netflix*, 869 F. Supp. 2d at 200–01 (citing H.R. REP. NO. 101-485(II), pt. 2, at 108 (1990)).

⁷² *Id.*

⁷³ See *id.*

⁷⁴ *Id.* at 201–02.

⁷⁵ *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).

line of reasoning, the *Netflix* court found that Congress intended the ADA to protect individuals who purchase services from Watch Instantly.⁷⁶ This makes sense because the ADA would protect individuals renting the same movies from a brick and mortar store like Blockbuster.⁷⁷ The court found that not protecting individuals who purchase services from Netflix Watch Instantly would “run afoul of the purposes of the ADA and would severely frustrate Congress’s intent” to protect and provide opportunity for the disabled.⁷⁸

Additionally, the court refuted the argument that Netflix could not qualify as a public accommodation because the programming is viewed in private residences.⁷⁹ The court stated that “the ADA covers the services ‘of’ a public accommodation, not services ‘at’ or ‘in’ a public accommodation.”⁸⁰ The word “of” has important implications for applying the ADA to websites, considering these services will almost never be located at or in a physical brick and mortar location. This ruling also raises concern for online video programming distributors who may not provide services in an actual, physical place but would still be required to accommodate deaf and hearing-impaired individuals under ADA requirements. Moving forward, if other courts affirm this approach, then websites providing services similar to those found in brick and mortar stores could more easily qualify as a public accommodation and be held to the same requirements as their brick and mortar counterparts.

Video programming distributors still have valid counterarguments against classifying websites as public accommodations. In *Cullen*, the court held that “websites are not places of public accommodations under the ADA because they are not actual physical places.”⁸¹ It follows that because the Netflix website is not a physical place, it cannot be a public accommodation. The court relied on the

⁷⁶ See *Netflix*, 869 F. Supp. 2d at 200–01.

⁷⁷ *Id.* at 200.

⁷⁸ *Id.* (quoting *Carparts*, 37 F.3d at 20).

⁷⁹ *Id.* at 201.

⁸⁰ *Id.* (citing 42 U.S.C. § 12181(7) (2006)).

⁸¹ *Cullen v. Netflix, Inc.*, No. 5:11-cv-01199-EJD, 2012 U.S. Dist. LEXIS 97884, at *11 (N.D. Cal. July 13, 2012).

precedent set in the Ninth Circuit case of *Weyer* to conclude that the ADA does not apply to “Netflix’s streaming video library.”⁸²

However, the *Cullen* court considered the more expansive meaning of public accommodation⁸³ adopted by other circuits as seen in *Carparts*⁸⁴ and *Netflix*.⁸⁵ The court even noted *Doe v. Mutual of Omaha Insurance Company*⁸⁶ from the Seventh Circuit, where the court wrote in dicta that public accommodations can encompass facilities “in both physical and electronic space.”⁸⁷ Although *Cullen* refused to adopt the more expansive interpretation of *Carparts* and *Netflix*, it did so because it was required to follow the more narrow interpretation established by Ninth Circuit precedent.⁸⁸ No Supreme Court decision directly addresses whether websites qualify as public accommodations under the ADA, therefore, district courts are often bound to follow the precedent in their circuit.⁸⁹

It is also important to note that the plaintiffs in *Cullen* did not attempt to allege a nexus between the Netflix website and a physical location.⁹⁰ If plaintiffs had successfully formed a connection between Netflix Watch Instantly and another physical location for Netflix, then the court could have qualified the website through the nexus approach as seen in the *Target* case.⁹¹ With Netflix, however,

⁸² *Id.* at *12.

⁸³ *Id.* at *10–11.

⁸⁴ *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).

⁸⁵ *Netflix*, 869 F. Supp. 2d at 200–01.

⁸⁶ 179 F.3d 557 (7th Cir. 1999).

⁸⁷ *Cullen*, 2012 U.S. Dist. LEXIS 97884, at *10 (citing *Doe*, 179 F.3d at 559).

⁸⁸ *Id.* at *11.

⁸⁹ *Id.* (citing *Ky Minh Pham v. Hickman*, 262 Fed. App. 35, 39 (9th Cir. 2007)) (explaining that the court must follow Ninth Circuit precedent when there is no Supreme Court decision directly addressing the issue).

⁹⁰ *Id.* at *11 n.3.

⁹¹ See *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 955 (N.D. Cal. 2006) (holding that the inaccessibility of the Target website for blind customers also affected the ability of blind customers to access the brick and mortar Target stores, which are public accommodations, therefore, the website’s inaccessibility was a hindrance to customers accessing the physical stores and in violation of the ADA).

there is not a brick and mortar location that the plaintiff could use to create a nexus between the online and physical location.⁹² Therefore, to apply the ADA to Netflix, courts must expand public accommodations to include website-only service providers.

Overall, the *Cullen* court was bound by the Ninth Circuit precedent but seriously considered expanding the interpretation of public accommodation as has occurred in other circuits.⁹³ As the prevalence of Internet programming continues to grow within society, courts are increasing their discussion of a broader interpretation of public accommodation.⁹⁴ Until the Supreme Court grants certiorari to decide this issue, or until Congress acts to update the ADA, lower courts will continue to debate application of the ADA to specific online services.

B. *Copyright Implications*

In establishing a requirement for closed captioning, one important issue is how video content providers can offer closed captioning without violating the exclusive rights of video producers who typically own the copyright in these works.⁹⁵ Under copyright law, the owner of the copyright has the exclusive rights “to reproduce the copyrighted work” or “to prepare derivative works based upon the copyrighted work.”⁹⁶ In other words, the

⁹² *Company Overview*, NETFLIX, <https://signup.netflix.com/MediaCenter> (last visited Nov. 2, 2012) (describing Netflix as an “internet subscription service”).

⁹³ *Cullen*, 2012 U.S. Dist. LEXIS 97884, at *10–11.

⁹⁴ *See id.* (discussing whether the ADA’s public accommodation includes website-based services); *see also* Nat’l Ass’n for the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200–01 (D. Mass. 2012) (discussing whether the ADA’s public accommodation includes website-based services).

⁹⁵ *See* Closed Captioning of Internet-Protocol Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, 27 FCC Rcd. 787, 800 (2012) (explaining that owners of copyrights could more easily add closed captioning to video content); *see also* *Netflix*, 869 F. Supp. 2d at 202 (explaining that video programmers “hold the exclusive copyrights necessary to caption content”).

⁹⁶ 17 U.S.C. § 106(1)–(2) (2006).

copyright owner has the exclusive right to modify or transform the copyrighted work.⁹⁷

The use of the work is transformative if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁹⁸ In a movie or television show, the closed captioning may not include every word or sound that is uttered, ultimately altering the content of the film or show for a deaf or hearing-impaired individual who is unable to experience the original content.⁹⁹ Typically, closed captioning uses only a small portion of the screen to display text, which prevents a viewer from seeing what happens on the bottom of the screen.¹⁰⁰ Although this appears minimal, it is possible that many deaf and hard of hearing viewers may miss an important event in the film or show because of these alterations. Thus, because the closed captioning can alter the content, video programming distributors are unable to provide closed captioning without the explicit permission of the copyright owner, as a closed caption version is a derivative work.¹⁰¹

For Netflix, this would mean the company would have to obtain permission from thousands of copyright owners of movies, television shows, and other content it provides to viewers before

⁹⁷ *See id.*

⁹⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁹⁹ *See* FED. COMM’NS COMM’N, CLOSED CAPTIONING GUIDE: FCC CONSUMER FACTS 2–4 (2012), *available at* <http://transition.fcc.gov/cgb/consumerfacts/closedcaption.pdf> (explaining the process for reporting bad or faulty captioning); *see also Filing Closed Captioning Complaints*, NAT’L ASS’N FOR THE DEAF, <http://www.nad.org/issues/television-and-closed-captioning/filing-closed-captioning-complaints> (last visited Dec. 7, 2012) (explaining the process to report bad or faulty captioning).

¹⁰⁰ *See* FED. COMM’NS COMM’N, *supra* note 99, at 1 (explaining that captioning displays text on the television screen).

¹⁰¹ *See Nat’l Ass’n for the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 202 (D. Mass. 2012); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.03 (Mathew Bender, rev. ed.2012) (discussing what constitutes a derivative work).

providing captioning.¹⁰² However, there is a possible fair use argument for allowing Netflix and other companies to provide closed captioning without the permission of the copyright owners.¹⁰³ Although the copyrighted material would be altered by providing closed captioning, the accessibility of the deaf and hearing-impaired to website services could improve the lives of these individuals for the better and benefit the general public in the process.

1. *Fair Use of Copyright for Closed Captioning*

Fair use is an equitable defense to copyright infringement and is based on the theory that the author gives “implied consent to reasonable and customary use when he releases his work for public consumption.”¹⁰⁴ For companies, the fair use doctrine can be employed as an affirmative defense to copyright violations.¹⁰⁵ If Netflix adds closed captioning to films or shows for the benefit of the deaf and hearing-impaired, then there is a possibility that copyright owners of the video content could sue for infringement.¹⁰⁶ Then, if Netflix is sued by a content provider who owns the copyright, courts could interpret closed captioning to be a fair use of the material.¹⁰⁷ To find fair use, courts will apply the four statutory factors under 17 U.S.C. § 107 to determine whether reproduction or manipulation of

¹⁰² *Frequently Asked Questions*, NETFLIX, <https://signup.netflix.com/HowItWorks> (last visited Nov. 16, 2012) (stating the company has “thousands of movies and TV episodes available to watch”).

¹⁰³ 17 U.S.C. § 107 (2006); *see also* Reply Comments of Public Knowledge, *supra* note 69, at 3 (explaining that fair use argument may be used to avoid copyright violations for closed captioning of films by video program distributors).

¹⁰⁴ *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1242 (2006) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985)).

¹⁰⁵ *See* 17 U.S.C. § 107 (explaining that fair use “is not an infringement of copyright”).

¹⁰⁶ *See* Mike Masnick, *Websites Deemed ‘Place of Public Accommodation’ Under the ADA; Expects Lots of Sites to Get Sued*, TECHDIRT (June 29, 2012, 8:34 AM), <http://www.techdirt.com/articles/20120628/02472919521/websites-deemed-place-public-accommodation-under-ada-expects-lots-sites-to-get-sued.shtml> (discussing the possibility that companies adding closed captioning to content could be sued for copyright infringement).

¹⁰⁷ 17 U.S.C. § 107.

the copyrighted work is a fair use.¹⁰⁸ The four factors examined in fair use include: “(1) purpose and character of the use; (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.”¹⁰⁹

In examining closed captioning, the first criterion to consider is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”¹¹⁰ Commercial use, as opposed to nonprofit use, will weigh against the court finding fair use.¹¹¹ In this case, Netflix Watch Instantly is a commercial, for-profit company so its status as a commercial business does not weigh in favor of fair use.¹¹² By adding closed captioning to their video content, a copyright owner could argue that Netflix is motivated by the prospect of attracting new customers to boost its overall sales.¹¹³ However, even if Netflix does distribute video programming commercially, the purpose of captioning would be to make the programming accessible, and not necessarily to make a profit.¹¹⁴

Still, under the first factor, commercial use is not the only issue to consider, and courts must also take into account the transformative

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* § 107(1)–(4).

¹¹⁰ *Id.* § 107(1).

¹¹¹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (explaining that commercial use can be considered exploitation of the rights of the copyright owner since the user is not paying for privilege of use of copyright).

¹¹² See Netflix, Inc., Annual Report (Form 10-K) (Feb. 10, 2012), available at <http://ir.netflix.com/secfiling.cfm?filingID=1193125-12-53009&CIK=1065280results.cfm>.

¹¹³ In fact, from 2009 until 2011, Netflix issued statements to customers outlining plans to include additional closed captioning. *Cullen v. Netflix, Inc.*, No. 5:11-cv-01199-EJD, 2012 U.S. Dist. LEXIS 97884, at *32–34. (N.D. Cal. July 13, 2012). In *Cullen*, the plaintiff alleged that Netflix’s statements about the captioning conveyed to deaf and hearing-impaired customers that Netflix would subtitle its streaming. See *id.*

¹¹⁴ Reply Comments of Public Knowledge, *supra* note 69, at 4 (arguing that the purpose of captioning “is to make the video programming accessible”).

nature of the work.¹¹⁵ In fact, the more transformative the work, then the less important other considerations such as commercial use become.¹¹⁶ In this situation, closed captioning is arguably transformative because it alters the video content so that the deaf and hearing-impaired can understand the content. This transformation by closed captioning is unique, however, because the captioning is performed alongside the original work.¹¹⁷ The captioning could be seen not as creating new copies of the original, but as providing the deaf and hearing-impaired with access to the meaning of the work.¹¹⁸ In this sense, the purpose of the captioning would be only to make these works accessible for a certain group and not for Netflix to increase profits by transforming an original work.

Next, the second fair use factor considers “the nature of the copyrighted work”¹¹⁹ and distinguishes between works that are “closer to the core of intended copyright protection.”¹²⁰ The more original and creative the movie or show, the closer it becomes to being intended for copyright protection.¹²¹ For example, a work of fiction is considered more original and creative than a phonebook organizing already existing material.¹²² In this situation, the video distributors would alter original and creative video content, like movies or television shows, intended to be protected by copyright. Because the nature of the content provided by Netflix is creative, courts are more likely to protect the copyright owners’ rights to control this material and less likely to allow alterations.

The third factor examines the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹²³

¹¹⁵ Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003).

¹¹⁶ *Id.*

¹¹⁷ Reply Comments of Public Knowledge, *supra* note 69, at 4.

¹¹⁸ *Id.* at 3.

¹¹⁹ 17 U.S.C. § 107 (2006).

¹²⁰ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

¹²¹ 4 NIMMER & NIMMER, *supra* note 101, § 13.05(A)(2)(a).

¹²² Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985) (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”).

¹²³ 17 U.S.C. § 107(3).

For example, in *Harper & Row Publishers v. Nation Enterprises*,¹²⁴ only a small passage from a book was used for a news article.¹²⁵ The book publisher alleged that even though the proportion of the passage was small, the passage discussed the heart of the book and was, therefore, some of the most valuable material.¹²⁶ In other words, the third factor looks at both the amount of the work used and the importance or value of the content altered in the original movie or television show.

On one side, by adding closed captioning, the original author's intent may be altered throughout the entire work, as closed captioning would occur throughout the entirety of the film or show.¹²⁷ This alteration through captioning could arguably modify the copyright owner's intent and thus violate the copyright owner's exclusive rights. Alternatively, closed captioning only adds to what is included in the video content. In contrast to deleting entire scenes of movies, as in *Clean Flicks of Colorado, LLC v. Soderbergh*,¹²⁸ closed captioning adds to the film by providing text of what is spoken or uttered in the video.¹²⁹ Because the alteration would be minimal and only add meaning for the deaf and hearing-impaired, this factor should move a court towards allowing closed captioning for most of the movies or television shows streamed by online providers.¹³⁰

The fourth and final factor for fair use examines the "effect of the use upon the potential market for or value of the copyrighted work."¹³¹ Under this factor, courts consider whether widespread conduct of the sort engaged in by the copyright infringer would

¹²⁴ 471 U.S. 539 (1985).

¹²⁵ *Id.* at 564–66.

¹²⁶ *Id.*

¹²⁷ See Reply Comments of Public Knowledge, *supra* note 69, at 4 (explaining that captions are unique because they are used alongside the entire copyrighted work).

¹²⁸ 433 F. Supp. 2d 1236 (2006).

¹²⁹ *Id.* at 1238.

¹³⁰ See Reply Comments of Public Knowledge, *supra* note 69, at 4 (explaining that captions allow deaf and hearing-impaired to access the meaning of the work and not create a new copy so this favors captioning being a fair use).

¹³¹ 17 U.S.C. § 107 (2006).

“result in a substantially adverse impact on the potential market.”¹³² The addition of closed captioning to Netflix programming would theoretically boost sales because deaf individuals would now be able to understand the video content. With the addition of this feature, more deaf individuals might choose to watch the movies or shows on Netflix because of the closed captioning and, in return, boost the revenue of the copyright owners of Netflix programming.

In contrast, Netflix might argue that captioning would add costs by requiring them to acquire resources to produce captioning.¹³³ With increased fees, Netflix might lose more customers because of price increases than would be gained from the addition of closed captioning. This prospect seems unlikely, however, because Netflix expected to have eighty percent of its content captioned by 2011 irrespective of a court mandate¹³⁴ and agreed to caption all content by 2014.¹³⁵

It appears that the addition of closed captioning to the video content of online providers like Netflix would likely increase the audience and benefit the copyright owner rather than harm the copyright holder’s market. In weighing the four factors, the benefit to the disabled community and the general public derived from closed captioning should outweigh the copyright owner’s right to control and reproduce the work.¹³⁶ Because fair use is

¹³² 4 NIMMER & NIMMER, *supra* note 101, § 13.05[A][4]; *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

¹³³ *See* Closed Captioning of Internet-Protocol Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, 27 FCC RCD. 787, 800 (2012) (explaining that video programming producers, not distributors, usually have the rights and ability to caption content making it more practical and effective for producers to caption); *see also* Todd v. Am. Multi-Cinema, Inc., No. Civ.A. H-02-1944, 2004 WL 1764686, at *4 (S.D. Tex. Aug. 5, 2004) (noting the large cost of providing closed captioning for movies played in movie theaters).

¹³⁴ Cullen v. Netflix, Inc., No. 5:11-cv-01199-EJD, 2012 U.S. Dist. LEXIS 97884, at *4. (N.D. Cal. July 13, 2012).

¹³⁵ Consent Decree, Nat’l Ass’n for the Deaf v. Netflix, Inc., No. 11-30168-MAP (D. Mass. Oct. 9, 2012), *available at* <http://dredf.org/captioning/netflix-consent-decree-10-10-12.pdf>.

¹³⁶ *See* Reply Comments of Public Knowledge, *supra* note 69, at 4 (arguing that fair use should be applicable to closed captioning for the deaf).

evaluated on a case-by-case basis, determining whether fair use is applicable for each video could make for a lengthy process in captioning content.¹³⁷ Although there is an argument that including closed captioning is fair use, claiming fair use seems to be an inefficient way to produce results for the deaf and hearing-impaired community.

2. *Copyrights and Benefiting the Disabled*

As Internet usage becomes more prevalent, closed captioning of online content would benefit the public as a whole by providing easier access to information for the deaf and hearing-impaired. Closed captioning of online content would further Congress's intent to eliminate the barriers that keep deaf and hearing-impaired individuals from integrating fully into society.¹³⁸

For example, in *Williams & Wilkins Co. v. United States*,¹³⁹ the plaintiff claimed that the National Institute of Health had violated copyright law by photocopying articles in commercial medical journals and distributing them to medical researchers to use in their research and profession.¹⁴⁰ Among other factors, the court held that "medical science would be seriously hurt if such library photocopying were stopped" and allowed the institute to continue the unauthorized use of commercial articles.¹⁴¹ In comparison, the accessibility of information for the deaf and hearing-impaired would be seriously hurt by not allowing closed captioning. Because *Williams & Wilkins* involves the benefit of a certain group by unauthorized reproduction of articles in commercial journals, it is a comparable case to *Netflix*, where a specific group of people would benefit from the captioning of commercial content.

¹³⁷ *Id.* at 3 (explaining that the application of fair use "depends upon the facts of each case").

¹³⁸ *See* 42 U.S.C. § 12101(b)(1) (2006). The purpose of the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b), 104 Stat. 327, 329 (1990) (codified at 42 U.S.C. § 12101(b)(1) (2006)).

¹³⁹ 487 F.2d 1345 (1973), *aff'd* 420 U.S. 376 (1975).

¹⁴⁰ *Id.* at 1346-47.

¹⁴¹ *Id.* at 1356.

Considering the vast expansion of Internet usage within everyday life, the deaf and hearing-impaired arguably need access to information at home to continually advance and sustain their place in society.¹⁴² For the deaf and hearing-impaired, everyday trips to the store can be more complicated than the average citizen because of the difficulty in communication, which makes access to services and goods over the Internet even more crucial for helping the disabled community fully function within society.¹⁴³ This notion also applies to crucial areas such as education, which is key for an individual to find work and earn an income.¹⁴⁴

In addition, Congress has acted in the past when a potentially beneficial alteration of copyrighted works for a certain group of individuals has been pursued. In *Clean Flicks*, the court found that companies were violating copyright law by editing offensive content out of movies and then allowing their customers to rent these movies.¹⁴⁵ The companies would buy the movies, edit out the explicit scenes, and allow members of their co-op to rent these edited versions.¹⁴⁶ The court in *Clean Flicks* found that these editing companies were infringing on the exclusive rights of the copyright owners to reproduce the work under 17 U.S.C. § 106(1)

¹⁴² See Koteen, *supra* note 21, at 428 (arguing that the Internet has become a public accommodation under the ADA).

¹⁴³ There is a potential argument that Internet accessibility would make the disabled more withdrawn from society by allowing them to stay at home. However, with many resources online (such as government information, bank account information, educational classes, etc.) this accessibility is becoming more necessary for deaf and hearing-impaired to do something as simple as check a bank account statement or apply for government benefits.

¹⁴⁴ Although Netflix mainly supplies films and television shows, it also provides access to educational documentaries. *E.g.*, *Auschwitz: Inside the Nazi State* (BBC television broadcast Jan. 11, 2005), available at <https://movies.netflix.com/movie/Auschwitz-Inside-the-Nazi-State/70213112>; *How Stuff Works* (Discovery Channel television broadcast Nov. 13, 2008), available at <https://movies.netflix.com/movie/How-Stuff-Works/70211515>; *Into the Universe with Stephen Hawking* (Discovery Channel television broadcast Apr. 21, 2010), available at <https://movies.netflix.com/movie/Into-the-Universe-with-Stephen-Hawking/70211618>.

¹⁴⁵ *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1243–44 (D. Colo. 2006).

¹⁴⁶ *Id.* at 1238–39.

and the exclusive right to distribution under 17 U.S.C. § 106(3).¹⁴⁷ Following the ruling, however, Congress enacted the Family Movie Act of 2005,¹⁴⁸ which allowed companies to complete this type of editing without the fear of violating copyrights.¹⁴⁹

By enacting the Family Movie Act of 2005, Congress permitted slight modifications to copyrighted work viewed in a private setting when it was beneficial to a certain group of individuals.¹⁵⁰ Similarly, closed captioning for Netflix content would cause only a slight modification of the original work and would be for viewing only in a private household of a Netflix subscriber.

Furthermore, *Netflix* differs from *Clean Flicks* in that the population benefiting from the copyright infringement is a community that has suffered historical discrimination.¹⁵¹ This distinction is important considering that the court in *Clean Flicks* denied the equitable defense of fair use because the editing companies were “exploiting a market for movies” different from the market studios “released into and for an audience the Studios [did] not [seek] to reach.”¹⁵² Because fair use is based on the idea that the author of the copyrighted work would consent to “reasonable and customary use when he releases [a] work for public consumption,” fair use would not be applicable to a situation like *Clean Flicks* that is targeting a different audience.¹⁵³ However, in *Netflix*, the deaf and hearing-impaired audience could reasonably be included in the original targeted audience. It is unlikely that a copyright owner of

¹⁴⁷ *Id.* at 1243–44.

¹⁴⁸ Family Movie Act of 2005, Pub. L. No. 109-9, § 202, 119 Stat. 218, 223–24 (2005) (codified at 17 U.S.C. § 110 (2006)).

¹⁴⁹ See 17 U.S.C. § 110(11) (stating that “the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing, from an authorized copy” is not a copyright infringement).

¹⁵⁰ *Id.* § 110.

¹⁵¹ See 42 U.S.C. § 12101(a)(2) (2006).

¹⁵² *Clean Flicks*, 433 F. Supp. 2d at 1242.

¹⁵³ *Id.*

video content intended to exclude deaf and hearing-impaired individuals from understanding the content.¹⁵⁴

Moreover, another distinction from *Clean Flicks* is the amount of public benefit derived from closed captioning of movies. The court in *Clean Flicks* found that the entertainment value of in-home viewing of the edited films did not equate with the advancement of medical science, as seen in the *Williams & Wilkins* case discussed above.¹⁵⁵ In contrast, the importance of providing the disabled with opportunities to integrate into society has been an important priority for Congress.¹⁵⁶ As discussed above, with the growing dependence on Internet-based companies to provide services, it is becoming more important to ensure the disabled have access to these services in order to maintain their productivity and inclusion in society.¹⁵⁷ Importantly, organizations like the World Intellectual Property Organization (“WIPO”) are taking up the issue of copyright and disability.¹⁵⁸ Currently, there is no consensus among nations on how to balance accessibility for the disabled with the rights of the copyright owners to protect their original content.¹⁵⁹ This interest by WIPO does illustrate the growing attention placed on trying to find a balance of protecting copyright owners while providing accessibility for groups such as the deaf and hearing-impaired.¹⁶⁰

¹⁵⁴ Reply Comments of Public Knowledge, *supra* note 69, at 3–4 (explaining that it is hard to imagine a copyright owner would not want the work accessible to someone who was deaf).

¹⁵⁵ *Clean Flicks*, 433 F. Supp. 2d at 1243.

¹⁵⁶ See 42 U.S.C. § 12101(b).

¹⁵⁷ See Koteen, *supra* note 21, at 428.

¹⁵⁸ See Claude Almansi, *Copyright and Disability: WIPO Consensus Document*, EDUC. TECH. & CHANGE (June 21, 2011), <http://etcjournal.com/2011/06/21/copyright-and-disability-wipo-consensus-document> (explaining that WIPO is working on an international level to find solutions to copyright barriers that hinder the accessibility of knowledge to those with disabilities).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*; see also *Disabled Users of Copyright*, INTELL. PROP. OFF., <http://www.ipo.gov.uk/types/copy/c-other/c-userorg/c-userorg-disabled.htm> (last visited Dec. 19, 2012) (recognizing that there may be copyright issues when material is converted into alternative formats, but there also may be exceptions for disabilities).

Programming distributors like Netflix may continue to fight against the mandatory requirements by alleging a lack of control over the copyrighted material and an undue burden for ensuring captioning for every video, but the benefits of providing the disabled with easier access compels some copyright exemptions for closed captioning.¹⁶¹ Although closed captioning modifies the content of the programming slightly, greater accessibility to educational and recreational programming for the deaf furthers Congress's intent of integrating the disabled into society.¹⁶²

C. *What Happens to the Content Not Covered by the CVAA*

The remaining question continues to be which entities should bear the burden of producing closed captioning. Going forward under the CVAA regulations, this problem is theoretically solved for video program distributors by placing the burden of captioning on the content providers.¹⁶³ However, even with the CVAA in place,

¹⁶¹ While this Recent Development was being prepared for publication, the Library of Congress revised 37 C.F.R. § 201.40(b) to add a provision allowing an exemption to the prohibition against circumvention for works on DVDs streamed online. Exemption to Prohibition Against Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,279 (Oct. 26, 2012) (to be codified at 37 C.F.R. pt. 201.40(b)(8)). This addition exempts from coverage:

Motion pictures and other audiovisual works on DVDs . . . that are distributed by an online service and protected by technological measures that control access to such works . . . for the purpose of creating players capable of rendering visual representations of the audible portions of such works . . . to enable an individual who is blind, visually impaired, deaf, or hard of hearing, and who has lawfully obtained a copy of such a work, to perceive the work

Id. at 65,270. Under this new regulation, companies can now produce video content players designed to provide closed captioning without fear of violating the prohibition against circumvention. *Id.* New players capable of rendering closed captioning for online content will hopefully help provide further accessibility for the deaf and hearing-impaired. Additionally, this amendment reflects the government intention to make online video content accessible for the deaf and hearing-impaired. *See id.*

¹⁶² *See* 42 U.S.C. § 12101(b) (2006).

¹⁶³ *See Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 204 (D. Mass. 2012) (suggesting that the duty of captioning under the CVAA is imposed onto video programming owners).

there are numerous works produced prior to the CVAA that are yet to be captioned and other works that are not covered under the requirements of the CVAA.¹⁶⁴

The CVAA mandate requires “closed captioning on video programming delivered using Internet Protocol that was published or exhibited on television with captions after the effective date of such regulations.”¹⁶⁵ In the CVAA, full-length video programming is defined as content that “appears on television and is distributed to end users, substantially in its entirety, via [Internet protocol].”¹⁶⁶ Effectively, this means the CVAA applies only to content that was shown on television, with captions, after the effective date of the regulations.¹⁶⁷ However, Netflix also distributes video content that was not shown on television.¹⁶⁸ This leaves some video content uncovered by the CVAA but shown via video programming distributors.¹⁶⁹

Because all content streamed online is not covered under the CVAA, the application of the ADA to online video distributors could play a key role in ensuring the deaf and hearing-impaired have access to closed captioning on website sources. If courts view the ADA as covering the content not regulated under the CVAA, then the courts must decide who bears the burden for captioning, the video content producers or the video content distributors. In contrast, video producers and distributors can argue that application of the ADA to cover content excluded from CVAA regulations would create an undue burden not intended by Congress.

¹⁶⁴ *See id.* at 208 (explaining that the CVAA only covers programming “shown on television with captions after the effective date of the FCC regulations” and, therefore, does not cover all online video programming).

¹⁶⁵ 47 U.S.C. § 613(c)(2)(A) (Supp. IV 2010).

¹⁶⁶ Closed Captioning of Internet Protocol Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, 77 Fed. Reg. 19,480, 19,516 (March 30, 2012) (to be codified at 47 C.F.R. § 79.4(a)(2)).

¹⁶⁷ *Netflix*, 869 F. Supp. 2d at 207.

¹⁶⁸ *Id.* at 206.

¹⁶⁹ *Id.* at 208.

One of the main arguments against the mandatory captioning requirement is the undue burden the requirement would potentially place on video program distributors and video content producers, such as film studios.¹⁷⁰ Both the ADA and the CVAA have provisions recognizing the need to examine possible economic hardships created by application of their requirements.¹⁷¹ According to *Netflix*, the court must conduct an “analysis of the economic burden of captioning on [Netflix]” under the ADA and consider factors similar to those of the FCC regulations.¹⁷² Because the court in *Netflix* will not complete this assessment due to the agreement¹⁷³ reached between parties, others will have to decide what entities will produce captioning for remaining content.

In regards to closed captioning, video programming distributors argue that they cannot be charged with captioning of video content because they do not have control over the copyrights necessary to caption content.¹⁷⁴ Netflix has contended that because it does not control this captioning, it cannot be held liable under the ADA.¹⁷⁵ In the case of *Netflix*, the court refuted this argument stating that Netflix has claimed to its own customers that it will be providing closed captioning.¹⁷⁶ The FCC regulations under the CVAA also point out that video programming distributors may choose either to control captioning or place that obligation on the video program producer through contracts.¹⁷⁷ In the *Netflix* case, the court

¹⁷⁰ *Id.* at 205 (citing 47 U.S.C. § 613(c)(2)(D)(ii)) (discussing the CVAA provision that allows the FCC to exempt closed captioning requirements that would be “economically burdensome”).

¹⁷¹ 42 U.S.C. § 12182(b)(2)(A)(iii) (2006); 47 U.S.C. § 613(c)(2)(C).

¹⁷² *Netflix*, 869 F. Supp. 2d at 205.

¹⁷³ Consent Decree, Nat’l Ass’n for the Deaf v. Netflix, Inc., No. 11-CV-30168-MAP (D. Mass. Oct. 9, 2012), available at <http://dredf.org/captioning/netflix-consent-decree-10-10-12.pdf>.

¹⁷⁴ *Netflix*, 869 F. Supp. 2d at 202.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Closed Captioning of Internet-Protocol Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, 27 FCC Rcd. 787, 799 (2012).

left open the issue of control in order to examine evidence regarding Netflix's contracts with the video producers.¹⁷⁸

If contracts with producers do not allow Netflix to control captioning without violating copyrights, then Netflix would not be able to control captioning of this content until such contracts are revised. Therefore, the court could not force Netflix into captioning content that Netflix cannot alter under copyright law. On the other hand, if Netflix chose to place this right on the producers, but had the option to perform the captioning itself, such actions would contradict Netflix's statement that the company would be including closed captioning on its content.¹⁷⁹ Netflix could argue that their motive to include closed captioning was originally based on the hope that video producers would provide more captioning for the content. However, because of the enactment of CVAA regulations, Netflix and other distributors can also argue that Congress intended video program producers to be the entities charged with providing closed captioning.

In the CVAA regulations, the FCC charges the video program owners to provide the distributors with captioning.¹⁸⁰ The FCC further explains that "imposing [the closed captioning] responsibility on [video program owners] is consistent with the statutory directive . . . because it will help to ensure that the mechanism the statute provides for will function efficiently."¹⁸¹ In contrast, if these responsibilities of captioning were left "to be defined entirely by private contractual arrangements [the process] would be more costly and less efficient than that appropriately allocating certain responsibilities among both [video program owners] and [video program distributors] by Commission rule."¹⁸² Consumer groups have also supported placing this burden on the owners and not the

¹⁷⁸ *Netflix*, 869 F. Supp. 2d at 202–03.

¹⁷⁹ *Cullen v. Netflix, Inc.*, No. 5:11-cv-01199-EJD, 2012 U.S. Dist. LEXIS 97884, at *3–4 (N.D. Cal. July 13, 2012).

¹⁸⁰ Closed Captioning of Internet-Protocol Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, 27 FCC Red. at 799.

¹⁸¹ *Id.*

¹⁸² *Id.*

distributors as this allows consumer groups to more easily address concerns regarding captioning.¹⁸³

Additionally, the FCC acknowledges that “as the copyright holders, the [video program owners] typically possess the necessary legal rights to modify the content and insert closed captions.”¹⁸⁴ This acknowledgment further supports Netflix’s argument that placing the burden of captioning on the distributor would be burdensome considering it does not have the rights to caption the material. The FCC also agrees that “placing such obligations on the [video program distributors] would be unduly burdensome, as their systems generally do not enable them to review video content, determine whether captions are required, and then insert captions.”¹⁸⁵ Finally, the FCC also points out that the statute regulating closed captioning for broadcast television “authorizes the Commission to regulate closed captioning of programming by providers and owners of video programming.”¹⁸⁶ The FCC’s intention and reasoning for requiring the providers to caption video content is based on practicality and efficiency.¹⁸⁷ Because owners have the most legal rights and control over the material, it will be easier for them to caption than the distributors who lack such control.¹⁸⁸

However, the FCC does recognize that these regulations can become an undue burden on the owners in certain situations. The FCC provides an exemption in the CVAA for owners who prove that captioning would be “economically burdensome.”¹⁸⁹ Overall, the FCC states that these recommendations would not be problematic “on an industry-wide basis,” further demonstrating that video owners should be the entity to provide captioning.¹⁹⁰

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 800.

¹⁸⁵ *Id.* at 800–01.

¹⁸⁶ *Id.* at 820.

¹⁸⁷ *Id.* at 800–01 (explaining that it would be less of a burden for video producer owners to provide captioning since they possess rights to alter video content).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 825.

¹⁹⁰ *Id.* at 820.

V. CONCLUSION

With the growing prevalence of the Internet, the need for access to online resources is becoming increasingly necessary to ensure that the deaf and hearing-impaired can fully function in society. The CVAA regulations display Congress's intent to provide this accessibility through the closed captioning of television programming that is streamed online. For content not covered under the CVAA the question remains: Who will caption this online content?

Under the interpretation in *Netflix*, the application of the ADA to websites like Netflix means that the video distributors will be held responsible for ensuring equal access for the deaf and hearing-impaired through closed captioning. Although distributors can claim they do not have control of the copyright in order to caption this content, there is a fair use argument for allowing this alteration for the benefit of the deaf and hearing-impaired community. Still, the fair use defense does not appear to be the most efficient method of handling this problem. Instead, distributors like Netflix can make efficiency arguments, supported by the CVAA regulations, to insist the burdening of captioning for material should be placed upon the video program producers.

Overall, Congress has shown its intent to include the deaf and hearing-impaired in society by requiring that aids such as closed captioning are used on video programming. As more video is streamed online, it becomes increasingly necessary for Congress and the courts to find a practical and efficient solution to ensure video producers and distributors provide equal access to the deaf and hearing-impaired, allowing them the same access to the online video programming enjoyed by the hearing community. Only then can the deaf and hearing-impaired become a fully functioning part of society.