



Minnesota
STATE COLLEGES
& UNIVERSITIES

OFFICE OF GENERAL COUNSEL

MEMORANDUM

Date: October 3, 2011

To: Chief Academic and Student Affairs Officers
Disability Officers
Intellectual Property Coordinators

From: Gail M. Olson
General Counsel

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651-201-1753

Subject: *Captioning Videos – Disability and Copyright Issues*

The purpose of this memorandum is to address questions about the options available to institutions and their instructors to ensure that students with disabilities receive legally required access to materials in video format and the impact of federal copyright law on the general obligation to caption such materials.

The Minnesota Human Rights Act makes it an unfair discriminatory practice for an educational institution to discriminate against any person because of disability “or to fail to ensure physical and program access for disabled persons.” Minn. Stat. § 363A.13. Title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act of 1973 also prohibit discrimination against persons with disabilities. 42 U.S.C. §§ 12131; 29 U.S.C. §§ 704. In relation to communication with students, non-discrimination generally includes taking steps to ensure that communications with persons with disabilities are as effective as communications with others, including provision of closed captioning for relevant material.

Applying these principles to the purchase or use of video materials, our institutions will generally have to make sure that video material is captioned for students with hearing impairments.

We have recently received some inquiries about the impact of federal copyright law on the general obligation to caption such materials. Copyright law generally prohibits the creation of “derivative works” unless written permission is obtained from the copyright

owner or another part of the Copyright Act authorizes such conduct. A derivative work is defined as a secondary work that is based primarily on a preexisting work (e.g., the second edition of a textbook). The addition of captioning to a video generally results in a derivative work of the original video. Therefore, institutions must follow the process in this memo to properly address situations requiring the use of captioned video materials for students.

Option 1. Purchase/Create Audiovisual Materials Containing Captioning.

Because it will avoid later issues, including copyright issues, the recommended practice when purchasing or creating new videos is to purchase or develop them with captioning. This practice is consistent with Minnesota Department of Management and Budget (MMB) policy for executive branch agencies that states:

All agencies, department, divisions and units that develop, use or purchase films or videos will buy or develop them with either open or closed captioning effective 12/31/94. The exception to this policy is: (1) the material will not be used for on-going training; (2) the material will be shown to a specific known audience which does not require open captioning for equal access to the material. Any films/videos which were purchased before 12/31/94 that are not captioned may continue to be used, but will be captioned upon request or as a requested reasonable accommodation.

(The link to the MMB policy is <http://www.mmb.state.mn.us/aid-services>.) This practice is also consistent with the Minnesota Office of Enterprise Technology's Accessibility Standard adopted on April 29, 2011, in response to legislation governing executive branch state agencies adopted in 2009. See Minn. Stat. § 16E.03, Subd. 9 (requiring development of accessibility standards for executive branch state agencies).¹

Option 2. Obtain Consent to Caption From the Copyright Holder.

If a captioned version of the material is unavailable, written permission from the copyright holder must be sought in order to caption. Attached to this memo is a sample written consent form. System Director for Intellectual Property Gary Hunter, at gary.hunter@so.mnscu.edu, is also available for assistance in obtaining consent. Please note that it can often take a considerable amount of time for the copyright holder to respond to a request and that the copyright holder is under no obligation to respond or to grant consent.

¹ Section 508 of the Rehabilitation Act requires that electronic and information technology developed, purchased or used by federal agencies must be accessible for use by persons with disabilities. 29 U.S.C. § 794d; 36 C.F.R. § 1194.24. This section may be applied to states or state institutions as a condition of certain federal grants such as the Technology and Telecommunications Infrastructure Program. 29 U.S.C. § 3003.

Option 3. Look For Alternative Materials.

If the copyright holder does not consent to caption or cannot be located, then the institution or its instructor may want to consider whether there are other captioned copies of the same material available through inter-library loan or a similar program.

The institution could also encourage its instructors to consider whether there are equivalent materials available in a captioned format. If it is determined that the best course of action is to substitute the equivalent materials, then those new materials should be used by all the students in the course.

Option 4. Determine Whether Fair Use Supports Captioning.

If all the above options have been unsuccessful, then the institution may determine whether captioning is permissible without written permission of the copyright holder under the fair use doctrine. Institutions should consult with system legal counsel regarding this determination. Please note that if the copyright holder has a captioned version of the material available through a subscription or for purchase, then that fact will make it much less likely that a fair use argument would be appropriate.

Application of These Principles to Already Owned or Created Works.

For previously purchased or created materials, institutions or their instructors will have to proceed through the same steps outlined above when receiving a request for accommodation—that is, determining whether there is a captioned option available, obtaining consent to caption if a commercial version is unavailable, etc.

Using YouTube Videos and Closed Captioning.

YouTube has implemented software that is able to add captioning to videos posted on their website. See the YouTube web page that instructs people on how to turn on captioning at http://www.youtube.com/t/captions_about. It is necessary to select captioning when uploading. See http://www.youtube.com/watch?v=meCIER_s7Ng. Videos that were uploaded prior to the captioned software being developed in 2010 usually do not contain captioning.

We recommend that institutions select YouTube videos with captioning. Instructors can locate captioning enhanced YouTube videos by adding the words "closed caption" in their search query. The YouTube terms and conditions of use only permit the viewing of the videos. Therefore, linking to the videos is recommended to comply with copyright law.

Please contact Assistant General Counsel Scott Goings at 651-201-1753 if you have questions about these issues. You may also contact System Director of Intellectual Property Gary Hunter for assistance in obtaining written consent for captioning.

Other resources you may wish to consult include:

Board Policy 1B.4 Access and Accommodation for Individuals with Disabilities available at <http://www.mnscu.edu/board/policy/1b04.html>; and

"Making Educational Software Accessible" the e-learning industry's first set of accessibility standards for people with disabilities.

c: Gary Hunter, System Director of Intellectual Property
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