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To: Chief Instructional Officers
Chief Student Services Officers
DSPS Coordinators
Librarians
High Tech Center Directors
Community College Attorneys

From: Ralph Black
General Counsel

Subject: Closed captioning of audiovisual materials in video format
Legal Opinion M 02-22

The purpose of this advisory is to answer questions which have been raised by college officials about the options available to colleges to ensure that students with disabilities are provided equal, effective and legally-required access to audiovisual materials in video format.

Background
Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12131 et seq.), and sections 504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 794, as amended in 1998), prohibit discrimination against persons with disabilities. Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d, as amended in 1998) and the implementing regulations (36 C.F.R. §§ 1194.1 et seq.) issued by the federal Architectural and Transportation Barriers Compliance Board (Access Board) require that electronic and information technology developed, purchased or used by federal agencies must be accessible for use by persons with disabilities. Video or multimedia products are covered by section 1194.24 of those regulations. (36 C.F.R. § 1194.24.)

The section 508 regulations are applicable to the states, and thus to the Chancellor's Office and its contractors and grantees, by virtue of the Assistive Technology Act of 1998. (29 U.S.C. § 3002.) All Chancellor's Office contracts and grants commencing after the new regulations became effective on June 21, 2001, contain a provision requiring the contractor or grantee to comply with the section 508 regulations. In addition, each district is asked to annually certify that it complies with section 508 as a condition of receiving funds under the Technology and Telecommunications Infrastructure Program (TTIP). Thus, community colleges are currently required to ensure that information technology, or services or products purchased, leased, or developed with TTIP funds or other funds received by grant or contract from the Chancellor's Office (or any other state or federal agency), meet the section 508 standards. (Please see

Chancellor's Office Legal Opinion No. M 01-17 for a full discussion of the section 508 requirements. That opinion is available in the Legal Affairs portion of the Chancellor's Office web site, on the Opinions page, at the following URL:

http://www.cccco.edu/divisions/legal/Opinions/opinions.htm.

From 1996 to 1998 the U.S. Department of Education, Office for Civil Rights (OCR) conducted a compliance review of the California Community Colleges to assess the extent to which colleges were prepared to provide access to print and electronic information to students with disabilities. In its January 22, 1998, letter to Chancellor Nussbaum, the OCR discussed the community colleges' "legal obligation to provide communication as effective as that provided to nondisabled students. . . ." The OCR is responsible for ensuring that all educational institutions comply with the requirements of all federal civil rights laws, including section 504 and Title II of the ADA. As a result, the opinions of OCR are generally accorded considerable weight by the courts in interpreting the requirements of these laws. The OCR has interpreted the term "communication" in this context to include the transfer of information, including (but not limited to) the verbal presentation of a lecturer, the printed text of a book, and the resources on the Internet, as well as access to information, which would include multimedia resources. The OCR has determined that, in order for a communication with a disabled student to be "as effective as" that provided to nondisabled students, three basic components must be considered: "timeliness of delivery, accuracy of the translation, and provision in a manner and medium appropriate to the significance of the message and the abilities" of the disabled student. (OCR Docket Nos. 09-95-2206 (January 25, 1996), 09-97-2002 (April 7, 1997) and 09-97-2145 (January 9, 1998).) The OCR has made it clear that providing alternate media for students with disabilities that does not provide equal access will not meet the requirements of the statutes or regulations, as "[t]he issue is not whether the student with the disability is merely provided access, but the issue is rather the extent to which the communication is actually as effective as that provided to others." (OCR Docket No. 09-95-2206, January 25, 1996)

In view of these decisions, we observed in Legal Opinion M 01-17 that OCR's interpretation of the ADA "imposes essentially the same requirements on colleges" as does section 508. We went on to explain that

> "As a result, if a college does not purchase available equipment or software which provides accessibility, OCR and the Chancellor's Office will not accept an argument based on undue financial hardship if a discrimination complaint is subsequently filed. This will typically mean that the college will be found in violation of the ADA and required to replace or modify the product, often at much higher cost."

Applying these principles to the purchase or use of video materials, it is clear that the ADA and section 508 will generally require that colleges ensure that video material is captioned for students with hearing impairments.[1] In recent months, a number of questions have arisen

[1] Although this advisory is focused on issues related to captioning, the same legal principles would apply to audio description of video material for use by blind or visually impaired students. Audio description involves adding a special narrative sound track in which a narrator describes visual elements of the production which would not

concerning how to comply with the legal obligation to caption instructional materials within the constraints imposed by federal copyright law. Unfortunately, there are no bright-line, definitive answers to these questions, as the law in this area is complex, and requires looking at the particular facts of each situation on a case-by-case-basis.

Section 121 of the U.S. Copyright Act (17 U.S.C. §§ 101, et seq.) permits an "authorized entity" (a nonprofit or governmental agency with a "primary mission to provide specialized services related to training, education or adaptive reading or information access needs of blind or other persons with disabilities") to reproduce copies or "phonorecords" from original works in "specialized formats" (such as braille, audio, or digital text) that are exclusively for use by the blind or other persons with disabilities without prior authorization from the original copyright owner. Section 121 does not include all nonprofits or governmental agencies in its definition of an "authorized entity"; it only includes those with a "primary mission" of providing specialized services to the blind or disabled. Nor does section 121 include captioning in its definition of "specialized formats"; and the definition of "phonorecords" in section 101 specifically excludes "audiovisual works" such as motion pictures or video. Therefore, as the section 121 exemptions do not clearly apply to community colleges or to closed-captioning, such activities would require the permission of the copyright holder unless, in a particular case, they fit within the "fair use" provisions of the copyright law. (17 U.S.C. § 107.)

The following general guidelines are intended to provide some direction and clarity for colleges wishing to purchase new instructional videos or to caption existing libraries of educational videos. However, a college should not rely **solely** upon these guidelines, and should seek the advice of its local district counsel in order to obtain legal advice and analysis specific to the facts of its individual situation and circumstances, and to avoid liability for copyright infringement. **The state Chancellor's Office is not responsible or legally liable for a college's implementation of unlawful procedures or failure to obtain appropriate authorization from a copyright holder prior to video captioning and/or dissemination of accessible materials.**

Option 1
<u>Purchase Audiovisual Materials Containing Captioning</u>
Each college should have a listing of videotape material. Typically, this information is stored in a central repository, most likely in the library and learning resource center. The production date of the material is a good place to start in determining whether or not captioning is already included in the format of the media. However, in many cases, publishers and manufacturers of videotaped material most likely had various formats available for purchase at the time of the college's order. One format offered may have been closed-captioned. Depending on the need at the time of purchase, it is possible that most colleges elected not to purchase the closed-captioned version. Each college will now need to review the format of these videos and determine whether the material is accessible.

The best possible option when purchasing new instructional video or contemplating the captioning of existing video is to contact the publisher and determine whether the desired video

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normally be apparent to a visually impaired individual. Of course, some videos may not require audio description, either because the visual elements are not important to an understanding of the material or because they are adequately conveyed by the existing sound track. This determination will need to be made on a case-by-case basis.

titles are available in a closed-captioned format. Even if your college already owns the titles in question, it may be more economical to repurchase those titles in a closed-captioned format than to caption the titles in-house or contract with a third-party provider for captioning services.

Option 2
Obtain Permission to Caption Audiovisual Materials
If a closed-captioned version of the needed video is unavailable from the publisher, the next best option is to request permission from the copyright owner to caption the video. It is important that you obtain written permission to caption the video. You should not interpret a lack of response from the copyright holder as permission to caption.

Copyright is a form of protection provided to the owner of the copyright in the original work by the laws of the copyright owner's resident country and through international treaties. The copyright owner may be the author of the work or a person or entity who derives their right in the work through the author (such as a publisher). The copyright owner has the exclusive right to reproduce or permit someone else to reproduce copyrighted works. Copyrighted work categories include: pictures, graphics and sculptures; architectural works; music and lyrics; literary works; dramatic works, including accompanying music; pantomimes and choreographic works; audiovisual works (including videotapes); and sound recordings. Purchasing, owning or possessing a licensed copy of the foregoing items does not give the possessor the right to copy or modify them. Copyright permission must be obtained prior to the modification of the audiovisual work (including videotapes). An additional authorization should be obtained if the material is going to be distributed.

The copyright owner should sign a statement, agreement, authorization or other instrument drafted or at least approved by the legal counsel for the district. We recommend that the agreement should include the following components:

- The copyright owner's permission for the described item or items to be modified in a described manner (i.e. captioning);
- A statement of the purpose of the modification, such as ensuring access for individuals with disabilities within the educational institution;
- A statement of where the material will be used (on or off campus);
- A statement of the extent to which the material will be used (i.e. if it will be used for noncredit, community services courses, for example);
- Who will have access to its use (i.e. could it possibly be used in contract education by instructors who are not community college employees?);
- The number of copies authorized;
- Instructions (if applicable) on specific usage and dissemination;
- The specific dates of the term of the authorization, including the effective date and the expiration date;
- Other specific information, such as the copyright owner's name, address, telephone number, signature, and date; and
- A place for a responsible person at the district to sign off on the agreement (this will probably be requested by the copyright owner).

Once permission has been obtained, a statement informing the users that permission has been obtained from the copyright owner to modify and disseminate the material should be clearly placed on the material. If there are limitations on its use and dissemination, a statement as to these limitations should either be clearly placed on the materials, or it should be indicated from whom permission must be obtained in order to use or disseminate the materials. It is recommended that legal counsel for the district be consulted as to the appropriate language to be used in such a statement.

The Alternate Media Exchange database hosted on the HTCTU website can be used to identify colleges and third-party captioning providers that have the material in captioned format. Colleges can request the time-coded transcripts from other colleges to expedite the on-site captioning process; or colleges may purchase captioned versions from third-party captioning providers at a significantly reduced rate.

Occasionally, copyright holders who do not currently provide closed-captioned versions of their video have asked colleges to provide them with a "caption master" of the video in exchange for permission to caption. Providing the copyright holder with a caption master is an appropriate use of public funds since colleges are receiving value (permission to caption) for their dollars. However, the district should enter into a contract with the copyright holder outlining the terms of the agreement in order to have a binding legal agreement for its protection and to show that providing the "caption master" did not constitute a gift of public funds.

Option 3
Request to Borrow Captioned Audiovisual Materials Through Inter-library Loan Program or Free Loan of Captioned Material

Exchange of a captioned audiovisual work may be accomplished through an established "loan" program. Most library and learning resource centers cooperate with other public library systems, and have entered into inter-library loan program agreements. Consultation with the college librarian would be useful to identify the procedures and process already in existence on your campus.

There are two conditions that must be satisfied before using this approach:

- First, if the materials the college is seeking to borrow are accessible versions of materials that have been purchased, leased or developed since June 21, 2001, with TTIP funds or other funds received by grant or contract from the Chancellor's Office (or any other state or federal agency), borrowing an accessible version will not be sufficient for compliance with section 508 with regard to those materials. As stated above, for all materials purchased after June 21, 2001, with the aforementioned funds, the college should have purchased an accessible version whenever available in order to comply with section 508 requirements.
- Second, with regard to older materials purchased, leased or developed prior to June 21, 2001, or materials purchased with funds not covered by section 508, this approach would be lawful, but only if a college has a mechanism in place to insure that borrowing could be accomplished reliably, in a timely manner, so that a student with a disability would have equal access to the materials (i.e. that the materials would be accessible to disabled

students during the same timeframe in which they are accessible to students that are not disabled).

Check online database collections to identify captioned audiovisual material. Some resources include:

- U.S. Department of Education, National Association of the Deaf, Captioned Media Program at http://www.cfv.org/;
- High Tech Center Training Unit (HTCTU) Alternate Media Exchange at http://exchange.htctu.fhda.edu:591/intro.html;
- Cabrillo College Closed Captioned Video Collection at http://libwww.cabrillo.cc.ca.us/html/about/closed-caption.html;

Option 4
Provide an Alternate Selection of Instructional Material
More rarely, the copyright holder may be unavailable, unknown, or unwilling to provide permission to caption. Under these circumstances, colleges may wish to select an alternate video for use by all students.

It would not normally be permissible to continue using an inaccessible video for nondisabled students and to have deaf students watch a different video which is available in captioned format. This is because, if the alternative video is truly equivalent from an educational standpoint, then it would be appropriate for use by nondisabled students and it will generally be best for all students to have the same experience so they can share and learn from each other.

The person(s) at the college responsible for making such a decision should meet with both faculty and the librarian to coordinate the selection (or substitution) of instructional (or resource) materials.

Option 5
Caption Audiovisual Material Without Permission
If all other options have been exhausted, a college may be faced with the question of whether to proceed with captioning the video without written permission from the copyright holder. In this situation, you should discuss with legal counsel for your district whether the doctrine of "fair use" might apply. The fair use provisions of the U.S. Copyright Act are contained in 17 United States Code, at section 107. Whether or not the captioning of a video is protected under the doctrine of fair use must be considered on a case-by-case basis. The courts have issued a number of complicated and often confusing decisions on how the fair use provisions apply to specific factual situations. A discussion of the fair use doctrine is beyond the scope of this advisory.

Regarding materials that are in DVD or any other digital format, it is important to note that pursuant to section 1201 of the Digital Millennium Copyright Act (17 U.S.C. § 1201), it is a criminal offense to circumvent copyright protection technology for any use, including otherwise-legal fair use. Efforts are currently being made to address this issue in federal legislation. (H.R. 2100 (Boucher) and S. 487 (Hatch).)

Litigation
Should litigation occur, a copyright owner may file suit for an injunction to prevent college staff from infringing his or her copyright. States have claimed sovereign immunity under the 11th Amendment to the United States Constitution as a defense against liability in copyright infringement cases. The 9th U.S. Circuit Court of Appeals has held that California community colleges can also claim sovereign immunity under the 11th Amendment, although it is important to note that these were not copyright cases. (*Cerrato v. San Francisco Community College District* (9th Cir. 1994) 26 F.3d 968; see also *Mitchell v. Los Angeles Community College District* (9th Cir. 1988) 861 F.2d 198, cert. den. 490 U.S. 1081 (May 22, 1989).) Therefore, it is likely that states (and thus the California community colleges) are currently immune from liability for copyright infringement depending, of course, upon the facts of a particular case (see, for example, *Genentech, Inc. v. Regents of the University of California* (Fed. Cir. 1998) 143 F.3d 1446 [state waived immunity in declaratory injunction action threatening to sue Genentech for patent infringement]). It is also important to note that at the federal level, Congress is presently considering legislation that would remove the protection of 11th Amendment immunity and allow copyright owners to sue states (and thus California community colleges) for copyright infringement. (S. 2031 (Leahy), S.1611 (Leahy), and H.R. 3204 (Coble).)

Summary
Whenever possible, colleges should obtain a captioned version of the desired video from the publisher or copyright holder. If this option is not available, a college may choose to obtain written permission to caption the video from the publisher or copyright owner through a written agreement. With regard to materials purchased, leased or developed by the college before June 21, 2001, or those materials not covered by section 508, another option may be to exchange or borrow a closed-captioned audiovisual work through an established "loan" program, if exercising this option will not negatively impact access. It might also be beneficial to make an inquiry to the publisher or copyright owner concerning the availability of a transcript in e-text format, or request permission to share a locally produced transcript with other California community colleges. It is permissible to exchange a "caption master" of the desired video with the copyright owner in exchange for permission to caption, so long as a proper legal contract is executed.

We strongly encourage a college to consult with its legal counsel in making any of the foregoing decisions and drafting any of the required legal documents, and **especially** before commencing to caption video without the publisher or copyright holder's permission.

A good resource for basic copyright information is the U.S. Copyright Office's website, at http://lcweb.loc.gov/copyright/

Contacts
General questions regarding the laws cited above may be directed to General Counsel, Ralph Black, at (916) 445-4826.
Questions regarding the role of DSPS in captioning should be directed to Peggy Tate, DSPS Specialist, at (916) 322-3234.
Questions related to library involvement in captioning should be directed to Carolyn Norman, Library and Learning Resource Programs Specialist, at (916) 322-6290.

Technical questions regarding captioning processes, equipment and services may be directed to HTCTU Director, Carl Brown, at (408) 996-4636.

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