

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Closed Captioning of Internet Protocol-Delivered Video Programming:)	
Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010)	MB Docket No. 11-154
)	
)	
Closed Captioning of Internet Protocol-Delivered Video Clips)	

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (NCTA)¹ hereby submits its comments in response to the *Second Further Notice* in the above-referenced proceeding.²

INTRODUCTION AND SUMMARY

The online clips captioning rules should be allowed to take effect before considering expanding an already complicated regulatory regime or accelerating timeframes for captioning live or near-live video clips. In recently adopted rules, the Commission extended its online captioning requirements to certain clips of full length programming previously shown on television with captions. January 2016 will usher in new rules requiring the captioning of “straight lift” clips on programmers’ websites or apps, followed the next year by captioning of

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$210 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 27 million customers.

² *In re Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010; Closed Captioning of Internet Protocol-Delivered Video Clips*, Second Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 8687 (2014) (“*Clips Order*” or “*Second Further Notice*”).

“montage” clips on such sites and, in July 2017, “straight-lift” and “montage” clips of live or near live programming on such sites. This gradual roll out is a reflection of the unique technical and operational challenges that must be overcome before wide scale online captioned clips of the television programs aired with captions can become a reality.

The *Second Further Notice* explores whether additional rules are warranted. Specifically, it asks whether (1) to extend online captioning requirements beyond video programmers’ own websites and apps to encompass all or some of the myriad third party websites on which short-form video may be shown; (2) to apply caption requirements to “advance” video clips; (3) to cover certain content in “mash-ups”; and (4) to shorten the just-adopted grace period for captioning live and near-live online clips.

As explained below, while industry shares the goal of increasing the amount of captioned online video clips, imposing more captioning rules would be premature and unwarranted. The newly-adopted rules will ensure the availability of many more captioned online video clips, both on programmers’ own sites and through links to those sites from other places on the web. Industry continues to explore technological developments that will lead to even wider availability of captioned video clips, both on their own sites and elsewhere. In the meantime, the Commission should refrain from adopting additional requirements. Further rules at this point in time could lead to the unwanted effect of reducing or significantly delaying the availability of online video clips.

I. THE COMMISSION SHOULD REFRAIN FROM ADOPTING ADDITIONAL REGULATION OF THE CAPTIONING OF ONLINE CLIPS.

A. The Commission Should Not Extend Captioning Obligations to Video Clips on Third Party Websites.

The recently-adopted online video clips captioning rules apply “if the video programming provider or distributor (as those terms are defined in the IP closed captioning rules) posts on its

website or app a video clip of video programming that it published or exhibited on television in the United States with captions on or after the applicable compliance deadline.”³ The rules thus apply where a video programmer that has control over the television exhibition of a program with captions creates a video clip of that program and posts it on its own website or app. There are good reasons for confining the reach of the online captioning rules in this manner, and for excluding from the rules’ ambit “third party” distribution of IP clips of programs that appeared on television with captions.

Unlike long-form television programming, typically available online through a defined number of distribution outlets, IP-delivered video clips can be found all over the web. They can be seen on sites ranging from the originating programmer’s website to individual users’ Facebook postings, and myriad different places in between.

Clips make their way to third party websites in several ways. In some cases, a programmer has a direct licensing agreement with the third party site provider that authorizes the posting of the clips on that website. In other cases, a programmer has a relationship with a middle man or “consolidator,” who serves the clips to these third party sites with which the programmer has no direct relationship. In yet other cases, a programmer has no direct or indirect relationship with the site or online service where the clip is posted. This latter category includes pirated and unauthorized clips and sites where individuals post links or “tunnel through” to the programmer site to capture clips. Given this complicated ecosystem, it would be unreasonable to adopt rules that hold the video programming owner (“VPO”) responsible for sending caption files to these myriad entities.

³ *Clips Order* ¶ 22.

The *Second Further Notice* asks whether the presence of a licensing agreement between VPOs and third party video programming providers and distributors could serve as an appropriate dividing line for regulation,⁴ and whether in such circumstances it could require a programmer to send a caption file to the third party website to enable the rendering or pass through of all required captions to the end user, along the lines of the rules for full-length online captioned television programming.⁵ Even where a licensing agreement exists for full-length programming, the captioning ecosystem is currently very different for full-length online programming previously aired with captions and online video clips.

In particular, the practices for licensing full-length programming and clips to third party sites differ in scale, timing, and technology. *First*, many more video clips are provided to more third party distributors than is the case for full-length online programming. This broader range of distribution outlets coupled with a significantly increased amount of video product increases exponentially the difficulty in ensuring that any particular video clip can be distributed in a timely fashion to a licensee with quality captions. This is particularly true given that caption files for online video clips can be formatted in multiple different ways. *Second*, online video clips are meant to be posted quickly and easily, and are sent to third party sites ready to distribute to viewers. An expanded captioning obligation could necessitate significant changes to work flows at both ends of the process, increasing the time to posting to account for ingest and encoding, and delaying the time between the clips being received and posted online. *Third*, unlike full-length programming that already is captioned, many clips are taken from video not yet aired on television with captions. This introduces another significant layer of complexity. Providing captions for these “advance” clips would cause significant problems, as described

⁴ *Second Further Notice* ¶ 38.

⁵ *Id.* ¶ 39.

infra. In other cases, clips might not yet have associated caption files to send to a third party – and once clips have been distributed to third parties, matching up captioning files with previously posted clips would be a burdensome and significant undertaking for programmers and website operators alike.⁶ *Finally*, while third party websites may have the capability to render captions through their media players, we understand that social media outlets for video clips may lack an infrastructure for displaying captioning. For all these reasons, the existence of a contractual relationship between the VPO and third party video programming providers and distributors does not mean that requiring captioning of clips online would necessarily be achievable at this time.

Moreover, even if the Commission were able to devise an appropriately narrow regulation that took all these challenging issues into account, rules for third party sites would create consumer confusion and enforcement in this area would lead to significant administrative and compliance burdens. A consumer would have no way of knowing whether any particular clip should have been available with captions on a third party site,⁷ nor would the Commission be capable of determining the validity of any complaint without input from the programmer and website operator. As such, it is likely that an enforcement regime for third party sites would ensnare programmers and third party websites in complex complaint proceedings that would unnecessarily consume valuable company – and Commission – resources.

Importantly, avenues for viewing clips with captions online will increase even in the absence of any further Commission action. By requiring programmers' own sites to contain

⁶ The *Second Further Notice* touches on some of these complexities, asking how any “mechanism” could develop to inform third parties that a video clip in their library was subsequently shown on television with captions and, conversely, how a program owner would know that a video clip has been posted online and by whom. *See id.*

⁷ By contrast, when a programmer posts clips to its own website or app, consumers on that site would likely understand that such clips are authorized by the programmer.

captioned clips, the websites and apps most closely associated with clips' content will be making the content available in a way that is clear for consumers to find and recognize the content. And because clips on the programmers' sites are often linked to by other sites, the rules already ensure that a large number of third party websites that link to a programmer's website will display captioned clips. In addition, in some cases third party sites use the programmer's media player, which will allow the captions associated with clips posted on that programmer's site to be viewed via the third party site. In other cases, programmers voluntarily will send caption files to third parties with whom they have relationships without any rule requiring such action, and those sites' players will be capable of passing through or rendering captions to consumers. And, as programmers gain experience with posting captioned clips on their websites, third party sites will have a better understanding of what changes will be necessary for their own sites to accommodate captioned clips.

For all these reasons, the Commission should monitor developments and should evaluate whether additional steps are necessary or appropriate after the initial rules have been in effect.

B. The Commission Should Not Apply Captioning Requirements to Advance Clips.

The *Second Further Notice* seeks comment on issues related to "advance" clips, defined by the Commission as:

video clips that are added to the video programming distributor's or provider's library on or after January 1, 2016 for straight lift clips and January 1, 2017 for montages, when the associated video programming (including the advance video clips) is later shown on television with captions on or after the compliance deadline and the advance video clips remain online.⁸

We previously explained to the Commission that advance clips are not covered by the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA") because "clips

⁸ *Id.* ¶ 47.

created and posted online before being televised” are “not excerpted from full-length TV programs aired with captions.”⁹ Such content cannot meet the Commission’s definition of “video clips,” *i.e.*, “[e]xcerpts of full-length video programming,” because it is not an excerpt of something that has aired.¹⁰

The legal status of such clips does not change once the associated video programming is shown on television with captions. The CVAA directed the Commission to “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.”¹¹ Because advance clips are published online *before* programming is published or exhibited on television with captions, such clips are not covered.

If the Commission were to determine that the CVAA encompasses advance clips, it should categorically exempt them pursuant to § 202 because applying the regulations would be economically burdensome. As a primary matter, a sizeable number of advance clips are used for promotional purposes. Often, due to time constraints, advance clips must be published using content from a program that is not yet finalized, and thus, is not yet captioned. However, many advance clips, like promos on television, contain visual tune-in information that conveys the essential information to online viewers.¹² Many advance clips are of short duration, are not monetized with advertising, and have a short shelf-life. Moreover, in an extremely diverse,

⁹ Letter from Diane B. Burstein, Vice President and Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, filed in MB Dkt. No. 11-154 at 2 (Apr. 25, 2014).

¹⁰ 47 C.F.R. § 79.4(a)(12). In turn, “full-length programming” is defined as video programming “that appears on television and is distributed to end users, substantially in its entirety, via Internet protocol, excluding video clips or outtakes.” § 79.4(a)(2).

¹¹ The Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 202(b), 124 Stat. 2751, 2770 (2010) (codified at 47 U.S.C. § 613(c)(2)(A)) (“CVAA”) (emphasis added).

¹² *See* Letter from Diane B. Burstein, Vice President and Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, filed in MB Dkt. No. 11-154 at 1-2 (June 18, 2014) (“*NCTA June 18 Ex Parte Letter*”).

dynamic, and competitive programming environment, applying regulatory requirements to online marketing and promotional efforts would seriously interfere with the most cost-effective method of reaching potential viewers.¹³

As we noted earlier in this proceeding, the Commission previously exempted promotional announcements from the television captioning obligations for similar reasons.¹⁴ And, as we also previously explained, advance clips typically would need to be captioned anew.¹⁵ It makes no sense to require programmers to caption the same promotional material, from scratch, just because it remains online after the associated full program has aired on television with captions.¹⁶ Rather, the Commission should follow¹⁶ the approach taken in the television captioning context and exempt advance clips from any captioning requirement.

In addition, any regulatory requirement to track and replace advance clips would “present an inordinate administrative burden” and “act as a deterrent to providing these types of clips online at all.”¹⁷ Advance clips are widely distributed online to third party sites, including those with which the programmer has no formal contractual relationship. As we have explained, although it might be theoretically possible to figure out a way to track and replace advance clips

¹³ New programs would be disproportionately burdened if they were to lose an inexpensive means to educate potential viewers about, and drive interest in, their full-length programming.

¹⁴ See NCTA Comments at 6, n.21 (explaining that the Commission found that “the benefits of captioning interstitial materials and promotional announcements are outweighed by the burdens of captioning such programming . . . the large number of such programs, the brief period from their creation to airing, and their short shelf life make captioning these programs expensive and logistically difficult”) (citing *In re Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report & Order, 13 FCC Rcd 3272 ¶ 151 (1997)). Unless otherwise indicated, all comments and reply comments cited herein were filed in MB Dkt. No. 11-154 on February 3, 2014, and March 5, 2014, respectively.

¹⁵ See *NCTA June 18 Ex Parte Letter* at 1; see also Letter from Diane B. Burstein, Vice President and Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, filed in MB Dkt. No. 11-154 at 2-3 (June 3, 2014) (“*NCTA June 3 Ex Parte Letter*”).

¹⁶ *NCTA June 18 Ex Parte Letter* at 2, n.3.

¹⁷ *NCTA June 3 Ex Parte Letter* at 4; see also *NCTA June 18 Ex Parte Letter* at 1 (noting that advance clips “often must be captioned from scratch” and “resources that would be required to track and delete (or replace) such clips could well outweigh the benefits, leading to fewer clips being posted online”).

when associated material is shown on television with captions, we currently know of no way to do so.

Finally, other serious ramifications could result from a requirement to caption advance clips. Any requirement to pull down existing material and replace it with a captioned version risks “breaking the link” and erasing all of the metadata, measurement and analytics for the originally posted clip. In addition, anyone who posted, embedded, pointed to, or otherwise interacted with that advance clip could end up with a dead link (or possibly an error message). Alternatively, a replaced advance clip could appear to users to be “new,” creating confusion about why a user is seeing the same clip again, and creating a potentially bad consumer experience. These risks are particularly pronounced if advance clips posted by third parties are pulled into the fray. Even if the owner of an advance clip has a relationship with a third party who distributes an advance clip, it would be an exceedingly complicated undertaking for programmers to identify and replace advance clips with captioned versions after the associated program is displayed on television with captions.

In sum, we believe that there are many important reasons for the Commission to refrain from regulating advance clips. Instead, it “should leave to the reasonable judgment of the programmers whether the ‘advance clip’ retains value such that replacing it with a captioned version makes sense after the program airs on television with captions.”¹⁸

C. Mash-Ups Are Outside of the Scope of the CVAA.

The *Second Further Notice* seeks comment on the application of the IP closed captioning rules to “mash-ups,” defined as “files that contain a combination of one or more video clips that have been shown on television with captions, and other content (such as online-only content) that

¹⁸ NCTA June 3 Ex Parte Letter at 4.

has not been shown on television with captions.”¹⁹ In particular, the Commission seeks comment on “issues associated with the captioning of the portion of the clip that was shown on television with captions.”²⁰

As a legal matter, mash-ups should be deemed to be outside the scope of the CVAA.²¹ As suggested in the *Second Further Notice*, because mash-ups are a single file consisting of integrated content, such files are a “new work” that does not constitute “video programming . . . that was published or exhibited on television with captions” subject to the statutory obligations.²² Congress did not intend to require captions for “new works” like mash-ups that are created *expressly* for use online. The legislative history explains that although “[t]he Committee notes that an increasing amount of video programming is being delivered using Internet protocol only on the Internet and without captioning . . . the Committee declined to apply the captioning requirement to such programming.”²³

There are also strong policy reasons for the Commission to conclude that mash-ups should not be subject to captioning requirements. Including captions on only the parts of the mash-up that were shown on television would be disruptive and confusing to consumers. Such confusion could result in the Commission and regulated entities being burdened with the processing of complaints about captions appearing in some sections of a piece but not in other sections – yet in each case the piece would be fully compliant with the rules. Moreover, as we have explained, “ensuring that ‘mash-ups’ containing original content are captioned online

¹⁹ *Second Further Notice* ¶ 44.

²⁰ *Id.*

²¹ *See id.* ¶ 45.

²² We note that, consistent with the Commission’s approach in the *Clips Order*, simply adding “a brief introduction or advertisement to an otherwise covered video clip” would not render a mash-up free of CVAA obligations. *See Clips Order* ¶ 20, n.86.

²³ H.R. Rep. No. 111-563 at 30 (2010) (discussing “web-only” and “Internet-only” programming).

would require VPOs to recaption content from scratch – a costly and time-consuming process” that “would require expenditure of significant resources and could result in programmers posting less video content online.”²⁴ Thus, if the Commission interprets the CVAA to apply to portions of mash-ups that were previously shown on television with captions, it should exercise its authority to categorically exempt such material as “economically burdensome.”²⁵

II. RECONSIDERING THE NEWLY-ADOPTED GRACE PERIOD WOULD BE PREMATURE.

The Commission very recently adopted a compliance deadline of July 1, 2017 and a grace period applicable to IP-delivered clips of live or near-live programming.²⁶ In particular, the grace period works as follows: “video clips of live and near-live programming may be posted online without captions initially, with captions added within 12 hours (for live) or eight hours (for near-live) of the video programming being shown on television.”²⁷ In adopting this approach, the Commission explained that it “appropriately balance[d] industry’s concern with captioning time-sensitive IP-delivered video clips, with the fact that it is just as important for individuals who are deaf or hard of hearing to have access to these clips as it is for other members of the general public.”²⁸ Even as it adopted this approach, the *Second Further Notice* portion of the item sought comment on whether “in the future [it] should decrease or eliminate this grace period for providing captions.”²⁹

²⁴ *NCTA June 3 Ex Parte Letter* at 3.

²⁵ CVAA § 202(b) (codified at 47 U.S.C. § 613(c)(2)(D)(ii) (providing that the regulations “may exempt any service, class of service, program, class of program, equipment or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment”).

²⁶ *See Clips Order* ¶ 30.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Second Further Notice* ¶ 42.

We have explained that although industry players are dedicating significant resources to improving the process for providing captions with online clips, satisfactory automated solutions simply do not yet exist.³⁰ It would be speculation to guess when these technologies will be available. As Commissioner O’Reilly pointed out, “[t]his item repeatedly acknowledges that captioning Internet clips is not easy and no one can estimate with any certainty when better technology will be readily available.”³¹

We anticipate that “at some time in the future, it will be appropriate to decrease or eliminate this grace period because we expect that technology will automate the process such that a grace period is no longer needed.”³² We are not there yet. We agree with Commissioner Pai, who recommended that the Commission “let newly adopted rules take effect and then assess their real-world impact before we decide whether to change them.”³³ The existing time frames are already challenging for many programmers, and at this juncture nothing has changed to make an accelerated timeframe more reasonable or achievable.

³⁰ NCTA Reply Comments at 6 (“[I]t remains the case that ‘no automated software currently exists that can encode high quality captions for online video clips.’”) (citing NAB Comments at 5); NCTA Comments at 2 (“[T]he industry continues to explore technological developments that hopefully will make providing captions with online clips as possible as the repurposing of captioned full length television programming over the Internet”).

³¹ *Clips Order*, O’Reilly Statement at 1-2.

³² *Second Further Notice* ¶ 43.

³³ *Clips Order*, Pai Statement at 2.

CONCLUSION

The newly-adopted rules governing clips will ensure the availability of an increased amount of captioned video clips online. As explained herein, expanding those rules at this time would be premature and unwarranted. Industry continues to explore technological developments that will lead to even wider availability of captioned video clips. For now, however, the Commission should refrain from adopting additional requirements.

Respectfully submitted,

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