

Before the
Federal Communications Commission
Washington, DC

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

Comments of

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)
National Association of the Deaf (NAD)
Hearing Loss Association of America (HLAA)
Association of Late-Deafened Adults (ALDA)
Cerebral Palsy and Deaf Organization (CPADO)
Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)
California Coalition of Agencies Serving the
Deaf and Hard of Hearing (CCASDHH)
American Association of the Deaf-Blind (AADB)
Speech Communication Assistance by Telephone (SCT)
Technology Access Program at Gallaudet University (TAP)

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Blake E. Reid
Counsel to TDI
blake.reid@colorado.edu
303.492.0548

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)

Contact: Claude Stout, Executive Director • cstout@TDIforAccess.org
8630 Fenton Street, Suite 121, Silver Spring, MD 20910
www.TDIforAccess.org

National Association of the Deaf (NAD)

Howard Rosenblum, Chief Executive Officer • howard.rosenblum@nad.org
Contact: Andrew Phillips, Policy Counsel • andrew.phillips@nad.org
8630 Fenton Street, Suite 820, Silver Spring, MD 20910
301.587.1788
www.nad.org

Hearing Loss Association of America (HLAA)

Anna Gilmore Hall, Executive Director • AGilmoreHall@Hearingloss.org
Contact: Lise Hamlin, Director of Public Policy, LHamlin@Hearingloss.org
7910 Woodmont Avenue, Suite 1200, Bethesda, MD 20814
301.657.2248
www.hearingloss.org

Association of Late-Deafened Adults (ALDA)

Dave Litman, President • aldaprez2014@gmail.com
Contact: Brenda Estes • bestes@endependence.org
8038 Macintosh Lane, Suite 2, Rockford, IL 61107
www.alda.org

Cerebral Palsy and Deaf Organization (CPADO)

Contact: Mark Hill, President • president@cpado.org
2025 SE Pine Street, Apt. #302, Portland, OR 97216
503.468.1219
www.cpado.org

Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)

Cheryl Heppner, Vice Chair • CHeppner@nvrc.org
3951 Pender Drive, Suite 130, Fairfax, VA 22030

California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH)

Contact: Sheri A. Farinha, Vice Chair • SFarinha@norcalcenter.org
4708 Roseville Rd, Ste. 111, North Highlands, CA 95670
916.349.7500

American Association of the Deaf-Blind (AADB)

Mark Gasaway, President • mark.gasaway@comcast.net
Contact: Randall Pope • randy.pope@aadb.org
PO Box 8064, Silver Spring, MD 20907

Speech Communications Assistance by Telephone (SCT)

Bob Segalman, President • drsts@comcast.net
515 P Street Apt # 207, Sacramento, CA 95814

Technology Access Program at Gallaudet University (TAP)

Contact: Christian Vogler, Ph.D., Director • christian.vogler@gallaudet.edu
Department of Communications Studies
SLCC 1116, Gallaudet University
800 Florida Avenue NE, Washington, DC 20002
202.250.2795
tap.gallaudet.edu

Summary

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), the Hearing Loss Association of America (HLAA), the Association of Late-Deafened Adults (ALDA), the Cerebral Palsy and Deaf Organization (CPADO), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), the California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), the American Association of the Deaf-Blind (AADB), and Speech Communication Assistance by Telephone (SCT), collectively, “Consumer Groups,” and the Technology Access Program at Gallaudet University (TAP) commend the Commission’s continued attention to ensuring equal access to IP-delivered video clips. The Commission’s *Second Recon Order* takes significant steps toward ensuring the promise of equal access to video programming in clip format, but leaves to the *Second FNPRM* the elimination of critical barriers that pose substantial confusion and deny equal access to consumers who are deaf or hard of hearing.

We urge the Commission to act quickly to eliminate these barriers by requiring third-party distributors to render or pass through captions for video clips on equal terms to the Commission’s requirements for full-length programming. We also urge the Commission to phase out and eventually sunset grace periods for posting live and near-live programming with captions—periods that are presently poised to prevent deaf and hard of hearing viewers from accessing breaking news and other time-sensitive video programming until it is stale and potentially no longer relevant. Finally, we urge the Commission to require captioning for clips within “mashups” of programming that has been shown or exhibited on television with captions, and to ensure that programmers cannot avoid captioning obligations simply by posting clips online in advance of showing them on television.

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Discussion

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), the Hearing Loss Association of America (HLAA), the Association of Late-Deafened Adults (ALDA), the Cerebral Palsy and Deaf Organization (CPADO), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), the California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), the American Association of the Deaf-Blind (AADB), and Speech Communication Assistance by Telephone (SCT), collectively, "Consumer Groups," and the Technology Access Program at Gallaudet University (TAP), respectfully comment on the Commission's *Second FNPRM* in the above-referenced docket.¹

Consumer Groups seek to promote equal access to video programming for the 48 million Americans who are deaf, hard of hearing, late-deafened, or deaf-blind so that they may fully experience the informational, educational, cultural, and societal opportunities afforded by the telecommunications revolution. We applaud the Commission's action in the *Second Recon Order* in the above-referenced docket, which took critical steps toward fulfilling the promise of equal access to video programming enshrined in the Twenty-First Century Communications and Video Accessibility Act ("CVAA") and the Telecommunications Act of 1996 ("1996 Act") by plugging a critical loophole in the Commission's rules that left a wide swath of Internet Protocol ("IP")-delivered programming delivered in "clip" form uncaptioned and inaccessible to Americans who are deaf or hard of hearing.² We also commend the progress of our colleagues in the video programming industry for the strides they have taken toward making clips accessible to all Americans.

¹ *Closed Captioning of Internet Protocol-Delivered Video Programming and Video Clips, Second Order on*

² *See Second Recon Order*, 29 FCC Rcd. at 8692-93, ¶ 9.

As Chairman Wheeler noted, however, the Commission's work on video clips is not finished until "people with disabilities not only get the same access as the rest of [Americans], but that the access that they get is as timely and therefore as relevant, as what the rest of [Americans] get."³ The magic of Internet Protocol-delivered video programming lies in the rapid dissemination of important, informative, and entertaining videos through the speed of the advanced social media and search platforms—videos often presented in clip form so they can be easily digested and shared on a panoply of mobile devices, Internet-connected televisions, web browsers, and applications. As Commissioner Rosenworcel explained:

[T]he future of video involves a lot more than gathering around a television screen for programs of uniform 30- or 60-minute length. Those programs now get sliced and diced into abbreviated bits and pieces. The excerpts, or IP video clips, that emerge get posted online and widely viewed.⁴

While this low-friction proliferation of video clips is the reality experienced by most Americans, those who are deaf or hard of hearing face a deep uncertainty every time they encounter a video: will it be captioned and accessible? And if captions are missing, will notifying the video's distributor or the Commission lead to someone fixing the problem?

Resolving this uncertainty requires a viewer who is deaf or hard of hearing to first determine whether the video she is trying to watch satisfies a series of confusing (and often impossible-to-determine) factual and legal conditions:

- Has the video been published or exhibited on television with captions?⁵ (How would the viewer trying to watch it on the Internet after the fact know?)
- If the video was published or exhibited on television with captions, has the relevant deadline in the Commission's rules passed?⁶

³ *Id.* at 8761.

⁴ *Id.* at 8764.

⁵ *See* 47 C.F.R. § 79.4(b).

- Is the video not subject to any exemptions?⁷
- Is the video “full-length” programming—i.e., distributed “substantially in its entirety”—or is it a clip “excerpted” from some other full-length program?⁸ (What does “substantially in its entirety” mean?)
- If the video is a clip, is the viewer watching it on a web site or application of the same entity who published or exhibited the clip on television with captions?⁹ (How would the viewer know?)
- If the clip is on a covered web site or application, was the clip excerpted from “live programming” that was originally “shown on television substantially simultaneously with its performance”?¹⁰ If so, have twelve hours elapsed since the live programming originally finished airing on television?¹¹
- If the clip wasn’t taken from “live programming,” was it taken from “near-live programming” that was “performed and recorded less than 24 hours prior to the time it was first aired on television”?¹² (How would the viewer know?) If so, have eight hours passed since the near-live programming originally finished airing on television with captions?
- Does the clip “contai[n] a single excerpt of a captioned television program with the same video and audio that was presented on television”?¹³ If not, is it part of “multiple video clips that each contain a single excerpt of a captioned television program with the same video and audio that was presented on television?”¹⁴
- Was the clip added to its distributor’s library after it was published or exhibited on television with captions?¹⁵ (How would the viewer know?)

Only if the viewer can answer these questions in the affirmative—a daunting task even for an attorney well-versed in the rules’ arcana—can she expect to view the video with captions or at least seek meaningful redress if the captions are missing or of poor quality.

⁶ *See id.*

⁷ *See id.*

⁸ *See* 47 C.F.R. § 79.4(a)(2), (12).

⁹ *See* 47 C.F.R. § 79.4(b)(2).

¹⁰ *See* 47 C.F.R. § 79.4(a)(7).

¹¹ *See* 47 C.F.R. § 79.4(b)(2)(ii)

¹² *See* 47 C.F.R. § 79.4(a)(8).

¹³ *See* 47 C.F.R. § 79.4(b)(2)(i)(A).

¹⁴ *See* 47 C.F.R. § 79.4(b)(2)(i)(B).

¹⁵ *See* 47 C.F.R. § 79.4(b)(2).

While the Commission has undoubtedly approached the contours of its IP captioning rules with the best of intentions, there can be little doubt that the complex maze of conditions that presently dictates whether IP-delivered video programming will be captioned does not rise to the CVAA's promise of equal access—particularly when people who are hearing can access videos of their choice without paying heed to any of those conditions. And while eliminating many of those conditions may be beyond the scope of the *Second FNPRM*, the Commission does have the opportunity to eliminate major barriers that stand in the way of equal access to video clips by removing or phasing out several unnecessary conditions—an action we implore the Commission to take. In order to best effectuate the promise of the CVAA, the Commission should presumptively eliminate or narrow conditions to the maximum extent possible absent evidence justifying the maintenance or extension of a condition.

Specifically, we agree with Chairman Wheeler that the Commission should “act quickly to address application of the . . . rules to video clips provided by third-party distributors, and to decrease or eliminate the grace period applicable to video clips of live programming.”¹⁶ We further urge the Commission to ensure that mashups and advanced clips are captioned.

I. The Commission should require third-party video programming providers and distributors to caption video clips.

We are disappointed with the Commission's decision in the *Second FNPRM* to omit third-party distributors from distributing video clips with captions solely based on the unsubstantiated concern of the National Association of Broadcasters (“NAB”) and National Cable and Telecommunications Association (“NCTA”) that doing so would somehow “hold entities responsible for issues they do not control.”¹⁷ The Commission's

¹⁶ See *Second Recon Order*, 29 FCC Rcd. at 8761.

¹⁷ See *id.* at 8701-02, ¶ 22.

conclusion that it “do[es] not have an adequate record” to apply the rules to third-party distributors seemingly ignores that it has uncontroversially applied its television and IP captioning rules for full-length programming to third-party distributors for many years and has identified no meaningful reason to treat them differently in the context of clips.¹⁸ Accordingly, we urge the Commission to reverse this faulty conclusion and presumptively require third-party distributors to provide captioning on the same terms that the IP captioning rules require for full-length programming.

This result is mandated by the CVAA. As the Commission concludes, “IP-delivered video programming that was shown on television with captions, whether full-length or an excerpt, must also be captioned when delivered using IP.”¹⁹ The CVAA makes no provision to exclude the delivery of a video from the Commission’s captioning rules simply because it is delivered by a third-party, and we urge the Commission to reject any overture to the contrary.²⁰

While we believe the Commission has developed a sufficient record over the past two decades in developing its television and IP captioning rules to cover third-party distributors without more, even a cursory examination of the third-party distribution ecosystem should reinforce the notion that requiring third-party distributors to caption clips would plainly serve the public interest and the aims of the CVAA and 1996 Act.²¹ Indeed, a wide variety of popular third-party video programming websites and top news websites deliver clips of captioned television programming that would otherwise be

¹⁸ See 47 C.F.R. § 79.4(c)(1), (2) (describing discrete obligations for video programming owners and distributors/providers).

¹⁹ See *Second FNPRM*, 29 FCC Rcd. 8714, ¶ 41.

²⁰ See 47 U.S.C. § 613(c)(2).

²¹ See *Second FNPRM*, 29 FCC Rcd. at 8713, ¶ 38.

subject to the Commission's rules, including Hulu,²² YouTube,²³ Yahoo! Screen,²⁴ and USA Today.²⁵

Notwithstanding the variety of questions raised in the *Second FNPRM* about the relationships between third-party distributors of video clips and video programming owners ("VPOs), we believe that requiring third-party distributors to deliver video clips with captions is fundamentally simple using the model adopted in the IP captioning rules: VPOs must provide their covered clips with captions, and video programming distributors ("VPDs") and providers ("VPPs") must enable the rendering or pass through of those captions.²⁶ The latter obligation should apply to VPDs or VPPs regardless of whether they published the associated video on television because there is no reason to expect that not having done so would in any way affect a VPD's or VPP's ability to enable the rendering or pass-through of captions provided by the VPO when delivering the video via IP.²⁷ Moreover, there is no reason to expect that VPOs will not be able to agree with VPDs and VPPs to similar "mechanisms" as they must in the context of full-length programming to identify video programming subject to the rules.²⁸

We are not aware of any reason that replacing an uncaptioned video clip with a captioned version would in any way impede the functioning of links to the original video

²² *E.g.*, Hulu, *Popular Clips*, <http://www.hulu.com/tv/popular/clips> (last visited Oct. 5, 2014) (showing clips from popular television shows).

²³ *E.g.*, YouTube, *The Tonight Show Starring Jimmy Fallon*, <http://www.youtube.com/user/latenight> (last visited Oct. 5, 2014) (showing clips from a television show).

²⁴ Yahoo! Screen, <https://screen.yahoo.com/> (last visited Oct. 5, 2014) (showing clips from various popular television shows).

²⁵ USATODAY, *Videos: Most Popular*, <http://www.usatoday.com/media/> (last visited Oct. 5, 2014) (showing clips taken from television shows).

²⁶ *See Second FNPRM*, 29 FCC Rcd. at 8713, ¶¶ 38-39; 47 C.F.R. § 79.4(c)(1)(i), (2)(i).

²⁷ *See Second FNPRM*, 29 FCC Rcd. at 8713, ¶ 38.

²⁸ *See id.*

so long as VPDs and VPPs post captioned video to the same URL as the original video.²⁹ Nor are we aware of any technical, legal, or other issues that might impact the ability of third-party VPDs and VPPs to deliver clips with captions, particularly given that the record contains no obvious evidence of third-party VPDs and VPPs facing such issues in delivering full-length programming.³⁰ When programming is embedded on rather than hosted by a third-party website, responsibility for rendering the captions should lie with whichever entity controls the software that plays back the video and thereby can most simply and efficiently render the captions.³¹

We believe that the *Second Recon Order* adopts a sufficiently lengthy compliance period for first-party clip captioning that the clip captioning deadlines for third-party VPDs and VPPs should not be delayed substantially beyond the existing deadlines for first-party VPDs and VPPs, as any further delay would unduly compromise the civil rights of people who are deaf or hard of hearing.³² In particular, the Commission should not adopt third-party deadlines more than six months out from the first-party deadlines specified in Rule 79.4(b)(2)(i).³³

Finally, we urge the Commission not to exempt any programming without substantial justifying evidence. In particular, we agree with the Commission that the CVAA requires a specific and detailed showing to justify the promulgation of an “economically burdensome” exemption.³⁴ Because the record in this proceeding contains nothing that would justify such an exemption, we urge the Commission to reject any calls for an exemption absent substantial evidence.

²⁹ See *id.* at 8713, ¶ 40.

³⁰ See *id.*

³¹ See *id.* at 8714, ¶ 40.

³² See *id.* at 8713, ¶ 40.

³³ See 47 C.F.R. § 79.4(b)(2)(i).

³⁴ See *Second FNPRM*, 29 FCC Rcd. at 8714, ¶ 41.

II. The Commission should phase out and ultimately eliminate grace periods for live and near-live video clips.

As we detailed in numerous *ex parte* filings leading up to the *Second FNPRM*, the serious detriment to people who are deaf or hard of hearing in delaying the posting of captions with time-sensitive breaking news content and other content embedded in clips for up to half a day after the original posting is unquestionable.³⁵ As the Commission notes, “[it] remain[s] concerned about the impact that delayed access to IP-delivered video clips of live and near-live programming will have on people who are deaf and hard of hearing. For example, breaking news aired live on television and initially posted online without closed captions effectively excludes these individuals from having timely access to this information.”³⁶ There can be no serious question that denying viewers who are deaf or hard of hearing access to content for many hours leaves them as second-class citizens to hearing viewers who can access the same content without any delay, nor that there are substantial benefits to accessing critical video content on equal terms—a proposition central to Congress’s intent in enacting the CVAA.

We have remained receptive to concerns that requiring immediate posting of clips with captions may necessitate an adequate phase-in time to permit video programmers to integrate the appropriate caption clipping software into their workflows. However, we have consistently urged the Commission to (a) limit any grace period to the time actually required to post captions for live and near-live video clips and (b) to gradually eliminate any such grace period to provide video programmers the necessary incentive to develop systems that permit the contemporaneous extraction and posting of captions with clips.³⁷

³⁵ *E.g., Ex Parte of TDI, et al.*, at 6 (Mar. 28, 2014)

³⁶ *See Second FNPRM*, 29 FCC Rcd. at 8714, ¶ 43.

³⁷ *E.g., Ex Parte of TDI, et al.*, at 3 (June 6, 2015).

As the Commission notes, “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.”³⁸ We agree. However, we note that as this proceeding has repeatedly demonstrated, video programmers will be unlikely to develop the necessary technology without appropriate regulatory incentives to do so. Because the Commission’s rules already afford video programmers until July 2017—nearly three years from now—to develop systems that work with 12 and 8 hour grace periods, we believe that programmers should need no more than one year following the July 1, 2017 deadline to develop systems that eliminate the need for any grace period altogether.³⁹

By July 2018, viewers who are deaf or hard of hearing will have waited nearly 8 years after the CVAA’s October 2010 enactment for fulfillment of its promise to equal access to Internet video clips—a phenomenon that will have existed for at least fifteen years. We urge the Commission to treat with skepticism arguments that even more time is necessary for the video programming industry to accomplish the fundamentally uncomplicated task of automatically clipping the captions of a video program in conjunction with clipping the video itself.

III. The Commission should require captioning of mashups absent substantial evidence to warrant disparate treatment.

As we have previously noted, we believe that the portions of “mashup” programming that have been shown on television with captions are unequivocally covered by the CVAA and should be captioned—a process that should be made even easier by the possibility of repurposing such captions.⁴⁰ No evidence presently exists on the record of to

³⁸ *Second FNPRM*, 29 FCC Rcd. at 8714-15, ¶ 43.

³⁹ *See* 47 C.F.R. § 79.4(b)(2)(i)(C); *Second FNPRM*.

⁴⁰ *Ex Parte of TDI, et al.*, at 3 (June 6, 2005).

warrant disparate treatment of mashups under the Commission's captioning rules, and we urge the Commission to require captioning of mashup programming on equal terms to other video clips absent such evidence.

Moreover, the record is effectively devoid of evidence of even the basic nature of mashups. Thus, we reserve comment on the numerous questions raised in the *Second FNPRM* on mashups until we are able to review specific examples and information about the prevalence of such clips provided by our industry colleagues.⁴¹

IV. The Commission should require advance clips to be captioned.

While the *Second FNPRM* raises nearly two dozen distinct questions about the captioning of "advance" clips, our position remains simple: viewers who are deaf or hard of hearing should not be denied access to a video clip simply because its distributor hosted it online before it was shown on television and became subject to the rules.⁴² While the confusion that stems from having to wait for the clip to be shown on television is an unavoidable consequence of the CVAA's limitations, it is untenable to leave the clip forever inaccessible once it becomes subject to the CVAA's requirements. It is beyond dispute that requiring captioning of such clips is not only consistent with but required by the CVAA and that doing so would serve the public interest.

Moreover, the Commission's rules for full-length programming already cover similarly situated full-length "archival programming" under a deadline that passed more than six months ago without any apparent burden to video programmers.⁴³ At a bare minimum, there is no evidence on the record to warrant altogether excluding similarly-situated video clips from the Commission's captioning requirements.

⁴¹ See *Second FNPRM*, 29 FCC Rcd. at 8715-16, ¶¶ 45-46.

⁴² See *id.* at 8716-19, ¶¶ 50.

⁴³ See 47 C.F.R. § 79.4(b)(1)(iv).

The only question that remains, then, is whether a grace period for posting such clips is appropriate or warranted. We believe to the extent any such grace period is warranted, it should be limited to the time period actually necessary to replace the non-captioned advance clip with a captioned version—a time period that should be minimal where, as is likely often the case, the video programmer receives advanced warning that the clip will be shown on television and thus become subject to the rules. As with grace periods for live and near-live content, we believe any grace period for posting advance content should be phased out and eventually eliminated to provide appropriate incentives to video programmers to develop the necessary technology and workflows to post such content immediately upon its publication or exhibition on television.

Respectfully submitted,

/s/

Blake E. Reid

Counsel to TDI

blake.reid@colorado.edu

303.492.0548

Cc:

Maria Kirby, Office of Chairman Wheeler

Adonis Hoffman, Office of Commissioner Clyburn

Clint Odom, Office of Commissioner Rosenworcel

Matthew Berry, Office of Commissioner Pai

Erin McGrath, Office of Commissioner O’Rielly

Kris Monteith, Consumer and Governmental Affairs Bureau

Karen Peltz Strauss, Consumer and Governmental Affairs Bureau

Greg Hlibok, Consumer and Governmental Affairs Bureau

Eliot Greenwald, Consumer and Governmental Affairs Bureau

Caitlin Vogus, Consumer and Governmental Affairs Bureau

Suzy Rosen Singleton, Consumer and Governmental Affairs Bureau

Michelle Carey, Media Bureau

Mary Beth Murphy, Media Bureau

Steven Broecker, Media Bureau

Diana Sokolow, Media Bureau