

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

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

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

Jill M. Lockett
Senior Vice President
Program Network Policy

William A. Check, Ph.D.
Senior Vice President, Science & Technology
Chief Technology Officer

Andy Scott
Vice President, Engineering
Science & Technology

October 18, 2011

Rick Chessen
Diane B. Burstein
Stephanie L. Poday
National Cable & Telecommunications
Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

INTRODUCTION	1
DISCUSSION.....	3
I. SECTION 202 PROVIDES LIMITED AUTHORITY FOR THE COMMISSION TO REGULATE	3
A. Various Entities have Responsibility for Making Online Captioning Available to End Users.....	4
1. The Schedule of Deadlines Recommended by the VPAAC Presupposes Adoption of the SMPTE Standard	4
a) The Definition of “Live” Programming Should Include Simulcasts	8
b) The Rules Should Recognize that Near Live Programming Can Include Prerecorded Elements	8
c) A Longer Roll-Out for Prerecorded Edited Programming is Warranted.....	9
2. The Definitions Should Clarify that the Rules Address Distribution of Programming Over the Internet Rather than IP Technology	10
3. Entities Relying on the SMPTE TT Standard Should Be Deemed in Compliance with the Rules	11
4. Contracts Are the Most Appropriate Mechanism for Providing Information on Television Programming Subject to the CVAA	12
5. The Commission Should Refrain From Adopting Burdensome Monitoring or Information Requirements.....	14
B. The FCC Should Not Regulate Online Caption Quality.....	15
C. The Online Captioning Rules Should Incorporate the Existing Captioning Exemptions	16
D. The Rules Should Apply Prospectively to Full Length Programming Aired On Television with Captions in the United States.....	18
1. The Rules Should Apply Prospectively Only	18
2. The Rules Should Only Apply to Full Length Programming	20
3. Foreign TV Shows Should Be Excluded From Coverage	20
E. Complaints and Compliance.....	21
II. THE FCC SHOULD REFRAIN FROM IMPOSING DEVICE-SPECIFIC REGULATIONS ON MVPD-SUPPLIED DEVICES OR APPLICATIONS PURSUANT TO ITS SECTION 203 AUTHORITY.....	23
CONCLUSION.....	28

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

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

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

The National Cable & Telecommunications Association (NCTA)¹ hereby submits its comments in response to the *Notice* in the above-referenced proceeding.² This proceeding implements provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010 (the “CVAA” or “the Act”)³ which are designed to update the closed captioning rules to apply to captioned television programming when delivered over the Internet.

INTRODUCTION

The cable industry has been actively involved in efforts to facilitate the provision of captioned television programming online. NCTA worked with Congress and representatives of the disabilities community to craft legislation that would provide a balanced approach to ensuring that deaf and hard-of-hearing consumers will be able to enjoy the same captioned programming shown on television when it is made available on the Internet. NCTA and several

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 \$170 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 23 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*, MB Docket No. 11-154, FCC No. 11-138, Notice of Proposed Rulemaking (rel. Sept. 19, 2011) (“*Notice*”).

³ Pub. L. No. 111-260, § 202(b), 124 Stat. 2751 (2010).

of its members also participated in the Video Programming Accessibility Advisory Committee (“VPAAC”) working group (“WG1”) devoted to online captioning issues, which issued its report to the Commission on July 13, 2011.⁴

There are multiple entities involved in providing television programming to viewers via the Internet, either through streaming or downloading. Viewers can gain access to video content by clicking directly on programmer websites, through online portals provided as part of their MVPD subscription such as Xfinity Online TV, or by going to free or pay online video provider websites like Hulu, Netflix, Amazon Prime or iTunes. And viewers can watch that programming on any number of Internet-connected devices, including gaming platforms like the Nintendo Wii, Microsoft Xbox 360, and the Sony PS3; Internet-connected television sets; Blu-Ray players; TiVos, Roku players and Apple TV, and even a range of non-traditional third-party devices like personal computers, lap-tops, tablets, and smartphones.

Imposing captioning requirements on the complex and still emerging online distribution chain presents complex and difficult issues. The *Notice* in this proceeding raises the specter of Commission regulation of a wide range of heretofore unregulated entities, such as copyright owners, websites, and a multitude of Internet entities. But Congress did not intend the Commission to adopt an overly regulatory approach. In fact, it made clear that “an entity may meet the requirements of this section through alternate means than those prescribed by regulations...” so long as the underlying purposes are met.⁵

Rather than adopt prophylactic rules that impose new burdens on nascent business models, the Commission should adopt a more flexible, market-based approach. Specifically, the

⁴ First Report of the Video Programming Accessibility Advisory Committee on the Twenty-first Century Communications and Video Accessibility Act of 2010: Closed Captioning of Video Programming Delivered Using Internet Protocol (July 13, 2011) (hereinafter “VPAAC Online Captioning Report”).

⁵ CVAA § 202(b)(3).

Commission should monitor the roll-out of captioned television programming online pursuant to the schedule proposed in the *Notice*. Based on that experience, the agency can revisit the need for additional rules if problems develop and if it determines that targeted regulatory solutions are necessary and can be helpful.

DISCUSSION

I. SECTION 202 PROVIDES LIMITED AUTHORITY FOR THE COMMISSION TO REGULATE

In Section 202 of the CVAA, Congress directed the Commission to adopt certain regulations within six months of the VPAAC report. Given this expedited timeframe, the Commission should focus on the specific tasks that Congress assigned to it: (1) adopt “an appropriate schedule of deadlines for the provision of closed captioning of video programming once published or exhibited on television,” taking into account whether the programming is prerecorded, edited, or live or “near-live” (as defined by the Commission); (2) clarify that “video programming distributors” (“VPDs”) and “video programming providers” (“VPPs”) include entities that make available directly to the end user video programming under certain circumstances; (3) “describe” the responsibilities of video programming providers or distributors and video programming owners; (4) adopt exemptions for economic burdens if appropriate; (5) establish a mechanism to make available information to VPDs and VPPs on video programming subject to the Act; and (6) consider a VPP or VPD in compliance “if such entity enables the rendering or pass through of closed captions and makes a good faith effort to identify video programming subject to the Act” using the above-mentioned mechanism.

As described below, the *Notice* in several respects strays beyond what is necessary to accomplish Congress’ limited directives in ways that impose significant unnecessary burdens on this developing video programming platform.

A. Various Entities have Responsibility for Making Online Captioning Available to End Users

Section 202(b) amends the Communications Act to require the Commission to “describe the responsibilities of video programming providers or distributors and video programming owners.” The *Notice* proposes to “*require* VPOs to send program files to VPDs/VPPs with all required captions, and as contemplated by Section 202(b), to *require* VPDs/VPPs to enable ‘the rendering or pass through’ of all required captions to the end user.”⁶ But in focusing on assigning regulatory responsibility and on issues of enforcement (e.g., “what types of evidence should be considered to establish the VPD/VPP’s knowledge, and should the VPD/VPP bear the burden of proof on that issue?”⁷) the *Notice* puts the cart before the horse. The Internet environment is significantly more complicated than the *Notice* reflects, and the ability of an end user to obtain captions depends on the actions of many different entities in the ecosystem. That said, one similarity with the traditional television context is the need for all the entities in the ecosystem to work cooperatively through their business and contractual relationships to ensure the successful implementation of the CVAA. Rather than enacting detailed enforcement mechanisms, the Commission should monitor developments and seek further comment after the initial rollout has begun and the Commission has a better factual record on which to base any rules. The Commission at this juncture should establish certain objectives and parameters to guide the entities going forward.

1. The Schedule of Deadlines Recommended by the VPAAC Presupposes Adoption of the SMPTE Standard

The CVAA provides that the Commission’s rules “shall include an appropriate schedule of deadlines for the provision of closed captioning, taking into account whether such

⁶ *Notice* ¶ 16 (emphasis supplied).

⁷ *Id.*

programming is prerecorded and edited for Internet distribution, or whether such programming is live or near-live and not edited for Internet distribution.”⁸ Congress thus recognized that several variables affect the ability of program producers to include captions on programming transmitted over the Internet.

The *Notice* proposed to adopt the VPAAC’s recommendation for three different deadlines for the provision of online captioning for programming that was captioned when shown on television after the effective date. First, six months after Federal Register publication of the rules, “programming that has been prerecorded and unedited for Internet distribution to the end user” would be captioned when distributed online. Six months after that, “live and near-live programming” would be presented with captions online. Programming “that has been prerecorded and substantially edited for Internet distribution to the end user” would be shown with captions online eighteen months after Federal Register publication.⁹ The different deadlines reflect the relative degree of difficulty that content suppliers will face when distributing captioned television programming online, given the need to adjust existing workflows and develop and acquire equipment and software enabling captioned programming to be exhibited online.

NCTA-member programmers participating on the VPAAC agreed to take concrete steps to make captioned television programming that they put online also available with captioning. However, the consensus timeline reached by the VPAAC was based on several assumptions --

⁸ CVAA § 202(b).

⁹ VPAAC Report at 30.

the most important of which was that captions already authored for television programming using the 608/708 system could be reused with relatively little difficulty on the Internet.¹⁰

While the *Notice* proposes to reject the VPAAC's recommendation to adopt SMPTE TT as a captioning standard, it fails to consider the relationship between that recommendation and the feasibility of content suppliers meeting the VPAAC's proposed timetable for captioning rollout. The 6-12-18 month benchmarks are dependent on content suppliers being able to use a single format for authoring captions for use on the Internet. Requiring content suppliers to determine what captioning format various online distributors need and then deliver different versions of programs separately to each of these distributors would add significant complexity and therefore was rejected by the VPAAC. A single format allows programmers to create only one version for interchange and delivery of content directly to a consumer video player, in contrast with a wide number of proprietary versions that may be required in the absence of an agreed-to baseline. Because SMPTE TT was created specifically to repurpose captions in television programming for use on the Internet,¹¹ it is ideally suited to meet this objective. Content suppliers at the leading edge of online captioning efforts have already encouraged equipment suppliers to invest in supporting SMPTE TT. Requiring content providers to write code to respond to a variety of differing captioning formats will introduce additional time lag, complexity and cost before more widespread and consistent deployment of online video with captions can be achieved. Thus, content suppliers may need a longer lead time to provide captioned material online if the Commission does not adopt the SMPTE TT standard.

¹⁰ As the VPAAC explained, “[w]e offer these definitions and deadlines based on certain known scenarios...” *Id.* at 29.

¹¹ VPAAC Report at 25-26.

Another variable Congress considered in the CVAA concerned the need for different deadlines for different categories of programming. This concept was adopted by the VPAAC when it recommended a phase-in for online captioning obligations for prerecorded unedited programming, live/near live programming, and prerecorded edited programming. When prerecorded captioned product is posted online, the entity posting the television programming has control over when and whether that particular program is distributed on the web. Once appropriate equipment and software is in place and work flows are adjusted to ensure that the television captions are recognized and translated when programming is re-encoded for distribution on the Internet, prerecorded, unedited programming will present the fewest challenges for providing a captioned version online. The VPAAC-endorsed timetable tentatively proposed by the Commission recognizes this by suggesting that prerecorded unedited product be the first category for online captioning.¹²

By contrast, live programming presents multiple challenges. Depending on the programming, a live event (particularly sports) might be aired on television by one entity and streamed simultaneously on the Internet by a separate entity. Marrying up captions from live telecasts to web versions of the same event will require significant coordination among the different entities presenting the program. Sometimes, two entirely unrelated companies may have rights to the same live event, one with the television rights and the other with Internet distribution rights. Modifying workflows to ensure that captioning is done once, rather than twice, will be a challenging undertaking that will take time to achieve.

¹² The Commission should clarify that prerecorded unedited *new* programming falls into this first bucket. Prerecorded unedited *reruns* should fall into the same later 18 month timeframe as edited programming. Even if unedited, preparing this library content for online distribution may require new captioning just like edited content. Moreover, unlike new programs, which are scheduled well in advance and put into a network's "operational cue" ahead of time, reruns may get scheduled at the last minute and change frequently. Networks need to be equipped to adapt quickly to put these reruns into the cue to prepare them for online distribution with little or no advanced planning. This process will take some time to develop.

a) The Definition of “Live” Programming Should Include Simulcasts

The VPAAC proposed defining “live programming” as “programming created and presented on television and simulcast for Internet distribution to the end user as it airs on television.”¹³ The *Notice*, however, proposes to rewrite this definition to remove the reference to “simulcast” and to define “live” to mean “video programming that is shown on television substantially simultaneously with its performance.”¹⁴ However, as the VPAAC report reflects, simulcasting a linear channel on television and on the Internet presents the same technical and operational challenges as providing traditional “live” programming, even if some programs shown on television are prerecorded.¹⁵ Therefore, simultaneous streaming should be subject to the same schedule as that applicable to individual live program content.

b) The Rules Should Recognize that Near Live Programming Can Include Prerecorded Elements

“Near-live” and traditional live programming present similar challenges. Content suppliers must rely on live captioning, which introduces additional complications when that programming is shown online. For these reasons, the VPAAC proposed to define “near-live content... as any programming that was produced from start to finish within 12 hours of being published or exhibited on television. Production work is typically completed too close to air time for offline captioning workflows.”¹⁶ However, as the VPAAC noted, there is a “difference

¹³ VPAAC Report at 29.

¹⁴ *Notice* ¶ 24.

¹⁵ Those prerecorded shows, if posted on a website, would be subject to the more aggressive schedule for prerecorded unedited material.

¹⁶ VPAAC Report at 29.

in perspective between industry and consumer groups” on how to define “near live,”¹⁷ which involves the question of whether some portions of a “near live” program could be prerecorded.

As the *Notice* explains, it is possible that some but not all elements of a program are produced outside the 12-hour window, necessitating the use of live, rather than off-line captioning. This presents the same problems for online captioning as does a purely “live” program. News magazine programs, and programs typically viewed as “live,” such as reality television shows, often combine some pre-recorded material with material produced and recorded shortly before distribution. As the *Notice* recognizes, such programming “may be captioned as it is shown on television.”¹⁸ Therefore, the *Notice* appropriately proposes to define “near-live” as “video programming that is substantively recorded and produced within 12 hours of its distribution to television viewers” to capture these circumstances.¹⁹

c) A Longer Roll-Out for Prerecorded Edited Programming is Warranted

The VPAAC recommended an effective date of 18 months after Federal Register publication for “programming that has been prerecorded and substantially edited for Internet distribution to the end user.” We agree with the *Notice*’s proposal to define “prerecorded programming” as “video programming that is not ‘live’ or ‘near-live.’”²⁰ We also agree that programming with significant edits should have a longer timeframe to comply. Programmers may not have the rights to deliver the program as shown on television intact on the Internet. For example, certain music might have to be deleted, in which case the programming must be

¹⁷ *Id.*, App. C.

¹⁸ *Id.*

¹⁹ The Commission must avoid entanglement in programming content judgments and should defer to the programmers’ good faith determination regarding the percentage of a program that is recorded within the 12 hour window.

²⁰ *Notice* ¶ 27.

rescored, or entire scenes may be deleted for online distribution. The ability to show this type of prerecorded edited programming online with captions thus requires not only the specialized equipment and software required for all captioning, but also modifications to the underlying captions. A longer compliance timeframe is thus warranted.

2. The Definitions Should Clarify that the Rules Address Distribution of Programming Over the Internet Rather than IP Technology

The CVAA sweeps within its scope a variety of new entities with responsibilities for online captioning, and properly defining those entities is important to ensure that the Act works as intended. The *Notice* proposes to make clear that both VPDs and VPPs in the online environment are defined by their relationship with the “end user.” But the Commission should not confuse distribution using Internet protocol (“IP”) – a technology for delivering programming that may have nothing to do with the Internet – with distribution using IP *over the Internet*.²¹ Rather than focus on the *transmission technology* used to deliver video programming, the Commission should modify its definition to focus on the *platform* – the Internet – through which that programming is distributed. Thus, the FCC should revise its definition of VPD/VPP to mean “any entity that makes available to the end user video programming over the Internet through a distribution method that uses Internet protocol.” Such a definition will better reflect the CVAA’s intent²² and will avoid any confusion about which captioning regime applies when

²¹ Cable operators in their role as ISPs are exempt from responsibility under the CVAA. See CVAA § 2 (limitation on liability) (exempting from liability with respect to video programming or online content entities that merely “provide[] an information location tool, such as a directory, index, reference, pointer, menu, guide, user interface, or hypertext link, through which an end user obtains access to such video programming...”).

²² See, e.g., H.R. Rep. No. 111-563 at 18 (2010) (“House Report”) (discussing “web-only” and “Internet-only” programming); *Introduction of the 21st Century Communications and Video Accessibility Act* 154 Cong. Rec. E1292 (June 19, 2008) (statement of Rep. Markey) (explaining that the bill “adds a definition for video programming to include *programming distributed over the Internet* to make clear that the existing closed captioning obligations . . . contained in Section 713 apply to video programming *that is distributed or re-distributed over the Internet*”) (emphasis added); Press Release, *Markey Celebrates First-Year Milestone for Making 21st Century Tech Accessible to All* (Oct. 7, 2011) (explaining that the CVAA requires that “a wide range of devices and services needed in the digital era, including . . . closed captioning *for online video* . . . are

MVPDs use Internet protocol instead of MPEG 2 or any other distribution technology to deliver programming to traditional MVPD customers.

3. Entities Relying on the SMPTE TT Standard Should Be Deemed in Compliance with the Rules

In light of the “decades of video programming” in which television programming has been captioned in CEA-608/708 format, the VPAAC proposed that “a standard format must be specified for these captions to be delivered via Internet protocols in such a way that the consumer’s experience is in no way degraded.”²³ The VPAAC considered several technical solutions and “recommend[ed] that the industry use SMPTE 2052-1:2010 *Time Text Format* (SMPTE-TT).”²⁴ Thus, this standard would be used as the “interchange” format, which the VPAAC defined as the “encoded caption data that preserves all the original semantic information and text (including information which may not be used in display, such as edit decision lists) and allows easy conversion to other formats.”²⁵ According to the VPAAC Report, “distributors of programming services and applications must be required to (a) receive the captioned content from the content provider encoded in the standard interchange format, and then (b) ensure that any reformatting performed before delivery to end users (consumers) is supported by the applications and devices (e.g., Web browsers, proprietary downloaded applications, and generalized video players) used for playback so that the caption-viewing experience is at least equal to that which CEA-608-708 enables, and that the additional delivery formats used are

accessible to individuals with disabilities”), *available at* <http://markey.house.gov/index.php?option=com%5fcontent&task=view&id=4537&Itemid=141>.

²³ VPAAC Report at 17.

²⁴ *Id.* at 26.

²⁵ *Id.* at 18.

based on standards developed within an open process by recognized industry standard-setting organizations.”²⁶

Notwithstanding the VPAAC’s recommendation, the *Notice* proposes to “refrain from specifying any particular standard for the interchange format or delivery format of IP-delivered video programming at this time, in order to foster the maximum amount of technological innovation.”²⁷ In particular, the *Notice* rejected the VPAAC’s proposal for a standard interchange format, leaving it to industry to settle on the appropriate format.²⁸ If the Commission opts not to mandate a single format here, however, it should find that use of the SMPTE TT format facilitates and satisfies any online captioning obligation.

4. Contracts Are the Most Appropriate Mechanism for Providing Information on Television Programming Subject to the CVAA

Congress directed the Commission to “establish a mechanism to make available to video programming providers and distributors information on video programming subject to the Act on an ongoing basis,”²⁹ but did not specify how that mechanism would operate. The *Notice*, however, proposes that to satisfy this requirement, “VPOs providing video programming to VPDs/VPPs for IP delivery [would] provide each program either with captions simultaneously, or with a dated certification stating that captions are not required for a reason stated in the certification.”³⁰ It further proposes to require that “VPDs/VPPs retain all such VPO certifications for as long as they make the certified programming available to end users through a

²⁶ *Id.* at 17.

²⁷ *Notice* ¶ 40.

²⁸ *Id.*

²⁹ CVAA § 202(v).

³⁰ *Notice* ¶ 35.

distribution method that uses IP and at least one calendar year thereafter.”³¹ This type of program-by-program certification and associated recordkeeping requirement would be extremely burdensome and impractical. The rules for television captioning do not require anything approaching the program-by-program certification proposal for Internet captioning. And the Commission has never required program networks to provide detailed information about the basis for a program not being captioned. It should refrain from adopting any such requirement here.

Contractual relationships have ensured that captioned programming is available to the viewing public on television without the need for any similar requirement, just as the Commission envisioned when it adopted the current captioning rules in 1997.³² For purposes of the CVAA, then, the Commission should leave the mechanics of compliance with the Act to licenses between VPOs and VPDs, and this deference to contractual relationships would satisfy the Act’s “mechanism” requirement. Currently, we are unaware of any fail-safe mechanism for including data with the online programming that would indicate whether captioning is present or not. Over time, perhaps more granular information about the availability of captioning for a particular program might develop and databases or other independent information collection sources might arise if a need is evident. But at this early juncture in the provision of captioned programming online and regulation of websites, less regulation rather than more is the most appropriate approach and the one most likely to lead to timely implementation.

³¹ *Id.* ¶ 36.

³² See *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 ¶¶ 27-28 (“1997 Captioning Order”).

5. The Commission Should Refrain From Adopting Burdensome Monitoring or Information Requirements

The Commission should not impose any requirement for VPDs or VPPs to “*ensure that video programming has the required captions before they pass it through to viewers.*”³³ No such obligation applies in the television environment, where even today not all programming is required to be captioned.³⁴ MVPDs are not required to police the compliance of particular programming with any captioning rules prior to retransmitting it to their customers, and no problem has been identified which suggests that VPDs or VPPs should be forced to investigate the captioning status of any particular program before it is even provided online to viewers. In any event, VPDs that are not also VPOs of the programming at issue are unable to modify or “fix” captions even if a problem were to be detected.

The *Notice* also suggests a variety of possible new obligations that would apply to websites providing video programming with closed captioning, such as requiring a VPD/VPP “to provide a mechanism, such as a button or icon, on its website which would allow consumers to easily access closed captioning” and to “include on their websites program listings that indicate whether a particular program is captioned.”³⁵ These proposals go well beyond the CVAA and even go beyond what is required under the long-standing television captioning rules. Websites already include methods to access whatever captioning might be available on a program, and there is every reason to believe that websites will continue to make information available about how to view content with captions as even more captioned programming comes online. Requiring websites to post additional information for consumers or to comply with a particular

³³ *Notice* ¶ 16 (emphasis supplied).

³⁴ *See, e.g.*, 47 C.F.R. § 79.1(d) (identifying types of programs and providers exempt from traditional captioning rules).

³⁵ *Notice* ¶ 16.

method of accessing captions adds another layer of technical complexity and may lead to less consumer-friendly interfaces. For all these reasons, the Commission should decline to impose any such requirements.

B. The FCC Should Not Regulate Online Caption Quality

The *Notice* seeks comment on whether the rules should include performance objectives for captioning of IP-delivered video programming.³⁶ Without citation, the Commission claims that Congress intended “that captions of IP-delivered video programming should be of at least the same quality as captions shown on television.”³⁷ But this requirement is nowhere to be found in Section 202 of the CVAA.

The Commission proposes to add a rule specifying that “the quality of the captioning of IP-delivered video programming must be at least equal to the quality of the captioning of that programming when shown on television” and directing that “[i]n evaluating quality, the Commission may consider such factors as completeness, placement, accuracy, and timing.”³⁸ But even assuming, *arguendo*, the Commission has authority to impose any performance objectives, it should refrain from imposing any such requirements. Content suppliers and distributors have been working to replicate the TV captioning experience on the Internet and are committed to the goal of ensuring a positive online captioning environment. The *Notice* provides no basis to believe that the process of providing captioned television programming online will lead to a reduction in quality from that enjoyed on television. Adopting specific requirements at this stage will lead to unnecessary confusion and could inhibit the ability of

³⁶ *See id.* ¶ 17.

³⁷ *Id.* ¶ 18.

³⁸ *Id.*, App. A, proposed § 79.4(d).

content suppliers to serve non-traditional, smaller devices that may not be able to display the identical captioning as that seen on a larger television screen.

Moreover, language in the proposed rule that directs the Commission to consider placement and accuracy when evaluating compliance exceeds that which even the long-standing television closed captioning rules require. The Commission has examined and rejected proposals related to non-technical quality in the past, and should reject such requirements in the instant proceeding.³⁹

C. The Online Captioning Rules Should Incorporate the Existing Captioning Exemptions

The Commission proposes to create an exemption process based on economic burden that is comparable to the procedures for exemptions based on undue burden applicable to the television closed captioning rules.⁴⁰ The *Notice* suggests that the Commission will apply the identical factors as applied to the undue burden standard when considering exemption requests based on the “economically burdensome” standard.⁴¹ However, the “economically burdensome” standard has been interpreted to consider factors in addition to those under the “undue burden” standard, and the Commission has traditionally treated the two standards as distinct.

The Commission has previously stated that the standards were “closely related.”⁴² However, that same Commission decision included separate and detailed discussions regarding

³⁹ When it initially declined to adopt non-technical quality standards, the Commission expressed concern about the administrative burden that would be imposed on video programming providers and the Commission if millions of hours of television programming had to be monitored for incorrect, misspelled, or missing words. *See* NCTA Comments filed in CG Docket No. 05-231, at 2-3 (Nov. 10, 2005) (“*NCTA 2005 Comments*”) (citing *1997 Captioning Order* ¶ 224).

⁴⁰ *See Notice* ¶ 30.

⁴¹ *See id.*

⁴² *See 1997 Captioning Order* ¶ 143; *see also In re Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report & Order, 26 FCC Rcd. 11847 ¶ 22 & n.65 (2011).

each of the two standards.⁴³ The “economically burdensome” standard, at least in the traditional captioning context, is broader, allowing considerations of whether “[c]aptioning would be *difficult or technically infeasible*, would *not add significantly to the information that is already available* visually, *would create severe logistical problems*, or the economic support for the programming is *inherently fragile*.”⁴⁴ Further, under that standard the Commission examined whether the benefits would offset the economic burden imposed by the accessibility requirement, and also whether “the addition of extensive captioning obligations would either make the service nonviable or adversely impact the content of the service provided.”⁴⁵

Thus, the Commission’s definition of “economically burdensome” should not be limited to the proposed language of “imposing significant difficulty or expense.”⁴⁶ Rather, it should consider all these additional factors in evaluating petitions based on “economic burden.” To do otherwise would effectively undo the change in the relevant standard for exemptions.

The *Notice* also proposes to rely on the categorical exemptions in the existing television captioning rules rather than to import these exemptions into the online captioning rules, based on the theory that “if a program is not captioned on television because it is subject to one of the existing categorical exemptions, then it will not be required to be captioned when delivered via IP.”⁴⁷ While this is true today at the inception of this obligation, it is nonetheless still important to specifically incorporate the existing exemptions into the online captioning rules. For example, if a new network is exempt from captioning on television and airs a non-captioned program

⁴³ See *1997 Captioning Order* ¶¶ 87-168 (discussing the “economically burdensome” standard), ¶¶ 182-205 (discussing the “undue burden” standard).

⁴⁴ *1997 Captioning Order* ¶ 145 (emphasis supplied).

⁴⁵ *Id.*

⁴⁶ *Notice* ¶ 30.

⁴⁷ *Id.* ¶ 32.

online, the rules should make clear that the new network exception applies online even if that same program is shown captioned on TV by another non-exempt network.

It also does not follow that programming voluntarily captioned for television should be required to be captioned online.⁴⁸ This additional cost and burden could provide disincentives to caption at all if the program were to later be posted online. Therefore, the obligation to provide programming with captions online should only apply to programming that is required to be captioned on television.

D. The Rules Should Apply Prospectively to Full Length Programming Aired On Television with Captions in the United States

1. The Rules Should Apply Prospectively Only

The *Notice's* proposals to require updated certifications and the replacement of uncaptioned online programs with captioned versions after they appear on television with captions reflects a significant misunderstanding of which programming must be captioned online.⁴⁹ The online captioning requirements apply to 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.*”⁵⁰ The legislative history explains that “the Committee elected to apply the captioning requirement *only prospectively* and *only to programming that is aired on television with captions and also delivered using Internet*

⁴⁸ *See id.*

⁴⁹ *See, e.g., Notice* ¶ 36 (proposing “to require VPOs to keep their certifications current, and to provide VPDs/VPPs with any revised information as to the captioning status of previously delivered programming within seven days of the underlying change (*i.e.*, within seven days of a program being shown on television with captions for the first time after the effective date of the new rules). If the underlying change of status requires that the programming at issue be captioned pursuant to the CVAA, we propose to require the VPO also to deliver within seven days the caption files, if not previously delivered, to the VPDs/VPPs. We also propose to require VPDs/VPPs to make required captions available online within five days of the receipt of any updated certifications.”).

⁵⁰ CVAA § 202(c)(2)(A).

protocol.”⁵¹ Thus, the language of the Act and the legislative history show that only programming aired with captions on television *after* the effective date of the rules and placed on the Internet simultaneously or subsequently would be subject to the online captioning obligation. There was no intent to require that other copies of video content that may have been posted online *before* the television airing be replaced with newly captioned copies.

Indeed, it would make no sense to interpret the Act to require this search and replace mission. The *Notice’s* complex database suggestion is evidence of the enormous difficulties that such a requirement would needlessly impose. That the rights to air a program on television and online may be held by different entities makes the compliance burden going forward complicated enough. But those burdens would be impossible if this obligation applied to material on the web *before* the rules’ effective date. Consider, for example, that a single television station might air a captioned episode of a syndicated library program at some point after 2013 and that same episode is online today without captioning. Copyright owners cannot be expected to know that the station aired the program with captions, triggering an obligation to track down any other copy of that episode on the Internet that may have been posted sometime long before it was even licensed to the station. In any event, the *Notice* is mistaken in its view that a copyright owner could simply send a caption file to the website now hosting the older version. There are numerous costs and complexities involved in taking down a program already online and adding captions to it, which essentially require the recreation of the entire archival content.⁵²

⁵¹ S. Rep. No. 111-386, at 6 (2010) (emphasis supplied) (“Senate Report”); House Report at 18 (same).

⁵² The specifications required by “Download To Own” (or “Electronic Sell Thru”) sites vary and, in some cases, have changed dramatically over time. For this reason, rather than use the original video, new files may need to be completely recreated to incorporate the closed captioning file. Even program files that were created for online distribution more recently may have to be recreated from scratch to incorporate captions. Many Download to Own sites require captioning to be included within the physical video file, requiring the injection of captions during the transcoding, or creation, of that download to own file.

For all these reasons, the Commission should apply its rule prospectively only and should not require the replacement of content that was delivered and distributed online before the effective date. Instead, as the CVAA intends, the Commission should require programs shown on television with captions after the effective date to be captioned if placed online simultaneously or subsequent to the program’s television airing.

2. The Rules Should Only Apply to Full Length Programming

In the *Notice*, the Commission proposes to exempt video clips and outtakes from the captioning requirements of Section 202(b).⁵³ As the Commission recognizes, this approach is consistent with the legislative history, which indicates that the regulations were intended “to apply to full-length programming and not to video clips or outtakes.”⁵⁴ Full-length programming should be defined as “programming that appears as a whole on television,” such as an episode of a television series, a sporting event, a news program or a movie. To the extent the full-length television program appears online as one continuous file, or in separate segments that together compose the entirety of the program, it would be required to be captioned. “Outtakes” should be defined as “content that is not used in an edited version of video programming shown on television.” Since they have not been aired on television, outtakes would be excluded from the Act’s coverage. “Video clips” should be defined as “an excerpt of a full-length program.”

3. Foreign TV Shows Should Be Excluded From Coverage

Programming aired on television with captions in countries other than the United States should not trigger the proposed rules. As explained in the *Notice*, “the best reading of the statute requires closed captioning on IP-delivered video programming that was published or exhibited

⁵³ *Notice* ¶ 21.

⁵⁴ *Id.* ¶ 21 & n.82 (citing Senate Report at 13-14; House Report at 30).

on television *in this country* with captions after the effective date of the regulations.”⁵⁵ A broader interpretation would exceed the authority provided to the Commission in the Act and risk “hinder[ing] the process of transferring [differing] captions to a suitable format for U.S. consumers.”⁵⁶ As the Commission suggests, requiring the translation of a variety of different captioning formats that may be used in programming published or exhibited on television in foreign countries would result in significant complication and delay in providing the programming with captions online.

E. Complaints and Compliance

The *Notice* proposes “to adopt procedures for complaints alleging a violation of the IP closed captioning rules that are analogous to the procedures the Commission uses for complaints alleging a violation of the television closed captioning rules.”⁵⁷ While some of those processes can be imported into the online space, many of those procedures have been developed over years in a very different environment. The Commission should not simply superimpose those obligations on the online world.

As a threshold matter, the Commission generally should refrain from entertaining complaints during the initial roll-out of the rules. Regulation by the Commission of video delivered via the Internet is a new endeavor, and even determining to whom the Commission should direct complaints will take time. Rather than delineating all the complaint rules at this initial stage, the Commission should evaluate how the process is working after its captioning device deadline. Otherwise, entities will be faced with the very difficult task of determining whether a complaint is valid. Captioning of online television programming might not show up

⁵⁵ *Notice* ¶ 22 (emphasis supplied).

⁵⁶ *Id.*

⁵⁷ *Id.* ¶ 43.

on a particular device for a variety of reasons. It could be because the device was not yet compliant; a VPD might not have passed through captioned programming; the programming might not have to be captioned; or a range of other issues may prevent or significantly delay the ability to identify whether non-compliance exists, and if so, at what point in the distribution chain. Given the staggered timetable for the roll-out of online captioned television programming, and the possibility of an even later deadline for captioning-enabled devices,⁵⁸ it would be premature for the Commission to require responses to Commission-initiated complaints at this early stage. And trying to predict how long it will take to resolve an individual complaint is simply guess work at this time. Even in the television captioning environment, where the players are generally in privity with each other and the relationships are well-known, it can take considerable time to resolve even systemic captioning problems. Determining why any particular program is not captioned in the online environment presents numerous additional challenges.

Nonetheless, consumers should be able to send inquiries regarding online captioning issues. Even though many websites do not have robust customer-facing operations designed for these purposes, websites generally do have ways for their customers to “contact us” in writing. The website can then investigate and determine where the issue resides without the need for Commission involvement.⁵⁹

⁵⁸ *See id.* ¶ 60.

⁵⁹ While the Commission has required MVPDs to provide specific contact information for the receipt of captioning complaints, it should not import that concept here. *See Notice* ¶ 47. Websites and other online entities generally do not have customer service operations designed to handle inquiries about regulatory compliance from members of the general public.

II. THE FCC SHOULD REFRAIN FROM IMPOSING DEVICE-SPECIFIC REGULATIONS ON MVPD-SUPPLIED DEVICES OR APPLICATIONS PURSUANT TO ITS SECTION 203 AUTHORITY

Section 203 of the CVAA directs the Commission to adopt captioning-related regulations for any “apparatus” used to receive, play back, or record video programming.⁶⁰ The *Notice* invites comment on the scope of the term “apparatus” for purposes of implementing Section 203.⁶¹ As detailed below, the Commission should conclude that its Part 79 pass-through rules cover devices or applications provided by MVPDs and should therefore refrain from imposing any additional regulations on such devices or applications pursuant to its Section 203 authority.

As an initial matter, Section 203 arguably does not even apply to devices that MVPDs lease to their customers. Where Congress intended to impose regulations on such devices in Title II of the CVAA, it did so expressly.⁶² Moreover, the section of the Communications Act that Section 203 of the CVAA amends – Section 303(u) – has historically been construed by the Commission to apply to apparatus sold at retail to consumers, not to equipment that MVPDs may lease to their customers.⁶³

Nonetheless, to the extent that the Commission construes Section 203 as applying to devices supplied to customers by MVPDs, the Commission’s authority in this regard is limited. The *Notice* suggests that the Commission’s authority under Section 203(a) sweeps broadly to cover “all hardware that is used in receiving or playing back video programming.”⁶⁴ Such an interpretation would be overbroad. By its terms, Section 203(a) relates to devices that are used

⁶⁰ See CVAA § 203.

⁶¹ See *Notice* ¶ 49 (inviting comment on the issue of what constitutes “apparatus” under Section 203(a)); *id.* ¶ 54 (seeking comment on the issue of what constitutes “apparatus” under Section 203(b)).

⁶² See CVAA § 205 (establishing access-related requirements for “navigation devices” that MVPDs supply to end-user customers).

⁶³ Prior to enactment of the CVAA, Section 303(u) applied to TV receivers.

⁶⁴ *Notice* ¶ 49.

to *view* programming. The provision requires the Commission to adopt regulations for apparatus used to receive or play back video programming if, among other things, such apparatus “uses a picture screen of any size.” The legislative history confirms this view.⁶⁵ Set-top boxes and other devices supplied by multichannel video distributors do not include displays and, therefore, are not subject to this provision.

In contrast, Section 203(b) covers apparatus used to record video programming. Currently, the only distributor-supplied devices that record video programming are digital video recorders (“DVRs”). More limited-function devices, such as non-DVR set-top boxes and digital transport adapters (“DTAs”) do not include recording functionality and therefore would be beyond the scope of the Commission’s Section 203(b) authority.

In any event, regardless of the precise scope of the Commission’s authority under Section 203, regulating distributor-supplied devices is unnecessary and duplicative regulatory requirements should be avoided. The simple fact is that multichannel video distributors *already* have a duty to support closed captions included in video programming that they carry on their systems. In particular, Section 79.1(c) of the Commission’s rules requires such distributors to pass through captions to customers.⁶⁶ As the Commission has explained in its implementing orders, the pass-through rule is aimed at ensuring that distributor equipment is working properly to ensure the accurate transmission of the closed captions to decoders in the subscriber’s household.⁶⁷ Implementation of the pass-through requirement varies depending on the type of

⁶⁵ See House Report at 30 (“Section 203(a) ensures that devices consumers use to view video programming are able to display closed captions . . .”); Senate Report at 14(same).

⁶⁶ See 47 C.F.R. § 79.1(c).

⁶⁷ See, e.g., *1997 Captioning Order* ¶¶ 85, 211-12; *In re Closed Captioning and Video Description of Video Programming; Implementation of Section 305 of the Telecommunications Act of 1996; Accessibility of Emergency Programming*, Second Report & Order, 15 FCC Rcd. 6615 n.48 (2000); *In re Closed Captioning of Video Programming; Closed Captioning Requirements for Digital Television Receivers*, Declaratory Ruling, Order, and NPRM, 23 FCC Rcd. 16674 ¶ 15 (2008).

device and connector a customer may be using. Standard definition set-top boxes and DTAs pass through closed captions for decoding in a TV set via analog outputs. In contrast, high-definition (“HD”) boxes typically have built-in captioning decoders that enable the decoding and rendering of closed captions. When this capability is turned on by the subscriber, the captions are processed in the box itself, and then output with the video stream for display on the connected TV set.⁶⁸ HD boxes also can pass through captions for decoding in a connected TV set if the box and TV are connected via an analog output.⁶⁹

The Commission has proposed a similar pass-through requirement in the *Notice* for video programming distributors that provide Internet-delivered video to consumers. Among other things, proposed Section 79.4(c)(2) would require VPDs to “enable the rendering or pass through of all required captions to the end user.”⁷⁰ Consequently, to the extent that a distributor enables access to Internet-delivered video via a leased device, under the Commission’s proposal, the device would need to support the rendering or pass through of captions contained in such video.

The same basic model also might apply in cases where a third-party IP-enabled device is used to access captioned video programming. Typically, in such cases, captions will be rendered in the device application supplied by the distributor (provided that the device does not create any compatibility issues) or directly from the provider or captions will be rendered in the native

⁶⁸ As the *Notice* explains, there is no technical means to pass through closed captions to a decoder in an HDTV in situations where the HD STB is connected to an HDTV set via HDMI or component analog. *Notice* ¶ 55. In such configurations, the HD STB does the caption decoding. This HDMI implementation has been well documented by the Commission’s Consumer Advisory Committee Working Group on Digital Closed Captions, see Program Report (Dec. 9, 2009), at <http://www.fcc.gov/encyclopedia/consumer-advisory-committee-dccvd-working-group-progress-report>, and also has been discussed in prior NCTA filings at the Commission. See, e.g., NCTA Reply Comments, filed in CS Dkt. No. 97-80, at 22-23 (June 28, 2010).

⁶⁹ Cable operators provide information to their customers regarding the captioning features of their boxes. See, e.g., Comcast Customer Central, Closed Captioning, at <http://customer.comcast.com/Pages/FAQListViewer.aspx?topic=Cable&folder=f601e707-c196-4ef2-87b3-9be44fce7af6> (last visited October 10, 2011); Time Warner Cable, Closed Captioning FAQs, at <http://www.timewarnercable.com/texas/site.faqs/DigitalCab/#Closed+Captioning> (last visited Oct. 10, 2011).

⁷⁰ See *Notice*, App. A, proposed § 79.4(c)(2) (proposed rules for video programming distributors).

caption decoding capability in the device itself (which can be supported in hardware or software).

So, for example, where a multichannel video customer wants to watch a TV Everywhere service on his or her PC, the customer will generally download an application from the distributor to the PC. When the customer is watching video using the application, the customer will have the ability to activate the captioning feature that is built into the downloaded application. In contrast, if that same customer wanted to watch the same TV Everywhere service on his or her iPad, rather than a PC, the customer would still download the distributor's application to the device. In this case, however, captions will be rendered by a software-based caption decoding capability in the iPad. In the first case, the distributor would render the captions under the Commission's proposed rules; in the second case, the distributor would pass through the captions to the decoder in the iPad and the iPad would have a separate captioning obligation.⁷¹ When retail devices render the captions distributed by a VPD, they should have the same responsibility as would a VPD with respect to its leased device.

It bears emphasis that covering distributor-supplied devices or applications in this way would be fully consistent with Congress's intent. Congress gave the Commission the authority under Section 203(e) of the CVAA to determine that caption-related requirements for such devices are being achieved through "alternate means"⁷² and further stated its intent that the Commission's regulations should "afford entities maximum flexibility in meeting the

⁷¹ Distributors should have the flexibility to pursue an application-based approach to delivering captions on third-party devices and not be compelled to rely on the captioning functionality that might be built into such devices. A distributor should be deemed in compliance with the Commission's proposed rendering/pass-through rule if it makes a good faith effort to render captions in an application, but the underlying device includes hardware or software that interferes with the proper functioning of the captioning feature in the application.

⁷² See CVAA § 203(e).

requirement that video programming delivered using Internet protocol be captioned.”⁷³ In short, consistent with this directive, the Commission could rely on Section 203(e) to conclude that its pass-through rules qualify as an “alternate means” for ensuring compliance with its device regulations.⁷⁴

In this same vein, the Commission should generally pursue a light regulatory touch in implementing Section 203. The Commission invites comment on whether it should regulate “interconnection mechanisms” that are or may be used to distribute video to devices in a home network.⁷⁵ It should not. The CVAA directs the Commission to require that interconnection mechanisms “are available” to transmit captioning information from source devices for rendering on display devices.⁷⁶ The simple fact is that such mechanisms are available today in the marketplace. As an example, the home-networking technology that some cable operators use to distribute content to “client” devices in the home today – a technology known as MoCA – already supports the pass-through of closed captions to client devices. Furthermore, next-generation home networking technologies that the cable industry is helping to develop through DLNA[®] (“Digital Living Network Alliance”) will support captioning functionality as well on linear programming streams.

⁷³ House Report at 31.

⁷⁴ This approach also would have the virtue of avoiding potential uncertainty around which entity – the distributor or device manufacturer – is responsible for compliance with the rules. The Commission’s Part 15 rules generally apply to device manufacturers. If the Commission imposed regulations on distributor-supplied devices pursuant to its Section 203 authority, then it would in effect be imposing two parallel sets of regulatory requirements relative to those devices – *i.e.*, one set of requirements imposed on the distributor via the pass-through rule, and a second set of requirements imposed on the manufacturer via the new device rules.

⁷⁵ Notice ¶ 55.

⁷⁶ CVAA § 203(b).

CONCLUSION

The cable industry is committed to working to facilitate the provision of captioned television programming online. As explained herein, the Commission at this juncture should establish certain objectives and parameters to guide the entities going forward. Rather than adopt prophylactic rules that propose heavy burdens on nascent business models, the Commission should take a more flexible approach and monitor developments in this area.

Respectfully submitted,

/s/ Rick Chessen

Jill M. Lockett
Senior Vice President
Program Network Policy

William A. Check, Ph.D.
Senior Vice President, Science & Technology
Chief Technology Officer

Andy Scott
Vice President, Engineering
Science & Technology

October 18, 2011

Rick Chessen
Diane B. Burstein
Stephanie L. Poday
National Cable & Telecommunications
Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445