

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**In the Matter of**

**CLOSED CAPTIONING OF INTERNET  
PROTOCOL PROGRAMMING:  
IMPLEMENTATION OF THE TWENTY-FIRST  
CENTURY COMMUNICATIONS AND VIDEO  
ACCESSIBILITY ACT OF 2010**

MB Docket No. 11-154

**REPLY COMMENTS OF DIRECTV, INC.**

Like a majority of those who filed comments in response to the notice of proposed rulemaking<sup>1</sup> issued in this proceeding, DIRECTV, Inc. (“DIRECTV”) supported most of the Commission’s proposals for implementing the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”). In these reply comments, DIRECTV responds to the small minority of commenters that urged the Commission to deviate from the statutory mandate by placing responsibility for captioning on distributors rather than programmers. The statute requires video programming owners (“VPOs”) to caption their programming, and the Commission lacks authority to place this responsibility on others. So long as the Commission defines VPOs as Congress intended (*i.e.*, to refer to entities that license programming for IP distribution), this statutory allocation of responsibility will not be difficult to implement or enforce. DIRECTV also supports those who urged the Commission to clarify the rules

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<sup>1</sup> See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd. 13734 (2011) (“Notice”); see also Public Notice, DA 11-1866 (rel. Oct. 21, 2011) (extending reply comment date to November 1, 2011).

applicable to multichannel video programming distributors (“MVPDs”) providing end-to-end service, to eschew retroactive captioning requirements, and to consider making the SMPTE-TT standard a safe harbor (but not an exclusive technology mandate).

**I. OWNERS ARE RESPONSIBLE FOR CAPTIONING THEIR PROGRAMMING.**

In the *Notice*, the Commission proposed a regime in which VPOs would be responsible for sending program files to video programming distributors and video programming providers (“VPDs/VPPs”) with all required captions, while VPDs/VPPs would be responsible for enabling the rendering or pass through of all required captions received from the VPO to the end user.<sup>2</sup> DIRECTV supported this proposal as a workable regime for IP closed captioning. Numerous commenters agreed, most of whom pointed out that the Commission’s proposal reflects the allocation of responsibilities set forth in the CVAA itself.<sup>3</sup>

Some commenters, however, propose to replace Congress’s allocation of responsibilities with formulations of their own. MPAA, for example, urges the Commission not to “invent[] a new regulatory scheme” and to instead “adhere as closely as possible” to the regime governing television captioning, in which distributors bear the primary responsibility for ensuring compliance.<sup>4</sup> Likewise, TDI suggests that VPDs/VPPs, rather than VPOs, should bear the

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<sup>2</sup> *Notice*, ¶ 16.

<sup>3</sup> *See, e.g.*, Verizon Comments at 2 (“Unless an entity is acting as a VPO and is originating content, generally all it can do is pass through the closed captioning it receives. The CVAA takes this into account, specifying that ‘the video programming provider or distributor shall be deemed in compliance if such entity enables the rendering or pass through of closed captions...’”); American Cable Association (“ACA”) Comments at 14 (supporting the Commission’s approach as “consistent with the language of the CVAA, legislative intent and the practical realities of the MVPD business”); AT&T Comments at 7 (the only obligations imposed by the CVAA on VPDs/VPPs are to ensure that captions are rendered or passed through). Unless otherwise indicated, all comments were filed in MB Docket No. 11-154 on October 18, 2011.

<sup>4</sup> Motion Picture Association of America (“MPAA”) Comments at 3.

“exclusive responsibility” for captioning.<sup>5</sup> NAB suggests that the Commission should “place the burden of compliance on the entity that is closest to the end user.”<sup>6</sup> For the reasons discussed below, the Commission must reject these suggestions.

**A. The CVAA Limits VPD/VPP Obligations to Rendering and Passing Through Captions Provided by VPOs.**

The Commission should reject the alternate formulations proposed by MPAA and others, first and foremost, because it simply cannot ignore the explicit terms of the CVAA. It is “axiomatic” that the Commission may act only pursuant to authority delegated to it by Congress.<sup>7</sup> Here, Congress chose to adopt a particular regime for IP-delivered programming, allocating legal responsibilities that correspond with entities’ roles in creating, passing along, and decoding closed captioning.<sup>8</sup> Thus, the CVAA requires programmers to caption,<sup>9</sup> requires providers and distributors to pass that captioning intact to an “apparatus,”<sup>10</sup> and requires the apparatus to decode the captioning.<sup>11</sup> Unlike prior statutes governing closed captioning that gave the Commission more limited jurisdiction, the CVAA uses the term “VPO” and directs the Commission to establish the obligations of such entities with respect to IP closed captioning.

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<sup>5</sup> Telecommunications for the Deaf and Hard of Hearing, Inc., *et al.* (“TDFI”) Comments at 7-8.

<sup>6</sup> National Association of Broadcasters (“NAB”) Comments at 11.

<sup>7</sup> *E.g.*, *Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010).

<sup>8</sup> In the words of one VPO, the CVAA “narrowly tailor[s] requirements for each participant in the IP-content delivery chain that are logically related to their respective roles within the chain.” Starz Entertainment Comments at 2.

<sup>9</sup> The Commission must “establish a mechanism” to make information on programming subject to the Act available to VPP/VPDs on “an ongoing basis.” 47 U.S.C. § 613(c)(2)(D)(v). Such a regime presupposes that somebody further up the chain—*i.e.*, the VPO—has captioned the programming. Otherwise, the requirement to “make information available” would be nonsensical. *See, e.g.*, *United States v. American Trucking Ass’n., Inc.*, 310 U.S. 534, 543 (1940) (noting that a court should not construe a statute in a manner that leads to absurd or futile results).

<sup>10</sup> 47 U.S.C. § 613(c)(2)(D)(vi) (speaking of “the rendering or pass through” of captions).

<sup>11</sup> The Commission must require the manufacturers and developers of “apparatus designed to receive or play back video programming” to ensure that such apparatus be equipped with built-in closed captioning decoder capability. 47 U.S.C. § 303(u).

Conversely, it specifically provides that a VPD or VPP “*shall be deemed* in compliance if such entity enables the rendering or pass through of closed captions and video description signals and makes a good faith effort to identify video programming subject to the Act using [a mechanism to be established by the Commission].”<sup>12</sup>

In considering the CVAA, Congress was plainly aware of the existing closed captioning regime for television.<sup>13</sup> Yet it chose a different allocation of responsibility. Where, as here, Congress expressly considered one regime but adopted another, the Commission simply lacks the authority to adopt the regime Congress rejected.<sup>14</sup>

**B. The Commission Should Define “Video Programming Owner” to Refer Only to the Entity That Licenses Programming for Distribution.**

Commenters’ primary objection to the CVAA’s placement of captioning responsibility on VPOs relates not to the statutory language itself but to the alleged difficulty in implementing that language.<sup>15</sup> MPAA and others, for example, argue that it would simply be too hard to keep track

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<sup>12</sup> 47 U.S.C. § 613(c)(2)(D)(vi) (emphasis added).

<sup>13</sup> As MPAA itself points out, “the statute’s legislative history emphasizes that Congress sought to *update* the communications laws and directed the FCC to *revise* its regulations.” MPAA Comments at 4-5 (internal quotations and citations omitted).

<sup>14</sup> *See, e.g., Motion Picture Ass’n v. FCC*, 309 F.3d 796, 806-07 (D.C. Cir. 2002) (finding that “[a]fter originally entertaining the possibility of providing the FCC with authority to adopt . . . rules, Congress declined to do so,” Congress’s “silence surely cannot be read as ambiguity resulting in delegated authority to the FCC to promulgate the disputed regulations,” and refusing to find authority under Sections 2(a) and 4(i) for similar reasons); *see also, e.g., AT&T Corp. v. FCC*, 323 F.3d 1081, 1086 (D.C. Cir. 2003) (rejecting the FCC’s anti-slamming rules because “the regulations go beyond the anti-slamming statute’s express terms,” and noting that Congress “would have written the statute to prohibit” the slamming practices in question if it had wanted to empower the FCC to regulate them); *FCC v. Midwest Video Corp.*, 440 U.S. 690, 705, 708 (1979) (finding that certain public access rules were outside of the FCC’s ancillary jurisdiction because the relevant statutory provisions and legislative history “manifest[] a congressional belief” that such regulation was unwarranted).

<sup>15</sup> MPAA also suggests in passing that “direct regulation of copyright owners” would raise constitutional concerns. *See* MPAA Comments at 12. Whatever the merits of MPAA’s constitutional arguments, DIRECTV is confident that they would apply equally to the “direct regulation” of VPDs/VPPs, who, as the Supreme Court has repeatedly held, are first amendment “speakers” in their own right. *See, e.g., Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and

of all of the potential ultimate owners, licensees, and sublicensees in the copyright ownership chain.<sup>16</sup> No such tracking is necessary, however, if the Commission properly defines “VPO.” Rather than defining the term to include every single link in the copyright chain,<sup>17</sup> it should define “owner” as the single entity that licenses the copyrighted work for distribution. Doing so will limit the relevant “owner” to a single entity, and thereby simplify the analysis of responsibility for closed captioning of IP-delivered programming.<sup>18</sup>

Moreover, adopting a definition of ownership that focuses on distribution rights better comports with the Copyright Act than does one applying to “any” copyright ownership. That Act does not speak of “ownership” in a vacuum, but rather permits the holders of *particular rights*—which are divisible and transferable<sup>19</sup>—to prevent infringement of those specific rights.

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transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable programmers and operators ‘seek to communicate messages on a wide variety of topics and in a wide variety of formats.’”) (*Leathers v. Medlock*, 499 U.S. 439, 444 (1991), and *Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 494 (1986)).

<sup>16</sup> See MPAA Comments at 5-6 (disagreeing with the proposal that “would require any person or entity that owns the copyright of the video programming to bear responsibility for sending program files to video programming distributors or providers with all required captions”).

<sup>17</sup> See Notice, ¶ 15 (proposing to define VPO as “any person or entity that owns the copyright of the video programming delivered to the end user through a distribution method that uses IP”).

<sup>18</sup> Likewise, claims that certification would be too difficult ignore the fact that, under the CVAA, VPOs are held directly accountable for captioning, so certification is unnecessary. See DIRECTV Comments at 9.

<sup>19</sup> 17 U.S.C. § 201(d)(2) (“Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.”) (emphasis added); 17 U.S.C. § 501(a) (providing that “[a]nyone who violates the *exclusive rights* of the copyright owner” is subject to the remedies set forth in the statute); 17 U.S.C. § 501(b) (providing that “[t]he legal or beneficial owner of an exclusive right under a copyright is entitled ... to institute an action for any infringement of that particular right committed while he or she is the owner of it.”). Indeed, permitting individual rights in the “bundle of copyright rights” to be divided and transferred freely was one of the principal changes made by the 1976 Copyright Act. See, e.g., *New York Times Co. v. Tasini*, 533 U.S. 483, 495-96 (2001) (noting that, in enacting the 1976 revision, Congress

The CVAA requires captioning of video programming for “Internet distribution.”<sup>20</sup> Thus, the only copyright “ownership” of any relevance to the CVAA is the right to license Internet distribution. It simply does not matter whether this ownership arises from the original copyright or a license with rights to sublicense.

Limiting the definition of “VPO” to those who license programming for distribution would also address the enforcement concerns raised by MPAA and others. It is, of course, much easier to identify such an entity than it is to identify every single link in the copyright chain. Indeed, in the Internet context, it is often easier to identify such a VPO than it is to identify the relevant VPD/VPP.<sup>21</sup> Limiting the scope of the “VPO” definition, as proposed by Starz and Microsoft, would establish a simple and workable enforcement regime.

## **II. THE COMMISSION SHOULD NOT SUBJECT MVPDs TO CONFLICTING RULES.**

NCTA and ACA each point out a potential ambiguity in the proposed rules. Traditional MVPDs, such as cable and satellite operators, can be VPDs/VPPs. Yet they can, and increasingly do, also distribute programming in IP format *as MVPDs*, both over their own dedicated networks and the over consumers’ home networks.<sup>22</sup> As DIRECTV noted in its initial comments, for example, it delivers programming in IP in a variety of configurations, including provision of VOD programming to set-top boxes and delivery of programming throughout the

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“rejected the doctrine of indivisibility, recasting the copyright ‘exclusive rights,’ each of which ‘may be transferred ... and owned separately.’”) (internal citations omitted).

<sup>20</sup> 47 U.S.C. § 613(c)(2)(B).

<sup>21</sup> For example, even though a viewer may receive a Fox program from many different sources (over the air via a Fox owned and operated station, from an MVPD such as DIRECTV, or by accessing the Hulu or Fox.com websites), in each case Fox’s role as the “owner” is obvious. As NAB itself points out, by contrast, it can be much more difficult for a viewer to identify every VPD/VPP in all of these contexts, particularly where providers store copies of their content in multiple CDNs for retrieval by end users. End users would have no reason at all to know that CDNs even exist. NAB Comments at 9.

<sup>22</sup> *E.g.*, ACA Comments at 6 *et seq.*

house via the “whole home DVR.” In each of these configurations, DIRECTV passes through the CEA-708 closed captioning data for delivery in IP format in a form that its set-top boxes (or RVU client devices) can decode and render. Viewers thus receive IP-delivered closed captioning with all of the features and functions available on their digital televisions.

The Commission’s proposed rules do not clearly address this situation. For example, in such cases, would an MVPD be required to pass through captions by virtue of its status as a “video programming distributor”<sup>23</sup> under the television captioning rules, or would it be excused from passing through captioning until the new requirements for VPDs/VPPs using IP distribution take effect? On an ongoing basis after the IP distribution rules take effect, moreover, it is not clear which rules would govern the MVPD with respect to any technical, complaint, and enforcement considerations. As ACA and NCTA suggest, one solution to this problem would be to clarify the definition of VPD/VPP to apply only with respect to the distribution of content online, over the Internet.<sup>24</sup> Applying this approach, the television captioning rules would apply to MVPDs acting as MVPDs, while the IP captioning rules would apply to distributors of content online. By clearly drawing this distinction, the Commission would eliminate a potential source of confusion in the interplay of its captioning rules.

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<sup>23</sup> 47 C.F.R. § 79.1(a)(2) (defining video programming distributors as “any television broadcast station licensed by the Commission and any multichannel video programming distributor as defined in Sec. 76.1000(e) of this chapter, and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission”).

<sup>24</sup> ACA Comments at 8; National Cable and Telecommunications Association (“NCTA”) Comments at 10 (“[T]he 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*.”).

### **III. THE COMMISSION SHOULD NOT REQUIRE RETROACTIVE CAPTIONING.**

The CVAA provides that the Commission’s rules implementing requirements for captioning of IP-delivered programming should apply only to programming that was “published or exhibited on television with captions after the effective date of such regulations.”<sup>25</sup> The legislative history confirms that these requirements are to be applied prospectively.<sup>26</sup> From this, NCTA and NAB argue persuasively that programming properly made available by VPOs without captioning that is later shown on television *with* captioning is not thereby made subject to a retroactive captioning requirement.<sup>27</sup> As NCTA puts it, “[c]opyright 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.”<sup>28</sup> Accordingly, the Commission should not adopt a regime that would require VPOs to retrieve and replace every once-compliant programming file delivered without captioning should that programming subsequently fall within the scope of the CVAA’s requirements.

### **IV. SMPTE-TT APPEARS TO BE A GOOD CANDIDATE FOR A SAFE HARBOR STANDARD, BUT THAT SHOULD NOT PRECLUDE THE USE OF OTHER INDUSTRY STANDARDS.**

A number of commenters urge the Commission to designate SMPTE-TT as a safe harbor standard such that its use for IP interchange and delivery to devices unaffiliated with the distributor would presumptively satisfy the CVAA’s requirements.<sup>29</sup> DIRECTV does not object to such a designation, so long as the Commission makes clear that VPOs, VPDs/VPPs, and

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<sup>25</sup> 47 U.S.C. § 613(c)(2)(A).

<sup>26</sup> See S. Rep. No. 111-386, at 6 (2010); H.R. Rep. No. 111-563, at 18 (2010).

<sup>27</sup> NCTA Comments at 19; NAB Comments at 27-28.

<sup>28</sup> NCTA Comments at 19.

<sup>29</sup> See, e.g., Consumer Electronics Association (“CEA”) Comments at 6 (recommending SMPET-TT as a “safe harbor”).

apparatus manufacturers retain the flexibility to use alternative industry standards in addition to or instead of SMPTE-TT. Such flexibility will enable all affected parties to continue to innovate, and allow the development of alternative standards that may have different or improved capabilities.

In this regard, DIRECTV would note that although SMPTE has developed a recommended practice defining the method for converting from the analog standard for television closed captioning (CEA-608) to SMPTE-TT, the corresponding conversion protocol with respect to the digital television standard (CEA-708) is still under development.<sup>30</sup> As discussed in its comments, DIRECTV currently passes along CEA-708 data along with programming delivered via IP. Accordingly, at least in the near future, SMPTE-TT could be problematic for a VPD/VPP that plans to pass through CEA-708 data as DIRECTV does. By making SMPTE-TT a safe harbor standard but not the only one that can be used, the Commission will allow the industry to continue to search for the most robust solution or set of solutions to transmitting closed captioning data via IP.

Respectfully submitted,

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<sup>30</sup> See SMPTE 2052-0:2010 - SMPTE Roadmap (*available at* <http://vpaac1.wikispaces.com/file/view/st2052-0-2010.pdf>).