

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

REPLY COMMENTS OF TIME WARNER INC.

Time Warner Inc. (“Time Warner”) submits these reply comments in response to comments submitted regarding captioning of television programming distributed via Internet protocol (“IP”) and the above-captioned Notice of Proposed Rulemaking (“NPRM”).¹ Time Warner is a content-focused company which, through its divisions, is involved primarily in the operation of multichannel television networks, the production and distribution of filmed entertainment (including motion pictures, television programming, and video games), and the production and distribution of magazines.² As an industry leader in both the creation and packaging of high quality content, and technical innovations that enable new ways for consumers to access this content, Time Warner has a strong interest in this proceeding.

¹ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, MB Docket No. 11-154 (released Sept. 19, 2011) (“NPRM”).

² Time Warner’s motion picture and television production studio assets include Warner Bros. Pictures and Warner Bros. Television. The company’s programming networks include Home Box Office and Cinemax, as well as CNN, TNT, TBS, Cartoon Network, and other Turner Broadcasting System, Inc. cable networks. All of Time Warner’s businesses, including the Time Inc. publishing business, are actively engaged in the development of digital products and services for multiple platforms.

Time Warner shares the Commission’s goal of ensuring that implementation of Section 202 of the Twenty-First Century Communications and Video Accessibility Act (the “CVAA”) is accomplished in a way which is both helpful to consumers and readily achievable for entities involved in the delivery of television content via IP.³ To this end, we generally agree with the comments filed by the MPAA and NCTA, and particularly support MPAA’s proposals to modify the structure of the NPRM’s proposed rules to better serve this shared goal.⁴

In crafting captioning obligations for television content distributed by traditional means, the Commission appropriately focused its regulatory obligations on the entity that has the direct relationship with the consumer (*i.e.*, the “video programming distributor” or “VPD”), not copyright owners or other intermediate parties within the distribution chain that lack a direct-to-consumer nexus.⁵ The Commission concluded that this structure would “increase the availability of video programming with closed captions most expeditiously” and allow the agency “to monitor and enforce [its] rules more efficiently.”⁶ This regime also offers clarity and efficiency for consumers by focusing on “a single entity to which complaints must be addressed.”⁷ In establishing this regulatory framework, the Commission expressly understood that program owners (“VPOs”) and providers (“VPPs”) would cooperate with distributors to ensure the availability of captioning, and that the “parties will negotiate for an efficient allocation of

³ See Pub. L. No. 111-260, 124 Stat. 2751, § 202(b) (2010) (among other matters, revising Section 713 of the Communications Act of 1934, as amended (“Communications Act“)).

⁴ See Comments of Motion Picture Association of America, MB Docket No. 11-154 (submitted Oct. 18, 2011); Comments of National Cable & Telecommunications Association, MB Docket No. 11-154 (submitted Oct. 18, 2011).

⁵ See 47 C.F.R. § 79.1. See also *Closed Captioning and Video Description of Video Programming, et al.*, Report and Order, 13 FCC Rcd 3272 (1997) (“*Closed Captioning Order*”), *recon. granted in part on other grounds*, 13 FCC Rcd 19973 (1998).

⁶ See *Closed Captioning Order*, 13 FCC Rcd at 3286-88 (¶¶ 27, 30).

⁷ See *id.* at 3286 (¶ 27) (“By holding distributors responsible for captioning, there typically will be a single entity to which complaints must be addressed, and there will be no need for tracking the entities responsible for producing programs alleged to violate the rules.”)

captioning responsibilities” through their business and contractual relationships.⁸ This regime has been in place for more than a decade, and has been successful in addressing any captioning issues on a case-by-case basis.

In light of this long-established framework, the imposition of any direct regulatory obligations on copyright owners in this proceeding would depart from the Congressional directive that the CVAA was intended to “update” the Commission’s existing regulations.⁹ The CVAA’s instruction to the Commission to “describe the responsibilities” of VPDs, VPPs and VPOs with respect to IP captioning does not mandate a change in its compliance focus away from the party with the direct-to-consumer relationship. As initially promulgated, Section 713 of the Communications Act¹⁰ similarly referenced VPPs and VPOs in recognition that some amount of collaboration was needed to ensure closed captioning would be successfully implemented, but this did not result in direct regulation of either type of entity.¹¹ In other words, with respect to captioning, the Commission already has concluded that “responsibility” does not necessitate “direct regulation.” The Commission’s current approach has served well for more than a decade, and nothing in the CVAA compels a change in course. Indeed, the inherent complexity and fluidity of the online ecosystem weighs further in favor of a restrained regulatory approach in the

⁸ *See id.* at 3286-87 (¶ 28).

⁹ NPRM at ¶ 9 (citing S. Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010) & H.R. Rep No. 111-563, 111th Cong., 2d Sess. at 19).

¹⁰ *See* Section 305 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (adding Section 713 to the Communications Act of 1934, which was codified at 47 U.S.C. § 613).

¹¹ *See id.* at 3286-87 (¶ 28) (“Although we are placing the ultimate responsibility on program distributors, we expect that distributors will incorporate closed captioning requirements into their contracts with producers and owners, and that parties will negotiate for an efficient allocation of captioning responsibilities. The references to program ‘owners’ in Section 713 reflect Congress’ recognition that it is most efficient to caption programming at the production stage, and the assumption that owners and producers will be involved in the captioning process.”).

instant proceeding.¹² As such, the Commission should focus regulatory responsibility here on VPDs, which are the entities with the direct-to-consumer relationship.¹³

This result is further compelled by the Commission's responsibility to interpret statutes in ways which minimize constitutional implications.¹⁴ As the Supreme Court has explained, "the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny."¹⁵ Direct regulation of copyright owners or content providers thus is likely to raise serious First Amendment questions, including whether the risk of agency sanction expressly against copyright owners or content providers may inappropriately affect a speaker's editorial judgments or artistic interpretations.¹⁶

Similarly, any mandated quality standard with respect to captioning content raises questions of constitutional dimension. Technical guidance as to what may be necessary to ensure that captioning provided with IP-delivered video content is not lost in transmission is fundamentally different from requirements as to the quality of the content of that captioning. Consistent with this distinction, the Commission has not imposed non-technical quality standards as part of its captioning requirements vis-a-vis traditional television outlets, notwithstanding the

¹² In addition to important jurisdictional limits on the Commission's authority with respect to both content and the Internet, the fluidity of and rapid changes in the online video marketplace are sufficient grounds to justify caution in the Commission's approach in this proceeding. Cf. *Annual Video Competition Report*, Further Notice of Proposed Rulemaking, MB Docket No. 07-269, NCTA Comments at 25 (submitted June 8, 2011) (noting that Internet video marketplace is "evolving at breakneck speed").

¹³ In an online environment, the entity with the direct-to-consumer relationship will vary depending on the business model involved. For example, with a subscription service, the entity with whom the consumer has the subscription would be the relevant VPD. For non-subscription, ad-based websites, the VPD would be the entity operating the website.

¹⁴ See, e.g., *US WEST v. FCC*, 182 F.3d 1224 (10th Cir. 1999), cert. denied sub nom. *Competition Policy Institute v. US WEST, Inc.*, 530 U.S. 1213 (2000).

¹⁵ *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion by J. Breyer) (quoted in part by *Reno v. ACLU*, 521 U.S. 844, 875-76 (1997)).

¹⁶ We acknowledge, however, that where a VPO or VPP is acting as a VPD with a direct-to-consumer relationship, the Commission's proposed rules may apply to them in so far as they are acting as a distributor.

imposition of other technical obligations relevant to those requirements.¹⁷ Indeed, many parties have submitted comments in various captioning dockets that further explain that such quality mandates, even in the traditional television context, would be counterproductive, cumbersome, subjective, and “impose unnecessary burdens on programming providers and the Commission to implement and enforce.”¹⁸ Against this backdrop, the Commission must not interpret proposals to utilize CEA-608/708 as a baseline for technical compatibility to justify the creation of any sort of quality standard for IP captioning.¹⁹

Moreover, any quality obligation raises significant burden-of-proof and procedural issues in light of today's Internet environment. Internet video transmission involves a number of steps, and different end users may experience different results with respect to what may be the same underlying programming depending on a number of technical and other factors.²⁰ From a legal perspective, most parties in the distribution chain, especially upstream program providers or content owners, lack sufficient privity to determine the myriad factors that may affect a particular end user's viewing experience. In light of such practical and legal considerations, the Commission should not further consider quality standards as part of this proceeding.

¹⁷ See, e.g., 47 C.F.R. §79.1(c) & *Closed Captioning Order*, 13 FCC Rcd at 3375. See also Public Notice, CG Docket No. 05-231 & ET Docket No. 99-254, DA 10-2050, (CGB rel. Oct. 25, 2010) & *Closed Captioning of Video Programming: Telecommunications for the Deaf, Inc., Petition for Rulemaking*, Notice of Proposed Rulemaking, 20 FCC Rcd 13211 (2005) (both seeking additional comment regarding this issue).

¹⁸ Comments of Home Box Office, Inc., CG Docket No. 05-231, at 9-11 (submitted Nov. 10, 2005) (quoting *Closed Captioning and Video Description Implementation of Section 305 of the Telecommunications Act of 1996 et al.*, Memorandum Order and Opinion, 13 FCC Rcd 19973, 19993 (1998)); see Comments of Time Warner Inc., CG Docket No. 05-231 & ET Docket No. 99-254, at 6-8 (submitted December 9, 2010).

¹⁹ Cf. 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 at 13-14 (rel. July 12, 2011) .

²⁰ Although the NPRM suggests that the time of a particular viewing for a programming stream may not be relevant in the Internet video context, see NPRM at ¶ 44, the time and date of the alleged captioning issue may be very relevant in particular cases for determining whether there was an actual captioning issue upstream of the end user.

Given the expansive scope of this proceeding and the abbreviated time frame for its completion, the Commission should maintain the structure of its existing closed captioning rules, avoid direct regulation of copyright owners or content providers, and refrain from the adoption of quality standards.

Respectfully submitted,

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