

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.  
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000  
FAX: (202) 393-5760  
www.skadden.com

DIRECT DIAL  
(202) 371-7040  
DIRECT FAX  
(202) 661-8340  
EMAIL ADDRESS  
CSLOAN@SKADDEN.COM

FIRM/AFFILIATE OFFICES

BOSTON  
CHICAGO  
HOUSTON  
LOS ANGELES  
NEW YORK  
PALO ALTO  
WILMINGTON

BEIJING  
BRUSSELS  
FRANKFURT  
HONG KONG  
LONDON  
MOSCOW  
MUNICH  
PARIS  
SÃO PAULO  
SHANGHAI  
SINGAPORE  
SYDNEY  
TOKYO  
TORONTO  
VIENNA

November 21, 2011

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

RE: Notice of *Ex Parte* Communication  
MB Docket No. 11-154

Dear Ms. Dortch:

On November 18, 2011, the undersigned and Jared Sher of this Firm together with Linda Kinney, Vice President, Regulatory Affairs of the Motion Picture Association of America, Inc. (“MPAA”), met with Austin Schlick, William Scher, Royce Sherlock, Susan Aaron, Mary Beth Murphy, Michelle Carey, Diana Sokolow, Steve Broeckart, Jeff Neumann, and Karen Peltz Strauss of the Commission to discuss matters relating to the above-referenced proceeding.

In particular, we discussed MPAA’s serious concerns regarding the constitutional implications raised by the closed captioning rules proposed in the *Notice*.<sup>1</sup> While MPAA reiterated its support for the goals underlying Section 202 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”), it explained that closed captioning regulations affect speech and therefore warrant heightened constitutional scrutiny. For the first time, in a major shift from the existing captioning regime, the Commission would impose burdens on

---

<sup>1</sup> See *In re 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, FCC 11-138 (rel. Sept. 19, 2011) (the “*Notice*”).

program owners and creators when they do not directly present content to consumers. A government mandate that these speakers include captioning on television programs that appear on the Internet would compel a speaker to speak in a manner not of its own choosing. MPAA explained that, even if the government has an important interest in ensuring that hard of hearing Americans can access online television content, First Amendment principles and jurisprudence require that the government not impose a burden on speech that is more extensive than essential to achieve the governmental interest.<sup>2</sup> Because there exists a captioning regulatory framework that has functioned successfully for more than a decade without regulating content creators, MPAA said that the rules proposed in the *Notice* would impose a greater burden on free speech than is necessary.

With respect to the requirement that a speech restriction be appropriately tailored, MPAA said that the Commission's closed captioning proposal impermissibly and unnecessarily targets a new category of speakers. MPAA stressed that the successful current regime applies to programming distributors, such as broadcasters and multichannel video programming distributors, all of whom maintain a direct relationship with end-user consumers. In implementing the original television captioning rules in 1997, the Commission itself explicitly noted that focusing on distributors – rather than content creators – was preferable.<sup>3</sup> Specifically, the FCC said that “[b]y 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.”<sup>4</sup> In light of this history, MPAA noted that it is not abstractly arguing that there may be a narrower alternative to the proposed new rules. Rather, the current regime demonstrates that it is possible for the FCC to achieve the goals of the CVAA while maintaining flexibility for the industry and without imposing an unnecessary burden on speech and on a new category of speakers.

In short, MPAA said that a simple extension of the current closed captioning model presents a viable, less burdensome alternative to the rules proposed in the *Notice*. MPAA also noted that this position is supported by the very consumer groups that are the intended beneficiaries of the CVAA – including the National

---

<sup>2</sup> See *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (restriction on First Amendment freedoms must be no greater than is essential to the furtherance of an important governmental interest).

<sup>3</sup> See *In re Closed Captioning and Video Description of Video Programming; Implementation of Section 305 of the Telecommunications Act of 1996; Video Programming Accessibility*, 13 FCC Rcd 3272, 3286 (1997).

<sup>4</sup> *Id.*

Association of the Deaf.<sup>5</sup> As explained in the consumer groups' November 10, 2011 *ex parte* letter, consumers require "a single, obvious point of responsibility for captions in order to facilitate efficient and robust enforcement of the captioning rules."<sup>6</sup> The groups emphasized the way in which video programming distributors, unlike content creators, play a consistent, easy-to-identify role. Particularly in light of the fact that continuation of the current regime would benefit the intended beneficiaries of the statute, there is no constitutionally valid rationale for imposing new burdens on speech.

For all of these reasons, MPAA explained, as it indicated in its comments, that it would be far more efficient and effective for the Commission to extend to this proceeding the existing captioning framework applicable in the television environment. In doing so, the Commission would avoid the constitutional risks clearly presented by the rules proposed in the *Notice*.

This letter is being submitted electronically in the above-referenced docket, which has been granted permit-but-disclose status, pursuant to Section 1.1206(b) of the Commission's Rules. Should you have any questions concerning this submission, kindly contact the undersigned.

Respectfully submitted,

/s/  
Clifford M. Sloan  
*Counsel to MPAA*

cc: Austin Schlick  
William Scher  
Royce Sherlock  
Susan Aaron  
Mary Beth Murphy  
Michelle Carey  
Diana Sokolow  
Steve Broeckaert  
Jeff Neumann  
Karen Peltz Strauss

---

<sup>5</sup> See Letter from Andrew S. Phillips, National Association of the Deaf, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 11-154 (dated Nov. 10, 2011).

<sup>6</sup> *Id.*