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December 14, 2011

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

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

Dear Ms. Dortch:

The Motion Picture Association of America, Inc. (“MPAA”), on behalf of its member studios, submits this *ex parte* letter regarding implementation of Section 202 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”) with respect to archival Internet content (that is, content hosted on a web site on or before the effective date of new rules adopted in this proceeding).

MPAA and its members want to make certain that the CVAA is implemented in a way that is both practical and achieves Congress’ goal of ensuring that deaf and hard of hearing Americans can enjoy television programming delivered via the Internet. To that end, we detail below a voluntary proposal that would result in even *more* captioned archival content than required by the statute, but in a measurable, achievable, and more realistic timeframe than proposed in the *Notice*.¹

MPAA’s proposal is a win-win for all parties. Adding captions to online television series and movies comprehensively and systematically is a much more consumer-friendly approach; it will provide hearing-disabled viewers with a broader range of content, including access to entire series of television programs

¹ 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*”).

over multiple seasons. By contrast, the scattershot approach proposed in the *Notice* would result in captioning of random individual episodes of programs based on the date that they happen to be re-aired on television. Attempting to search for and replace uncaptioned content with captioned content on potentially thousands of web sites on an episode-by-episode basis is so logistically complex that it would be difficult if not impossible for content owners and their distribution partners to comply.

Let there be no mistake – captioning online libraries would be a colossal undertaking. Indeed, the volume of content already hosted online is almost unfathomable. While current-run television shows and recently-released theatrical films may be at the forefront of people’s minds, scores of programs and tens of thousands of hours of legacy content are hosted on a wide array of web sites. Various online distributors today offer decades-old scripted television series side-by-side with years-upon-years of news programs, to say nothing of generations of motion pictures.

Such an ambitious undertaking will take time to accomplish. Content owners, distributors, and device manufacturers will already be devoting significant time and resources to put into place new procedures for ensuring that online captions are available for all new content going forward. Thus, it will be necessary to phase in the captioning of archival content over a number of years.

Proposal

The benchmarks proposed below are derived from the schedule the Commission adopted for the current television captioning rules. In that context, the Commission found that two-year benchmarks give parties “sufficient time” for implementation while providing a “fair balance between the interests of persons with hearing disabilities and video programming interests.”² Benchmarks for captioning of archival content would be as follows:

- (1) Within 24 months of the effective date of new rules, content owners would provide captions for all of the full-length content that is hosted on their wholly-owned and operated web sites, that is licensed for display on broadcast or pay television, and that was initially produced on or after January 1, 1998.

² *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 19973, 19982 (1998); *see also* 47 C.F.R. § 79.2(b).

- (2) Within 48 months of the effective date of the new rules, content owners would provide authorized third party web sites with captions for all of their theatrical films initially produced on or after January 1, 1998 and that are licensed for display on broadcast or pay television.
- (3) Within 72 months of the effective date of the new rules, content owners would provide authorized third party web sites with captions for archival television content consisting of full-length programs that are licensed for display on broadcast or pay television and that were originally produced on or after January 1, 2006.
- (4) Within 96 months of the effective date of the new rules, content owners would provide authorized third party web sites with captions for archival television content consisting of full-length programs that are licensed for display on broadcast or pay television and that were originally produced between January 1, 1998 and December 31, 2005.

The content in the classes specified above would be captioned according to this schedule without regard to whether/when any particular piece of content is re-aired on television. In this regard, the proposal contemplates that content owners would caption *more* online content than would otherwise be required by the statute (given that the CVAA only applies to content that is aired on television after the effective date of the new rules). The commitment would only extend to content with an initial production date on or after January 1, 1998, because that is the date on which the original television captioning rules became effective, and there can be no reasonable expectation that content produced earlier must be captioned.³

Because of the enormity of this undertaking, content owners require 24 months to add online captions to existing content posted on their wholly-owned and operated web sites. Moreover, given that content owners will be working with online distributors to facilitate compliance with the FCC's roll-out schedule for new content over the 6-, 12- and 18-month periods following the effective date of new rules, a 24-month period is appropriate.

Content owners would focus next on providing additional captioning for existing libraries of theatrical films, for which the universe of relevant content is

³ To be clear, the benchmarks proposed here would serve only as a baseline. In many cases, content owners would (or in fact already do) go beyond this, both by captioning older television shows and movies and by making captions available more quickly than the above timelines. In addition, this proposal would relate to domestic content on domestic web sites.

more manageable in comparison to the hundreds or even thousands of separate television series hosted on third-party web sites. Finally, we propose to differentiate between television content produced before and after January 1, 2006, because that date marked the point in time when the current television rules called for 100% of new, non-exempt English-language programming to be captioned.⁴ Thus, captions are likely to be more readily available for content created since 2006. In addition, because captioning technology was still evolving, it may not be feasible to extract and reformat captions from archival content created prior to that time, increasing the likelihood that captions would need to be re-created for online use. This older category of television content will be the most challenging and time-consuming to replace with a captioned version online.

With respect to all captions provided to third-party sites, content owners would be deemed to have fulfilled their commitment if they maintain records sufficient to demonstrate proof of sending the requisite content, with captioning or with a stand-alone caption file, in the SMPTE format (or in another format only to the extent expressly agreed upon by the content provider and the online distributor).

As a legal matter, Congress anticipated that there might be an alternative to regulation when it comes to achieving the statutory goals of the CVAA.⁵ Section 202(b) of the law allows an entity to meet the requirements of the Act “through alternate means than those prescribed by regulations . . . if the requirements of this section are met, as determined by the Commission.”⁶ Given that online content distributed on television after the effective date will be covered by the rules going forward, and in light of the logistical complexities unique to archival material, we submit that this voluntary proposal represents the best way to move forward in lieu of regulation.

The logistical difficulties posed by a government mandate to provide captions for archival content to hundreds if not thousands of online distributors on an episode-by-episode basis should not be underestimated. Moreover, the notion that there is any reasonable mechanism to track precisely when any particular piece of this legacy content may appear on television going forward belies an appreciation of the enormity of this universe of material. Even the Video Programming

⁴ See 47 C.F.R. § 79.2(b).

⁵ See Pub. L. No. 111-260, § 202(b).

⁶ *Id.*

Accessibility Advisory Committee (“VPAAC”) could not figure out a way to resolve this complicated issue.⁷

The challenges are many-fold. First, different pieces of content that already are online today have been captioned for their original use in a variety of different technical formats. At the same time, as the Commission is aware, different online video distributors use different proprietary standards for online captioning on their sites and in their applications.⁸ Going forward for new content, these differences can and will be bridged pursuant to commercial negotiations between the parties. But for archival content, melding together these incompatible formats for tens of thousands of individual programs will require investment in new technology, as well as substantial time and resources.

Second, particularly with respect to television programming, content often is created by one party and aired by a different party or even multiple different parties (*e.g.*, a production studio that sells a series to a broadcast or cable network or via syndication to various television stations). The online distributors for this content can vary widely from series to series. If archival content is subjected to a captioning mandate, it would be tremendously complicated for the relevant parties to figure out how to comply. Essentially, a content owner would be placed in the position of having to take action based on the conduct of one third party that airs a program on television, which would trigger an obligation to coordinate with various other third parties with online distribution rights. And the triggering event may not even be evident. A small market station, for example, could preempt a scheduled network program with an episode of a syndicated show for which it has rights; that event could obligate one or more online video distributors who have the same series as part of their online libraries to ensure that the same episode is captioned online. Tracking all of these scenarios would become a logistical labyrinth.

Indeed, there are more than 2,000 full power and Class A television stations and an additional 600+ national and regional cable programming networks nationwide. Keeping track of which programs are aired by multiple, independent third parties, then notifying still-different independent third-party online distributors

⁷ See 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 12, 2011), list of unresolved issues at Appendix C (stating that determination of the responsibility for assurance of delivery of captions is a “complicated” issue).

⁸ See, *e.g.*, Letter from Paul Margie, Counsel to Apple, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 11-154 (dated Dec. 7, 2011).

of the date that individual episodes air, is just not realistic. Resources across all industries would be better spent supplying closed captions to a broader class of content, rather than developing a tracking mechanism that would never be 100% reliable. If anything, consumers typically prefer to have access to captions for entire seasons of a TV series, rather than random episodes that may happen to be re-aired on television after the effective date of new rules.

Third, captioning formats are constantly evolving to take advantage of new technologies. For archival content that already is online, the original captions used for an initial television airing several years ago may rely upon older technologies. It simply may not be possible to use the underlying captions, because they cannot always be extracted from the older content or its captioning files, which would effectively require that much of this older content – especially material initially distributed for television prior to 2006 – would have to be re-captioned. These logistical issues must be taken into account for older content.

A Win-Win for All Stakeholders

This voluntary proposal builds on the efforts that MPAA members and other rights holders have already undertaken to distribute a large volume of captioned content via the Internet.⁹ Online distributors and content owners would have in place a reasonable, straightforward way to approach the complexities associated with captioning archival materials. At the same time, it provides the hearing-disabled community with predictable, measurable results and access to a vast amount of content that might otherwise go uncaptioned. And the Commission would not find itself in the awkward position of trying to administer an unmanageable regime. All parties would benefit.

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.

Respectfully submitted,



Michael O'Leary
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⁹ As just one example, on Hulu alone, there are *more than 20,000 captioned episodes* of popular television series.