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January 10, 2012

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 January 9, 2012, the undersigned of this Firm, together with Linda Kinney of the Motion Picture Association of America, Inc. (“MPAA”), met with Erin McGrath of Commissioner McDowell’s office in connection with the above-referenced proceeding.¹ Also, on January 9 Linda Kinney spoke by phone with Michelle Carey of the Media Bureau, and on January 10 she spoke with Dave Grimaldi of Commissioner Clyburn’s office.² In the meeting and telephone calls, MPAA explained how the Commission’s approach in this proceeding may have broad implications for the legal and business concerns of video programming owners (“VPOs”) and video programming providers (“VPPs”).³ In particular, MPAA asked that the FCC provide parties that will

¹ *In the Matter of 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 (rel. Sept. 19, 2011) (the “Notice”).

² Ann Bobeck of the National Association of Broadcasters was on the call with Ms. Kinney and Mr. Grimaldi.

³ In this context, VPPs are entities such as program networks that license certain distribution rights from VPOs, including in some circumstances the right to sublicense to video programming distributors (“VPDs”) for online or other IP distribution. In other distribution models, either a VPO or VPP may also act as a VPD, to the extent it directly distributes content to consumers.

be subject to the new rules with flexibility as to timing, especially with respect to the manner in which VPOs, VPPs and VPDs share information about the captions contained in programming to be distributed online.⁴ We also asked that the Commission pursue only willful violations of the new rules during the two-year period immediately following when the rules become effective, to ensure that parties acting in good faith have adequate time to address unforeseen issues that arise during the transition to IP captioning. And we urged the FCC to refrain from requiring captions for any online clips or outtakes, consistent with the statute.

MPAA continues to believe, moreover, that the Commission should support the efforts of VPOs and VPPs to protect their content against unauthorized distribution or use. Just as with traditional television distribution, VPOs and VPPs develop private business arrangements with video programming distributors in the online context in order to make video content available legitimately while also protecting it from unauthorized distribution. Indeed, to the extent that a VPD is distributing IP video content, including full-length video programming that has aired on traditional television outlets, without any legal arrangement or other form of privity with the relevant VPO (whether direct or indirect through a licensed VPP or VPD), such distribution would raise serious copyright and other legal concerns.⁵ The Commission should not endorse or condone any violation of the legal rights of VPOs or VPPs in this proceeding.

⁴ See Letter from Brien C. Bell, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 11-154 (filed Jan. 9, 2012), at 3 (“We expect that during the phase-in period of the rules, the added burden of swapping archival content on a short timetable, such as 30 days, could overwhelm our capacity. The additional burden of swapping out archival content would conceivably limit or delay our ability to keep other current and more compelling content up to date. In light of these realities, 90 days is a reasonable amount of time to afford VPDs to complete required asset swaps.”).

⁵ Multiple comments noted that private business arrangements among VPOs, VPPs and VPDs are essential elements in the Internet environment, although these relationships, like those in traditional television distribution involving multiple networks, syndicators, packagers, and simultaneous broadcast and nonbroadcast distribution outlets, may at times be complicated. See, e.g., Comments of Motion Picture Association of America, Inc. at 5-7; Reply Comments of CBS Corp. at 3, 6 (“CBS Reply”); Reply Comments of Motion Picture Association of America, Inc. at 3-6 (“MPAA Reply”); but see Reply Comments of Microsoft Inc. at 3 (suggesting that the traditional television context does not involve “numerous parties” on the way to the consumer). There is no evidence in the record that demonstrates that VPDs routinely air full-length programming that is or will be presented on television without an appropriate business relationship or other type of privity, and MPAA would question any suggestion that distribution without permission is legitimate. In short, the Commission should not allow these rules to give unauthorized distribution of content any veneer of legitimacy, whether by imposing obligations on VPOs or VPPs with respect to a VPD that does not have a relationship with a programming source or other responsible party, or otherwise. This assumes that

In addition, the Commission should follow its general practice of avoiding interference in private business dealings.⁶ The record in this proceeding does not demonstrate any marketplace failings suggesting that the parties comprising the IP distribution chain would be unable to negotiate amongst themselves to ensure that any relevant regulatory requirements are met, just as has been done with multichannel video and broadcast television distribution for years. To the contrary, multiple parties have submitted comments confirming that VPOs, VPPs and VPDs routinely negotiate IP-distribution arrangements, notwithstanding the nascent and evolving status of the online video marketplace.⁷ The recent growth of online video content, as described in the *Notice*, offers further confirmation that the private marketplace continues to function successfully, with commercial negotiations yielding mutually beneficial agreements.⁸

Furthermore, as MPAA previously has explained in its comments, the Commission's decision in this proceeding should take into account the tremendously successful existing closed captioning regime for traditional video distribution. In one recent study, the FCC staff determined that the Commission has received a very small number of closed captioning complaints relative to the overall number of hours of television programming aired on multichannel video and broadcast outlets.⁹ This study

the Commission could determine who the relevant VPOs or VPPs were in the absence of such relationships. As in traditional television distribution, the identity of the relevant VPD will be more readily apparent to both the consumer and the Commission in IP distribution context, as that is the entity through which the consumer accesses the content. All comments referenced herein were filed as part of MB Docket No. 11-154.

⁶ See, e.g., CBS Reply at 6 n.12 (*quoting* Comments of Telecommunications for the Deaf and Hard of Hearing, Inc. at 9).

⁷ See, e.g., CBS Reply at 3, 6; MPAA Reply at 5-6. These arrangements routinely allocate responsibilities between the parties for any number of issues, and there is nothing in the record here to suggest that they could not likewise adequately address any future closed captioning matters that may arise (just as parties address other concerns relating to the implementation of their private arrangements in the face of new or evolving business or regulatory realities).

⁸ See *Notice*, at ¶ 8 (“The Commission previously recognized that the Internet has become a powerful method of video programming distribution, and that the amount of video content available on the Internet is continuing to increase significantly each year, as consumers increasingly utilize the Internet for this purpose.”)

⁹ In a 2010 report, the Consumer and Governmental Affairs Bureau and the Office of Engineering and Technology found that the Commission had received 107 captioning complaints from consumers between May 2009 and May 2010, a time period during which captions were required for 100 percent of all post-2002 and nonexempt English-language television programming (and, by the end of that period, 100 percent of all post-2002 and nonexempt Spanish-language television programming). See

also found that “the causes of captioning complaints are varied” and that “caption failures can occur at various points on the transmission path along which captions travel.”¹⁰ These variances reflect the fact that while a small number of occasional issues unfortunately occur, overall there is widespread compliance and entities involved in the traditional video distribution chain, including VPOs and VPPs, have successfully collaborated through private negotiations to satisfy the Commission’s captioning requirements. In light of this positive track record, MPAA asked that the FCC seek to replicate in this proceeding a light touch regulatory approach that encourages and promotes a similar transition with respect to IP distribution.

Finally, MPAA urged the Commission to remain cognizant of the fact that the IP-delivered video ecosystem continues to evolve. A restrained regulatory approach – with a reasonable delay in enforcement – is therefore warranted so as to give all relevant entities in the distribution chain time to complete the necessary transitional steps to enable widespread access to IP captioning. During this initial rollout, the Commission would be better able to study and assess whether problems emerge and, if so, what approaches (regulatory or otherwise) would best address them. This would preserve both Commission and industry resources in the near term and allow entities in the distribution chain to focus on their implementation efforts. A transition period of at least two years also would provide the Commission with a better understanding of how the online video ecosystem works and how it is evolving. Ultimately, this approach would enable the Commission to avoid inadvertently taking action that could hinder the continued growth of IP-delivered video.

Report on Digital Closed Captioning, Informal Complaints: Review and Analysis May 2009 – May 2010, at 5 & n.21 (OET, presented Oct. 27, 2010) (the “*2010 Captioning Report*”) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302783A1.pdf); *see also* 47 C.F.R. § 79.1. This paucity of complaints is striking when compared to the tens of thousands of hours of captioned television programming shown on broadcast and multichannel video outlets each year.

¹⁰ *See 2010 Captioning Report*, at 2, 11. For example, the *2010 Captioning Report* found that equipment issues were the cause of more than half of the complaints analyzed, but that these were just some of the 10 or more issues underlying the studied complaints. *See id.* at 7. The report thus indicates that captioning, even in more traditional distribution contexts, remains a complicated process, made all the more complex by the fact that consumers increasingly access content in different ways, on different devices, and at different times.

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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/

Jared S. Sher
Counsel to MPAA

cc: Erin McGrath
Michelle Carey
Dave Grimaldi