

Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPORT AND ORDER

Adopted: January 12, 2012

Released: January 13, 2012

By the Commission: Commissioner McDowell concurring and issuing a statement;
Commissioner Clyburn issuing a statement.

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## I. INTRODUCTION

1. Pursuant to our responsibilities under the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”),<sup>1</sup> this *Report and Order* adopts rules governing the closed captioning requirements for the owners, providers, and distributors of video programming delivered using Internet protocol (“IP”).<sup>2</sup> This *Report and Order* also adopts rules governing the closed captioning capabilities of certain apparatus on which consumers view video programming. Closed captioning is the visual display of the audio portion of video programming, which provides access to individuals who are deaf or hard of hearing.<sup>3</sup> Prior to the adoption of the CVAA, the Communications Act of 1934, as amended (the “Act”), required the use of closed captioning on television,<sup>4</sup> but not on IP-delivered video programming that was not part of a broadcaster or multichannel video programming distributor (“MVPD”) service.<sup>5</sup> That changed with the enactment of the CVAA, which directed the Federal Communications Commission (“Commission”) to revise its regulations to require closed captioning of IP-delivered video programming that is published or exhibited on television with captions after the effective date of the new regulations.<sup>6</sup> Further, the CVAA directed the Commission to impose closed captioning requirements on certain apparatus that receive or play back video programming, and on certain recording devices.<sup>7</sup> The rules we adopt here will better enable individuals who are deaf or hard of hearing to view IP-delivered video programming, as Congress intended. Moreover, we believe these benefits of our rules to deaf or hard of hearing consumers will outweigh the affected entities’ costs of compliance.

2. As discussed in Section III below, we adopt the following closed captioning requirements for the owners, providers, and distributors of IP-delivered video programming under Section 202(b)-(c) of the CVAA. Specifically, we adopt rules that will:

- Specify the obligations of entities subject to Section 202(b) by:
  - Requiring video programming owners to send required caption files for IP-delivered video programming to video programming distributors and providers along with program files;

<sup>1</sup> Pub. L. No. 111-260, 124 Stat. 2751 (2010). *See also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

<sup>2</sup> The CVAA defines “Internet protocol” as including “Transmission Control Protocol and a successor protocol or technology to Internet protocol.” Pub. L. No. 111-260, § 206(5).

<sup>3</sup> *See infra* App. B, § 79.4(a)(6) (defining “closed captioning” as “The visual display of the audio portion of video programming pursuant to the technical specifications set forth in this part.”).

<sup>4</sup> *See* 47 C.F.R. § 79.1 (setting forth the requirements for closed captioning of video programming on television); 47 U.S.C. § 613 (as originally enacted).

<sup>5</sup> *See infra* Section III.A.1.

<sup>6</sup> 47 U.S.C. § 613(c)(2)(A).

<sup>7</sup> 47 U.S.C. §§ 303(u)(1), (z)(1).

- Requiring video programming distributors and providers to enable the rendering or pass through of all required captions to the end user, including through the hardware or software that a distributor or provider makes available for this purpose;
- Requiring video programming owners and video programming distributors and providers to agree upon a mechanism to make available to video programming distributors and providers information on video programming that is subject to the IP closed captioning requirements on an ongoing basis;<sup>8</sup> and
- Requiring video programming owners to provide video programming distributors and providers with captions of at least the same quality as the television captions for the same programming, and requiring distributors and providers to maintain the quality of the captions provided by the video programming owner.<sup>9</sup>
- Create a schedule of deadlines under which:
  - All prerecorded programming that is not edited for Internet distribution and is subject to the new requirements must be captioned if it is shown on television with captions on or after the date six months after publication of these rules in the Federal Register;
  - All live and near-live programming subject to the new requirements must be captioned if it is shown on television with captions on or after the date 12 months after publication of these rules in the Federal Register;
  - All prerecorded programming that is edited for Internet distribution and is subject to the new requirements must be captioned if it is shown on television with captions on or after the date 18 months after publication of these rules in the Federal Register;<sup>10</sup> and
  - Archival content must be captioned according to the following deadlines: Beginning two years after publication of these rules in the Federal Register, all programming that is subject to the new requirements and is already in the VPD's library before it is shown on television with captions must be captioned within 45 days after it is shown on television with captions. Beginning three years after publication of these rules in the Federal Register, such programming must be captioned within 30 days after it is shown on television with captions. Beginning four years after publication of these rules in the Federal Register, such programming must be captioned within 15 days after it is shown on television with captions;<sup>11</sup>
- Craft procedures by which video programming providers and owners may petition the Commission for exemptions from the new requirements based on economic burden;<sup>12</sup>
- Not treat a *de minimis* failure to comply with the new rules as a violation, and permit entities to comply with the new requirements by alternate means, as provided in the CVAA;<sup>13</sup> and

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<sup>8</sup> See *infra* Section III.A.2.

<sup>9</sup> See *infra* Section III.A.3.

<sup>10</sup> See *infra* Section III.B.

<sup>11</sup> See *infra* Section III.A.2.

<sup>12</sup> See *infra* Section III.C.

<sup>13</sup> See *infra* Section III.D.

- Adopt procedures for complaints alleging a violation of the new requirements.<sup>14</sup>

3. As discussed in Section IV below, we adopt the following closed captioning requirements for the manufacturers of devices used to view video programming under Section 203 of the CVAA. Specifically, we adopt rules that will:

- Establish what apparatus are covered by Section 203:<sup>15</sup>
  - All physical devices designed to receive and play back video programming, including smartphones, tablets, personal computers, and television set-top boxes;
  - All “integrated software” in covered devices (that is, software installed in the device by the manufacturer before sale or that the manufacturer requires the consumer to install after sale); and
  - All recording devices and removable media players;<sup>16</sup>
- Exclude professional and commercial equipment from the scope of Section 203;
- Exempt display-only monitors as set forth in Section 203, and establish procedures for finding a lack of achievability or technical feasibility;<sup>17</sup>
- Establish the requirements for devices covered by Section 203:
  - Specify how covered apparatus must implement closed captioning by adopting functional display standards;<sup>18</sup>
  - Require apparatus to render or pass-through closed captioning on each of their video outputs;<sup>19</sup>
  - Decline to grant blanket waivers or exempt any device or class of devices from our rules based on achievability or the waiver provisions set forth in Section 203;
- Establish general complaint procedures and modify our existing television receiver closed captioning decoder requirements to conform to screen size and achievability provisions;<sup>20</sup> and
- Establish a deadline for compliance of January 1, 2014 by which devices must comply with the requirements of Section 203.<sup>21</sup>

Finally, we adopt a safe harbor for use of a particular interchange and delivery format.<sup>22</sup>

## II. BACKGROUND

4. On October 8, 2010, President Obama signed the CVAA into law, requiring the

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<sup>14</sup> See *infra* Section III.E.

<sup>15</sup> See *infra* Section IV.A.

<sup>16</sup> See *infra* Sections IV.A, IV.D.

<sup>17</sup> See *infra* Section IV.B.

<sup>18</sup> See *infra* Section IV.C.

<sup>19</sup> See *infra* Section IV.E.

<sup>20</sup> See *infra* Sections IV.I, IV.F.

<sup>21</sup> See *infra* Section IV.H.

<sup>22</sup> See *infra* Section V.

Commission to establish closed captioning rules for the owners, providers, and distributors of IP-delivered video programming, and for certain apparatus on which consumers view video programming. The CVAA also required the Commission to establish an advisory committee known as the Video Programming Accessibility Advisory Committee (“VPAAC”),<sup>23</sup> which submitted its statutorily mandated report on closed captioning of IP-delivered video programming to the Commission on July 12, 2011.<sup>24</sup> The Commission initiated this proceeding in September 2011.<sup>25</sup> In the *NPRM*, the Commission provided extensive background information regarding the history of closed captioning, IP-delivered closed captioning, the applicable provisions of the CVAA, and the VPAAC Report, which we need not repeat here.<sup>26</sup> The CVAA directs the Commission to revise its rules within six months of the submission of the VPAAC Report to require closed captioning on IP-delivered video programming and include a schedule of deadlines for the provision of such closed captioning.<sup>27</sup> By the same date, Section 203 of the CVAA directs the Commission to adopt requirements for the closed captioning capabilities of certain apparatus.<sup>28</sup> To fulfill these statutory mandates, we adopt the rules discussed below.<sup>29</sup>

5. As discussed in the *NPRM*, in 1997 the Commission first adopted rules and implementation schedules for closed captioning of video programming on television.<sup>30</sup> In recent years, the Internet has become a powerful method of video programming distribution, and the amount of video content available on the Internet is increasing significantly each year.<sup>31</sup> IP-delivered video programming today takes a number of forms, such as programming delivered to a personal computer, tablet device,

<sup>23</sup> Pub. L. No. 111-260, § 201(a). Although the CVAA refers to this advisory committee as the “Video Programming and Emergency Access Advisory Committee,” the Commission changed its working name to the “Video Programming Accessibility Advisory Committee” to avoid confusion with the “Emergency Access Advisory Committee” referenced in Section 106 of the CVAA.

<sup>24</sup> 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, available at [http://transition.fcc.gov/cgb/dro/VPAAC/First\\_VPAAC\\_Report\\_to\\_the\\_FCC\\_7-11-11\\_FINAL.pdf](http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf) (“VPAAC Report”).

<sup>25</sup> *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, 26 FCC Rcd 13734 (2011) (“*NPRM*”).

<sup>26</sup> See *id.* at 13737-42, ¶¶ 5-14.

<sup>27</sup> 47 U.S.C. §§ 613(c)(2)(A), (B).

<sup>28</sup> Pub. L. No. 111-260, § 203.

<sup>29</sup> Given the tight statutory deadline, we decline to consider proposals that go beyond implementation of the specific requirements of the CVAA. See, e.g., Comments of the National Court Reporters Association at 2-3 (“NCRA Comments”) (suggesting that the Commission address television captioning quality); Comments of TVGuardian, LLC (“TVGuardian Comments”) (suggesting that the Commission further the Child Safe Viewing Act by using IP closed captioning to foster language filtering technology). As noted below, the Commission has an open proceeding addressing the quality of closed captioning on television programming. See *infra* n. 174. The quality of captioning delivered over the Internet necessarily will be linked to the quality of captioning delivered over television.

<sup>30</sup> See *NPRM*, 26 FCC Rcd at 13738, ¶ 7; see also *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, Report and Order*, 13 FCC Rcd 3272, 3276, ¶ 7 (1997) (“1997 Closed Captioning Order”), recon. granted in part, *Order on Reconsideration*, 13 FCC Rcd 19973 (1998) (“1998 Closed Captioning Recon. Order”).

<sup>31</sup> See, e.g., *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4256, ¶ 41 (2011) (“*Comcast-NBCU Order*”).

cellular telephone, game console, Blu-ray player, or set-top box. Through the CVAA, Congress sought to “update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.”<sup>32</sup> Video programming owners sometimes make their video programming available via IP through their own websites, and sometimes they enter into licensing agreements with third parties to distribute their video programming using IP.<sup>33</sup> Although closed captioning of IP-delivered video programming has not been required previously, certain companies have chosen to make it available voluntarily.<sup>34</sup> When a video programming owner enters into a licensing agreement with a third party to enable the third party to distribute the owner’s programming via IP, the video programming owner or other entity may provide a closed captioning file to the third-party distributor, which may then make the closed captioning available to end users. The rules adopted below will implement new responsibilities regarding the distribution of video programming over IP, as well as new requirements for the apparatus consumers use to view video programming.

### III. SECTION 202 OF THE CVAA

#### A. Entities Subject to Section 202(b) of the CVAA and Their Obligations

##### 1. Definition of Video Programming Owner, Distributor, and Provider

6. Provisions in Section 202(b) and (c) of the CVAA use the terms “video programming owner” (“VPO”), “video programming distributor” (“VPD”), and “video programming provider” (“VPP”) without defining these terms. Accordingly, the Commission must define these terms for purposes of our implementing regulations.<sup>35</sup>

7. *Video Programming Owner.* As explained below, we define a VPO as “any person or entity that either (i) licenses the video programming to a video programming distributor or provider that makes the video programming available directly to the end user through a distribution method that uses Internet protocol; or (ii) acts as the video programming distributor or provider, and also possesses the right to license the video programming to a video programming distributor or provider that makes the video programming available directly to the end user through a distribution method that uses Internet protocol.” In the *NPRM*, the Commission proposed to define a 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

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<sup>32</sup> See S. Rep. No. 111-386, 111<sup>th</sup> Cong., 2d Sess. at 1 (2010) (“Senate Committee Report”); H.R. Rep. No. 111-563, 111<sup>th</sup> Cong., 2d Sess. at 19 (2010) (“House Committee Report”).

<sup>33</sup> See, e.g., Reply Comments of CBS Corporation at 3 (“CBS Reply”) (“CBS, for example, not only distributes its broadcast and Showtime programming on line through its own outlets, but also licenses a variety of downstream distributors to make it available to online users.”).

<sup>34</sup> See, e.g., Comments of DIRECTV, Inc. at i (“DIRECTV Comments”) (“For its own part, DIRECTV has already begun to pass through digital television closed captioning data with programming delivered via IP.”); Reply Comments of the Association of Public Television Stations and the Public Broadcasting Service at 4 (“APTS/PBS Reply”) (“PBS designed its online video distribution system to support closed captioning, and approximately a quarter of all content that is posted online through this system, including some station-produced programming, is captioned today.”); CBS Reply at 2 (“On a voluntary basis, the CBS Television Network already has begun providing closed captions on CBS broadcast programming that is made available online.”). Closed captioning is also available through Apple’s iTunes. See *Finding Closed Caption Programming Available on iTunes*, available at <http://www.apple.com/itunes/inside-itunes/2011/09/finding-closed-caption-programming-available-on-itunes.html> (last visited January 9, 2012).

<sup>35</sup> The definitions we adopt for the terms VPO, VPD and VPP in this *Report and Order* apply only to those terms as used with regard to Sections 202 and 203 of the CVAA, and not to those terms in other contexts, such as our television closed captioning or video description rules. See *NPRM*, 26 FCC Rcd at 13742, n. 63.

IP.”<sup>36</sup> Several commenters support this proposal.<sup>37</sup> DIRECTV, however, proposes that the Commission “should define ‘owner’ as the single entity that licenses the copyrighted work for distribution,”<sup>38</sup> and Consumer Groups argue that the definition of VPO proposed in the *NPRM* should be “more robust.”<sup>39</sup> We agree with DIRECTV that the definition proposed in the *NPRM* is problematic for present purposes because multiple copyright owners may possess particular rights in a single piece of video programming.<sup>40</sup> In this context, we are interested in the person or entity that licenses the video programming to a video programming distributor or provider that makes the video programming available directly to the end user through a distribution method that uses IP. Defining a VPO in this manner will ensure that a single entity is responsible for fulfilling the VPO’s responsibilities, which is beneficial from an enforcement perspective given that an alternative definition may create problems in identifying the responsible VPO. We expect that the VPO often, but not always, will be the copyright owner. Even in instances in which the VPO does not itself create captions for the programming, we expect that the VPO (as we define that term) will be better positioned than the VPD or VPP to obtain the captions, since by definition the VPO is higher up the distribution chain than the VPD or VPP. Accordingly, we adopt DIRECTV’s proposed definition of VPO. We recognize, however, that there may be situations where the VPO is also the VPD or VPP (for example, if the VPO makes its video programming available through its own website), and we believe that our definition also should cover VPOs in such situations, even though there is no licensing agreement in such circumstances.<sup>41</sup> Accordingly, we expand the definition of VPO proposed by DIRECTV to include any person or entity that acts as the video programming distributor or provider, and also possesses the right to license the video programming to a video programming distributor or provider that makes the video programming available directly to the end user through a distribution method that uses Internet protocol. Thus, the definition of VPO is intended to include entities that have the right to license IP distribution of programming to others, but make the programming available through their own websites, as well as entities that license others to distribute the video programming to the end users.

8. *Video Programming Distributor and Provider.* We adopt the definition of VPD and VPP that the Commission proposed in the *NPRM*, with one modification. Specifically, we define a VPD or VPP as any person or entity that makes video programming available directly to the end user through a distribution method that uses IP.<sup>42</sup> We have added the phrase “person or” to this proposed definition to

<sup>36</sup> See *id.* at 13742, ¶ 15.

<sup>37</sup> See, e.g., Comments of Digital Media Association at 5 (“DiMA Comments”); DIRECTV Comments at 6-7; Reply Comments of DISH Network L.L.C. at 2 (“DISH Network Reply”); Comments of Microsoft Corporation at 4 (“Microsoft Comments”); Reply Comments of Time Warner Cable Inc. at 5 (“TWC Reply”).

<sup>38</sup> Reply Comments of DIRECTV, Inc. at 5 (“DIRECTV Reply”).

<sup>39</sup> See Comments of Telecommunications for the Deaf and Hard of Hearing, Inc. *et al.* at 5-6 (“Consumer Groups Comments”).

<sup>40</sup> See DIRECTV Reply at 5; see also Comments of the Motion Picture Association of America, Inc. at 6 (“MPAA Comments”); CBS Reply at 7.

<sup>41</sup> Where the VPO is also the VPD or VPP, it may not rely on a good faith use of the mechanism described in Section III.A.2, *infra*, because as the VPO, it should know whether its programming is shown on television with captions after the effective date of our new rules. See also 47 U.S.C. § 613(c)(2)(D)(vi) (providing that the Commission’s regulations “shall consider that the video programming provider or distributor shall be deemed in compliance if such entity enables the rendering or pass through of closed captions and makes a good faith effort to identify video programming subject to the Act using the mechanism created in (v)”).

<sup>42</sup> As stated above, we agree with those commenters who note that sometimes a VPO may also be a VPD/VPP, and as noted in paragraph 7, above, our definition of VPOs is intended to cover this situation. See DIRECTV Comments at 8; MPAA Comments at 6 n. 14; Comments of Verizon and Verizon Wireless at 2 (“Verizon Comments”); Reply (continued....)

parallel the VPO definition adopted herein, and to make explicit our coverage of an individual distributor or provider, to the extent one exists.

9. We affirm the *NPRM*'s tentative conclusion to define VPDs and VPPs as meaning the same thing. Congress directed the Commission to “describe the responsibilities of video programming providers *or* distributors,”<sup>43</sup> leaving it to the Commission’s discretion to determine whether to define the terms as interchangeable. Based on the existing record, we find that in the context of IP closed captioning, VPDs and VPPs are both people or entities that make video programming available directly to the end user through a distribution method that uses IP. We have no factual basis on which to distinguish between VPDs and VPPs and the record does not support different definitions.<sup>44</sup> Although we recognize that certain provisions in the CVAA reference VPPs but not VPDs,<sup>45</sup> we disagree with TWC that Congress affirmatively decided that VPDs and VPPs are distinct categories with distinct responsibilities,<sup>46</sup> and we do not see any support for that position in the legislative history. Thus, we find no legal or policy basis for interpreting VPDs and VPPs differently. In this regard, we note that several commenters in the record support our finding.<sup>47</sup> And we also note that, although the Commission in the *NPRM* highlighted the fact that certain statutory provisions reference VPPs, but not VPDs, and asked specifically about the relevance of this,<sup>48</sup> commenters did not provide any insight on this issue.

10. We note that commenters that suggest that VPD and VPP should mean different things<sup>49</sup> propose definitions that would reach entities that we do not believe Congress intended to cover through the CVAA, such as an Internet service provider (“ISP”) from which end users receive Internet access.<sup>50</sup>

(Continued from previous page)

Comments of the American Cable Association at 7 (“ACA Reply”); Reply Comments of the National Association of Broadcasters at 6 n. 14 (“NAB Reply”).

<sup>43</sup> 47 U.S.C. § 613(c)(2)(D)(iv) (emphasis added).

<sup>44</sup> Since for the reasons stated in this paragraph, we define VPDs and VPPs as meaning the same thing, we will refer to them as “VPDs” throughout the rest of this *Report and Order*.

<sup>45</sup> 47 U.S.C. §§ 613(c)(2)(C), (c)(2)(D)(vii), (d)(3).

<sup>46</sup> See TWC Reply at 2.

<sup>47</sup> See, e.g., Consumer Groups Comments at 2; Verizon Comments at 2; DISH Network Reply at 2; see also *NPRM*, 26 FCC Rcd at 13742, ¶ 15.

<sup>48</sup> See *NPRM*, 26 FCC Rcd at 13742, ¶ 15 (“If we were to define VPDs and VPPs differently from one another, what would be the effect on provisions of the CVAA that apply to VPPs and VPOs but not VPDs?”).

<sup>49</sup> See, e.g., Microsoft Comments at 5-7; APTS/PBS Reply at 5-6; TWC Reply at 1-2, 5-6. Eternal World Television Network also proposes that the Commission adopt different definitions of VPD and VPP. See Comments of Eternal World Television Network, Inc. at 3 (“EWTN Comments”) (“In the instance where the programmer is televising acquired programming, it is not the VPO, but VPP. The MVPD is the VPD, but yet the programmer may be exempt. The definitions should permit the exempt programmer to remain exempt in this scenario and all matters of complying with the proposed rules remain with the MVPD.”). We find EWTN’s proposal to be unclear, whereas our definitions will enable affected entities to clearly determine who is subject to which requirements.

<sup>50</sup> See, e.g., Reply Comments of the National Cable & Telecommunications Association at 6-7 n. 21 (“NCTA Reply”). See also Comments of the American Cable Association at 8 n. 22 (“ACA Comments”); Consumer Groups Comments at 3; Comments of the Independent Telephone & Telecommunications Alliance at 3 (“ITTA Comments”); Comments of the National Cable & Telecommunications Association at 10 n. 21 (“NCTA Comments”); ACA Reply at 4, 19-20; Pub. L. No. 111-260, § 2(a); cf. *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17982-83, ¶¶ 141-142 (2010) (“Unlike cable television operators, broadband providers typically are best described not as ‘speakers,’ but rather as conduits for speech . . . [W]hen defending themselves against subpoenas in litigation involving alleged copyright violations, broadband providers typically take the position that they are simply conduits of information provided by others.”) (footnote omitted).

Congress specifically excluded such entities from obligations under the CVAA for advanced communications services, and similarly we do not think that Congress intended to reach them here.<sup>51</sup> We agree with ACA, ITTA, and NCTA that VPDs and VPPs should not include entities that are acting as ISPs, simply providing access to video programming distributed by another entity.<sup>52</sup> We find that regulating such entities as part of the IP closed captioning regime would be unworkable; for example, Section 202(b) of the CVAA requires VPDs and VPPs to make “a good faith effort to identify video programming subject to the” closed captioning requirements, a requirement that could not be met by an entity that merely provides Internet access and is not aware of the video programming content that it passes along the distribution chain.<sup>53</sup>

11. For the reasons explained below, the IP closed captioning rules will not apply to a broadcaster’s or MVPD’s provision of programming that is subject to the Commission’s television closed captioning rules.<sup>54</sup> Section 79.1 imposes television closed captioning requirements on video programming distributors, which it defines as “[a]ny television broadcast station licensed by the Commission and any [MVPD] as defined in § 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>55</sup> In the *NPRM*, the Commission proposed to define VPD in the IP closed captioning context as “any entity that makes available directly to the end user video programming through a distribution method that uses IP.”<sup>56</sup> Some commenters support the proposed definition.<sup>57</sup> Others assert that rather than “IP” distribution, the Commission’s regulations should focus more specifically on online or Internet distribution.<sup>58</sup> These commenters express concern over the confusion that would result from new rules that cover some of the same MVPD services, such as IPTV,<sup>59</sup>

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<sup>51</sup> See Pub. L. No. 111-260, § 2(a) (“Except as provided in subsection (b), no person shall be liable for a violation of the requirements of this Act . . . with respect to video programming, online content, applications, services, advanced communications services, or equipment used to provide or access advanced communications services to the extent such person-- (1) transmits, routes, or stores in intermediate or transient storage the communications made available through the provision of advanced communications services by a third party; or (2) provides an information location tool, such as a directory, index, reference, pointer, menu, guide, user interface, or hypertext link, through which an end user obtains access to such video programming, online content, applications, services, advanced communications services, or equipment used to provide or access advanced communications services.”).

<sup>52</sup> To the extent an ISP distributes video programming directly to end users, for example by making video programming available on its own website, the ISP is not merely providing access to the video programming distributed by another VPD, but rather, is acting as a VPD.

<sup>53</sup> See 47 U.S.C. § 613(c)(2)(D)(vi).

<sup>54</sup> For example, if a local television station also makes its programming available on the Internet, the television broadcast remains subject to Section 79.1, and the programming available on the Internet will be subject to Section 79.4.

<sup>55</sup> 47 C.F.R. § 79.1(a)(2).

<sup>56</sup> *NPRM*, 26 FCC Rcd at 13742, ¶ 15.

<sup>57</sup> See, e.g., DiMA Comments at 5; DIRECTV Comments at 6-7; DISH Network Reply at 2.

<sup>58</sup> See, e.g., ACA Comments at 8; ITTA Comments at 3; MPAA Comments at 1 n. 2; NCTA Comments at 10-11; Reply Comments of AT&T at 7 (“AT&T Reply”); DIRECTV Reply at 7; Reply Comments of the Motion Picture Association of America, Inc. at 11 n. 11 (“MPAA Reply”); TWC Reply at 2.

<sup>59</sup> Internet Protocol Television (“IPTV”) is a technology used by some MVPDs to deliver television services. Video content typically travels over a managed, two-way IP network and can be delivered to the subscriber using a combination of fiber and Digital Subscriber Line (“xDSL”) over copper technology.

that are covered by the Commission's existing television closed captioning rules.<sup>60</sup> We agree with ACA that we must presume Congress knew that MVPDs are subject to existing closed captioning rules.<sup>61</sup> The television closed captioning rules are broader than the IP closed captioning rules adopted herein, insofar as the television closed captioning rules require closed captioning for all new nonexempt English-and Spanish-language video programming,<sup>62</sup> whereas the CVAA only requires closed captioning of IP-delivered video programming if the programming is "published or exhibited on television with captions after the effective date" of the new rules.<sup>63</sup> Congress did not give any indication that it intended the new IP closed captioning rules to override the existing television closed captioning rules where an MVPD provides its service via IP. Thus, we clarify that the new IP closed captioning rules do not apply to traditional managed video services that MVPDs provide to their MVPD customers within their service footprint, regardless of the transmission protocol used; rather, such services are already subject to Section 79.1 of the Commission's rules.<sup>64</sup>

12. All video programming that is available on the Internet is IP-delivered, but not all video programming that is delivered via IP is Internet programming.<sup>65</sup> We therefore decline to limit application of the IP closed captioning requirements to programming that VPDs deliver over the Internet. While some portions of the legislative history reference "Internet distribution,"<sup>66</sup> we agree with Consumer Groups that such references were not intended to limit the reach of Section 202(b) to Internet-delivered video programming.<sup>67</sup> To the contrary, consistent with the language of the statute itself, the legislative history made repeated references to "Internet protocol."<sup>68</sup> We agree with Consumer Groups that if Congress had intended the CVAA to apply more narrowly to a certain class of IP-delivered video programming, it would have said so.<sup>69</sup> We note that, as technology evolves, a decision to limit the application of the new IP closed captioning rules to "Internet" or "online" video programming could have unforeseen consequences.<sup>70</sup> For the same reasons, we disagree with ACA's proposal that an MVPD be subject to the new IP closed captioning requirements only when it is "acting as an online video distributor outside its MVPD footprint."<sup>71</sup> An MVPD that distributes video programming online within its MVPD

<sup>60</sup> See, e.g., ACA Reply at 3, 9; AT&T Reply at 7; DIRECTV Reply at 7.

<sup>61</sup> See ACA Comments at 10; see also ACA Comments at 11 ("[I]n the CVAA Congress was simply filling in a gap that was not addressed in the prior law."); ACA Reply at 2.

<sup>62</sup> See 47 C.F.R. § 79.1(b).

<sup>63</sup> See 47 U.S.C. § 613(c)(2)(A).

<sup>64</sup> See, e.g., AT&T Reply at 7. By "traditional managed video service," we mean a service through which an MVPD offers multiple channels of video programming, including IP-based video offerings such as those provided by AT&T.

<sup>65</sup> For example, programming may be delivered via IP using an entity's private network. Such programming would be IP-delivered, but it would not be Internet programming.

<sup>66</sup> See, e.g., Senate Committee Report at 13.

<sup>67</sup> See Reply Comments of Telecommunications for the Deaf and Hard of Hearing, Inc. *et al.* at 19 ("Consumer Groups Reply").

<sup>68</sup> See, e.g., Senate Committee Report at 13; House Committee Report at 30.

<sup>69</sup> See Consumer Groups Reply at 19.

<sup>70</sup> See, e.g., *id.* at 18.

<sup>71</sup> See ACA Reply at 8-9. ACA proposes that the Commission incorporate into its definition of VPD the distinction between an MVPD and an online video distributor, as that term is defined in the *Comcast-NBCU Order*, and that it only apply its new IP closed captioning rules to online video distributors. See ACA Comments at 3, 7-13; ACA Reply at 11-16. Specifically, ACA proposes that the Commission define VPD as "[a]ny entity that makes available (continued....)

footprint, but not as part of its MVPD service subject to Section 79.1, will be subject to new Section 79.4. In general, an MVPD will be subject to the new IP closed captioning rules if it is distributing IP-delivered video programming that is not part of the traditional managed video services that it provides its MVPD customers within its service footprint. The distinction that ACA proposes, which would exclude from coverage online video distribution within the MVPD's footprint, is unsupported by the CVAA and its legislative history.

13. We are not persuaded by the concerns of Consumers Groups that the proposed definition of VPD is both under-inclusive and over-inclusive. Specifically, Consumer Groups argue that the proposed definition is under-inclusive, in that it includes the term "directly" and thus may not reach certain entities, and over-inclusive, in that it "may lay captioning responsibility at the feet of network providers and other entities that lack the ability to assist consumers in fixing videos with insufficient or missing captions."<sup>72</sup> We do not believe that inclusion of the term "directly" in the definition of VPD is under-inclusive; rather, use of the word "directly" avoids placing requirements on certain entities, such as ISPs, that are not aware of the video programming content that they pass along the distribution chain.<sup>73</sup> Our definition is also consistent with Section 202(b) of the CVAA, which requires the Commission's regulations to "clarify that . . . the terms 'video programming distributors' and 'video programming providers' include an entity that makes available *directly* to the end user video programming through a distribution method that uses Internet protocol."<sup>74</sup> As to the argument that the proposed definition is over-inclusive, we find that VPDs, as we have defined them, will in fact include the entities that are best suited to address consumer concerns in the first instance. We agree with Consumer Groups that an entity that merely caches Internet videos hosted on another website or server is not a VPD.<sup>75</sup>

## 2. Responsibilities of Video Programming Owners, Distributors, and Providers

14. Section 202(b) of the CVAA requires the Commission's regulations to "describe the responsibilities of video programming providers or distributors and video programming owners."<sup>76</sup> It also requires the Commission to "establish a mechanism to make available to video programming providers and distributors information on video programming subject to the Act on an ongoing basis."<sup>77</sup> The purpose of the required "mechanism" is to enable VPDs to determine whether the video programming that they intend to make available via IP has been shown on television with captions after the effective date of the new rules. Section 202(b) further provides that the Commission's regulations for closed captioning of IP-delivered video programming:

shall consider that the video programming provider or distributor shall be deemed in compliance if such entity enables the rendering or pass through of closed captions and makes a good faith effort to identify video programming subject to the Act using the

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directly to the end user video programming using an IP distribution method over the Internet or other IP-based distribution path provided by an entity other than the VPD. A VPD does not include an MVPD using IP distribution inside its MVPD footprint or an MVPD to the extent it is offering online video programming as a component of an MVPD subscription to customers whose homes are inside its MVPD footprint." ACA Reply at 14 (footnote omitted).

<sup>72</sup> See Consumer Groups Comments at 3.

<sup>73</sup> See *supra* ¶ 10.

<sup>74</sup> 47 U.S.C. § 613(c)(2)(D)(iii) (emphasis added).

<sup>75</sup> See Consumer Groups Comments at 3.

<sup>76</sup> 47 U.S.C. § 613(c)(2)(D)(iv).

<sup>77</sup> 47 U.S.C. § 613(c)(2)(D)(v).

mechanism [referenced above].<sup>78</sup>

15. *Video programming owner responsibilities.* We adopt the *NPRM*'s proposal to require VPOs to send program files to VPDs with all required captions.<sup>79</sup> We find that placing such an obligation on VPOs is consistent with the CVAA and the record in this proceeding.<sup>80</sup> Although we acknowledge that the Commission chose not to directly regulate video programming owners in the television context and that there are similarities between the television and IP captioning statutory schemes, the record in this proceeding reflects that "closed captioning over television and IP are fundamentally different and merit different regulatory approaches."<sup>81</sup>

16. Our decision is consistent with the statutory language.<sup>82</sup> Section 202(b) of the CVAA requires the Commission to revise its regulations to require closed captioning<sup>83</sup> of IP-delivered video programming that was shown on broadcast or MVPD-delivered television with captions after the effective date of the new regulations. While the CVAA does not direct the Commission to impose captioning obligations on VPOs, it clearly authorizes the Commission to promulgate rules directly affecting VPOs as well as VPDs.<sup>84</sup> Direct regulation of VPOs closes a potential gap in the statutory scheme. Section 202(b) of the CVAA provides that a VPD "shall be deemed in compliance if such entity enables the rendering or pass through of closed captions and makes a good faith effort to identify video programming subject to the [CVAA] using the mechanism created" herein for identifying such programming.<sup>85</sup> Under this provision, a VPD is responsible for rendering or pass through of closed captions and good faith efforts to

<sup>78</sup> 47 U.S.C. § 613(c)(2)(D)(vi).

<sup>79</sup> See *NPRM*, 26 FCC Rcd at 13743, ¶¶ 16. We leave it to the parties to determine how or whether a VPO should convey to a VPD that captions are not required for a particular program because it has not been shown on television with captions, even though the VPO is providing a caption file. We strongly encourage VPDs to provide captioning for programming delivered via IP in all instances in which the VPO makes an appropriate captioning file available.

<sup>80</sup> Of course, a VPD that is also a VPO is subject to the requirements of VPDs and the requirements of VPOs, such that it must produce the captions.

<sup>81</sup> Reply Comments of Microsoft Corporation at 2-3 ("Microsoft Reply") (footnote omitted).

<sup>82</sup> See, e.g., ACA Reply at 19; AT&T Reply at 4-5; DIRECTV Reply at 3-4 and n. 9; Reply Comments of Verizon and Verizon Wireless at 3 ("Verizon Reply").

<sup>83</sup> The rules we adopt here define "closed captioning" to mean, "The visual display of the audio portion of video programming pursuant to the technical specifications set forth in this part." See *infra* App. B, § 79.4(a)(6). The *NPRM* defined the term to mean, "The visual display of the audio portion of video programming." *NPRM*, 26 FCC Rcd at 13768 (App. B, § 79.4(a)(6)). We have added the phrase "pursuant to the technical specifications set forth in this part" to follow the approach used to define the term "closed captioning" for purposes of the Commission's television closed captioning requirements, 47 C.F.R. § 79.1(a)(4), and to clarify that the closed captioning requirements we adopt herein are subject to the applicable technical specifications.

<sup>84</sup> Specifically, under the "requirements for regulations," the CVAA directs the Commission to "describe the responsibilities of video programming providers or distributors and *video programming owners*." See 47 U.S.C. § 613(c)(2)(D)(iv) (emphasis added). See also 47 U.S.C. § 613(c)(2)(D)(vii) (directing that the Commission's regulations "provide that de minimis failure to comply with such regulations by a video programming provider or owner shall not be treated as a violation of the regulations.") (emphasis added); 47 U.S.C. § 613(c)(2)(C) (authorizing the Commission to delay or waive its IP closed captioning regulations to the extent it finds the "regulations would be economically burdensome to providers of video programming or program owners") (emphasis added). The legislative history sheds no additional light on the issue of Congress's intent with respect to direct regulation of VPOs. See Senate Committee Report at 1-3, 13-14; House Committee Report at 1, 30.

<sup>85</sup> See 47 U.S.C. § 613(c)(2)(D)(vi). The previous version of Section 713 of the Act, which addressed television closed captioning, did not contain a comparable limitation on the imposition of VPD responsibilities. The mechanism that the CVAA provides for is discussed later in this Section III.A.2.

identify programming subject to the CVAA, and is protected from liability for distributing programming without closed captions if those two requirements are met. We recognize that, in the absence of a requirement that VPOs provide captioning, VPDs and VPOs may nonetheless enter into private contracts placing such an obligation on VPOs. We find, however, that it is more efficient and less costly to place appropriate obligations on VPOs and on VPDs, rather than to expect the parties to enter into contracts mandating the same obligations. Thus, we believe that imposing responsibility on VPOs as well as VPDs is both consistent with the Commission's authority to identify the responsibilities of VPOs under the statute and necessary to further the statutory purpose of helping to "ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming."<sup>86</sup>

17. Further, we find that imposing responsibility on VPOs is consistent with the statutory directive to establish a "mechanism" to make available to VPDs information on video programming subject to the Act on an ongoing basis because it will help to ensure that the mechanism the statute provides for will function effectively. In contrast, leaving VPOs' responsibilities to be defined entirely by private contractual arrangements<sup>87</sup> would be more costly and less efficient than appropriately allocating certain responsibilities among both VPOs and VPDs by Commission rule.<sup>88</sup>

18. We also find that placing obligations on VPOs will ensure that the Commission may hold a responsible party accountable for violations of the CVAA. For example, if a VPO erroneously certifies to a VPD that captions are not required for a particular program, and the VPD makes a good faith use of the "mechanism" discussed below, there would be no entity to hold legally accountable (*e.g.*, with respect to a consumer complaint or enforcement action) in the absence of rules placing obligations on the VPO.<sup>89</sup> We note that Consumer Groups state that, "to the extent that the Commission interprets the CVAA to require a safe harbor for VPDs and VPPs who pass through or render caption files, . . . we would support a decision by the Commission to make VPOs and their licensees and sublicensees responsible for captioning IP-delivered video programming to the extent the CVAA does not permit placing that responsibility with VPPs or VPDs."<sup>90</sup> Thus, Consumer Groups support the approach we adopt here. In that regard, we note that Consumer Groups initially expressed concern about placing responsibilities on both VPDs and VPOs on the ground that consumers and the Commission would be faced with the potentially difficult task of identifying VPOs against whom to file a complaint or seek enforcement.<sup>91</sup> To address these concerns, as explained below, we make clear that consumers will be free to file their complaints against VPDs, and the Commission will require VPDs to provide information on the VPO's identity if the VPD claims that the captioning problem was the fault of the VPO.<sup>92</sup> Accordingly, we agree

<sup>86</sup> Senate Committee Report at 1; House Committee Report at 19.

<sup>87</sup> See, *e.g.*, MPAA Comments at 6; NCTA Comments at 12.

<sup>88</sup> See Reply Comments of Google, Inc. at 5 ("Google Reply") ("Continued reliance on the types of negotiations involving closed captioning for television programming would be inefficient, would not result in consistent caption quality, and would fail to adequately address the needs of consumers.").

<sup>89</sup> See Senate Committee Report at 14 ("The Committee recognizes that online video distributors that are not multichannel video programming distributors may not be able to readily ascertain whether programs were distributed on television and thus subject to the closed captioning requirement. Accordingly, the Committee encourages the Commission to recognize good faith efforts to identify video programming subject to the Act").

<sup>90</sup> Letter from Andrew S. Phillips, Policy Attorney, National Association of the Deaf, *et al.*, to Marlene H. Dortch, Secretary, FCC, at 2 (Dec. 2, 2011).

<sup>91</sup> See Consumer Groups Comments at 7-8; Consumer Groups Reply at 16; Letter from Andrew S. Phillips, Policy Attorney, National Association of the Deaf, to Marlene H. Dortch, Secretary, FCC, at 1 (Nov. 10, 2011) ("Consumer Groups Nov. 10 *Ex Parte* Letter"); see also MPAA Comments at 2; MPAA Reply at 4-6.

<sup>92</sup> See *infra* Section III.E.

with Verizon that regulating VPOs as well as VPDs will not have a negative impact on consumers.<sup>93</sup>

19. Our examination of the record in this proceeding likewise provides support for imposing duties directly on VPOs. Numerous commenters support the *NPRM*'s proposal to impose captioning obligations on content owners rather than assign such obligations exclusively to VPDs.<sup>94</sup> Even one VPO recognizes that the Commission should allocate responsibilities among the parties in the chain of IP content delivery, with requirements placed on both VPOs and VPDs.<sup>95</sup> Commenters argue that "VPOs are in the best position to assess whether captions are required for a particular program since they have knowledge of which content has been shown on television," and "as the copyright holders, the VPOs typically possess the necessary legal rights to modify the content and insert closed captions."<sup>96</sup> We agree, and believe that these factors further justify placing the obligation to provide required captions on VPOs.<sup>97</sup> We also agree with Google that placing such obligations on VPDs would be unduly burdensome, as their systems generally do not enable them to review video content, determine whether

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<sup>93</sup> See Verizon Reply at 3 ("Consumers will still be able to contact their video distributor or provider to inquire or complain about an absence of closed captions, and the video distributors and providers will still have processes they must follow to carry out their responsibilities and to address consumer complaints. But consumers will also have the opportunity under the new statute to seek enforcement against a content owner that fails to properly caption its programming, and the content owner will fall squarely within the Commission's jurisdiction for these purposes."). As explained in Section III.E below, in addition to contacting VPDs about captioning concerns, consumers may also file their complaints directly with the Commission. See *infra* Section III.E.

<sup>94</sup> See, e.g., ACA Comments at 13-14; Comments of AT&T at 6-7 ("AT&T Comments") (agreeing with the Commission's proposed division of captioning responsibility, "which recognizes the crucial roles of VPOs . . . in ensuring the successful delivery of closed captions"; stating that VPOs are in the best position to know if a program has appeared on TV with captions); DiMA Comments at 5 (a requirement to provide captions or a certification that captioning is not required should be imposed on the VPO, which is in the best position to determine whether captioning is required); DIRECTV Comments at 2 ("commend[ing] the Commission for recognizing that primary responsibility for captioning must fall upon those who create video programming rather than those who distribute it"), 9 ("the CVAA gives the Commission clear authority directly over VPOs as well as VPDs/VPPs" and thus "VPOs can be held directly accountable for captioning IP-delivered programming as required"); Comments of Google, Inc. at 7 ("Google Comments"); Microsoft Comments at 5; Verizon Comments at 1-3; ACA Reply at 16-19 ("Consistent with the CVAA, the proposed rules place the primary responsibility for compliance with IP closed captioning mandates on VPOs to send program files to VPPs/VPDs with all required captions"); APTS/PBS Reply at 5 (supporting the Commission's proposal to require the entity that owns the copyright in the video programming (the VPO) to send program files to the VPD that include captions or a certification explaining why captions are not required); AT&T Reply at 3-5; DIRECTV Reply at 2-4 (assigning VPDs exclusive responsibility for captioning would be inconsistent with the CVAA's deemed in compliance provision for VPDs which pass through closed captions and make a good faith effort to identify video programming subject to the Act); DISH Network Reply at 3; Google Reply at 4-5; Microsoft Reply at 2-4; Reply Comments of Rovi Corporation at 2 ("Rovi Reply"); Verizon Reply at 2-3.

<sup>95</sup> See Comments of Starz Entertainment, LLC at 2-4 ("Starz Comments").

<sup>96</sup> Microsoft Comments at 5. See also Google Comments at 7-8 (in view of VPOs' ability to readily make determinations as to which programs are subject to captioning, requiring this undertaking of VPDs would be "unduly burdensome").

<sup>97</sup> We recognize that some of the above arguments may be premised on VPO copyright ownership, consistent with the VPO definition proposed in the *NPRM*, whereas we have decided to define a VPO based on its license to distribute programming to a VPD. See *supra* ¶ 7. Even if a VPO does not own the copyright to programming, however, we believe it will be in a better position than the VPD to determine whether the programming aired on television with captions and to obtain the rights necessary to add captions because it will be closer to the copyright owner than the VPD in the "potentially complicated chain of copyright ownership." See MPAA Comments at 2; *infra* ¶ 24.

captions are required, and then insert captions.<sup>98</sup> Further, for the reasons above, we agree with commenters who suggest that imposing obligations on VPOs would be most consistent with the statute.<sup>99</sup>

20. We agree with commenters who argue that key differences between the television and IP contexts justify different regulatory treatment of VPOs.<sup>100</sup> Similar to the CVAA, the closed captioning statute governing broadcast television and MVPD services authorizes the Commission to regulate closed captioning of programming by providers and owners of video programming.<sup>101</sup> The Commission decided in 1997 to place the responsibility for compliance with the closed captioning rules on video programming distributors, defined as all entities who provide video programming directly to customers' homes, regardless of distribution technology used (*i.e.*, broadcast or MVPD).<sup>102</sup> The Commission reasoned in 1997 that placing compliance obligations on distributors would promote more efficient monitoring and enforcement of the closed captioning rules, because there would typically be a single entity to which complaints must be addressed, and there would be no need for tracking the entities responsible for producing programs alleged to violate the rules.<sup>103</sup> The Commission expressed an expectation that distributors would privately negotiate with program owners regarding "an efficient allocation of captioning responsibilities" and that program owners would "cooperate with distributors to ensure that nonexempt programming is closed captioned in accordance with our rules."<sup>104</sup> Thus, the Commission chose to limit regulatory oversight to distributors, notwithstanding that excluding program owners from the rules would leave a liability gap in the television/MVPD captioning context. In that regard, the Commission explained, "[d]istributors will not be held responsible for situations where a program source falsely certifies that programming delivered to the distributor meets our captioning requirements if the distributor is unaware that the certification is false."<sup>105</sup>

21. Notwithstanding the statutory and regulatory similarities between IP and television closed captioning, we find that a different regulatory approach for the IP closed captioning regime than the television closed captioning regime is justified by fundamental differences between television and IP distribution.<sup>106</sup> "[I]n the television context," as Microsoft explains, "a single broadcaster, MVPD, or

<sup>98</sup> See Google Comments at 7-8.

<sup>99</sup> See *supra* n. 94. See also Starz Comments at 2-3; NAB Reply at 7 ("clearly, Congress intended for VPOs to bear some direct responsibility under the law, and NAB recognizes this fact.").

<sup>100</sup> See, *e.g.*, Microsoft Reply at 2-3.

<sup>101</sup> See, *e.g.*, 47 U.S.C. § 613(b)(2) (directing the Commission to prescribe regulations that "shall ensure" that "video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions) (emphasis added); 47 U.S.C. § 613(d) (authorizing the Commission to exempt classes of programs where "the provision of closed captioning would be economically burdensome to the provider or owner of such programming" and authorizing the "provider of video programming or program owner" to petition the Commission for an exemption from the captioning requirement) (emphasis added).

<sup>102</sup> 1997 Closed Captioning Order, 13 FCC Rcd at 3280, ¶ 18.

<sup>103</sup> *Id.* at 3286, ¶ 27.

<sup>104</sup> *Id.* at 3286, ¶ 28.

<sup>105</sup> *Id.*

<sup>106</sup> See, *e.g.*, AT&T Comments at 3 ("The Commission should recognize that the IP video market as targeted by the CVAA differs from the traditional television broadcast or [MVPD] models in several key ways that may necessitate a different approach to achieving the goal of making closed captions available to the widest extent possible."); DiMA Comments at 11 (stating that there are "many differences between the television and IP ecosystems"); DIRECTV Comments at 15 ("Unlike television programming, IP-delivered programming may be accessed at different times and in different ways by consumers viewing it on different devices."); Google Comments at 5 ("[I]t (continued....)")

similar entity is responsible for the delivery of video programming,” whereas “video on the Internet often will pass through the hands of numerous parties on its way to the consumer” and VPDs in a chain often cannot identify one another, lack contractual relationships, and will not possess the rights necessary to caption a work.<sup>107</sup> Indeed, Congress mandated that the Commission establish a mechanism to make available to VPDs information about whether programming has aired on television, a mechanism that is unnecessary in the television context.<sup>108</sup> We believe that this characteristic of the IP distribution chain helps to justify imposing obligations directly on VPOs in the IP context, whereas the Commission reasonably believed that in the television/MVPD context it could rely on video programming distributors or providers working with program suppliers with whom they have close contractual relationships. Even where a distribution chain is complex and the VPO itself does not create the closed captions, we expect that the VPO will be better positioned than the VPD to obtain the captions, since by definition the VPO is farther up the distribution chain than the VPD.

22. We also believe that the differences between video programming distributors vis-à-vis video programming owners in the television and IP closed captioning contexts help to justify different regulatory approaches. Importantly, the IP closed captioning provisions of the CVAA reach a broader class of VPDs than the video programming distributors subject to the Commission’s television closed captioning rules – *i.e.*, broadcasters and MVPDs. This is significant because after the Commission placed sole liability on distributors in the television closed captioning context, we understand that in practice broadcasters and MVPDs typically placed certain obligations on content owners by contract.<sup>109</sup> As explained above, we find that it is more efficient and less costly to place appropriate obligations on VPOs and on VPDs, rather than to expect the parties to enter into contracts placing certain obligations on VPOs. The record indicates that captioning problems in the television context are sometimes the fault of the content owner rather than the distributor,<sup>110</sup> and so private contractual arrangements may indemnify television distributors in such instances. We are not confident that all VPDs of IP-delivered video programming (including online video distributors and other new media companies) have sufficient leverage and ability to obtain similar contract clauses or even have privity of contract with the entity with captioning rights. Thus, although the Commission concluded in the television context that holding

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is apparent that policies adopted for a broadcast-centric industry will not guarantee the adoption of closed captioning for IP-delivered video consistent with the CVAA.”); Comments of HDMI Licensing, LLC at 4 (“HDMI Licensing Comments”) (“The digital world is not nearly as simple” as television); Comments of the National Association of Broadcasters at 10 (“NAB Comments”) (noting “the implications of [IP] video delivery practices that vary so substantially from traditional television captioning.”); Microsoft Reply at 2-3.

<sup>107</sup> Microsoft Reply at 2-3.

<sup>108</sup> See Senate Committee Report at 14 (The Committee recognizes that online video distributors that are not multichannel video programming distributors may not be able to readily ascertain whether programs were distributed on television and thus subject to the closed captioning requirement.”); *infra* ¶¶ 28-32.

<sup>109</sup> See, e.g., MPAA Comments at 7; NAB Comments at 11; see also *1997 Closed Captioning Order*, 13 FCC Rcd at 3286, ¶ 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.”).

<sup>110</sup> See, e.g., Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, at 2 (Nov. 23, 2011) (“[T]he limited number of closed captioning complaints Verizon has experienced in the delivery of its FiOS TV service, such as missing or garbled captioning, most often stemmed from the content originators.”); Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC, at 1 (Dec. 1, 2011) (“Although they receive relatively few complaints related to captioning of television programming, DIRECTV and DISH Network have found that many of those complaints arise due to a failure of the programmer to provide complete and accurate captioning.”).

distributors responsible for captioning would be the most efficient approach,<sup>111</sup> in the IP closed captioning context we find it would be most effective to regulate both VPOs and VPDs.

23. We also note that distinctions between the two statutory schemes support adoptions of a different regulatory approach in the IP context. In that regard, Verizon points out that, unlike the statutory provisions governing television closed captioning, the CVAA “explicitly limits the video distributors and providers’ responsibility to passing through the closed captions they receive from content owners.”<sup>112</sup> In other words, the provisions governing television closed captioning allow the Commission to establish video programming distributor or provider responsibilities that encompass the actual provision of closed captioning, whereas the CVAA precludes imposing that direct responsibility.

24. We therefore disagree with commenters that argue that the Commission’s proposals improperly allocate responsibility, and that the regulations should focus exclusively on the entity with the direct-to-consumer relationship rather than on the VPO.<sup>113</sup> As discussed above, VPOs are better suited than VPDs to determine whether their programming has been shown on television with captions after the effective date, and VPOs more likely possess the rights necessary to caption their own content.<sup>114</sup> Even if a VPO lacks the rights necessary to caption its content, by definition the VPO is higher up the distribution chain than the VPD, and thus is better positioned than the VPD to obtain required captions. We also disagree with MPAA and Time Warner that extending the existing television regime to the IP context is justified because it would be simpler.<sup>115</sup> We believe that any benefit from such consistency is outweighed by the considerations set forth above, including the enforcement benefits of clearly defining the VPO as a single responsible person or entity. Further, we find unpersuasive MPAA’s argument that a “potentially complicated chain of copyright ownership” mandates against direct regulation of VPOs.<sup>116</sup> On the contrary, for the reasons above, we find that such complexity supports regulating VPOs directly in the IP context. We recognize that because the copyright ownership chain may be complicated, under some circumstances, the VPO as we have defined it may not possess captioning rights or be ideally positioned to determine whether programming it licenses is subject to the Act. Under such circumstances, however, we believe that the VPO is better positioned than the VPD to obtain required captions, and that it is necessary to impose captioning responsibility on a person or entity, rather than leaving a regulatory vacuum. As between the VPO and the VPD, we believe that the VPO—who owns the programming or is closer in the chain of custody to the owner—will be better positioned than the VPD to obtain the necessary rights and information and fulfill the responsibilities that we impose on VPOs, in particular providing captions, pursuant to our regulations.

25. Further, we reject commenters’ arguments that imposing closed captioning obligations on

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<sup>111</sup> See *1997 Closed Captioning Order*, 13 FCC Rcd at 3286, ¶ 27.

<sup>112</sup> Verizon Reply at 3.

<sup>113</sup> See, e.g., Consumer Groups Comments at 5, 7-9; MPAA Comments at 2-7, 11-12; NAB Comments at 11; CBS Reply at 3-7; Consumer Groups Reply at 15-17; Reply Comments of the Content Interests at 1-2 (“Content Interests Reply”) (the “Content Interests” include News Corporation, Time Warner Inc., Viacom Inc., and The Walt Disney Company); MPAA Reply at 4-8; NAB Reply at 6-7; Reply Comments of Time Warner Inc. at 2-4 (“Time Warner Reply”); Letter from Linda Kinney, Motion Picture Association of America, Inc., to Marlene H. Dortch, Secretary, FCC, at 1 (Nov. 4, 2011); Consumer Groups Nov. 10 *Ex Parte* Letter at 1.

<sup>114</sup> See, e.g., Google Comments at 7-8; ACA Reply at 18-19; AT&T Reply at 4-5; Microsoft Reply at 3-4.

<sup>115</sup> See MPAA Comments at 4-7; MPAA Reply at 8; Time Warner Reply at 2-4; see also NAB Comments at 11; CBS Reply at 4; Content Interests Reply at 2; NAB Reply at 6-7.

<sup>116</sup> MPAA Comments at 2.

content owners would raise First Amendment concerns.<sup>117</sup> MPAA argues that regulating VPOs directly would represent a “major shift from the existing captioning regime,” impermissibly and unnecessarily target a new category of speakers, and impose a greater burden on content owners’ speech than is necessary to ensure the deaf community has online access to television content.<sup>118</sup> As an initial matter, closed captioning requirements implicate the First Amendment only marginally at best. The D.C. Circuit has rejected the argument that captioning requirements regulate program content in violation of protected rights under the First Amendment, finding that closed captioning “would not significantly interfere with program content.”<sup>119</sup> Indeed, because closed captioning involves a “precise repetition of the spoken words” communicated by the speaker, any First Amendment burden is only incidental.<sup>120</sup> The D.C. Circuit’s explanation that closed captioning is a “precise repetition” is consistent with our definition of closed captioning as the visual display of the audio portion of video programming. Here, the captioning requirement is triggered only after the programming has been shown on television with closed captions. In addition, the record does not reflect that the total burden on all speakers associated with imposing responsibilities on VPOs would be any greater than the total burden on all speakers associated with regulating only providers and distributors. VPOs have no greater First Amendment right than VPDs to be free of captioning duties,<sup>121</sup> and some VPDs are already subject to broadcast television captioning requirements and have not objected to extension of such requirements to the IP context. The Commission would simply be allocating similar captioning burdens differently among video programming owners, distributors and providers in the IP context than in the traditional television context, in order to implement the statutory directives and objectives as described above. This allocation does not impermissibly burden VPOs’ First Amendment rights.

26. *Video programming distributor or provider responsibilities.* We require VPDs to enable “the rendering or pass through” of all required captions to the end user, as proposed in the *NPRM*.<sup>122</sup> In adopting this requirement, we note that it was generally unopposed in the record.<sup>123</sup> When a VPD initially receives a program with required captions for IP delivery, we will require the VPD to include those

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<sup>117</sup> See, e.g., MPAA Comments at 12; Time Warner Reply at 4; Letter from Clifford M. Sloan, Counsel to MPAA, to Marlene H. Dortch, Secretary, FCC, at 2 (Nov. 21, 2011) (“MPAA Nov. 21 *Ex Parte* Letter”).

<sup>118</sup> MPAA Nov. 21 *Ex Parte* Letter at 1-3.

<sup>119</sup> *Gottfried v. FCC*, 655 F.2d 297, 311 n. 54 (1981), *rev’d in part*, 459 U.S. 498 (1983) (Supreme Court did not disturb dictum of D.C. Circuit suggesting the constitutionality of closed captioning regulations). See also *MPAA v. FCC*, 309 F.3d 796, 803 (D.C. Cir. 2002).

<sup>120</sup> *MPAA v. FCC*, 309 F.3d 796, 803 (D.C. Cir. 2002) (noting a key difference for First Amendment purposes between video description (which regulates video content) and closed captioning (which involves a precise repetition of the spoken words)).

<sup>121</sup> See *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 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 ‘see[k] to communicate messages on a wide variety of topics and in a wide variety of formats’”). See also *DIRECTV Reply* at 4 n. 15 (rejecting the argument that content owners have superior First Amendment rights and claiming VPDs are First Amendment speakers in their own right).

<sup>122</sup> See *NPRM*, 26 FCC Rcd at 13743, ¶ 16.

<sup>123</sup> We note that, as discussed in Section III.A.1 above, we rejected the proposals of a few commenters that we should impose separate responsibilities for VPDs and for VPPs, based on the different definitions of the terms that they advocated. See, e.g., *Microsoft Comments* at 6-7; *APTS/PBS Reply* at 5-6; *TWC Reply* at 1-2.

captions at the time it makes the program file available to end users.<sup>124</sup> Other than requiring a good faith use of the “mechanism” discussed below, we decline to impose specific obligations on VPDs to determine whether captions are required and to ensure that video programming has the required captions. Commenters express their objection to such additional obligations.<sup>125</sup> We note, however, that the existence of an agreed-upon mechanism, discussed below, is not a defense for failure to enable the rendering or pass through of required captions to the end user if—at any time before or during the period in which the VPD made the video programming at issue available to end users through IP delivery—evidence shows that the VPD’s reliance on the mechanism was not in good faith.

27. We find that as part of the VPDs’ responsibilities under the Section 202(b) “render or pass through” obligation, they must ensure that any application, plug-in,<sup>126</sup> or device that they provide to the consumer is capable of rendering or passing through closed captions.<sup>127</sup> In other words, if a VPD chooses to deploy an application, device, or plug-in to deliver video to consumers, the VPD must ensure that captions can actually be displayed on the screen – whether by causing the text to appear or by passing the text through to another component on the device that will accept and display that text.<sup>128</sup> This includes making the captioning readily available to users, because if users cannot turn on the captioning and otherwise control the captions, the rendering or passing through of captions will be meaningless. We find that this is a reasonable and necessary interpretation of the requirement that a VPD must enable “the rendering or pass through of closed captions,”<sup>129</sup> because otherwise captions of video programming that VPDs render or pass through via their associated applications or hardware may not be viewable by end users. Our interpretation of the “render or pass through” obligation is consistent with how our existing closed captioning rules operate.<sup>130</sup> Thus, interpreting the “render or pass through” obligation in this way

<sup>124</sup> See *NPRM*, 26 FCC Rcd at 13743, ¶ 16; Verizon Comments at 3; APTS/PBS Reply at 5 (with regard to VPPs); AT&T Reply at 4. This time frame is different for archival programming, as discussed below.

<sup>125</sup> See ACA Comments at 14; AT&T Comments at 7-8; DIRECTV Comments at 10-11; Google Comments at 7; Microsoft Comments at 6-7; NCTA Comments at 14; Verizon Comments at 3; ACA Reply at 16-19; AT&T Reply at 3; DISH Network Reply at 3; TWC Reply at 13. Commenters explain that there would be a number of problems with such an obligation, including that it would be inconsistent with the CVAA, unnecessary and duplicative of VPO responsibilities, unworkable, and may force VPDs to block certain IP-delivered video programming. See, e.g., AT&T Comments at 8; DIRECTV Comments at 10-11; Verizon Comments at 3; DISH Network Reply at 4.

<sup>126</sup> A “plug-in” is defined as “[a] program of data that enhances, or adds to, the operation of a (usually larger) parent program.” See H. Newton, *Newton’s Telecom Dictionary* 642 (20th ed. 2004).

<sup>127</sup> See 47 U.S.C. § 613(c)(2)(D)(vi). See also VPAAC Report at 19-20 (discussing use cases involving delivery of video programming to web browsers or managed applications or devices).

<sup>128</sup> For example, if a VPD provides an application that consumers can download onto their smartphones to view the VPD’s programming, then the application must be capable of rendering or passing through closed captions. Likewise, if a VPD provides a device, such as a set-top box, to view the VPD’s programming, that device must be capable of rendering or passing through closed captions. Additionally, if the VPD delivers its programming through a website, it must design its website to permit the user to enable the display of closed captions. Where the VPD passes the text through to another component on a physical device over which the VPD has no control, then the manufacturer of that device will have separate obligations to ensure the capability to display such captions under Section 203 of the CVAA. See *infra* Section IV. We note that if the VPD is reasonably relying on the captioning display functionality in a device over which it has no control to display captions, the VPD has no liability to the extent that the captioning functionality on the device fails or operates improperly. We also note that to the extent that the VPD believes that it would be economically burdensome for it to comply with this requirement in a specific instance, it may petition us accordingly.

<sup>129</sup> See 47 U.S.C. § 613(c)(2)(D)(vi).

<sup>130</sup> See, e.g., NCTA Comments at 25 (“Consequently, to the extent that a distributor enables access to Internet-delivered video via a leased device, under the Commission’s proposal, the device would need to support the (continued....)”).

is consistent with Commission precedent. We note that this approach also is consistent with the Commission's approach in the *ACS Order* that, if a provider of advanced communications services makes software available to provide covered services, the provision of that software is subject to the applicable requirements.<sup>131</sup> Importantly, just as the Commission found in the *ACS Order* that an advanced communications service provider or equipment manufacturer is not responsible for third-party applications and services,<sup>132</sup> we find that a VPD is also not responsible for third-party services and applications. This means that if a consumer downloads software from a third party entity not affiliated with or used by the VPD in the delivery of its programming, and the consumer uses that software to access content provided by the VPD, the VPD is not responsible for ensuring closed captioning support in that application. We note, however, that where a VPD requires a consumer to download software or software upgrades from a third party, and the consumer could not otherwise view closed captioning on video programming for which the VPD bears a closed captioning obligation, the VPD is responsible for ensuring the accessibility of such software or software upgrades. Finally, as part of its obligation to enable the rendering or pass through of closed captions, a VPD providing an application, plug-in, or device to consumers in order to deliver video programming must ensure that the application, plug-in, or device complies with the requirements discussed below related to interconnection mechanisms (to the extent the VPD supplies the consumer covered devices under Section 203) and display of captions.<sup>133</sup>

28. *Mechanism for information on video programming subject to the CVAA.* Having set forth the allocation of responsibilities between VPDs and VPOs, we turn to the "mechanism" that the Commission must establish to make available to VPDs information on video programming that must be captioned when delivered via IP.<sup>134</sup> The CVAA requires that the Commission's implementing regulations "(v) shall establish a mechanism to make available to video programming providers and distributors information on video programming subject to the Act on an ongoing basis," and "(vi) shall consider that the video programming provider or distributor shall be deemed in compliance if such entity . . . makes a good faith effort to identify video programming subject to the Act using the mechanism created in (v)."<sup>135</sup> Without the good faith use of such a "mechanism," the Senate Committee Report explained that a VPD that is not also an MVPD may face difficulty in determining whether a particular program was shown on television with captions after the effective date of the new rules.<sup>136</sup> As explained below, we will require

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 rendering or pass through of captions contained in such video."); ACA Comments at 5 (stating that under the television closed captioning rules, "MVPDs are required to deliver captions intact and in a manner that can be displayed by captioning decoders. This includes the obligation to ensure that operator-supplied customer premises equipment, such as set-top boxes, are capable of passing through captions to subscribers.") (footnotes omitted).

<sup>131</sup> See *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd 14557, 14591 at ¶ 86 (2011) ("*ACS Order*").

<sup>132</sup> See *id.* at 14592, ¶ 88; see also Comments of the Consumer Electronics Association at 18 ("CEA Comments"); Reply Comments of the Consumer Electronics Association at 8 ("CEA Reply") ("Moreover, consistent with the *ACS Order*, manufacturers of covered apparatus should not be held responsible for whether third-party software downloaded by end users complies with the captioning requirements.") (footnote omitted).

<sup>133</sup> See *infra* Sections IV.E and IV.C.

<sup>134</sup> See *NPRM*, 26 FCC Rcd at 13752, ¶ 35.

<sup>135</sup> 47 U.S.C. §§ 613(c)(2)(D)(v), (vi).

<sup>136</sup> See Senate Committee Report at 14 ("The Committee recognizes that online video distributors that are not multichannel video programming distributors may not be able to readily ascertain whether programs were distributed on television and thus subject to the closed captioning requirement. Accordingly, the Committee encourages the Commission to recognize good faith efforts to identify video programming subject to the Act. Additionally, the Commission may work to encourage the development of technology to accurately identify video programming subject to this section.").

each VPO and each VPD to which the VPO has provided or will provide video programming for IP delivery to agree upon a “mechanism” that will inform the VPD of which programming is subject to the IP closed captioning requirements on an ongoing basis. The “mechanism” must provide adequate information to enable the VPD to identify programming subject to the IP closed captioning requirements on an ongoing basis.

29. We interpret the word “mechanism” to mean any process, method or system agreed upon between a VPO and a VPD that makes available to the VPD sufficient information to determine whether captioning is required of programming that it receives from the VPO and makes available directly to end users through a distribution method that uses IP. This interpretation is consistent with the statutory language, history, and purpose, and will provide maximum flexibility to VPOs and VPDs to comply with the CVAA’s requirements. The CVAA does not define the term “mechanism.” A common meaning of the term, however, is “a process or technique for achieving a result.”<sup>137</sup> Assigning the term its common meaning in the CVAA is consistent with the legislative purpose and history. In that regard, the CVAA requires a “mechanism” so that VPOs will make information available to VPDs regarding whether IP-delivered programming is subject to the captioning requirements in recognition of the difficulties VPDs otherwise might face in obtaining such information. In addition, the statute requires that VPDs be “deemed in compliance” when they make a good faith effort to identify programming subject to the captioning requirements using the mechanism.<sup>138</sup> Although the statutory reference to “a” mechanism might suggest that Congress contemplated a single method for making information available to VPDs, we find no support in the legislative history for such an interpretation, and nothing in the statutory scheme requires such a narrow interpretation. On the contrary, the broad interpretation we adopt will better serve the statutory purpose of maximizing the accessibility of IP-delivered video programming by providing flexibility for VPOs and VPDs to agree on processes or methods tailored to their needs, as well as by “encourag[ing] the development of technology to accurately identify video programming subject to this section.”<sup>139</sup>

30. Our broad interpretation of the statutory term “mechanism” also is justified by our examination of the record in this proceeding, which reflects sharply differing views as to whether a particular “mechanism” would work best, supporting our conclusion that one size may not fit all. While some commenters are amenable to the system of certifications proposed in the *NPRM*,<sup>140</sup> others argue that the proposed certification mechanism would be unworkable and unduly burdensome.<sup>141</sup> Some commenters favor allowing a VPD to monitor a third-party database,<sup>142</sup> and still others support leaving

<sup>137</sup> See Webster’s New Collegiate Dictionary 737 (9<sup>th</sup> Ed. 1989).

<sup>138</sup> See *supra* n. 135-136 and accompanying text.

<sup>139</sup> See Senate Committee Report at 14. Rather than limiting the definition of the statutorily-required mechanism to a specific process or method, we believe that our approach will enhance economic incentives for the development of technology. For example, under our rules, entities may choose to rely on a commercially available third-party database (to the extent one is developed) that accurately identifies video programming subject to the CVAA.

<sup>140</sup> See, e.g., AT&T Comments at 6-7; DiMA Comments at 4-5; Google Comments at 8; DISH Network Reply at 3; Google Reply at 4; TWC Reply at 11.

<sup>141</sup> See, e.g., ACA Comments at 16; Consumer Groups Comments at 28-29; MPAA Comments at 7-8; NAB Comments at 26-28; NCTA Comments at 13, 19; CBS Reply at 6-7, 9-11; NAB Reply at 7, 9 n. 24; NCTA Reply at 2, 4 n. 10.

<sup>142</sup> See, e.g., Comments of the National Center for Accessible Media at WGBH at 3 (“NCAM Comments”); Comments of Rovi Corporation at 4 (“Rovi Comments”); Rovi Reply at 2-3. Other commenters argued that a third party database might be expensive, incomplete or inaccurate, or difficult to manage. See, e.g., Consumer Groups Comments at 30-31 n. 56; MPAA Comments at 9; NAB Comments at 28-29; CBS Reply at 7 n. 14; NAB Reply at 9-10.

the choice for the parties to resolve by private contract.<sup>143</sup> We believe that the broad interpretation we adopt, by permitting the parties to select the “mechanism” that is most suitable for them, will provide needed flexibility to VPOs and VPDs while ensuring that VPDs will be able to obtain the information necessary to determine when a program must be provided with captions.

31. We will require each VPO and each VPD to which the VPO has provided or will provide video programming for IP delivery to agree upon a “mechanism” that will inform the VPD of which programming is subject to the IP closed captioning requirements on an ongoing basis.<sup>144</sup> This obligation will apply to programming that VPOs newly provide VPDs for IP delivery, as well as to programming that VPOs provided VPDs for IP delivery previously if it remains available to consumers, as explained below.<sup>145</sup> Any mechanism agreed upon by a VPO and VPD must provide adequate information to enable the VPD to identify programming subject to the IP closed captioning requirements on an ongoing basis, consistent with the definition of “mechanism” that we adopt here. A VPD cannot rely in “good faith” on a mechanism that fails to provide adequate information for it to identify programming subject to the Act, and a VPD that does rely on such a mechanism despite its inadequacy will not be “deemed in compliance” within the meaning of Section 202(b) of the CVAA.<sup>146</sup> If the parties agree upon a mechanism that involves certifications, they have the flexibility to determine whether certifications should apply to specific programming or whether to use a more general certification, for example, by addressing in a certification all programming covered by a particular contract. That is, we impose no requirement on the parties that the certifications apply on a program-by-program basis or include a program-specific explanation as to whether captions are, or are not, required.

32. In the *NPRM*, the Commission proposed “to require VPOs providing video programming to VPDs for IP delivery to provide each program either with captions simultaneously, or with a dated certification stating that captions are not required for a reason stated in the certification.”<sup>147</sup> Because we have decided to afford parties flexibility in choosing a mechanism, we decline to adopt a certification requirement. In the interest of providing certainty to those VPDs that may choose to use certification as the method of determining whether captioning is required, however, we declare that VPDs may rely in good faith on certifications, as long as they meet certain requirements. First, to the extent that a VPD relies on a certification by a VPO that the subject programming need not be captioned, such certification must include a clear and concise explanation of why captioning is not required. We believe that such an explanation is necessary to enable a VPD to rely on the certification in good faith, as it will enable the VPD to review the VPO’s reasoning and evaluate whether the VPD may rely on the certification. Second, in order to rely on a certification in the event of a complaint, VPDs must be able to produce it to the Commission. Thus, VPDs should retain any certifications on which they may need to rely until one year after they cease making the subject programming available to end users via IP delivery. If these requirements are met, VPDs may rely in good faith on such certifications for purposes of the “deemed in compliance” provision of the statute. In other words, when faced with a complaint, VPDs relying upon certifications need not prove that the mechanism they chose was adequate. In addition, if VPDs wish to obtain Commission determinations that other proposed mechanisms provide adequate information for them to be able to rely on the mechanisms in good faith for purposes of the “deemed in compliance”

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<sup>143</sup> See, e.g., NAB Comments at 25, 29; NCTA Comments at 13; CBS Reply at 6-7; MPAA Reply at 6-7; NAB Reply at 8; NCTA Reply at 3. Google expressed its opposition to a private contractual mechanism. See Google Reply at 5.

<sup>144</sup> Should a captioning problem occur where the VPD and VPO have failed to agree upon an adequate mechanism, the Commission may hold both parties responsible.

<sup>145</sup> See *infra* ¶¶ 33-35.

<sup>146</sup> See 47 U.S.C. § 613(c)(2)(D)(vi).

<sup>147</sup> See *NPRM*, 26 FCC Rcd at 13752, ¶ 35.

provision, they may seek such a determination by filing an informal request, and providing sufficient information for the Commission to determine whether the proposed mechanism would provide the VPD with adequate information for it to identify programming subject to the Act.<sup>148</sup>

33. We note that an uncaptioned, archival IP-delivered program that is not subject to the IP closed captioning requirements as of the effective date of the new rules may later become subject to the requirements, once it is shown on television with captions after the effective date.<sup>149</sup> In the *NPRM*, the Commission proposed that VPOs be required to provide VPDs with updated certifications as to the captioning status of a previously delivered program (and a caption file, if not previously provided) within seven days of the program becoming subject to the IP closed captioning requirements, and that VPDs be required to make required captions available to end users within five days of the receipt of an updated certification.<sup>150</sup> We decline to adopt this proposal in light of our decision to provide flexibility for VPOs and VPDs to agree to different mechanisms to enable VPDs to identify programming subject to the CVAA. We emphasize, however, that VPOs must provide updated information to VPDs concerning uncaptioned, archival IP-delivered programs pursuant to whatever “mechanism” they agree to use in order for VPDs to be able to rely on that mechanism in good faith, subject to the deadlines discussed below. For example, if the mechanism that a VPD and a VPO agree to use involves certifications, the VPO would have to provide the VPD with an updated certification to inform the VPD that a program in the VPD’s library has been shown on television with captions after the applicable compliance deadline.

34. Based on examination of the record, we conclude that VPOs and VPDs must be provided with a reasonable period of time to develop processes or methods of addressing uncaptioned, archival IP-delivered content that is shown on television with captions after the effective date of the new rules. The record reflects that no process or method presently exists to enable VPOs to accurately identify such content, and that the task of developing one is likely to be complex.<sup>151</sup> The record also reflects that the “costs and complexities involved in taking down a program already online and adding captions to it” would make compliance with our proposed seven- and five-day deadlines impossible at present.<sup>152</sup> Accordingly, for a period of two years after this *Report and Order* is published in the Federal Register,

<sup>148</sup> See 47 C.F.R. § 1.41. Parties filing any request pursuant to the rules we adopt here may seek confidential treatment of information submitted with their request pursuant to the Commission’s confidentiality rules. See 47 C.F.R. § 0.459.

<sup>149</sup> See 47 U.S.C. § 613(c)(2)(A).

<sup>150</sup> See *NPRM*, 26 FCC Rcd at 13753, ¶ 36.

<sup>151</sup> See, e.g., NCTA Comments at 19 (“Indeed, it would make no sense to interpret the Act to require this search and replace mission. The *Notice*’s complex database suggestion is evidence of the enormous difficulties that such a requirement would needlessly impose.”); CBS Reply at 10 (“VPOs will not necessarily know when uncaptioned, archival programs, which may have been licensed for television distribution over the course of many years to numerous entities, may be televised after the effective date with captions.”); Letter from Michael O’Leary, Senior Executive Vice President, Government Relations, Motion Picture Association of America, Inc., to Marlene H. Dortch, Secretary, FCC, at 4 (Dec. 14, 2011) (“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.”).

<sup>152</sup> See, e.g., NCTA Comments at 19 (“In any event, the *Notice* is mistaken in its view that a copyright owner could simply send a caption file to the website now hosting the older version. There are numerous costs and complexities involved in taking down a program already online and adding captions to it, which essentially require the recreation of the entire archival content.”) (footnote omitted); CBS Reply at 10 (“Even assuming the VPO knows or learns of such a television exhibition after the effective date, the task of locating each and every site on which an uncaptioned version of the program may reside on the Internet would be difficult, if not impossible.”).

we will not require captioning of uncaptioned, archival IP-delivered programming that is already in the VPD's library before it is shown on television with captions. We believe that two years will provide a reasonable period of time for VPDs to develop and implement a process to address such content. For such programming that is already in a VPD's library and is shown on television with captions on or after the date two years from Federal Register publication, the VPD must update its program file to enable the rendering or pass through of closed captions within 45 days of the program being shown on television with captions.<sup>153</sup> We believe that 45 days will provide sufficient time for VPDs to update program files to enable the rendering or pass through of closed captions, given that VPDs and VPOs will have two years to develop methods of complying with the 45-day deadline.<sup>154</sup> We further note that 45 days is significantly longer than the objected-to *NPRM* proposal.<sup>155</sup> We expect that, with the passage of time, parties will have established a better functioning mechanism for the update of archival content. Given this, we require that for programming that is already in a VPD's library and is shown on television with captions on or after the date three years from Federal Register publication, the VPD must update its program file to enable the rendering or pass through of closed captions within 30 days of the program being shown on television with captions. Further, we require that for programming that is already in a VPD's library and is shown on television with captions on or after the date four years from Federal Register publication, the VPD must update its program file to enable the rendering or pass through of closed captions within 15 days of the program being shown on television with captions. We expect that by four years after Federal Register publication, 15 days will be sufficient for VPDs to caption any archival content that remains uncaptioned.<sup>156</sup>

35. We reject the arguments of some commenters that our IP closed captioning rules should not apply to programming that is available from a VPD before it is shown on television with captions.<sup>157</sup> Section 202(b) of the CVAA requires the Commission to "revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations."<sup>158</sup> Some commenters maintain

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<sup>153</sup> Uncaptioned, archival programming will not be subject to the IP closed captioning requirements unless and until it is shown on television with captions on or after the two-year deadline. For the reasons discussed above, VPOs and VPDs will need two years to develop processes or methods of addressing such programming, and before such processes or methods are in place we do not believe it is reasonable to require them to keep track of whether such programming is shown on television with captions.

<sup>154</sup> Although we give VPOs and VPDs two years to develop a process for captioning archival content that is subject to the CVAA, we note that nothing in the statute precludes the VPO, during this period, from providing captions to the VPD for the archival content posted in the VPD's library. We note further the statement of Computer Prompting & Captioning Co. "that technology currently exists to easily and quickly extract closed caption data from videos produced and aired prior to 2006." Letter from Giovanni Galvez, Technical Developer, CPC - Computer Prompting & Captioning Co., to Marlene H. Dortch, Secretary, FCC, at 1 (Dec. 19, 2011).

<sup>155</sup> The lengthy compliance deadline adopted herein for programming already in a VPD's library is consistent with NCTA's request for a separate category in the schedule of deadlines for reruns. See NCTA Comments at 7, n. 12; see also Letter from Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, to Marlene Dortch, Secretary, FCC, at 1 (Dec. 7, 2011) ("[A]t a very minimum . . . if the Commission were to adopt any such requirement, significant additional time should be provided for the affected entities to comply.").

<sup>156</sup> The Commission may reconsider the time frames set forth in this paragraph upon a showing that VPOs and VPDs are incapable of compliance within these time frames.

<sup>157</sup> See, e.g., MPAA Comments at 9; Rovi Comments at 5 (proposing that the Commission grandfather content which a VPD received previously without captions, where the VPD has made a good faith effort to notify the VPO that it lacks captions or holds a certification that captions are not required); DISH Network Reply at 5; Rovi Reply at 4.

<sup>158</sup> See 47 U.S.C. § 613(c)(2)(A).

that the statute does not cover content delivered to the VPD and posted online prior to the effective date of the regulations, seemingly reading the term “delivered” in Section 202(b) to refer to the time of the VPO’s delivery of content to the VPD rather than the time of publication or exhibition on television with captions. These commenters argue that requiring updates of such programming to include closed captions would be inconsistent with Congress’s intent to apply the requirements prospectively only.<sup>159</sup> We disagree. We interpret Section 202(b) to cover any programming delivered to consumers using IP, provided that the programming was published or exhibited on television with captions after the effective date of the regulations. We believe that this interpretation is consistent with the language, history, and purpose of the statute. The statutory phrase “after the effective date of such regulations” does not modify “programming delivered using Internet protocol”; rather, it modifies the phrase “published or exhibited on television with captions.” Thus, whether the VPO delivered the programming to the VPD before or after the effective date of the regulations is irrelevant to whether the programming is covered by the statute.<sup>160</sup> While the legislative history of the CVAA indicates Congress’s intent “to apply the captioning requirement only prospectively,”<sup>161</sup> we believe that our reading is consistent with that intent: under our reading, captioning requirements do not apply to IP-delivered programming unless and until the programming is published or exhibited on television with captions after the effective date of our regulations. Our reading is also consistent with the statutory purpose of maximizing the availability of closed captions, whereas the reading advocated by some commenters would remove a significant amount of captioned television programming from the scope of the CVAA based upon whether a particular program happened to be in a VPD’s archive before it was shown on television with captions. Accordingly, we do not see any statutory basis for exempting the existing IP-delivered programming from the IP closed captioning requirements as some commenters request.

### 3. Quality of IP-Delivered Video Programming

36. The CVAA authorizes the Commission to impose requirements on the quality of video programming provided by VPOs for IP delivery, and on the quality of IP-delivered video programming that VPDs make available directly to end users.<sup>162</sup> The VPAAC recommended that the consumer experience with captions of IP-delivered video programming should be “equal to, if not better than,” the television experience, and it specifically proposed the consideration of such factors as completeness,

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<sup>159</sup> See, e.g., MPAA Comments at 8-9; NAB Comments at 27-28; NCTA Comments at 18-19; CBS Reply at 9-11; DIRECTV Reply at 8; DISH Network Reply at 4-5; Letter from Diane B. Burstein, Vice President and Deputy General Counsel, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, at 1 (Nov. 4, 2011) (“NCTA *et al.* Nov. 4 *Ex Parte* Letter”); see also MPAA Reply at 10 (instead of requiring immediate compliance for this type of content, “the Commission should establish an implementation timeline that provides industry with sufficient flexibility to replace existing online content over time, in order to meet Congress’ goals without undue burdens or consumer disruption.”).

<sup>160</sup> Even if the time of delivery, as opposed to the time of publication or exhibition on television with captions, were relevant to the scope of the CVAA’s coverage, we would agree with Consumer Groups that the delivery of a video to a consumer after the effective date of the new rules subjects it to the captioning requirements of Section 202(b) if it involves video programming that was shown on television with captions after the effective date. See Consumer Groups Reply at 4-6; see also 47 U.S.C. § 613(c)(2)(A) (“[T]he Commission shall revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.”); Consumer Groups Nov. 10 *Ex Parte* Letter at 2.

<sup>161</sup> See Senate Committee Report at 14; House Committee Report at 30.

<sup>162</sup> See 47 U.S.C. § 613(c)(2)(D)(iv) (authorizing the Commission to “describe the responsibilities of video programming providers or distributors and video programming owners”).

placement, accuracy, and timing in making this determination.<sup>163</sup> The *NPRM* proposed to require captions to be of at least the same quality as the television captions for the programming, and that an evaluation of “quality” includes the consideration of such factors as completeness, placement, accuracy, and timing.<sup>164</sup> While some commenters support the proposed quality standards,<sup>165</sup> others express concern that such a requirement could make VPOs or VPDs responsible for factors that affect caption quality but are outside of their control, such as broadband connection speeds or the constraints of a particular apparatus.<sup>166</sup>

37. We will require VPOs to provide VPDs with captions of at least the same quality as the television captions provided for that programming.<sup>167</sup> We will also require VPDs to maintain (*i.e.*, not degrade) the quality of the captions provided by VPOs in enabling the rendering or pass through of captions, and to transmit captions in a format reasonably designed to reach the end user in that quality. In evaluating whether the captions are of at least the same quality, the Commission will consider such factors as completeness, placement, accuracy, and timing.<sup>168</sup> At the same time, recognizing the complex chain of video programming delivery from the VPO to the consumer, we will not hold VPDs or VPOs responsible for quality issues outside of their control such as broadband connection speeds or the constraints of a particular apparatus. This slight modification of the quality requirements proposed in the

<sup>163</sup> VPAAC Report at 13-14. These are the four factors that the VPAAC Report included in its overview of performance objectives, in addition to its discussion of technical capabilities of apparatus.

<sup>164</sup> See *NPRM*, 26 FCC Rcd at 13744, ¶ 18.

<sup>165</sup> Consumer Groups Comments at 9-11; Google Comments at 8-9; Comments of TechAmerica at 2 (“TechAmerica Comments”) (supporting the proposal “where it is technically feasible and ‘achievable’ to do so”) (footnote omitted); Google Reply at 6-7; Consumer Groups Reply at 12-15; Consumer Groups Nov. 10 *Ex Parte* Letter at 2.

<sup>166</sup> See, *e.g.*, AT&T Comments at 10-11 (“In addition to the fact that IP transmissions over the World Wide Web are subject to dropped packets, which inevitably degrade video quality, bitstream management techniques and the inherent constraints of particular apparatus will affect the ability of IP-delivered closed captions to meet the proposed standards.”); CEA Comments at 4 n. 11 (“For example, apparatus using screen displays of less than 13 inches may not be able to achieve the same caption display position as originally designated by the VPO.”); Comments of CTIA-The Wireless Association at 20 (“CTIA Comments”) (“[W]ireless communications are only beginning to offer services comparable to traditional video distribution. Users of these services accept that there may be limitations because they understand that they are counterbalanced by the tremendous convenience and freedom that users of wireless devices enjoy.”); Microsoft Comments at 14 (“Requiring exact conformity in quality features between the television and the IP-delivered video experience may not be possible, for instance, with respect to character size due to differences in resolution capability or the user-chosen size of the video display window.”); NCTA Comments at 15-16 (“Adopting specific requirements at this stage will lead to unnecessary confusion and could inhibit the ability of content suppliers to serve non-traditional, smaller devices that may not be able to display the identical captioning as that seen on a larger television screen.”); APTS/PBS Reply at 9-10 (noting that “existing online video players do not currently include all of the features available for broadcast television, such as dynamic changes in caption placement,” and that “the timing of IP-delivered captions can be affected by variations in users’ broadband connection speeds”).

<sup>167</sup> NAB suggests that, “[t]o the extent the Commission takes any action regarding performance objectives, it should establish a safe harbor by which a covered entity that uses the same or substantially the same captioning used on television will be deemed in compliance.” NAB Comments at 17. Further, NAB states that “live programming or repeats of live programming originally transmitted live which have been appropriately captioned using the ‘electronic news room’ technique and which is placed online should be considered appropriately captioned for purposes of IP captioning.” *Id.* at 25 (footnote omitted). Since the quality requirement is based on the television quality, we believe we have addressed NAB’s concerns. If television captions were created using the “electronic news room” captioning technique, which creates captions from a news script computer or teleprompter, then the same text could be used online in compliance with the statute and our regulations.

<sup>168</sup> As we gain experience with the application of these rules, we may revisit the issue.