

Before the  
**Federal Communications Commission**  
Washington, DC 20554

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

**Opposition to the Petition for Reconsideration of the  
Consumer Electronics Association (CEA) by**

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)  
National Association of the Deaf (NAD)  
Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)  
Association of Late-Deafened Adults (ALDA)  
Hearing Loss Association of America (HLAA)  
Cerebral Palsy and Deaf Organization (CPADO)  
Technology Access Program at Gallaudet University (TAP)

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## SUMMARY

Consumer Groups respectfully oppose the petition for reconsideration by the Consumer Electronics Association (“CEA”) of various aspects of the Commission’s recent *Report and Order* in the above-captioned proceeding. CEA asks the Commission to conclude:

1. That section 203 of the Twenty-First Century Communications and Video Accessibility Act (“CVAA”) only applies to apparatuses specifically intended by their manufacturers to play back video programming;
2. That section 203 does not apply to removable media players, such as DVD and Blu-ray disc players; and
3. That the January 1, 2014 deadline for apparatuses to comply with the Commission’s new rules under section 203 refers to the date that apparatuses are manufactured.

With regard to CEA’s first two requests, we urge the Commission to affirm its holdings in the *Report and Order*. There, the Commission expressly considered and soundly rejected the same arguments now presented in CEA’s petition. CEA has failed to explain how it is possible for manufacturers to design apparatuses with the capability of playing back video programming, yet not intend those apparatuses to be used by consumers to play back video programming. CEA adds nothing of substance to its argument here, and the Commission should again reject it. CEA’s new complaints regarding captioning capability on digital cameras and camcorders, are better addressed, if at all, through individualized waiver petitions with specific, verifiable information explaining why such apparatuses should be exempt from the Commission’s rules.

We also urge the Commission to affirm its holding that removable media players are apparatuses subject to the requirements of section 203. Contrary to CEA's contentions, the plain language of section 203 dictates this result and is not contravened by section 202(b) or section 204 of the statute. Moreover, requiring removable media players to contain captioning capability would expressly serve the public interest by making accessible the large body of captioned removable media-based video programming.

Finally, we urge the Commission to clarify the implication of the *Report and Order* and associated rules that the January 1, 2014 deadline to comply with the requirements of section 203 refers to the date that apparatuses are made available for sale. Alternatively, we encourage the Commission to consider labeling requirements and other retail policies to minimize consumer confusion.

## OPPOSITION

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), the Association of Late-Deafened Adults (ALDA), the Hearing Loss Association of America (HLAA), the Cerebral Palsy and Deaf Organization (CPADO), collectively, “Consumer Groups,” and the Technology Access Program at Gallaudet University (TAP), pursuant to 47 C.F.R. § 1.429, respectfully oppose the Petition for Reconsideration of the Consumer Electronics Association (“CEA”) of the Commission’s *Report and Order* in the above captioned proceeding.<sup>1</sup>

In its petition, CEA argues that the Commission should reconsider and narrow the scope of apparatuses covered under the captioning requirements of section 203 of the CVAA<sup>2</sup> and the Commission’s corresponding rules, 47 C.F.R. § 79.103. More specifically, CEA urges the Commission:

1. To restrict the rules to “video programming players,” defined as “component[s], application[s], or system[s] that [are] specifically intended by the manufacturer to enable access to video programming, not video in general”; and
2. To exclude from the rules “removable media players” like DVD and Blu-ray players.<sup>3</sup>

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<sup>1</sup> *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Report and Order*, MB Docket. No. 11-154, 27 FCC Rcd. 787 (Jan. 13, 2012) (“*Report and Order*”); *Petition for Reconsideration of the Consumer Electronics Association*, MB Docket No. 11-154, at 2-3 (April 30, 2012) (“*CEA Petition*”).

<sup>2</sup> 47 U.S.C. §§ 303(u), (z) & 330(b).

<sup>3</sup> *CEA Petition* at 2.

These arguments are duplicative of those made in the CEA's numerous filings and during *ex parte* meetings with Commission staff throughout this proceeding. The Commission expressly considered and correctly rejected these arguments in the *Report and Order*. Because CEA's petition introduces no substantive new grounds for reconsidering these issues, the Commission should reject CEA's arguments and affirm its holdings in the *Report and Order*.

Finally, CEA argues that the Commission should clarify that the January 1, 2014 deadline for apparatuses to comply with the requirements of section 203 should apply only to devices *manufactured* on or after January 1, 2014, rather than devices imported, shipped, or sold after that date.<sup>4</sup> CEA's interpretation would confuse consumers who rightfully expect accessible apparatuses to be available on January 1, 2014. Accordingly, we encourage the Commission to clarify instead that the deadline refers to the date that apparatuses are made available for sale.

**I. The Commission correctly determined the scope of apparatuses subject to the CVAA's captioning requirements in the Report and Order.**

CEA argues that section 203 should be interpreted to apply only to "video programming players," defined as "component[s], application[s], or system[s] that [are] specifically intended by the manufacturer to enable access to video programming, not video in general."<sup>5</sup> More specifically, CEA argues that section 203 of the CVAA requires captioning capability only for devices that are specifically *intended* by their manufacturers to play back video programming, rather than devices that are merely *capable* of playing back video programming.<sup>6</sup> CEA also contends that section 203 applies only to those devices designed to play

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<sup>4</sup> *Id.* at 2-3.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.* at 5.

back “video programming” as defined under the CVAA, rather than video in general.<sup>7</sup> Finally, CEA dismisses the possibility that its concerns can be addressed by the Commission’s ability to grant waivers from section 203’s requirements.<sup>8</sup> We urge the Commission to reject these lines of argument.

**A. Apparatuses capable of playing back video programming are necessarily designed and intended by their manufacturers to play back video programming.**

Section 203(a) of the CVAA unambiguously requires that all “apparatus[es] *designed* to receive or play back video programming . . . be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming.”<sup>9</sup> CEA first argued in its comments and reply comments in this proceeding that apparatuses are only “designed” to receive or play back video programming if their manufacturers specifically *intend* that the devices be used to play back video programming, and not if their manufacturers merely include unintended video playback *capability*.<sup>10</sup>

In response, Consumer Groups pointed out that it was impossible for a product to be *capable* of playing back video programming and not also be *intended* and *designed* to do so.<sup>11</sup> Google Inc., a CEA member, agreed, noting that “to the extent a device requires software to direct the use and operation to

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<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.* at 7-8

<sup>9</sup> 47 U.S.C. § 303(u)(1) (emphasis added).

<sup>10</sup> See *Comments of the Consumer Electronics Association*, MB Docket No. 11-154, at 11-13 (Oct. 18, 2011) (“CEA Comments”); *Reply Comments of the Consumer Electronics Association*, MB Docket No. 11-154, at 6 (Nov. 1, 2011).

<sup>11</sup> *Reply Comments of Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), et al.*, MB Docket No. 11-154, at 27 (Nov. 1, 2011) (“Consumer Groups Reply Comments”).

receive [and] play back video programming, it is an apparatus ‘designed’ to do so, and should be deemed apparatus for purposes of Section 203.”<sup>12</sup>

CEA did not respond or even acknowledge these contrary viewpoints. Instead, it reiterated its original argument verbatim at least seven more times in separate *ex parte* meetings with advisors to Chairman Genachowski,<sup>13</sup> Commissioner Capps,<sup>14</sup> Commissioner Clyburn,<sup>15</sup> Commissioner McDowell,<sup>16</sup> and Commission staff from the Media Bureau, the Consumer and Governmental Affairs Bureau, and the Office of Engineering and Technology.<sup>17</sup>

Following these meetings, the Commission expressly considered CEA’s argument in the *Report and Order* – and soundly rejected it.<sup>18</sup> The Commission acknowledged CEA’s argument that “[the Commission] should evaluate whether a device is covered [under section 203] by focusing on the original design or intent of the manufacturer of apparatus and not the consumer’s ultimate use of the apparatus.”<sup>19</sup> But the Commission disagreed, noting that “to determine whether a device is designed to receive or play back video programming, and therefore covered by the statute, [the Commission] should look to the device’s functionality, *i.e.* whether it is capable of receiving or playing back video programming.”<sup>20</sup>

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<sup>12</sup> *Reply Comments of Google Inc.*, MB Docket No. 11-154, at 7 (Nov. 1, 2011) (“*Google Reply Comments*”).

<sup>13</sup> *CEA Notice of Ex Parte*, MB Docket No. 11-154, at Agenda p. 2 (Dec. 7, 2011).

<sup>14</sup> *CEA Notice of Ex Parte*, MB Docket No. 11-154, at Agenda p. 2 (Dec. 1, 2011).

<sup>15</sup> *CEA Notice of Ex Parte*, MB Docket No. 11-154, at Agenda p. 2 (Dec. 16, 2011).

<sup>16</sup> *CEA Notice of Ex Parte*, MB Docket No. 11-154, at Agenda p. 2 (Nov. 30, 2011).

<sup>17</sup> *CEA Notice of Ex Parte*, MB Docket No. 11-154, at Agenda p. 2 (Nov. 4, 2011); *CEA Notice of Ex Parte*, MB Docket No. 11-154, at Agenda p. 2 (Nov. 14, 2011); *CEA Notice of Ex Parte*, MB Docket No. 11-154, at 2 (Dec. 21, 2011).

<sup>18</sup> *Report and Order*, 27 FCC Rcd. at 842, ¶ 95 & n.374 (citing *CEA Comments* at 12).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 842, ¶ 95 & n.375 (citing *Google Reply Comments* at 9-10; *Consumer Groups*

Moreover, the Commission affirmed that a manufacturer's deliberate inclusion of video playback capability on a device undeniably demonstrates that the manufacturer intended the device to play back video programming. The Commission noted that "to the extent a device is built with a video player, it would be reasonable to conclude that viewing video programming is one of the intended uses of the device" and that "from a consumer perspective, it would also be reasonable to expect that a device with a video player would be capable of displaying captions."<sup>21</sup>

CEA now presents the same argument for a *tenth* time in its petition for reconsideration. CEA adds nothing of substance, simply insisting as it has since its original comments that the CVAA mandates consideration of a manufacturer's subjective intent in designing a product when determining whether it was "designed" to play back or receive video programming.<sup>22</sup>

CEA does not explain, nor can it, how it is possible for a manufacturer to deliberately create a product that is *capable* of playing back or receiving video programming but somehow is not *intended* or *designed* to do so. As previously noted, the distinction between a manufacturer's intent for a device to perform video programming playback and its capability to do so is a meaningless one.<sup>23</sup> Video playback capability is not a function that can be unintentionally or accidentally included in a product; if a device is capable of playing back or receiving video, then its manufacturer necessarily intended and designed it to do so.<sup>24</sup> And there can be no concern about having to support devices that are truly

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*Reply Comments* at 27).

<sup>21</sup> *Id.* at 842, ¶ 95.

<sup>22</sup> *CEA Petition* at 5-7.

<sup>23</sup> *See Consumer Groups Reply Comments* at 27.

<sup>24</sup> *Id.*

incapable of playing back video. As the Commission noted, only those devices that specifically support video playback by virtue of their manufacturers' intentional inclusion of video playback technology – whether out-of-the-box or via a manufacturer-supplied upgrade – must be capable of displaying closed captions.<sup>25</sup>

Indeed, no manufacturer can be at all surprised that a device that, as CEA notes, specifically “incorporate[s] and support[s] the same technologies (e.g., codecs) needed to enable [video] playback of pre-recorded ‘video programming,’” and that the manufacturer knows is “technically capable of [playing back ‘video programming’]” will, in fact, be used by consumers to *play back video programming*.<sup>26</sup> As the Commission noted, “from a consumer perspective, it would also be reasonable to expect that a device with a video player would be capable of displaying captions.”<sup>27</sup>

If manufacturers were permitted to opt-out of the CVAA’s captioning capability requirements simply by asserting ignorance that their video programming playback devices might in fact be used by consumers to play back video, providing captioning capability would effectively be voluntary, and the requirements of section 203(a) would be vitiated.<sup>28</sup> Such an absurd result would flatly contravene Congress’s intent in enacting section 203: to ensure that consumers are able to view captions when viewing video programming on their apparatuses.<sup>29</sup>

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<sup>25</sup> *Report and Order*, 27 FCC Rcd. at 842, ¶ 95, n. 376 (internal citations omitted).

<sup>26</sup> See *CEA Petition* at 7.

<sup>27</sup> *Report and Order*, 27 FCC Rcd. at 842, ¶ 95.

<sup>28</sup> See *Consumer Groups Reply Comments* at 27-28.

<sup>29</sup> See S. Rep. No. 111-386, at 14 (2010); H.R. Rep. No. 111-536, at 30 (2010).

**B. Apparatuses capable of video playback are necessarily designed to play back video programming.**

CEA nevertheless attempts to resuscitate its argument by pointing out that section 203 applies only to devices designed to play back “video programming” as defined under the CVAA, and not video content more generally.<sup>30</sup> CEA insists that this limitation necessarily restricts the application of section 203 to only those devices whose manufacturers intend them to play back “video programming,” and not those devices whose manufacturers intend them to play back video not included in the CVAA’s definition of “video programming.”<sup>31</sup>

This contention, however, is mere window dressing on CEA’s already-rejected argument that it is possible for a manufacturer to include video programming capability in an apparatus but not have intended or designed the apparatus to be used to play back video programming. Indeed, the Commission’s rules under section 203 apply only to apparatuses “designed to receive or play back *video programming*.”<sup>32</sup> But it is entirely unclear how an apparatus, concededly designed by its manufacturer to play back video – by virtue of the manufacturer’s inclusion of a video player – could somehow *not* be designed to play back video programming.

Of course, it is theoretically possible that a device could be capable of playing back only certain types of video, and not “video programming.” But CEA does not provide a single example of such a device, nor are we aware of the existence of one.

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<sup>30</sup> See *CEA Petition* at 4-5.

<sup>31</sup> *Id.* at 4-5.

<sup>32</sup> See 47 C.F.R. § 79.103(a).

The apparent absence of any video playback device that is incapable of playing back “video programming” likely results from the reality that the CVAA’s definition of “video programming” does not draw quantifiable distinctions between different types of video that are technically cognizable by a video player, such as formats or codecs. Rather, the CVAA’s definition of “video programming” – “programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media” draws qualitative legal distinctions based on the attributes of the programming embodied in a video, such as its source.<sup>33</sup> For example, a video created by a television broadcast station constitutes “video programming,” while a consumer-generated home movie might not.

But to the best of our knowledge, there is no easily implemented method for an apparatus designed to play back video to distinguish between “video programming” and other types of video – nor can we conceive of any reason for a manufacturer to so artificially constrain the capability of an apparatus. Rather, as CEA acknowledges, a device designed to play back video is “technically capable” of playing back any video that a consumer is able to load on the device – whether the video is “video programming” or not.<sup>34</sup> CEA even describes how it envisions a consumer performing this task: by simply “cop[ying] a video file and mov[ing] it to [a device].”<sup>35</sup> But unless a video playback device contains some mechanism to distinguish between “video programming” and other types of programming that might be embodied in a video file, the device is necessarily capable, and thereby intentionally designed, to play back video programming.

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<sup>33</sup> See 47 U.S.C. § 613(h)(2).

<sup>34</sup> See *CEA Petition* at 7.

<sup>35</sup> *Id.*

“It is well established that the Commission will not grant reconsideration merely for the purpose of permitting reargument of matters previously considered.”<sup>36</sup> “Reconsideration will not be granted merely for the purpose of again debating matters on which the agency has once deliberated and spoken.”<sup>37</sup> CEA’s petition adds nothing to CEA’s original position that the scope of section 203 should turn on manufacturers’ intent. Instead, CEA merely seeks in its petition to rehash the Commission’s careful consideration and sound rejection of an argument that CEA has now unsuccessfully made to the Commission on at least ten separate occasions. Accordingly, the Commission should affirm its determination in the *Report and Order* that the manufacturer of an apparatus must comply with section 203’s closed captioning requirements if the apparatus is capable of playing back video programming.

**C. CEA’s concerns about cameras and camcorders are more appropriately addressed through individual purpose-based waivers.**

Beyond its general arguments about manufacturers’ intent, CEA more specifically insists that all “digital still cameras” and “consumer video cameras,” or “camcorders” should be exempt from the closed captioning rules because “[c]onsumers certainly have no expectation of this feature,” because “[t]here is no benefit to consumers” to requiring such devices to support closed captions, and because such devices “are designed to create, record, and play back [only] *user-generated* video content.”<sup>38</sup> CEA acknowledges the CVAA’s mechanism for

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<sup>36</sup> E.g., *Assignment of License of Station KROQ-FM*, 3 FCC Rcd. 1,667, 1,667, ¶ 2 (1988) (citation omitted).

<sup>37</sup> E.g., *Knoxville Broadcasting Corp.*, 87 F.C.C.2d 1103, 1107, ¶ 11 (1981) (citations omitted).

<sup>38</sup> *CEA Petition* at 4, 7 (citations omitted).

seeking purpose-based waivers from the captioning rules, but complains that it is “untried” and that no waivers have yet been granted.<sup>39</sup>

CEA does not acknowledge, however, that the Commission specifically considered and rejected several waiver requests in the *Report and Order* because they were “broad, unspecific requests” for blanket exemptions of broad product categories such as mobile devices, smartphones, cell phones, tablets, and gaming consoles.<sup>40</sup> As the Commission acknowledged, the legislative history of the CVAA clarifies that purpose-based waivers are only available where a manufacturer presents *individualized* evidence that video programming playback capability is only an incidental feature of a device and that an overwhelming majority of consumers of a particular device do not and would have no reason to use the device to view video programming.<sup>41</sup> The Commission correctly concluded that blanket waivers are likely to be inappropriately overinclusive and that successful waiver requests must be “highly fact specific and unique to each device presented.”<sup>42</sup>

CEA now presents the same type of generalized claims about cameras and camcorders that the Commission rejected in the *Report and Order*. For example, CEA insists that “[t]here is no benefit to consumers” to requiring still cameras to support closed captions on their video players.<sup>43</sup> But the most popular still cameras on Flickr, a widely-used photo-sharing website, are the Apple iPhone 4

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<sup>39</sup> *Id.* at 7-8.

<sup>40</sup> *Report and Order*, 27 FCC Rcd. at 849-850, ¶ 107.

<sup>41</sup> *Id.* at 849, ¶ 106.

<sup>42</sup> *Id.* at 849-850, ¶¶ 106-07.

<sup>43</sup> *CEA Petition* at 4.

and iPhone 4S<sup>44</sup> – smartphones that possesses widely-used video programming playback functionality and most certainly are not ineligible for waivers.

Indeed, many categories of devices and software such as smartphones, cameras, tablets, set-top boxes, laptop computers, web browsers, and video game consoles are increasingly converging and being designed to perform multiple functions, including the playback of video programming. Consumers rightfully expect that these devices, which they often purchase specifically to play back video programming, should be capable of displaying closed captions.

Should CEA nevertheless believe that consumers would truly derive no benefit from the inclusion of closed captioning functionality on particular video programming playback apparatuses, its members must file individualized waiver petitions with sufficient information to demonstrate that consumers in fact will not use those apparatuses to play back video programming. Such petitions must be fact-based and supported by specific evidence, rather than relying on general, unverifiable assertions about vaguely bounded categories of devices and unsupported assertions about consumer desires and behavior.

## **II. The Commission correctly determined that removable media players are apparatuses subject to section 203's requirements.**

CEA next argues that the *Report and Order* impermissibly applies the closed captioning requirements of section 203 of the CVAA to removable media players such as DVD and Blu-ray disc players.<sup>45</sup> As support for this argument, CEA points to the limitation of section 203's requirements to apparatuses that can receive or play back "video programming *transmitted* simultaneously with

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<sup>44</sup> *Camera Finder*, Flickr, <http://www.flickr.com/cameras/> (last visited June 3, 2012).

<sup>45</sup> *CEA Petition* at 8-9.

sound.”<sup>46</sup> CEA also argues that section 202(b) and section 204 of the CVAA indicate that Congress did not intend for section 203 to cover removable media players, that the Commission lacks the statutory authority to regulate removable media players, and that requiring removable media players to render closed captions would disserve the public interest.<sup>47</sup> Again, we urge the Commission to reject this line of argument.

**A. Section 203 plainly applies to removable media players.**

Section 203 of the CVAA requires “apparatus[es] designed to receive or play back video programming transmitted simultaneously with sound” to “be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming.”<sup>48</sup> CEA first argued in its comments in this proceeding that “[i]n the case of playback-only fixed-media players [such as DVD and Blu-ray disc players], no video programming is ‘transmitted’ within the meaning of [section 203].”<sup>49</sup> CEA reiterated this argument in its reply comments, noting that the Commission should “give meaning to the limiting modifier ‘transmitted’ in [section 203] and exclude fixed-media playback devices (*e.g.*, DVD and Blu-ray players) and other similar devices from the closed captioning requirements.”<sup>50</sup>

In Consumer Groups’ reply comments, we noted that CEA had provided no valid basis for excluding removable media players from the rules.<sup>51</sup> We further noted that the legislative history of section 203 strongly supports

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<sup>46</sup> *Id.* at 9.

<sup>47</sup> *See id.*

<sup>48</sup> 47 U.S.C. § 303(u)(1)(A).

<sup>49</sup> *CEA Comments* at 13.

<sup>50</sup> *CEA Reply Comments* at 5.

<sup>51</sup> *Consumer Groups Reply Comments* at 28.

requiring *all* devices that consumers use to view video programming to include closed captioning capability.<sup>52</sup>

In the *Report and Order*, the Commission acknowledged CEA's argument, noting that "[s]ome commenters argue that the word 'transmitted' indicates content that is streamed, downloaded, or broadcast via 'wire or radio,' thus excluding . . . removable media devices [from the scope of section 203]."<sup>53</sup> But the Commission disagreed, noting that CEA's reading of section 203 "ignores Congress's use of the word 'or'" in section 203 and would require "devices to both 'receive *and* play back' video programming in order to be covered under [section 203]" – as opposed to section 203's actual language, which plainly applies to devices that either "receive *or* play back" video.<sup>54</sup>

CEA now marshals several references to the term "transmit," "transmitted," and "transmission" from portions of the CVAA and other communications laws, broadly insisting that Congress "consistently" uses the terms to refer to content "sent at a distance by wire or radio, not as part of consumer's [sic] playback of a disc or other fixed media."<sup>55</sup> But CEA neither acknowledges nor makes any effort to refute the Commission's sound reasoning in the *Report and Order*, which correctly concludes that the phrase "transmitted simultaneously with sound" must be read *in the specific context of section 203* "to describe how video programming is conveyed from [a] device (e.g., DVD player) to the end user (simultaneously with sound), rather than [to] describe how the video programming arrived at the device (e.g., DVD player)."<sup>56</sup>

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<sup>52</sup> *Id.* (citing S. Rep. No. 111-386, at 14; H.R. Rep. No. 111-536, at 30).

<sup>53</sup> *Report and Order*, 27 FCC Rcd. at 845, ¶ 99 & n.396 (citing *CEA Comments* at 13).

<sup>54</sup> *Id.* at 845-46, ¶ 99.

<sup>55</sup> *CEA Petition* at 11, 14.

<sup>56</sup> *Report and Order*, 27 FCC Rcd. at 845-46, ¶ 99.

The Commission's conclusion is mandated by the plain and unambiguous of text of section 203. As the Commission correctly notes, section 203 applies not just to devices that are designed to "receive" video programming "transmitted simultaneously with sound," but to devices that are designed to either "receive or play back" such video programming.<sup>57</sup>

Thus, to give meaning to the plain language of the CVAA, section 203 must be interpreted to include devices that are designed merely to "play back" and not "receive" video programming "transmitted simultaneously with sound." But devices that are not designed to "receive" video programming necessarily cannot receive video programming that has been "sent." CEA's interpretation of video programming "transmitted simultaneously with sound" as being "sent at a distance by wire or radio" would impermissibly exclude any device capable of playing back but not receiving video programming with sound from section 203.

Accordingly, the Commission's interpretation of the phrase "transmitted simultaneously with sound" as describing how video programming is conveyed from an apparatus to the end user is the only logical reading of section 203, which must apply to devices designed to either "receive or play back" video programming. CEA does not contest the proposition that removable media players are generally designed to convey video program to an end user. Thus, removable media players are within the scope of section 203 and must be manufactured with caption display capability.

**B. Section 202(b) does not restrict the scope of section 203.**

CEA nevertheless argues that Congress did not intend section 203 to extend captioning requirements to removable media players because section 202(b) of

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<sup>57</sup> *Id.*

the CVAA requires closed captioning only for IP-delivered video.<sup>58</sup> But CEA supplies no citation to the text of section 203 to support this proposition.

Section 203(a) amends section 303(u) of the Communications Act of 1934 (“1934 Act”), which formerly required caption display capability only for “apparatus designed to receive *television pictures broadcast* simultaneously with sound,” to require such capability for all “apparatus designed to receive *or play back video programming transmitted* simultaneously with sound.” If Congress had intended section 203(a) to expand the scope of section 303(u) from apparatuses designed to receive television broadcasts to merely include apparatuses used for viewing IP-delivered video, it could have done so by specifically referencing IP-delivered video or section 202(b). But instead, Congress completely removed section 303(u)’s specific reference to “television pictures” and replaced it with a more general reference to “video programming.”

Moreover, there is no indication that Congress intended section 203(a)’s expansion of section 303(u) to be limited to requiring devices used to view IP-delivered programming to display captioning. Section 203(a) added numerous new requirements not specifically related to IP or captioning, including new accessibility requirements for devices with picture screens of less than 13 inches,<sup>59</sup> video description for television broadcasts,<sup>60</sup> and accessible emergency information.<sup>61</sup> And the legislative history of section 203 indicates that Congress had no such limitation in mind; both the House and Senate committee reports on the CVAA note simply that section 203 was enacted to ensure that “devices consumers use to view video programming are able to display closed captions,”

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<sup>58</sup> *CEA Petition* at 14-15.

<sup>59</sup> 47 U.S.C. § 303(u)(1).

<sup>60</sup> 47 U.S.C. § 303(u)(1)(B).

<sup>61</sup> 47 U.S.C. § 303(u)(1)(C).

without drawing any distinctions based on the type of device or delivery mechanism used.<sup>62</sup>

**C. Section 204 does not restrict the scope of section 203.**

CEA further argues that Congress did not intend section 203 to extend captioning requirements to removable media players because section 204 references “video programming transmitted in digital format using Internet protocol.”<sup>63</sup> Indeed, section 204 requires that “digital apparatus[es] designed to receive or play back video programming transmitted in digital format simultaneously with sound, including apparatus[es] designed to receive or display video programming transmitted in digital format using Internet protocol,” be manufactured with accessible user interfaces.<sup>64</sup>

But while section 204 specifies that the universe of “digital apparatus[es] designed to receive or play back video programming transmitted in digital format simultaneously with sound” *includes* “apparatus[es] designed to receive or display video programming transmitted in digital format using Internet protocol” its applicability is not *limited* to IP-based devices.<sup>65</sup> Rather, IP-based devices are merely one type of device, in addition to removable media players, that might be designed to receive or play back video programming transmitted in digital format simultaneously with sound.

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<sup>62</sup> S. Rep. No. 111-386, at 14; H.R. Rep. No. 111-536, at 30.

<sup>63</sup> *CEA Petition* at 16.

<sup>64</sup> 47 U.S.C. § 303(aa)(1).

<sup>65</sup> *See, e.g., Samantar v. Yousuf*, 130 S. Ct. 2278, 2287 (2010) (“[U]se of the word “include” can signal that the list that follows is meant to be illustrative rather than exhaustive”).

**D. The Commission’s specific jurisdiction under the CVAA obviates the need to consider general or ancillary jurisdiction in this context.**

Next, CEA argues that neither the Commission’s general grant of jurisdiction over “interstate and foreign communication by wire [and] radio” nor its ancillary jurisdiction extends to transmissions between a removable media player and a display device.<sup>66</sup> As discussed above, the CVAA specifically grants the Commission jurisdiction to require closed captioning capability on all apparatuses designed to play back video programming transmitted simultaneously with sound, including removable media players. Accordingly, it is unnecessary for the Commission to consider whether it might also permissibly regulate recordable media players under its general or ancillary jurisdiction.

**E. Requiring removable media players to include captioning capability would serve the public interest.**

Finally, CEA claims that requiring removable players to include caption display capability would disserve the public interest.<sup>67</sup> More specifically, CEA contends that no video programming distributed via removable media is required to contain closed captions, and that subtitles and subtitles for the deaf and hard of hearing (“SDH”) included on DVDs are sufficient to make programs on removable media accessible to viewers who are deaf or hard of hearing.<sup>68</sup>

CEA’s contention that no video programming distributed via removable media is required to contain closed captions is flatly untrue. First, the Individuals with Disabilities Education Act (“IDEA”) requires the Secretary of Education to award grants to provide closed captioning for “new and emerging technologies”

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<sup>66</sup> *CEA Petition* at 17-18.

<sup>67</sup> *Id.* at 10.

<sup>68</sup> *Id.*

such as DVDs and “other new forms of multimedia” that are appropriate for use in classroom settings.<sup>69</sup> Second, regulations promulgated pursuant to section 508 of the Rehabilitation Act require certain government-procured television sets to be capable of “receiv[ing], decod[ing], and display[ing] closed captions from . . . DVD signals”<sup>70</sup> – confirming that some DVDs contain closed captions.

And CEA’s peers from the content creation industry agree that captioned video programming is often distributed via removable media. A consortium of commenters including the Motion Picture Association of America (“MPAA”) asserted in a recent filing to the United States Copyright Office that “nearly 100% of DVDs” include closed captioning, that “television programming and motion pictures are almost all available with captions . . . on DVD,” and that “copyright owners and technology companies are working to increase th[e] availability [of closed captioning] through voluntary efforts as well as regulatory compliance.”<sup>71</sup>

While we do not agree with the MPAA that all or even most DVDs are distributed with closed captions, it is clear that a significant proportion of video distributed via removable media includes closed captions. But it is unclear how consumers can make use of those closed captions unless they are able to purchase video players capable of rendering or passing through those captions. Accordingly, CEA’s contention that requiring removable media players to include closed captioning capability “will provide minimal, if any, benefit to persons with disabilities,” is plainly specious.<sup>72</sup>

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<sup>69</sup> 20 U.S.C. § 1474(a)(1), (c)(1)(B)(iii).

<sup>70</sup> 36 C.F.R. § 1194.24(a).

<sup>71</sup> *Joint Comments of the Association of American Publishers, et al.*, Docket No. RM 2011-7, at 43, 45 (Feb. 10, 2012), [http://www.copyright.gov/1201/2012/comments/Steven\\_J.\\_Metalitz.pdf](http://www.copyright.gov/1201/2012/comments/Steven_J._Metalitz.pdf).

<sup>72</sup> See *CEA Petition* at 10.

Furthermore, the inclusion of subtitles and SDH on removable video does not obviate the need for closed captions. As the Commission plainly explained the *Report and Order*, neither subtitles nor SDH “generally meet the functional requirements necessary to accomplish the goals of the [CVAA].”<sup>73</sup> The Commission noted that subtitles “often do not . . . identify speakers and background noises, such as sound effects, or the existence of music and laughter, information that is often critically important to understanding a program’s content.”<sup>74</sup> And subtitles generally cover only portions of video programming that are not in English, leaving the remainder of the program wholly inaccessible.

Moreover, SDH is not a functional substitute for closed captions. As the Commission noted in the *Report and Order*, removable media players utilizing SDH “do not typically offer consumers the user controls available when closed captions are provided in accordance with the EIA-708 technical standard used for digital television programming.”<sup>75</sup> The EIA-708 user controls, including the ability to change color, opacity, font, background, character attributes, and other caption display options are required of devices under section 203 because they are necessary to make programming truly accessible.<sup>76</sup> The Video Programming Accessibility Advisory Committee (“VPAAC”) agreed, noting that that SDH “may not offer the same level of user control over presentation” as closed captioning.<sup>77</sup> These user controls are particularly important to viewers who are deafblind or who are both deaf or hard of hearing and visually impaired, who

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<sup>73</sup> 27 FCC Rcd. at 846, ¶ 100.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *See id.* at 852, ¶ 111.

<sup>77</sup> *Second Report of the VPAAC Committee: User Interfaces, and Video Programming Guides and Menus*, at 18 (Apr. 19, 2012).

must be able to individually adjust the visual presentation of captions to ensure accessibility. And SDH does nothing to address the needs of consumers with large libraries of closed captioned DVDs who will be unable to access them without captioning-compatible players.

Requiring manufacturers of removable media players to include caption decoding technology will serve the public interest by ensuring that removable media players include the user controls necessary to guarantee that the video programming consumers view on those devices is accessible. Accordingly, we urge the Commission to reject CEA's argument to the contrary and affirm the requirement set forth in the *Report and Order* that removable media players comply with the requirements of section 203.

**III. The Commission should clarify that the January 1, 2014 deadline for section 203 compliance refers to the date products are made available for sale, or investigate labeling requirements.**

CEA urges the Commission to clarify that the January 1, 2014 deadline for compliance with section 203's requirements refers to the manufacturing date of apparatuses and not the date that apparatuses are imported, shipped, or sold.<sup>78</sup> CEA contends that its requested clarification will simplify manufacturers' compliance with the deadline and is consistent with the Commission's past practices regarding similar deadlines.<sup>79</sup>

While we understand CEA's desire to ensure clarity for manufacturers, we remind CEA that the CVAA was enacted for the benefit of millions of Americans who are deaf or hard of hearing and who have for decades been unable to purchase accessible video programming products and services. We are deeply

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<sup>78</sup> CEA Petition at 19.

<sup>79</sup> *Id.*

concerned that basing the January 1, 2014 compliance deadline on an apparatus's date of manufacture will sow seeds of uncertainty and confusion among consumers who are waiting to purchase apparatuses that include the most advanced closed captioning technology available. As they stand, the *Report and Order* and the associated rules in 47 C.F.R. §§ 79.102 & 79.103 suggest that apparatuses complying with section 203 must be made available starting on January 1, 2014. More specifically, the *Report and Order* states that manufacturers will "design, develop, test, manufacture, and *make available for sale*" accessible new products by January 1, 2014;<sup>80</sup> sections 79.102 and 79.103 simply state that "all digital television receivers," "all separately sold DTV tuners," and "all digital apparatuses designed to receive or play back video programming" must include closed captioning capability "[e]ffective January 1, 2014."

Consumers have followed the Commission's activities in this proceeding with great interest, and it is now widely known that January 1, 2014 is the date by which apparatuses must comply with the Commission's new accessibility rules. Consequently, we fear that consumers will flock to brick and mortar and online retail outlets in January, an especially active shopping month, to purchase new accessible apparatuses, only to find out when they plug the apparatuses in at home that the apparatuses lack the anticipated accessibility features.

Accordingly, we urge the Commission to clarify that January 1, 2014 is the date by which products made available for sale must comply with the new accessibility features. CEA contended in its recent petition for waivers of the ACS rules that product lifecycles for consumer electronics like the apparatuses covered under section 203 generally require a two-year period to develop and

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<sup>80</sup> *Report and Order*, 27 FCC Rcd. at 859, ¶ 122

bring the products to market.<sup>81</sup> Because the CVAA was signed into law in October of 2010, manufacturers will have had more than three years to prepare for the effective date of the rules and two years from the date that the Commission announced the specifics of the section 203 requirements in the *Report and Order*. By CEA's own metrics, manufacturers should face no difficulty in ensuring that accessible products are brought to market by January 1, 2014.

Manufacturers can easily determine a hard deadline for manufacturing products by determining the average time it takes for their products to work their way through retail channels and ensuring that devices manufactured within that time period prior to January 1, 2014 comply with the rules. And looking to the date that products are made available for sale sets a clear, easily verifiable basis for the Commission to enforce the new rules.

Should the Commission nevertheless conclude that January 1, 2014 should refer to the date by which devices must be manufactured in compliance with the rules, it should take steps to ensure that manufacturers and retailers act to reduce consumer confusion. In particular, we recommend that manufacturers be required to include conspicuous labels on products indicating what accessibility features they include, particularly including the user control requirements of section 203.<sup>82</sup> Conversely, manufacturers may wish to pursue other means of communicating with consumers, such as including labels on non-compliant products manufactured before January 1, 2014 but likely to be sold after or maintaining lists on their websites of specific products that comply with the

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<sup>81</sup> *Consumer Electronics Association Petition for Waiver*, CG Docket No. 10-213, WT Docket No. 96-198, CG Docket No. 10-145 (Mar. 22, 2012) <http://apps.fcc.gov/ecfs/document/view?id=7021902799>.

<sup>82</sup> *C.f., e.g., Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, 15 FCC Rcd. 17,568 (2000).

rules. We also encourage the Commission to recommend that CEA work with its retail members and partners to ensure that consumers who inadvertently buy equipment that is inaccessible are able to easily return and exchange the equipment and avoid restocking fees. We look forward to working with CEA to help ensure that consumers can make informed purchasing decisions when looking for accessible products.

### CONCLUSION

We believe that the Commission appropriately resolved the issues raised by CEA in the *Report and Order*. Accordingly, we encourage the Commission to confirm that section 203 applies to all devices capable of playing back video programming, including removable media players. We also encourage the Commission to confirm that the January 1, 2014 deadline for section 203 compliance refers to the date that apparatuses are made available for sale, or alternatively to require apparatus labeling to minimize consumer confusion.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on June 7, 2012, pursuant to the 47 C.F.R. § 1.429, a copy of the foregoing Opposition was served by first class U.S. mail, postage prepaid, upon the petitioner:

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