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Via Electronic Filing

September 26, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

Re: *Written Ex Parte Presentation – MB Docket No. 11-154*

Dear Ms. Dortch:

I write on behalf of the Consumer Electronics Association (“CEA”) to explain further one aspect of CEA’s pending petition for reconsideration of the *IP Captioning Order*¹ (the “PFR”), filed on April 30, 2012.²

As discussed in the PFR,³ to be consistent with the limited scope of Section 303(u) of the Communications Act of 1934, as amended (the “Act”),⁴ CEA urges the Commission to limit new

¹ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787 (2012).

² CEA, Petition for Reconsideration, MB Docket No. 11-154 (filed Apr. 30, 2012) (“PFR”). In addition to the issue discussed in the text of this letter, the PFR also urges the Commission to:

- Reconsider the finding in the *IP Captioning Order* that standalone removable media players (e.g., Blu-ray Disc™ and DVD players) are covered by Section 79.103; and
- Clarify that the January 1, 2014 compliance deadline refers specifically to the date of manufacture, so that only apparatus manufactured on or after that date are subject to the new rules, without affecting the importation, shipment, or sale in the United States of apparatus manufactured before that date. *See id.* at 2.

³ *See id.* at 3-8.

Section 79.103(a) of the rules and the accompanying note⁵ to apply **only** to apparatus intended by the manufacturer to receive or play back “video programming,”⁶ not **any** video content such as consumer-generated media. This clarification is necessary to bring this rule in line with Congress’s intent in Section 303(u) to limit the application of the apparatus closed captioning rules to a subset of video players (*i.e.*, players intended for receiving or playing back “programming by, or generally considered comparable to programming provided by a television broadcast station”⁷), rather than **all** video players.

The *IP Captioning Order* exceeds the Commission’s statutory authority by mistakenly finding that any device “built with a video player,” and accordingly capable of receiving or playing back “video,” is therefore necessarily “designed to receive or play back **video programming** transmitted simultaneously with sound” within the meaning of Section 303(u).⁸ Contrary to the approach of the *IP Captioning Order*, the Commission must give the unambiguous term “designed to” in Section 303(u) its ordinary and widely-held meaning. As CEA noted in the PFR, the term “designed” means “to intend for a definite purpose.”⁹ In contrast, “capable” means “having the ability or capacity for.”¹⁰ By equating “designed to” with “capable of,” the *IP Captioning Order* ignores the plain language of the statute and impermissibly removes the

⁴ See 47 U.S.C. § 303(u)(1) (requiring “that, if technically feasible . . . apparatus designed to receive or play back **video programming** transmitted simultaneously with sound . . . be equipped with built-in . . . capability designed to display closed-captioned video programming” (emphasis added)).

⁵ See 47 C.F.R. § 79.103(a) and note.

⁶ 47 U.S.C. § 613(h)(2) (defining “video programming” as “programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media”).

⁷ *Id.*

⁸ 47 U.S.C. § 303(u) (emphasis added); see *IP Captioning Order*, 27 FCC Rcd at 842 ¶ 95 (“We believe that **to determine whether a device is designed to** receive or play back video programming, and therefore covered by the statute, **we should look to the device’s functionality, i.e. whether it is capable of** receiving or playing back video programming.” (emphasis added)).

⁹ *Design Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/design> (last visited Sept. 26, 2012). See also *Design Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/design> (“to have as a purpose: intend”) (last visited Sept. 26, 2012); *Design Definition*, OXFORDDICTIONARIES.COM, <http://oxforddictionaries.com/definition/design?region=us&q=design> (“do or plan (something) with a specific purpose or intention in mind”) (last visited Sept. 26, 2012).

¹⁰ *Capable Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/capable> (last visited Sept. 26, 2012). See also *Capable Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/capable> (“having traits conducive to or features permitting”) (last visited Sept. 26, 2012).

manufacturer's intent – the hallmark of the term “design” – as a limitation to the scope of Section 79.103.¹¹ This has significant practical as well as legal effects. For example, as CEA has pointed out, neither camcorders nor digital still cameras are designed or intended to play back video programming, but because they contain video players, they apparently are covered under the current version of the rule and accompanying note, contrary to the intent of Section 303(u).¹²

Although the text of Section 79.103(a) largely follows the statute,¹³ the accompanying note currently provides:

Note to paragraph (a): Apparatus includes the physical device and the **video players** that manufacturers install into the devices they manufacture before sale, whether in the form of hardware, software, or a combination of both, as well as any video players that manufacturers direct consumers to install after sale.¹⁴

CEA believes that the Commission can resolve this issue by a clarification and revision of the note to Section 79.103(a). Consistent with CEA's reply to opposition to petition for reconsideration (“PFR Reply”), the Commission should revise this note by replacing the term “video player” with “video programming player.”¹⁵ The Commission should clarify that the term “video programming player” means a feature specifically intended by the manufacturer to enable access to “video programming,” as defined in the CVAA, not video in general. For example, as noted in the PFR Reply, numerous popular applications (“apps”) are specifically designed to play video programming.¹⁶

¹¹ See PFR at 5-7.

¹² See *id.* at 4, 7.

¹³ See 47 C.F.R. § 79.103(a):

Effective January 1, 2014, all digital apparatus designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size must be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming pursuant to the provisions of this section, if technically feasible, except that apparatus that use a picture screen less than 13 inches in size must comply with the provisions of this section only if doing so is achievable as defined in this section.

¹⁴ *Id.*, note to paragraph (a) (emphasis added). This note apparently is meant to reflect the discussion in paragraphs 93-95 of the *IP Captioning Order*, 27 FCC Rcd at 839-42, ¶¶ 93-95.

¹⁵ See CEA, Reply to Opposition to Petition for Reconsideration, MB Docket No. 11-154, at 3 (filed June 18, 2012) (“PFR Reply”); see also PFR at 8.

¹⁶ Apps from Hulu and Netflix are examples of such video programming apps. See PFR Reply at 3 & n.12.

Thus, inclusion of a video programming app or feature (as defined above) in a product at the time of sale should be taken to indicate that the product has been designed to receive or play back video programming, while the absence of such a feature should be taken to indicate that the product was not so designed. The manufacturer's marketing or advertisement of intended uses of the product could provide additional evidence of whether the conditions of Section 303(u) are satisfied. These clarifications, as requested in the PFR and PFR Reply, would bring the Commission's rules into conformance with Section 303(u) of the Act.¹⁷

Because the pleading cycle for the PFR is complete, and CEA's members need certainty in the near future as they design products affected by issues raised in the PFR, CEA urges the Commission to grant the PFR as quickly as possible.

Pursuant to Section 1.1206 of the Commission's rules,¹⁸ this letter is being electronically filed with your office. Please let the undersigned know if you have any questions regarding this filing.

Respectfully submitted,

/s/ **Julie M. Kearney**

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¹⁷ See PFR at 8; PFR Reply at 3.

¹⁸ 47 C.F.R. § 1.1206.