

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Accessibility of User Interfaces, and Video) MB Docket No. 12-108
Programming Guides and Menus)

**REPLY COMMENTS OF
THE CONSUMER ELECTRONICS ASSOCIATION**

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ASSOCIATION**

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY.....	1
II.	THE RECORD SUPPORTS A PLAIN-LANGUAGE READING OF SECTIONS 204 AND 205 OF THE CVAA TO DETERMINE THEIR SCOPE.....	5
III.	THE COMMENTS SHOW THAT SECTION 204 APPLIES NARROWLY.....	8
A.	The “Digital Apparatus” Subject to Section 204 Must Be Carefully Delineated... 9	
B.	The Commission Should Not Adopt the <i>NPRM</i> ’s Tentative Conclusion That the “Appropriate” Functions Covered by Section 204 Include “All User Functions of the Device”.....	10
IV.	SECTIONS 204 AND 205 DO NOT REQUIRE USE OF A DEDICATED BUTTON OR A SINGLE STEP FOR USER CONTROL ACTIVATION MECHANISMS.....	13
V.	SECTIONS 204 AND 205 LIMIT THE APPLICABILITY OF THE USER CONTROL ACTIVATION MECHANISMS AS CODIFIED IN SECTIONS 303(AA) AND (BB) OF THE ACT.....	15
VI.	THE RECORD ILLUSTRATES THE NEED FOR A UNIFORM THREE-YEAR PHASE-IN PERIOD.....	17
VII.	THE COMPLIANCE DEADLINE FOR THE RULES IMPLEMENTING SECTIONS 204 AND 205 SHOULD APPLY TO DEVICES BASED ON THE DATE OF MANUFACTURE.....	18
VIII.	MANUFACTURERS OF DIGITAL APPARATUS AND NAVIGATION DEVICES SHOULD NOT BE RESPONSIBLE FOR THE ACCESSIBILITY OF THIRD-PARTY APPLICATIONS DOWNLOADED AND INSTALLED BY USERS AFTER SALE... 20	
IX.	CONCLUSION.....	21

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I. INTRODUCTION AND SUMMARY

The Consumer Electronics Association (“CEA”) hereby replies to comments filed regarding the above-captioned Notice of Proposed Rulemaking (“*NPRM*”),¹ which seeks to implement Sections 204 and 205 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“*CVAA*”).² The wide variety of views expressed in the initial comments illustrates the complexity of Sections 204 and 205, which generally require that certain user interfaces on “digital apparatus” and “navigation devices”³ used to view video

¹ See *Accessibility of User Interfaces, and Video Programming Guides and Menus*, Notice of Proposed Rulemaking, 28 FCC Rcd 8506 (2013) (“*NPRM*”). CEA filed initial comments on the *NPRM* on July 15, 2013 (“CEA Comments”). In this reply, unless otherwise indicated, all comments are short-cited and refer to pleadings filed on or about July 15, 2013, in MB Docket No. 12-108.

² Pub. L. No. 111-260, §§ 204-05, 124 Stat. 2751, 2773-76 (2010) (“*CVAA*”) (codified at 47 U.S.C. §§ 303(aa), (bb), and note); An Act to make technical corrections in the Twenty-First Century Communications and Video Accessibility Act of 2010 and the amendments made by that Act, Pub. L. No. 111-265, 124 Stat. 2795 (2010).

³ Section 76.1200(c) defines “navigation devices” as “[d]evices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.” 47 C.F.R. § 76.1200(c).

programming be accessible to and usable by individuals who are blind or have visual impairments.

The record demonstrates that the Commission should be guided by the following principles in devising rules to implement Sections 204 and 205:

- The plain language of Sections 204 and 205 best indicates statutory intent.
- With limited exceptions, the Commission should follow the guidance regarding accessibility solutions provided by Working Group 4 of the Video Programming Accessibility Advisory Committee (“VPACC”) in its report on the provision of accessible user interfaces on video programming devices (the “*User Interfaces Report*”).⁴
- As expressly recognized in the CVAA, industry must have flexibility in complying with the requirements of Sections 204 and 205 to ensure both improved accessibility and continuing innovation in the development of new features products.⁵

These principles should inform the Commission’s analysis of the comments in this proceeding, which express a wide variety of views on the provisions of Sections 204 and 205.

Abandoning these principles could result in regulations that deviate from the clear guidance provided by the statute. With the limited time remaining before the October 9, 2013, statutory deadline for adopting regulations, the Commission should focus on the essentials of implementing Sections 204 and 205.⁶

The record shows that, consistent with the plain meaning of the statute, Section 205 applies to all navigation devices, not only those supplied by multichannel video programming distributors (“MVPDs”), while Section 204 applies only to the digital apparatus described in that

⁴ See Second Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: User Interfaces, and Video Programming and Menus (2012) (“*User Interfaces Report*”), available at <http://vpaac.wikispaces.com/>. As a member of the VPAAC, CEA was also a member of Working Group 4, which was responsible for developing the *User Interfaces Report*.

⁵ See Comcast Comments at 2; AT&T Comments at 3; CEA Comments at 15, 18-21.

⁶ See DISH and EchoStar Comments at 2.

section. A device subject to Section 204 as covered digital apparatus is not subject to Section 205 as a navigation device. Moreover, the scope of Section 204 is limited to “digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound, including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol,” except that the term “‘apparatus’ does not include a navigation device.”⁷ Even if the Commission were to apply Section 205 only to MVPD-supplied navigation devices, as presented in the *NPRM*, it is still the case that Section 204 applies only to the class of “digital apparatus” defined in the statute and only to “appropriate” functions of those apparatus.

In addition, contrary to the arguments of some commenters, the language of Section 204 does not support the *NPRM*'s proposal that the “appropriate” functions covered by the statute means “all user functions of the device.” The Section 204 requirements are limited to those functions of the apparatus necessary to receive or playback video programming, so unrelated features — in a multifunction device — are not required to be accessible. These requirements apply at most to the list of eleven “essential functions” specified in the VPAAC's *User Interfaces Report*, recognizing that some devices will not have all eleven of the functions specified, and Sections 204 and 205 do not give the Commission the authority to require a manufacturer to add functions on the list where those functions are not present in the device. Section 204 requires covered entities to make these functions accessible to and useable by individuals who are blind or have visual impairments.

⁷ CVAA § 204(a) (codified at 47 U.S.C. § 303(aa)).

As also noted by commenters, Sections 204 and 205 by their terms provide flexibility to covered entities to select user control activation mechanisms for accessibility features.⁸ They do not require use of a single step or a dedicated button. In implementing Sections 204 and 205, the Commission should not extend the requirements for user control mechanisms beyond the accessibility features that are specified in each section.

Multiple commenters agree that the Commission should adopt a uniform three-year phase-in period for all devices covered by Sections 204 and 205.⁹ A phase-in period of three years for all aspects of Sections 204 and 205 will allow for a smooth and consistent transition across categories of devices to full implementation and enforcement of the new rules without significantly delaying the introduction of accessible products. Consistent with prior practice, the Commission should interpret the compliance deadline to refer only to the date of manufacture, and not the date of importation, of apparatus.

As in other CVAA proceedings, the Commission should not hold manufacturers liable for the accessibility of third-party applications downloaded and installed by users after sale. In addition, CEA requests the Commission to clarify that devices, like professional video equipment¹⁰ and digital still cameras and baby monitors,¹¹ exempted from coverage under Section 203 of the CVAA are also exempt from coverage under Sections 204 and 205.

⁸ See, e.g., Telecommunications Industry Association (“TIA”) Comments at 10-11 (discussing “alternate means” under Section 204); National Cable & Telecommunications Association (“NCTA”) Comments at 13, 15 (discussing “maximum flexibility” under Section 205).

⁹ See AT&T Comments at 18-19; DISH and EchoStar Comments at 14; Entertainment Software Association (“ESA”) Comments at 8-9; TIA Comments at 11-12; CEA Comments at 23-24.

¹⁰ See *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, 846-847, ¶ 101 (2012) (“*IP Captioning Order*”).

¹¹ See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order on

II. THE RECORD SUPPORTS A PLAIN-LANGUAGE READING OF SECTIONS 204 AND 205 OF THE CVAA TO DETERMINE THEIR SCOPE

There was no reasoned opposition to CEA’s position that the Commission should rely on the plain language of Sections 204 and 205 to determine that:

- Section 205 applies to aspects of *all* navigation devices as defined in Section 76.1200 of the rules, not only those provided by MVPDs, and
- Section 204 applies to digital apparatus designed to receive or play back video programming, except for navigation devices as defined in Section 76.1200 of the rules.

This plain-language approach to interpreting the statute is consistent with the fundamental canons of statutory construction.¹²

Although a few commenters argue for an interpretation of Section 205 that would apply it only to MVPD-supplied navigation devices,¹³ the plain language of the statute does not support this reading.¹⁴ In considering the scope of Sections 204 and 205, “Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹⁵ As the *NPRM* acknowledges, “nowhere in the statute does it say that the navigation

Reconsideration and Further Notice of Proposed Rulemaking, MB Docket No. 11-154, FCC 13-84, ¶¶ 11-15 (rel. Jun. 14, 2013) (“*IP Captioning Reconsideration Order*”).

¹² See ACA Comments at 3; AT&T Comments at 8; DISH and EchoStar Comments at 2-5; NCTA Comments at 7-8; Rovi Comments at 2-4.

¹³ See, e.g., National Association of the Deaf, et al. (“Advocacy Groups”) Comments at 2-3; Letter from Mark Richert, Director, Public Policy, American Foundation for the Blind, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108, at 1-2 (filed Jul. 30, 2013) (“AFB Letter”).

¹⁴ See ACA Comments at 1-5; AT&T Comments at 4-8; CEA Comments at 6-10; DISH and EchoStar Comments at 2-5; Information Technology Industry Council (“ITI”) Comments at 2-4; NCTA Comments at 6-8; Rovi Comments at 2-5.

¹⁵ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

device carve-out contained in Section 204 or the term ‘navigation devices’ in Section 205 applies only to navigation devices supplied by MVPDs.”¹⁶

Other interpretations of the scope of Sections 204 and 205 should not be adopted. In particular, there is no basis for ACB’s argument that the class of “digital apparatus” defined in Section 204 is somehow a “superset” of devices so that the same set of accessibility requirements applies to both digital apparatus and navigation devices.¹⁷ To the contrary, Congress carefully defined Sections 204 and 205 to apply different accessibility requirements to mutually exclusive sets of devices.¹⁸ As CEA discussed in its initial comments,¹⁹ Section 205 expressly covers “navigation devices (as such term is defined in section 76.1200 of title 47, Code of Federal Regulations).”²⁰ The plain language of Section 204 provides that “the term ‘apparatus’ does not include a navigation device, as such term is defined in section 76.1200 of the Commission’s rules (47 CFR 76.1200).”²¹

This express and clear statutory separation of digital apparatus subject to Section 204 from navigation devices subject to Section 205 demonstrates that AFB is incorrect in arguing that a single piece of equipment could ever fall under both Sections 204 and 205.²² Although AFB cites

¹⁶ *NPRM*, 28 FCC Rcd at 8514, ¶ 21.

¹⁷ *See* American Council of the Blind (“ACB”) Comments at 3-5, 11. *See also* AFB Letter at 2-3 (arguing that a single piece of equipment can fall under both Section 204 and Section 205).

¹⁸ *See* AT&T Comments at 8; CEA Comments at 6; DISH and EchoStar Comments at 2-3; ESA Comments at 2; ITI Comments at 2-4; Rovi Comments at 5, 6-7.

¹⁹ *See* CEA Comments at 6.

²⁰ *See* CVAA § 205(a) (codified at 47 U.S.C. § 303(bb)(1)).

²¹ *See* CVAA § 204(a) (codified at 47 U.S.C. § 303(aa)(4)). Section 76.1200(c) of the rules defines “navigation devices” as “[d]evices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.” 47 C.F.R. § 76.1200(c).

²² *See* AFB Letter at 2-3.

Section 716(f) of the Communications Act (the “Act”),²³ added by Title I of the CVAA, in urging the Commission to apply both Sections 204 and 205 to a single piece of equipment,²⁴ the wording of Section 716(f) is not at all similar to Section 204’s clear exclusion of navigation devices from its coverage²⁵ and Section 205’s express application to navigation devices.

Moreover, contrary to the claims of a few parties,²⁶ Section 205 does not cause software applications by themselves to be treated as navigation devices. As multiple commenters explain, Section 205 does not authorize the Commission to regulate stand-alone software that is not installed or required to be installed by the manufacturer.²⁷ The class of navigation devices consists of software integrated with hardware, not stand-alone software.²⁸

The Commission also should exempt certain simple consumer electronics devices, specifically display-only video monitors,²⁹ from the definition of “navigation devices,” because they have not been included as navigation devices in the Commission precedent cited by the

²³ See 47 U.S.C. § 617(f) (“The requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 on the day before the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010. Such services and equipment shall remain subject to the requirements of section 255.”).

²⁴ See AFB Letter at 3.

²⁵ See CVAA § 204(a) (codified at 47 U.S.C. § 303(aa)(4)) (“[T]he term ‘apparatus’ does not include a navigation device, as such term is defined in section 76.1200 of the Commission’s rules (47 CFR 76.1200).”).

²⁶ See ACB Comments at 7-8; Advocacy Groups Comments at 4, 7; Montgomery County Comments at 5-6.

²⁷ See DISH and EchoStar Comments at 5; DIRECTV Comments at 20; ITI Comments at 2-4; CEA Comments 24-25.

²⁸ See *IP Captioning Order*, 27 FCC Rcd at 838-839, ¶ 93.

²⁹ See CEA Comments at 9-10. Display-only video monitors include computer monitors, as well as video display screens and video projectors that require a separate source device to display MVPD video content.

NPRM.³⁰ With neither a tuner nor Internet connectivity, such monitors cannot access multichannel video programming over multichannel video programming systems and therefore are not subject to Section 205. Display-only monitors do not include built-in closed captioning decoding capability.³¹ Exemption or waiver for this narrow set of devices thus will serve the public interest.³²

III. THE COMMENTS SHOW THAT SECTION 204 APPLIES NARROWLY

Based on the plain language of Sections 204 and 205, the scope of Section 204 is extremely limited. Even if the Commission were to apply Section 205 only to MVPD-supplied navigation devices, CEA urges it to recognize that Section 204 applies only to a focused class of “digital apparatus” and only to “appropriate” functions of those apparatus.

³⁰ See *NPRM*, 28 FCC Rcd at 8512, ¶ 15 (citing *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14784-85 (1998)). See also *NPRM*, 28 FCC Rcd at 8512, n.41 (citing *Implementation of Section 304 of the Telecommunications Act of 1996*, 14 FCC Rcd 7596, 7604, ¶ 17 (1999)) (stating that “every device that uses Internet access service could be considered a navigation device, regardless of whether it is also capable of accessing MVPD video programming”).

³¹ Professional video products such as professional movie theater projectors also should be exempt from Section 205, because these products do not provide on-screen text menus or guides and do not include built-in closed captioning decoding capability. Exemption of these products would be consistent with the Commission’s analysis in the *IP Captioning Order*, 27 FCC Rcd at 846-47, ¶ 10.

³² See *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest,” or alternatively, where “special circumstances warrant a deviation from the general rule and such a deviation will serve the public interest.”); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“The agency’s discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.” (citations omitted)).

A. The “Digital Apparatus” Subject to Section 204 Must Be Carefully Delineated

As explained above, Section 204 applies only to “digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound, including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol,” except that the term “‘apparatus’ does not include a navigation device,” as defined in Section 76.1200 of the rules.³³

By its terms, Section 204 does not apply to stand-alone software apps, contrary to ACB’s claims.³⁴ Because there is no definition of the term “digital apparatus” in the CVAA, the Commission can and should look to the dictionary meaning of “apparatus,” which reasonably means physical hardware and its components, not stand-alone software.³⁵ The Commission here should adopt its analysis in the *IP Captioning Order*, which found that the term “apparatus” does not refer to a software application by itself, but applies to physical hardware with integrated software.³⁶

³³ CVAA § 204(a) (codified at 47 U.S.C. § 303(aa)).

³⁴ See ACB Comments at 8.

³⁵ See *Apparatus Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/apparatus> (last visited Jul. 25, 2013) (referring to “a set of materials or equipment designed for a particular use”); *Apparatus Definition*, OXFORDDICTIONARIES.COM, http://oxforddictionaries.com/us/definition/american_english/apparatus?q=apparatus (last visited Jul. 25, 2013) (meaning “the technical equipment or machinery needed for a particular activity or purpose.”).

³⁶ See *IP Captioning Order*, 27 FCC Rcd at 838-839, ¶ 93. As noted in Section VIII below, device makers should not be responsible for compliance of third party apps or software downloaded and installed by users after sale of the device.

Because Section 204 is limited to digital apparatus that receive or play back video programming, display-only monitors or video projectors are excluded from Section 204 if they depend on a separate device to receive video programming.³⁷

B. The Commission Should Not Adopt the *NPRM*'s Tentative Conclusion That the "Appropriate" Functions Covered by Section 204 Include "All User Functions of the Device"

As multiple commenters explain, the *NPRM*'s tentative conclusion that Section 204 applies to all user functions of the device is overly broad.³⁸ The plain language of Section 204 limits the scope of the functions subject to the statutory requirements to those functions deemed to be "appropriate."³⁹ Although some parties support a broad construction of the statute,⁴⁰ Section 204 applies specifically to digital apparatus designed to receive or play back video programming, and places obligations only on "appropriate built-in apparatus functions."⁴¹ Therefore, the functions to be considered "appropriate" are limited to those that are necessary for the apparatus to receive or play back video programming.⁴²

Because manufacturers design and determine the functionality of the products that they sell, other commenters agree with CEA that it is reasonable under the terms of the statute for the Commission to grant manufacturers discretion in determining the functions that are "appropriate

³⁷ See ITI Comments at 2-3; Panasonic Comments at 4, 6. In addition, CEA requests the Commission to clarify that the devices, like digital still cameras and baby monitors, exempted from coverage under Section 203 of the CVAA, are also exempt from coverage under Sections 204 and 205. See CEA Comments at 25-26.

³⁸ See AT&T Comments at 9-10; ESA Comments at 5-6.

³⁹ 47 U.S.C. § 303(aa)(1).

⁴⁰ See, e.g., ACB Comments at 8, 13; Advocacy Groups Comments at 6, Montgomery County Comments at 7-8.

⁴¹ 47 U.S.C. 303(aa)(1); see DISH and EchoStar Comments at 5; Panasonic Comments at 4-5.

⁴² The covered functions only must be accessible to and usable by individuals who are blind or have visual impairments. See 47 U.S.C. § 303(aa)(1).

functions” to be made accessible pursuant to Section 204.⁴³ This discretion would be bounded, however, because CEA agrees with AT&T that reasonable guidance as to what “appropriate” means for such decisions by manufacturers would be “appropriate for a person who is blind or has a visual impairment.”⁴⁴

The limited nature of the “appropriate functions” under Section 204 would become even more crucial if the Commission were to broaden the scope of Section 204 to reach non-MVPD-provided navigation devices, rather than adhering to the plain language of the statute. Overly broad definitions of, or requirements for, “appropriate” features would impose significant burdens that could stall innovations in product design and functionality, a result inconsistent with the CVAA’s intent to foster increased access to video programming without hampering technological innovation.⁴⁵

In implementing Section 204, at most the eleven essential functions specified by the VPAAC in the *User Interfaces Report* (the “VPAAC list”)⁴⁶ are the “appropriate built-in apparatus functions” of Section 204 that must be accessible to and usable by individuals who are blind or visually impaired, if achievable. The VPAAC’s Working Group 4 focused on the “appropriate functions” issue in the *User Interfaces Report*, which made clear in its Glossary that its use of the term “essential functions” means the “appropriate built-in apparatus functions” specifically as referenced in Section 204.⁴⁷

⁴³ See DISH and EchoStar Comments at 5; Panasonic Comments at 4-5.

⁴⁴ See AT&T Comments at 9.

⁴⁵ See Panasonic Comments at 10; Rovi Comments at 7; Comcast Comments at 2.

⁴⁶ See *User Interfaces Report* at 8.

⁴⁷ *Id.* at 7 (citing CVAA § 204(a)).

There is detailed evidence in the record that the VPAAC list may be over-inclusive as a list of functions to be made accessible to those who are blind or have visual impairments.⁴⁸ Because of this, the VPAAC list should **not** be treated simply as illustrative⁴⁹ or as a minimum,⁵⁰ as some commenters claim. However, CEA continues to believe in the importance of the VPAAC list, so to the extent that a covered apparatus provides the functions in the VPAAC list, if the functions are accessible to and usable by individuals who are blind or visually impaired, the apparatus should qualify for a safe harbor and be deemed in compliance with the accessibility requirements for user interfaces.⁵¹ Of course, some apparatus may not include all functions in the VPAAC list. Thus, a given function should not become a requirement for all apparatus merely by virtue of its inclusion in the VPAAC list — certain functions may not be provided on a device for any user, and the Commission lacks authority to mandate such features to be added under Section 204.

Rather, Section 204 provides significant flexibility to manufacturers with respect to their product designs.⁵² In fact, Section 204 states that “the Commission may not specify the technical standards, protocols, procedures, and other technical requirements” for meeting 47 U.S.C. § 303(aa)(1).⁵³ The Commission should encourage all covered entities, including manufacturers, to use alternate means of compliance flexibly and creatively.

⁴⁸ See DIRECTV Comments at 16-17.

⁴⁹ See, e.g., ACB Comments at 9-10; Advocacy Groups Comments at 6.

⁵⁰ See AFB Letter at 4.

⁵¹ See Panasonic Comments at 10; Rovi Comments at 7.

⁵² Entities may comply with Section 204’s requirements “through alternate means other than those prescribed by regulations” if, as determined by the Commission, those requirements are satisfied. CVAA § 204(c).

⁵³ *Id.* § 204(a) (codified at 47 U.S.C. § 303(aa)(1)).

IV. SECTIONS 204 AND 205 DO NOT REQUIRE USE OF A DEDICATED BUTTON OR A SINGLE STEP FOR USER CONTROL ACTIVATION MECHANISMS

Limiting user control activation mechanisms for closed captioning or video description features to a dedicated physical button or a single step would be inconsistent with the plain language of the CVAA and the intent of Congress to provide industry with flexibility in complying with Sections 204 and 205.⁵⁴ Although the record includes some requests for the use of a physical button,⁵⁵ Sections 204 and 205 expressly provide covered entities flexibility to comply with the user control provisions through alternative means.⁵⁶ The Commission should disregard arguments that would require user control activation mechanisms to be physical buttons⁵⁷ and should decline to adopt the *NPRM*'s single-step proposal, which, as some commenters point out, is vague⁵⁸ and inconsistent with the CVAA.⁵⁹

In Sections 204 and 205, Congress made clear its intention to preserve flexibility for industry to comply with the user control provisions for covered digital apparatus and navigation devices. Section 205 expressly provides “maximum flexibility” to entities providing navigation

⁵⁴ See TIA Comments at 10-11; ESA Comments at 7-8; ITI Comments at 7; DISH and EchoStar Comments at 7-9; NCTA Comments at 13-15; DIRECTV Comments at 8-9; AT&T Comments at 15 & n.31; *but see* Montgomery County Comments at 18-19; Advocacy Groups Comments at 9-11.

⁵⁵ See Tonkinson Comments at 1; Walt Comments at 1.

⁵⁶ See CVAA §§ 204(c) (stating that covered entities may meet Section 204's user control provision “through alternate means”); *id.* § 205(b)(5) (providing for “maximum flexibility” in the selection of means for compliance with Section 205's user control provision for closed captioning); *see also* TIA Comments at 10-11 (“alternate means” under Section 204); NCTA Comments at 13, 15 (“*maximum flexibility*” under Section 205).

⁵⁷ See, e.g., ACB Comments at 13; Advocacy Groups Comments at 9-10.

⁵⁸ See AT&T Comments at 16; DISH and EchoStar Comments at 9. Even the Advocacy Groups express concern about the vagueness of the single-step proposal. See Advocacy Groups Comments at 8-9.

⁵⁹ See ESA Comments at 6-8; DIRECTV Comments at 8-9.

devices to comply with its user control provisions.⁶⁰ Similarly, Section 204 affords flexibility to covered entities by permitting them to provide through “alternate means” digital apparatus to comply with the user control provisions of that section.⁶¹ Congress’s use of the phrase “reasonably comparable” in both sections provides further evidence of its intent to preserve industry flexibility to devise and implement innovative activation mechanisms for closed captioning and video description features.⁶²

Because the plain language of Sections 204 and 205 indicates that Commission’s implementing rules must provide covered entities flexibility to comply with the accessibility requirements through alternative means, prescribing a single step, dedicated button, or other rigid solution would be inconsistent with the CVAA.⁶³ Assertions to the contrary⁶⁴ ignore the plain language of the CVAA. The *NPRM*’s single-step proposal does not provide the statutorily mandated “maximum flexibility” to entities subject to Section 205, because, as AT&T and others point out, the proposal could reduce the ability of covered entities to provide simplified access to closed captioning (and video description, for entities subject to Section 204) through innovative means.⁶⁵ In addition, requiring single-step user control activation mechanisms would be inconsistent with Section 204’s “alternate means” provision, because restricting mechanisms to a single step would impermissibly prohibit an entity from “meet[ing] the [user control]

⁶⁰ CVAA § 205(b)(5).

⁶¹ *Id.* § 204(c).

⁶² See CVAA §§ 204(a), 205(a) (codified at 47 U.S.C. § 303(aa)(3), (bb)(2)); see also TIA Comments at 10-11; ESA Comments at 7-8; DISH and EchoStar Comments at 9; AT&T Comments at 15 & n.31.

⁶³ See TIA Comments at 10-11; ESA Comments at 7-8; DISH and EchoStar Comments at 7-9; NCTA Comments at 13-15; DIRECTV Comments at 8-9; AT&T Comments at 15.

⁶⁴ See Montgomery County Comments at 18-19.

⁶⁵ See AT&T Comments at 15-16; TIA Comments at 11; DIRECTV Comments at 9; ITI Comments at 7.

requirements . . . through alternate means than those prescribed by regulations,” given that a single step is the prescribed means.⁶⁶

Instead of adopting the single-step proposal or requiring a dedicated physical button, which clearly exceeds the statutory command, the Commission should simply focus on the “reasonably comparable” concept.⁶⁷ “Reasonably comparable” in this context should mean that manufacturers are in compliance with this portion of the CVAA if they provide an alternative means of accessing the feature in a way comparable to how a non-disabled user would access the feature, so that, for example, the number of steps in which a person who is blind or visually impaired can access the covered features is similar to the number of steps in which a person without disabilities can access those features.⁶⁸

V. SECTIONS 204 AND 205 LIMIT THE APPLICABILITY OF THE USER CONTROL ACTIVATION MECHANISMS AS CODIFIED IN SECTIONS 303(aa) AND (bb) OF THE ACT

Sections 204 and 205 do not authorize the Commission to extend the user control activation mechanism requirements to functionalities or features other than built-in closed captioning capability, and, for digital apparatus subject to Section 204, video description as well. As codified in Section 303(aa)(3) of the Act, the user control provision in Section 204 identifies only built-in closed captioning and video description as features of covered apparatus that must be accessible via a mechanism that is “reasonably comparable to a button, key, or icon.”⁶⁹ In contrast, the user control provision in Section 205, as codified in Section 303(bb)(2) of the Act,

⁶⁶ See CVAA § 204.

⁶⁷ Cf. *User Interfaces Report* at 20.

⁶⁸ Because the processes used for access and parties’ definitions of what constitutes a “step” may differ, CEA urges the Commission not to require an identical number of steps.

⁶⁹ CVAA § 204(a) (codified at 47 U.S.C. § 303(aa)(3)).

identifies *only* built-in closed captioning capability as a navigation device feature that must be accessible via a mechanism that is “reasonably comparable to a button, key, or icon.”⁷⁰

The Commission should not apply the user control provision in Section 205 to the video description functionality of navigation devices.⁷¹ Section 205 cannot be construed to require a mechanism for activating video description (as opposed to closed captioning) that is reasonably comparable to a button, key, or icon.⁷² Contrary to the proposals of the *NPRM* and some commenters, Section 205’s use of the phrase “or accessibility features” does not authorize the Commission to extend Section 205’s user control requirement to video description.⁷³ Instead, that phrase is merely descriptive of the mechanism to which the mandated mechanism must be reasonably comparable.⁷⁴ The Commission should not disregard the plain language of Section 205, which expressly limits the applicability of the user control provision to the built-in closed captioning capability of navigation devices.⁷⁵

Similarly, proposals that rely on the phrase “or accessibility features” to justify extending the user control provisions of Sections 204 and 205 to accessibility settings or other features not

⁷⁰ CVAA § 205(a) (codified at 47 U.S.C. § 303(bb)(2)).

⁷¹ As a practical matter, Section 203 of the CVAA is the chief provision governing the availability to end users of video description capability on devices. The CVAA’s omission of video description from Section 205 does not alter the Section 203 requirements. The inclusion of closed captioning in Section 205 has the effect of helping to ensure that individuals with visual impairments who wish to use closed captioning on covered navigation devices can do so.

⁷² See AT&T Comments at 17-18; DIRECTV Comments at 18-19; NCTA Comments at 15-16; *but see* ACB Comments at 13; Montgomery County Comments at 18.

⁷³ See, e.g., ACB Comments at 13.

⁷⁴ See DIRECTV Comments at 19; AT&T Comments at 17-18.

⁷⁵ See CVAA § 205(a) (codified at 47 U.S.C. § 303(bb)(2)) (focusing only on navigation devices with built-in closed captioning capability and requiring “reasonably comparable” access to “that capability”); *id.* § 205(b)(5) (providing covered entities “maximum flexibility” in the selection of “user controls for closed captioning”); *see also* AT&T Comments at 17-18; DIRECTV Comments at 18-19.

specifically identified in the statute are not consistent with the plain language of Sections 204 and 205.⁷⁶ The Commission should reject these proposals. The phrase “or accessibility features” in Sections 204 and 205 is not an invitation to impose new, and hitherto unspecified, regulatory requirements on additional accessibility features besides closed captioning and video description (in Section 204) and closed captioning (in Section 205).⁷⁷ Rather, as stated above, the term “or other accessibility features” is “merely descriptive of the mechanism to which the mandated mechanism must be reasonably comparable.”⁷⁸

VI. THE RECORD ILLUSTRATES THE NEED FOR A UNIFORM THREE-YEAR PHASE-IN PERIOD

The record supports the Commission adopting a uniform compliance phase-in period of three years after Federal Register publication of the final rules for implementing all new rules under Sections 204 and 205.⁷⁹ A uniform three-year phase-in period for compliance with Sections 204 and 205 will allow for a smooth transition to full implementation and enforcement of Sections 204 and 205. Industry’s experience has demonstrated the need for a phase-in period that will allow manufacturers to comply with the new regulatory requirements in a coherent, coordinated, and efficient manner. Due to the timing of the product development cycle, especially for TVs, adopting a three-year phase-in period for compliance with the rules regarding digital apparatus will greatly simplify the development of accessible solutions for apparatus covered by Section 204 without significantly delaying the introduction of accessible devices.⁸⁰

⁷⁶ See Advocacy Groups Comments at 11; Montgomery County Comments at 18.

⁷⁷ See CEA Comments at 22-23; DISH and EchoStar Comments at 9-10.

⁷⁸ See AT&T Comments at 17; DIRECTV Comments at 19.

⁷⁹ See AT&T Comments at 18-19; DISH and EchoStar Comments at 14; ESA Comments at 8-9; TIA Comments at 11-12; CEA Comments at 23-24.

⁸⁰ See CEA Comments at 24. New TV models are usually introduced in the spring. Assuming that rules in this docket are published in the Federal Register in October 2013, a three-year

Several parties mention technical challenges for industry that support a uniform 3-year compliance period.⁸¹ The need for a uniform 3-year compliance period would be even greater if the Commission adopts the *NPRM*'s proposal to limit the scope of Section 205 to navigation devices provided by MVPDs, because, as TIA points out, Section 204 would then cover many multi-functional devices, which may present complex technical and operational issues that could surpass those presented by MVPD-supplied navigation devices.⁸² As Comcast cautions, the Commission should be wary of any approaches that force service providers and device manufacturers to rush development and deployment to satisfy short-term goals rather than encourage continued innovation.⁸³

VII. THE COMPLIANCE DEADLINE FOR THE RULES IMPLEMENTING SECTIONS 204 AND 205 SHOULD APPLY TO DEVICES BASED ON THE DATE OF MANUFACTURE

CEA urges the Commission to make clear that the new obligations in its implementing rules for Sections 204 and 205 place no restriction on the importing, shipping or sale of apparatus and/or navigation devices, as applicable, that were manufactured before the deadline for compliance with the new rules.⁸⁴ The requested clarification will simplify manufacturers'

phase-in period would end in October 2016. However, that season's new TV models would be introduced in spring 2016, which would be an effective phase-in period of only about two and a half years.

⁸¹ See Comcast Comments at 7; TIA Comments at 11-12; ESA Comments at 8-9; *but see, e.g.*, Advocacy Groups Comments at 14.

⁸² See TIA Comments at 11-12.

⁸³ Comcast Comments at 7.

⁸⁴ Proposed rule sections 79.107(b), 79.108(b), and 79.109(c) in Appendix A of the *NPRM* refer to "any apparatus manufactured after the effective date in the United States or outside the United States and imported for use in the United States." CEA supports the thrust of this language, but requests that it be altered in proposed rule section 79.108(b) (or any rule that the Commission adopts to address navigation devices) to apply expressly to navigation devices. Moreover, the text of the rules and/or the adopting order should explain that the term "effective date" in this context means the end of the compliance phase-in period and that the new rules place no

compliance with the new rules without limiting the accessibility of new apparatus.⁸⁵ Moreover, the requested clarification is consistent with the Commission's past practices regarding similar equipment compliance deadlines, including those for emergency information/video description,⁸⁶ apparatus closed captioning,⁸⁷ digital closed captioning,⁸⁸ V-chip implementation,⁸⁹ and analog captioning.⁹⁰

Ambiguity surrounding the compliance deadline provides no consumer benefit and creates unnecessary compliance risks for manufacturers. Manufacturers can identify and control

restriction on the importing, shipping or sale of apparatus and/or navigation devices, as applicable, that were manufactured on or before that date.

⁸⁵ Depending on the equipment type and the place of manufacture, the typical intervals between the date of manufacture and the date of importation are short, varying from two to three days for truck shipments to the United States to about two to three weeks for shipments by sea. *See* CEA Comments, MB Docket No. 12-107, at 12, n.38 (filed Dec. 18, 2012).

⁸⁶ *See* Notes to 47 C.F.R. §§ 79.105(a), 79.106(a); *see also* *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010 et al.*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 4871, 4924, ¶ 77 (2013) (“We clarify that the compliance deadline refers only to the date of manufacture.”).

⁸⁷ *See* Notes to 47 C.F.R. §§ 79.101(a)(2), 79.102(a)(3), 79.103(a), 79.104(a); *see also* *IP Captioning Reconsideration Order*, 28 FCC Rcd at 8798, ¶ 23 (“[T]he January 1, 2014 apparatus compliance deadline refers only to the date of manufacture . . .”).

⁸⁸ *See* Notes to 47 C.F.R. § 15.122(a)(1), (2) (2011), *redesignated as id.* § 79.102(a)(1), (2), (effective Apr. 30, 2012); *see also* *Closed Captioning Requirements for Digital Television Receivers*, Report and Order, 15 FCC Rcd 16788, 16808 ¶ 58 (2000) (“*DTV Closed Captioning Order*”) (“[T]he compliance date refers to the date when television receivers must be manufactured with the decoder circuitry . . .” (footnote omitted)).

⁸⁹ *See* Note to 47 C.F.R. § 15.120(a). *Technical Requirements to Enable Blocking of Video Programming based on Program Ratings*, Report and Order, 13 FCC Rcd 11248, 11257 ¶ 23 (1998) (“[T]his deadline [for compliance with the blocking standard for V-chip technology] should cause little disruption because it applies to the date the receivers are produced.”).

⁹⁰ *See* Note to 47 C.F.R. § 15.119(a) (2011), *redesignated as id.* § 79.101(a)(1) (effective Apr. 30, 2012); *see also* *Amendment of Part 15 of the Commission's Rules to Implement the Provisions of the Television Decoder Circuitry Act of 1990*, Memorandum Opinion and Order, 7 FCC Rcd 2279, 2279 ¶ 4 (1992).

the date they manufacture apparatus. However, the date of importation is subject to variables outside manufacturers' control. As a result, a manufacturer could easily ship a product from outside the United States with the good faith expectation that it would arrive, and be imported, in compliance with the deadline, only to learn after the fact that the product did not comply because it was imported later than expected. The lack of a manufacturing deadline provides no consumer benefit, but creates unnecessary compliance risks for manufacturers.

VIII. MANUFACTURERS OF DIGITAL APPARATUS AND NAVIGATION DEVICES SHOULD NOT BE RESPONSIBLE FOR THE ACCESSIBILITY OF THIRD-PARTY APPLICATIONS DOWNLOADED AND INSTALLED BY USERS AFTER SALE

Contrary to the arguments of the Advocacy Groups,⁹¹ manufacturers should not be responsible for the accessibility of applications, provided by MVPDs or other sources, that are downloaded and installed by users after sale.⁹² Instead, the Commission should follow the precedent of the *ACS Order* and the *IP Captioning Order* on this issue. The *ACS Order* found that there is no liability for a manufacturer of end user equipment for the accessibility of software that is independently selected and installed by the user, or that the user chooses to use in the cloud.⁹³ Similarly, the *IP Captioning Order* found that the term “apparatus” does not include “third-party software that is downloaded or otherwise added to the device independently by the consumer after sale and that is not required by the manufacturer to enable the device to play video.”⁹⁴ The Commission should not deviate from this approach.

⁹¹ See Advocacy Groups Comments at 4.

⁹² See DISH and EchoStar Comments at 5; TIA Comments at 9; Rovi Comments at 5-6; *but see* ACB Comments at 8.

⁹³ *ACS Order*, 26 FCC Rcd at 14564, ¶ 13.

⁹⁴ *IP Captioning Order*, 27 FCC Rcd at 841, ¶ 94.

