

March 20, 2014

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Notice for MB No. 11-154

On March 18, 2014, Brian Huseman with Amazon.com, Inc., Paula Boyd with Microsoft Corporation, Gerry Waldron with Covington & Burling LLP, and the undersigned, on behalf of the Digital Media Association (“DiMA”), met with Rosaline Crawford, Eliot Greenwald, and Karen Peltz Strauss of the Consumer & Governmental Affairs Bureau; and Steven Broeckaert, Michelle Carey, Mary Beth Murphy, Jeff Neumann, Alison Neplokh, and Diana Sokolow of the Media Bureau. The parties discussed the Commission’s *Public Notice* regarding the closed captioning of video clips online.

Consistent with DiMA’s comments in this proceeding, we reiterated that requiring captioning of video clips would be contrary to Congress’s intent in enacting the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”). We emphasized that video clips simply are not “comparable to programming provided by a television broadcast station.”¹ In that context, we discussed how a 2-minute clip from “The Late Show with David Letterman” is not “comparable to” a full-length television show any more than 2-pages from a compilation of the Communications Act is “comparable to” the full text of the statute. As noted in DiMA’s comments, the House and Senate committee legislative reports to the CVAA direct the Commission not to require the captioning “at this time” (*i.e.*, under the CVAA) of “video clips or outtakes,” the latter of which clearly falls outside of the scope of the CVAA.² We emphasized that if the Commission nonetheless does choose to proceed, it should issue a Notice of Proposed Rulemaking rather than issuing final rules.

¹ 47 U.S.C. § 613(h)(2).

² Public Notice at 1 (*quoting* S. Rep. No. 111-386, 111th Cong., 2d Sess. at 13-14 (2010); H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 30 (2010)). *See also* Comments of DiMA at 4-5.

We then discussed the significant challenges that video programming owners (“VPOs”) and video programming distributors (“VPDs”) would face if the Commission imposed video clip captioning requirements. First, VPOs/VPDs would have to identify which video clips are subject to any potential regulatory closed captioning requirements, since not all the video clips that appear online have been seen with clips on broadcast television. Second, VPOs would be obligated to prepare captions and VPOs and VPDs may need to expend significant effort on synchronization quality control as well. The parties explained that this process is much more complicated and involved than simply “cutting out” a 3-minute segment from a full-length program. The time and cost of enabling captions is not substantially less for a 2-minute clip than for a 2-hour full-length movie. In addition, some television shows and sports programming could generate multiple clips. Given the flexibility of the Commission’s rules, some VPDs voluntarily take on quality control requirements beyond simply not degrading what they receive from the VPO, which adds to the burden of any clip captioning requirement. Multiplying these challenges is the massive volume of video clips compared to full-length programming.

We then explained the particular problems that a video clip captioning requirement would pose with respect to live programming, and particularly sports. For example, the parties discussed that in ice hockey, during a lengthy period of uninterrupted play, the captions can lag behind the audio commentary despite the best efforts of all parties involved simply due to the unpredictability and fast pace of the action, technical limitations, and the human limitations even of skilled captioners. Segments of these intense periods of play are particularly likely to be the source of clips shown online. For such clips, the captioning would appear entirely out of sync unless the online VPO and VPD engage in significant quality control. Thus, VPOs and VPDs would need to expend significant effort that is not necessary for full-length programs to provide an acceptable user experience. The parties emphasized that given the variability of content online and in clips, that this problem could not be handled automatically by adding an extra five or ten seconds.

In addition, the parties explained that for some clips, VPDs would need to upgrade the video players. Many video players that previously did not need to include captioning capability because they do not handle full length programming would have to be retooled to display and render closed captions, a time-consuming exercise. Some VPDs provide numerous different video players for video clips in different contexts, whereas they provide comparatively few full-length video programming players. Thus, even for a single VPD, the burden of upgrading a large number of players would be significant. Imposing advanced display requirements as well would add even more development and engineering work.

At minimum, the parties emphasized that the Commission should adopt key limitations on any new video clip captioning requirement. First, the Commission should reiterate that, consistent with the CVAA, only video programming that has appeared on television in the United States with captions must be captioned online. Second, the Commission should adopt in its online rules the same limitation on the meaning of “video programming” that it applies in its television rules and define “video programming” to “include[] advertisements of more than five

minutes in duration but [exclude] advertisements of five minutes' duration or less.”³ In that context, the Commission should confirm that movie trailers are a form of advertisement that do not need to be captioned online if they are five minutes or less. Third, if the Commission establishes a video clip captioning requirement, that requirement should be prospective only. With respect to full-length programming, the Commission provided a lengthy phase-in for archival programming and applied its rules only to archival programming shown on television with captions after certain dates.⁴ These limitations may not be workable as to clips because of the difficulty of tracing clips back to particular programs. Given the tremendous volume of clips in comparison to full-length programming and expectations established by the existing rules that captioning as to clips would not be necessary, any clip captioning requirement should be prospective only.

Finally, if the Commission imposes any video clip captioning requirements, the parties discussed the appropriate definition of video clips and the proper period that VPDs will need to come into compliance. We noted that in other circumstance the Commission had used two years for compliance in a number of accessibility contexts. We agreed to consider various formulations and to have further discussions with the staff.

Please direct any questions to the undersigned.

Sincerely,

/s/ Gregory Alan Barnes
General Counsel, DiMA
1050 17th Street NW – Suite 220
Washington, DC 20036
gbarnes@digmedia.org

cc: Steven Broeckaert
Michelle Carey
Rosaline Crawford
Eliot Greenwald
Mary Beth Murphy
Alison Neplokh
Jeffrey Neumann
Diana Sokolow
Karen Peltz Strauss

³ 47 C.F.R. § 79.1(a)(1).

⁴ 47 C.F.R. § 79.4(b)(4).