

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

Accessibility of User Interfaces, and)	MB Docket No. 12-108
Video Programming Guides and Menus)	
)	
Accessible Emergency Information, and Apparatus)	MB Docket No. 12-107
Requirements for Emergency Information and Video)	
Description: Implementation of the Twenty-First Century)	
Communications and Video Accessibility Act of 2010)	

**REPLY COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION
TO THE FURTHER NOTICE OF PROPOSED RULEMAKING**

The Entertainment Software Association (“ESA”)¹ submits these reply comments in response to the Commission’s Further Notice of Proposed Rulemaking in the above-captioned proceeding.² Our reply focuses on two issues: (1) whether the “reasonably comparable to a button, key, or icon” requirement should extend beyond activation of the closed captioning and video description features to also include configuration of user display settings; and (2) whether a labeling requirement is appropriate for Section 204 devices.

We believe that users will be able to expect efficient access to configuration settings without the need for a mandate dictating that those underlying settings be reached in a particular way or placed in a specific location. When it comes to menu design, makers of game

¹ The ESA is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the Internet.

² *Accessibility of User Interfaces, and Video Programming Guides and Menus; 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*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 17330 (2013) (“*User Interfaces Order*” or “*FNPRM*,” respectively). The *User Interfaces Order* sought to implement key aspects of Sections 204 and 205 of the Twenty First Century Communications and Video Accessibility Act (the “*CVAA*”). All comments cited in this submission refer to initial comments to the FNPRM, unless otherwise indicated.

consoles have decades of experience in designing and iterating menu systems to simplify the task of users finding, activating, and configuring various features and settings. That design ethic will certainly inform how console makers organize the underlying display settings. Just as they've done with myriad other functions of game consoles, console makers will seek to provide access to display settings in way that is inclusive and intuitive for the gaming audience.³

We urge the Commission to continue to allow device makers the flexibility to make smart design choices and to resist specific design mandates, which would be complicated to implement across the variety of Section 204 devices that have multiple purposes beyond video programming. Console makers recognize their duty to make activation of the closed captioning and video description features simple on their devices.⁴ That overarching requirement will naturally drive makers of Section 204 devices, such as game consoles, to organize access to the underlying settings of those features in an intuitive and efficient way. Adopting this approach would advance the goal of providing consumers simplified and intuitive access without requiring the Commission to analyze every possible Section 204 device to ensure that any rule does not have unnecessary adverse impacts on that device's other features.⁵

³ For example, on the new Xbox One console, a user can activate the closed captioning feature *and* configure settings through the following simple steps: Main Menu → Settings (Console) → Closed Captioning → Closed captioning “on” and use custom style.

⁴ *See, e.g.*, Opposition by Entertainment Software Association to Petition for Reconsideration by National Association of the Deaf, *et al.*, MB Docket Nos. 12-107 & 12-108, at 1 (submitted Feb. 18, 2014) (agreeing with *User Interfaces Order* that CVAA focuses on “simplicity and ease of use” of the activation mechanism specified by CVAA Section 204).

⁵ Whatever problems the Commission may have had in the past with Section 205 devices should not color the Commission's approach to Section 204 devices, which may have different dynamics driving their design decisions. Many Section 204 devices are relatively new to video programming delivery and have many other technical considerations beyond those common to more traditional video programming devices. *See, e.g.*, Comments of Telecommunications Industry Association at 3 (“TIA Comments”).

Pursuing the alternative—requiring that settings be accessed (or used) “through a mechanism that is reasonably comparable to a button, key, or icon”—would be clunky to implement and could frustrate users. A single button, key, or icon would be difficult to use for configuring multiple settings, each of which may require the user to choose from several different options (e.g., font, size, color, transparency).⁶ In the FNPRM, the Commission poses the question of whether locating the settings within the “first level of the menu” would be an acceptable mechanism with respect to the “reasonably comparable” requirement. As noted above, we think the goal of simplicity can be met without the Commission having to define the design and use of the underlying settings. Congress suggested as much when it instructed that the Commission “not specify the . . . technical requirements for meeting this requirement” but afford manufacturers “maximum flexibility” to satisfy any substantive obligations or the right to satisfy these obligations “through alternate means.”⁷

In addition to these technical and practical considerations, the plain text of the CVAA makes clear that the “reasonably comparable to a button, key, or icon” requirement applies to *activation* of the closed captioning and video description features but does not extend to the *configuration* of the underlying settings or other functions. Section 303(aa)(3) provides that applicable devices have “built in access to those closed captioning and video description *features* through a mechanism that is reasonably comparable to a button, key, or icon designated for *activating* the closed captioning or accessibility *features*.”⁸ First, the choice of

⁶ Comments of the Consumer Electronics Association at 7 (“CEA Comments”).

⁷ See 47 U.S.C. § 303(aa)(1) & (bb)(1) (no technical requirements for Section 204 or Section 205 devices, respectively); Pub. L. No. 111-260, 124 Stat. 2775, Title II, Sections 204(c), 205(b)(4)(A) & 205(b)(5) (requiring alternate means of and maximum flexibility in compliance for Section 204 and 205 devices, respectively).

⁸ 47 U.S.C. § 303(aa)(3) (emphasis added).

the verb “activate” is instructive. It is limited in scope and refers to turning the feature on or off. Had Congress intended the concept to apply to settings, it could have clearly done so by choosing different words (*e.g.*, “activating and/or configuring”). Second, the use of the phrase “or accessibility features” should not be read to refer to settings. In the first part of the mandate, it appears Congress used “features” to refer to closed captioning and video description at a high level of abstraction (*i.e.*, as distinct from the device’s other capabilities). It seems unlikely that Congress would have used the same word to refer to the more granular concept of settings or other secondary functions within the same statutory section.

Consumer groups argue for a broader scope, suggesting that otherwise “or accessibility features” adds nothing to the meaning.⁹ But that is not necessarily the case. That phrase in Section 204 may easily be read to refer to multiple accessibility features, such as video description, that may be accessed through the same activation mechanism.¹⁰ We agree with other commenters that the better reading of the CVAA is that the “reasonably comparable” requirement applies to activation only.¹¹

⁹ Comments of Consumer Groups and Telcom-RERC at 4-5 (“Consumer Groups Comments”).

¹⁰ This latter reading also appears consistent with the use of the singular term “a mechanism.” *See* 47 U.S.C. § 303(aa)(3).

¹¹ *See, e.g.*, CEA Comments 6-7; Comments of National Cable & Telecommunications Association at 5-6; TIA Comments at 4-5. The ESA also agrees with other commenters that CVAA Section 204 does not direct or provide for additional FCC mandates to activate other accessibility features not named in Section 204.

Finally, the FNPRM raises the question of whether to require additional notice about the availability of the device’s accessibility features. Consumer Groups urge for disclosure on product packaging for both Section 204 and Section 205 devices.¹² For product packaging, the notice “needs to explain how to access the closed captioning control as well as display settings.”¹³ Of course, the ESA supports educating consumers about how to activate, configure, and use the various accessibility settings. But we do not think putting this information on a box is the best way to accomplish that goal, at least with respect to Section 204 devices that have multiple purposes other than video playback. Game consoles may provide access to multiple video-related apps (e.g., Netflix, Hulu Plus, Amazon Prime, Redbox Instant), and it would be impractical to provide detailed information about how to access each third-party app’s accessibility settings on a box. Software for video apps will inevitably evolve, perhaps in ways that result in changes to the accessibility instructions over time. Timely updating the product’s packaging each time a new variation in access instructions occurs would prove challenging. Additionally, information on packaging may be inaccessible to some consumers, and that inherent inaccessibility weighs against any requirement to place accessibility information on the box.

¹² Consumer Groups Comments at 12.

¹³ *Id.* at 13.

For these and other reasons, the ESA requests that the Commission resolve the issues raised in the FNPRM in a manner consistent with the CVAA and these recommendations.

Respectfully submitted,

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