

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Closed Captioning of Internet
Protocol-Delivered Video Programming:
Implementation of the Twenty-First Century
Communications and Video Accessibility
Act of 2010

)
)
) MB Docket No. 11-154
)
)
)

**NATIONAL ASSOCIATION OF
BROADCASTERS**

Jane E. Mago
Jerianne Timmerman
Ann West Bobeck
Justin L. Faulb
Kelly Williams
1771 N Street, NW
Washington, D.C. 20036
(202) 429-5430

October 6, 2014

Table of Contents

I. INTRODUCTION 1

II. THE COMMISSION SHOULD NOT ATTEMPT TO ARBITRARILY IMPOSE NEW CAPTIONING TIMEFRAMES 2

III. THE COMMISSION SHOULD RECOGNIZE ITS LIMITED AUTHORITY AND ALLOW APPROPRIATE MARKETPLACE FLEXIBILITY FOR ADVANCE CLIPS 6

IV. THE FCC SHOULD NOT EXTEND CVAA OBLIGATIONS TO THIRD-PARTY DISTRIBUTORS 10

A. Current Obligations Regarding Clips Are Appropriate And Broadcasters Lack Control Over Third-Party Distributors To Ensure Compliance With Any Proposed Regulation 10

B. The Commission Lacks The Means To Track And Ensure Third-Party Distributors Comply With The Rules 13

V. THE CVAA DOES NOT GIVE THE FCC AUTHORITY TO REGULATE MASHUPS..... 15

VI. CONCLUSION 17

EXECUTIVE SUMMARY

The National Association of Broadcasters (NAB) strongly supports increasing accessibility of broadcast content to all individuals, including those deaf and hard-of-hearing. Broadcasters are industry leaders in providing important local news and content in an accessible manner to individuals with disabilities. This includes the voluntary captioning of Internet protocol (IP) delivered video clips.

Less than 90 days ago, the Commission adopted rules setting, in its words, “reasonable timeframes” and an “appropriate schedule” for requiring the captioning of IP-delivered video clips. Given the minimal time since the FCC’s action, are no developments in captioning technology that would justify shortening these timeframes or reducing or eliminating the “grace periods” applicable to video clips of live and near-live programming. It would be arbitrary and capricious for the Commission to now alter the timeline for complying with captioning requirements that are not yet in force under the schedule the Commission very recently adopted.

The Commission should also recognize its limited authority to regulate advance video clips. Advance clips, by definition, have not yet been “published or exhibited on television,” and the Commission lacks authority under the Twenty-First Century Communications and Video Accessibility Act (CVAA) to require their captioning unless and until they have been aired. As a practical matter, moreover, no technology exists today that can tag and identify the thousands of online video clips created every day. Consistent with this limited authority and what video programmers can practically achieve, broadcasters must have sufficient time, after an advance clip is televised, to

either switch out an uncaptioned version with a captioned video clip or to allow a station to add a captioned clip to its website without removal of the original clip.

Further, the FCC should decline to extend CVAA obligations to third-party distributors. The Commission has no effective or appropriate mechanism to enforce or even monitor, let alone enforce, compliance by third parties. No video programming originator has full knowledge about, or operational control over, its video content once placed on a single third-party website, let alone a series of third-party websites. Broadcasters can only ensure compliance with the rules for clips on their own websites. Given the frequency with which Video Programming Owners' online content is shared or re-posted without their knowledge, and the complexity of the online ecosystem, problems with caption files or the display of captions on video players are inevitable. Broadcasters cannot be expected to ensure that online video clips have functional captions unless they have *operational* day-to-day control of a website and its video player.

Finally, the FCC's authority does not extend to mashups. A mashup combines varied content to create a completely new video program that was never televised with captions. As such, mashups do not fall under clear terms of the CVAA, which require the online captioning only of video programming "that was published or exhibited on television with captions." In any event, as a practical matter, imposing online captioning obligations would significantly decrease the number of available mashups for viewers, given that the cost and delay burdens associated with hiring a captioning agency to caption them outweigh the benefit of the mashup.

NAB continues to believe that a collaborative approach to addressing continuing challenges, resolving unexpected problems, and improving captioning technologies will best promote accessibility to online video content.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

**COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION

Accessibility of video content has continued to increase since the passage of the Twenty-First Century Communications and Video Accessibility Act (CVAA).¹ The National Association of Broadcasters (NAB)² fully supports efforts to better enable deaf and hard-of-hearing individuals to view broadcast content, including programming previously aired on TV with captions when it subsequently is delivered using Internet

¹ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of Title 47 of the United States Code). The law was enacted on Oct. 8, 2010 (S. 3304, 111th Cong.). See *also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010), also enacted on Oct. 8, 2010, to make technical corrections to the CVAA and the CVAA's amendments to the Communications Act of 1934. Section 202(b) of the CVAA requires the FCC to implement regulations requiring closed captioning of video programming delivered using Internet Protocol (IP) that previously was published or exhibited on television with captions.

² NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the FCC and other federal agencies, and the courts.

protocol (IP). Broadcasters and other video programmers have shown that they are committed to greater accessibility by developing and deploying, in a short period of time, an entirely new and very complex regime for distributing captioned IP-delivered content for new, archived and live-streamed programming. In these comments, NAB responds to the IP captioning of video clips *Further Notice*.³

II. THE COMMISSION SHOULD NOT ATTEMPT TO ARBITRARILY IMPOSE NEW CAPTIONING TIMEFRAMES

In its recent IP Captioning Order,⁴ the Commission sought to balance technological feasibility with enhanced accessibility of IP-delivered programming. The Commission specifically noted that it was setting forth an “appropriate” schedule of IP captioning deadlines.⁵ The *Second Order* also expressly stated that compliance “*will not be overly burdensome,*” particularly “*given the reasonable timeframes*” provided for “entities to come into compliance, as well as the *grace period* within which captions may be added to video clips of live and near-live programming.”⁶ The *Second Order* allowed additional time for the online captioning of montages and video clips for live and near-live programming, not only because of the “challenges associated with captioning these

³ Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, *Second Further Notice of Proposed Rulemaking*, 29 FCC Rcd. 8687 (July 14, 2014) (*Further Notice*).

⁴ Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-first Century Communications and Video Accessibility Act of 2010, *Second Order on Reconsideration*, 29 FCC Rcd. 8687 (July 14, 2014) (*Second Order*).

⁵ *Second Order* at ¶ 2.

⁶ *Second Order* at ¶ 19 (emphasis added).

types of clips,” but also “to allow the development of technological advances.”⁷

Importantly, the Commission added that it will act promptly on petitions to extend compliance deadlines if it finds that “technology has not progressed as expected with respect to posting these clips online.”⁸

It is thus particularly perplexing that after setting “reasonable and appropriate” timeframes for montages and video clips for live and near-live programming, the same document inexplicably asks whether the Commission should shorten or eliminate the very same compliance timeframes for live or near-live programming.⁹ As discussed below, the record does not support any such adjustment.¹⁰

As NAB previously explained in detail in this proceeding, broadcasters have worked diligently to build captioning for online video clips into their workflows to ensure the accessibility of their online video content. The current lack of automated technology and various other technological limitations, however, make captioning online video clips a challenging undertaking.¹¹ Although the *Second Order* cites one captioning vendor

⁷ *Id.* at ¶ 23.

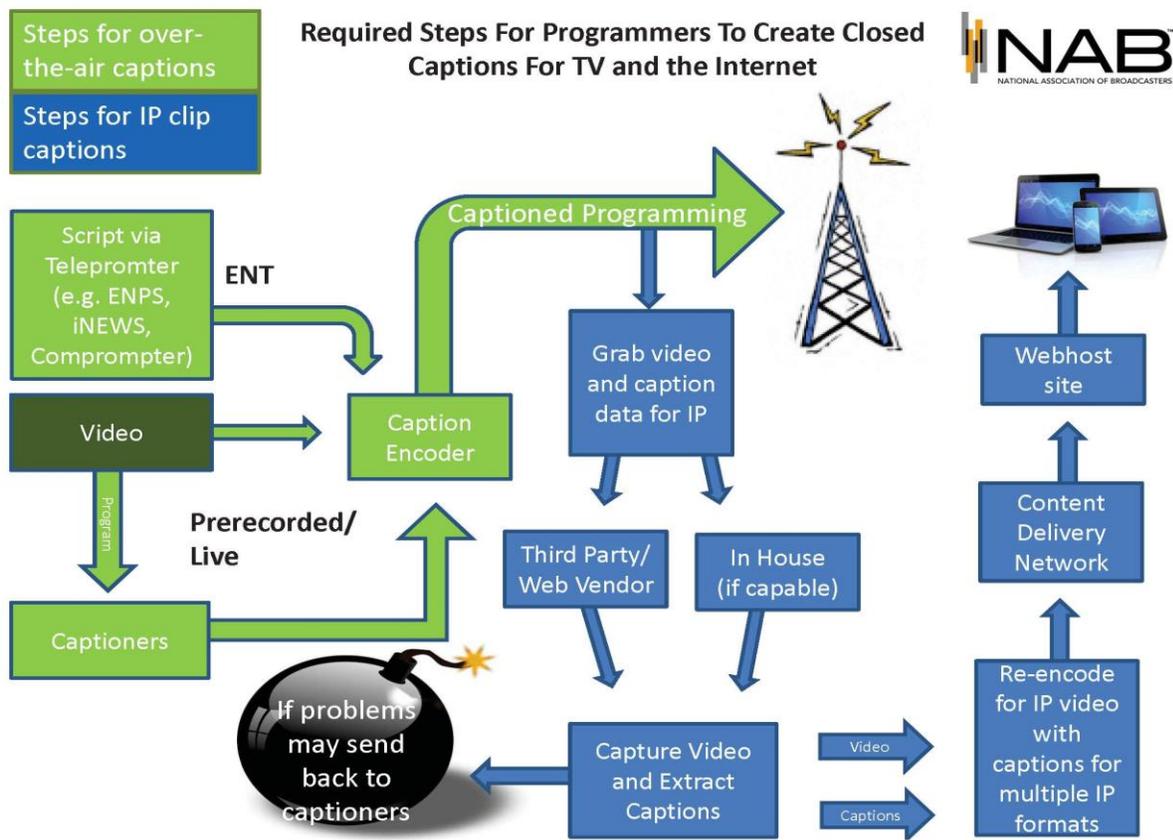
⁸ *Id.*

⁹ *Further Notice* at ¶ 43 (specifically inquiring about decreasing or eliminating the “grace period applicable to video clips of live and near-live programming”).

¹⁰ We agree with Commissioner Pai that video programmers, in particular medium and small broadcasters, are in a “regulatory merry go round where regulated entities are trapped in a never ending cycle of notice and comment rulemaking, with their legal obligations a constantly moving target.” *Second Order*, Concurring Statement of Commissioner Ajit Pai.

¹¹ See Comments of the National Association of Broadcasters, MB Docket No. 11-154, at 3-6 (Feb. 3, 2014) (NAB Comments); Letter from Ann West Bobeck, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 11-154 (June 27, 2014).

that asserts it can turn around captions in a few hours,¹² in reality captioners are rarely involved in creating online video clips with captions. In practice, a different set of vendors capture and extract captions from broadcast programs, re-encode the files for the IP environment, and then send the re-captioned clips to content delivery networks (CDNs) and webhost sites. To illustrate this complicated ecosystem, the flow chart below shows the different steps required to create and post video clips with captions.



¹² *Second Order* at ¶ 18 (citing VITACs representation that it captions 50 short form videos per day for one client). We note that in any given day, thousands, potentially tens of thousands, of video clips are posted by regulated entities – far greater than workload capacity of the finite pool of captioners.

Each of the above steps can delay the process, and these problems will continue until an automated solution is developed.¹³ It is therefore not reasonable for the Commission to expect that clips, including those of live and near-live programming, can be readily placed online within a short timeframe.

For example, if a station posts several news clips shortly prior to or after the 11 pm news, station personnel capable of posting and/or swapping out online content and ensuring that clip captions are correct are unlikely to be available until the next day. Moreover, if one considers the sheer scope of a captioning obligation on hundreds of station websites and thousands of clips posted every day by video programmers, the complexity and technological challenges of tracking, monitoring and posting video content becomes clear.¹⁴

Not surprisingly, in the three months since adoption of the *Second Order*, there have been no technological advances that have materially enhanced either the workflow for video programmers' captioning, tracking, and posting of clips, or the available software for automating these processes. While it is wholly appropriate that the Commission periodically query the industry as to the current state of its IP and captioning capabilities, in this instance, it is simply too soon. An appropriate interval to reexamine industry's ability to caption clips, including clips of live or near-live

¹³ See Letter from Justin Faulb, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, at 1, MB Docket 11-154 (July 2, 2014).

¹⁴ Obligations to caption and post online video clips, including live and near-live programming, are further complicated by 1) many stations outsourcing their web content to third-party website vendors, and 2) stations utilizing Electronic Newsroom Technique (ENT) to caption local news. See Letter from Justin Faulb, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, at 2, MB Docket 11-154 (June 27, 2014).

programming specifically, would be after the first regulatory benchmark in January 2016. At that time video programmers will not only have more experience working with vendors and larger volumes of “straight lift” clips, but will be further along in developing software tracking mechanisms to encode clips.

Shortening the grace period for captioning online clips of live and near-live programming approved less than 90 days ago – particularly when the requirement for captioning such clips is not even yet in force – would be arbitrary and capricious. The *Further Notice* proposes seemingly randomly chosen dates and altered grace periods – six hours by July 2018, three hours by July 2019 – without any basis for the modifications. The *Further Notice* cites no evidence that video programmers, web vendors, the captioning community or any other entity could meet these proposed deadlines. Nor does it explain how these revised deadlines are, in any measure, more “appropriate” than the timeframes established in the *Second Order*. We strongly urge the Commission to refrain from reducing the timeframes, or eliminating the grace periods for live or near-live programming, recently established in the *Second Order*. It is wrong to assume that technological advances can occur by some set date or that the Commission can force advances in technology by regulatory fiat.

III. THE COMMISSION SHOULD RECOGNIZE ITS LIMITED AUTHORITY AND ALLOW APPROPRIATE MARKETPLACE FLEXIBILITY FOR ADVANCE CLIPS

The *Further Notice* asks a series of questions as to the applicability of the online captioning rules to advance video clips.¹⁵ As a threshold matter, under the CVAA, the

¹⁵ *Further Notice* at ¶¶ 47-50.

Commission cannot require video programmers to caption programming that has not been first televised.¹⁶ Because advance clips, by definition, have not been “published or exhibited on television,” the Commission lacks authority to require their captioning unless and until they have been aired.¹⁷

As a practical matter, moreover, no technology exists today that can tag and identify the thousands of video clips every day that are posted by, linked to and distributed between video programming owners (VPOs), providers, distributors, news aggregators and individuals who post to their own social media sites and upload to YouTube, etc. The ecosystem for video clips is inherently vast and fluid.

The following hypothetical illustrates the problem: Station WWWW posts an uncaptioned three minute news clips about a developing mayoral scandal two hours before its six o'clock news program. That related story, including the clip, airs at the 6 o'clock hour. The audio and video from the clip may or may not be altered as the story develops so the televised version may or may not differ from the posted clip. The 6 pm news hour is live-captioned, and it takes the web vendor significant time to post the news story to the website with captions. In the two hours leading up to the 6 pm news, several other news outlets, as well as individuals, have noticed WWWW's reporting of the mayoral scandal and have hyperlinked to the original, uncaptioned video. Other

¹⁶ 47 U.S.C. §613(c)(1). “The regulations prescribed pursuant to subsection (b) shall include an appropriate schedule of deadlines for the provision of closed captioning of video programming *once published or exhibited on television*” (emphasis added).

¹⁷ See Letter from Ann West Bobeck, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, at 1, MB Docket 11-154 (July 7, 2014). See *also* Comments of the National Association of Broadcasters at 11, MB Docket No. 11-154 (Feb. 3, 2014); Reply Comments of the National Association of Broadcasters at 2, MB Docket No. 11-154 (Mar. 5, 2014).

people have shared the uncaptioned clip on Facebook or tweeted it. The story goes viral and it makes the national news by the evening cycle.¹⁸ At that point, not only may the original clip differ from what actually aired, station WWWW obviously has no means of knowing where the uncaptioned clip might be available.

Limits on the FCC's statutory authority aside, it is simply not feasible for the Commission to require that VPOs ensure all links in the chain have an updated, captioned version of an IP video clip within X hours or days. A broadcaster, as in the hypothetical above, has no means of tracking how many other distributors have previously posted the uncaptioned version. Nor, due to control and privacy restrictions, can a broadcaster switch out a shared hyperlink on an individual's website or social media profile. The number of links is infinite, and there is no means by which a third party can be readily notified that a captioned version is available in the library.

¹⁸ The FCC has first-hand experience of a video going viral, John Oliver's report on net neutrality. The original video, aired on HBO, was linked and reproduced completely using a variety of video players on blogs and websites as varied as: Ebaumsworld, John Oliver Schools You on Net Neutrality, Ebaumsworld.com, *available at* <http://www.ebaumsworld.com/video/watch/84135245/> (last visited Oct. 6, 2014); Time, John Oliver's Net Neutrality Rant Crashes FCC Servers, Time.com, *available at* <http://time.com/2817567/john-oliver-net-neutrality-fcc/> (last visited Oct. 6, 2014); HuffingtonPost, John Oliver's Dramatic Appeal to 'Monster' Internet Commenters: You Can Save Net Neutrality, *available at* http://www.huffingtonpost.com/2014/06/02/john-oliver-net-neutrality-last-week-tonight_n_5431215.html (last visited Oct. 6, 2014); Upworthy.com, John Oliver Goes Off On An Epic, Fact-Checked, Mic-Dropping Rant for 13 Minutes That You Need to See, *available at* <http://www.upworthy.com/john-oliver-goes-off-on-an-epic-fact-checked-mic-dropping-rant-for-13-minutes-that-you-need-to-see> (last visited Oct. 6, 2014). In addition, millions of Facebook shares and Twitter tweets reposted the video. Another example is the recent news explosion surrounding the hacking and subsequent release of intimate pictures of many celebrities. News stories about this leak exploded and were shared widely. See, e.g., More than 100 Celebrities Hacked, Nude Photos Leaked, WTSP.com, *available at* <http://www.wtsp.com/story/entertainment/2014/09/01/more-than-100-celebrities-hacked-nude-photos-leaked/14921933/> (last visited Oct. 6, 2014).

Many advance clips, moreover, are created solely for promotional purposes. VPOs create advance clips to promote upcoming programs, and after the promoted program airs the advance clip is outdated. Requiring VPOs to replace or delete promotional advance clips after the promoted material has aired would impose significant costs on programmers with no commensurate consumer benefit.¹⁹

The appropriate focus here should be on material that falls within the scope of the CVAA and what is practicable for broadcasters and VPOs to achieve. If an advance clip is subsequently televised, and the audio and video programming is *identical*, then the video programmer should have a choice. The programmer can (1) substitute the uncaptioned clip with a captioned version of the same clip, or (2) post on its website a captioned version alongside the advance clip (so long as the video programmer readily identifies on either the player or the clip that closed captioning is available).²⁰ Either way, the viewer has access to captioned programming. If an advance clip is not televised, or if a different version of an advance clip is aired, then the programmer cannot, under the CVAA, be required to caption that online advance clip.

With regard to timing, NAB strongly urges the Commission to allow at least 24 hours from the time a program airs for a broadcaster to either substitute a captioned version or post a second captioned version of an advanced video clip alongside the

¹⁹ We additionally note that the most important information about programs promoted by advance promotional clips, including the program title, air date, and channel, is often heavily highlighted, both visually and audibly so that such information is more easily accessible.

²⁰ For purposes of aggregating news and information, and tracking “hits” to websites and news content, the original link is generally the best metric by which to monitor content traffic. Thus, VPOs have a clear purpose for retaining original, uncaptioned advance clips on their websites.

original uncaptioned clip. This time period is needed in light of the re-encoding and reposting issues described in Section II. In addition, permitting at least 24 hours will help avoid unintended consequences, such as influencing local stations' editorial decisions about their online postings, or delaying breaking news and weather information important to local communities. Unrealistic deadlines for the captioning of subsequently-aired advance clips could deter stations unable to meet those deadlines from providing advance clips online or at least reduce the number of advance clips provided.

IV. THE FCC SHOULD NOT EXTEND CVAA OBLIGATIONS TO THIRD-PARTY DISTRIBUTORS

The Commission seeks comment on whether it should extend its rules to third-party distributors.²¹ It should decline to do so because there are no appropriate mechanisms to ensure compliance. Third-party distributors will have no incentive to comply and broadcasters will likely have little, if any, influence over them. Broadcasters can only ensure that their own websites comply with the rules. Indeed, even the Commission lacks the means to monitor, let alone enforce, third party compliance with video clip rules.

A. Current Obligations Regarding Clips Are Appropriate And Broadcasters Lack Control Over Third-Party Distributors To Ensure Compliance With Any Proposed Regulation

As demonstrated in the record²² and discussed in Section II, captioning online video clips entails many challenging and complex steps. Extending the obligation to third-party providers raises even more difficult issues.

²¹ *Further Notice* at ¶¶ 37-43.

²² *See, e.g., Second Order* at ¶ 24 and n. 100.

When VPOs create online video caption files, those caption files are designed with optimal playback for the programmers' video player to ensure high-quality captions. Broadcasters can be assured that online video clips comply with applicable regulations only when they have operational control of a website and its video player. When third parties copy or repost video clips on their own websites, broadcasters lose operational control of the clip and can no longer remedy a caption problem if the caption file does not play appropriately or at all. Websites use a variety of both open-source and proprietary video players (for example, Windows Media Player®, Quicktime®, and Flash® are popular players). The unique source code operating the video player may cause a caption file to malfunction, or not play at all.²³ VPOs have no input into a third party's video player operation and cannot feasibly format their caption files for all of the possible combination of video players used by consumers and third parties.

In addition, no system exists that identifies whether a clip was previously shown on television before it was posted as an online video clip. If solutions are developed, each solution will likely be proprietary, expensive and not easily scaled across industry due to each VPOs' individual clip creation process. Thus, even identifying clips required to be captioned as those clips are redistributed by various parties throughout the online video ecosystem will remain a problem for the foreseeable future.

These problems are amplified when third-party distributors use online video clips without VPOs' knowledge – which describes the majority of online video clips. Given the growth of the Internet, it is impossible to control where a video clip is shown online

²³ Or, the video file could become corrupted somewhere in the online video clip caption process.

once it is posted. Broadcasters have no way of knowing if a video clip was taken from their website and re-posted by a third party, or further re-posted by other third parties. Broadcasters also have no way of knowing if the caption file associated with the online video clip properly plays after a third party re-posts it. Nor would a third-party distributor have any way of knowing if the caption file played once someone shared or re-posted the clip from the third party's website. Given the lack of control the Commission must reject any "allocation of responsibility" similar to the IP closed captioning rules.²⁴ It simply would not work.

Even if VPOs license content, including online video clips, to certain third-party websites, these websites are still operationally independent from VPO control. Broadcasters, for example, generally have no ability to control or fix an online video clip whose captions no longer properly play once it is posted on a third-party website. This is the case even if a third-party website violates the licensing terms; thus, including contract language to cover compliance with the clip captioning rules is not a cure all for captioning problems with licensed content and cannot address unlicensed content at all.

NAB further notes that third-party websites, even if licensed, also encounter errors with their video players or caption files due to the complexities of the Internet. Technology at the CDN, or other level outside both the VPO and the third-party distributor's control, can routinely fail. A VPO's financial interest in a third-party video distributor (such as Hulu) will not remedy these problems. Unless a video programmer has *operational* control of a website, it lacks the day-to-day control necessary to ensure compliance with an online video clip captioning obligation.

²⁴ *Further Notice* at ¶ 39.

In sum, the application of proposed third party rules, even when the third party is properly licensing the content, is complicated and unlikely to be effective in the absence of actual operational control of the third-party's website. Unfortunately, the majority of third-party websites do not license the content they use from VPOs. Many online video clips are created by others from VPOs' online content or are taken by individuals and re-posted on other websites. A quick Google search, for example, shows a significant number of online video clips taken from popular televised programs without knowledge or control of the VPO. These videos do not have closed captioning.²⁵ Broadcasters have no knowledge of the actions of third parties or recourse in these situations. It would be patently unfair to subject broadcasters to potential liability for the actions of innumerable third-party distributors over whom broadcasters cannot exert control.

B. The Commission Lacks The Means To Track And Ensure Third-Party Distributors Comply With The Rules

The Commission should decline to expand its rules to third-party distributors because it lacks the means to ensure that unregulated entities comply with the rules. No party has put forth a reasonable or realistic proposal explaining how the Commission

²⁵ For example, The Simpsons, Best Comeback Ever, *available at* <https://www.youtube.com/watch?v=5izm9kHeHkg> (last visited Oct. 6, 2014), or The Daily Show: Recap – Week of 7/14/14, *available at* <https://www.youtube.com/watch?v=zgQMsBQifvU> (last visited Oct. 6, 2014), or The Simpsons, *Sideshow Jory*, *available at* <https://www.youtube.com/watch?v=h6blEjab9wU> (last visited Oct. 6, 2014), Seinfeld, *That's Gold, Jerry! That's Gold!*, *available at* <http://www.fanpop.com/clubs/seinfeld/videos/36879386/title/thats-gold-jerry-gold> (last visited Oct. 6, 2014).

can even track third parties' distribution of VPOs' content, let alone enforce its rules against innumerable and often unidentifiable third parties.²⁶

For many of the reasons discussed above, Commission efforts to ensure that clips distributed by third parties are properly captioned by imposing obligations on VPOs will be completely ineffective. Almost anyone can share a clip or create a new short video clip online without the knowledge of the original video programmer. VPOs cannot possibly monitor the entire Internet to ensure that third-party video clips are not shown without captions. And, even if the VPO somehow tracks third-party providers, it has no ability to force the third-party provider to either caption the content, switch out the IP video clip to a captioned version and/or update their software players to ensure captions can be viewed by consumers that use multiple devices.

The explosion of online video copyright theft is illustrative. Despite joint industry efforts to combat violations of their copyrights, content thefts remains a problem. Many third-party video clips violate VPOs' copyright protections. While VPOs who become aware of the theft can work to remove video infringing their copyrights, the same copyright-protected video will often be uploaded elsewhere by another party shortly after it is removed.

The Commission similarly cannot rely upon consumer complaints because direct FCC enforcement against third-party distributors also will be constrained. Purely online video websites may well question the FCC's authority to regulate them at all. A number of third-party websites may not be located within the United States' jurisdiction. In

²⁶ NAB also observes that the FCC's authority to impose obligations on various third-party distributors is unclear, at best.

addition, the Commission often will find it difficult to establish whether many videos were ever televised with captions. Proving the so-called “chain of custody” will be resource- and time-intensive.

Certainly the Commission should not act now. Given the current state of technology, imposing captioning requirements on third-party distributors will result in mass confusion and a systematic failure. A number of third-party distributors likely will not respond to FCC inquiries or consumer complaints. Third-party distributors who respond to complaints will be tempted to eliminate video clips lacking functional captions to avoid potential fines. Many third-party distributors will lack the resources to caption video clips when these clips generate very little revenue from advertising. The ultimate losers will be all consumers who view videos online. Thus, until captioning technology significantly develops and an automated system allows all entities to caption videos quickly and cost-effectively, the Commission should not consider extending CVAA obligations to third-party distributors of IP video clips.

V. THE CVAA DOES NOT GIVE THE FCC AUTHORITY TO REGULATE MASHUPS

A mashup is a completely new video program combining a video clip that was shown on-air with captions and a video clip(s) and/or other content that was never shown on-air. Mashups do not fall under the clear terms of the CVAA. The CVAA requires “the provision of closed captioning on video programming delivered using Internet protocol that was *published or exhibited on television with captions.*”²⁷ That Act defines video programming as “comparable to programming provided by a television

²⁷ 47 U.S.C. § 613(c)(2)(A) (emphasis added).

broadcast station.”²⁸ A mashup is a completely new video program that was never televised with captions and is not comparable to that programming televised by broadcast stations.

NAB agrees that if a mashup is televised, as a complete program, with captions, it would fall under the FCC’s current IP captioning or IP clip captioning rules. But, until the entirety of a mashup is televised with captions, the fact that a portion of a new video mashup was previously captioned is immaterial. The mere existence of some footage with captions does not transform a mashup into televised programming shown with captions that is covered by the CVAA. In short, the vast majority of mashups are created online and never televised nor captioned and, thus, do not fall under the CVAA’s clear terms.

As a practical matter, moreover, an obligation to caption online mashups will only discourage their creation and reduce their availability to viewers online. To caption a mashup, an entirely new caption file would need to be created. The fact that a portion of the mashup previously had captions would not make captioning of the mashup any quicker or easier, as the captioning file for that portion may no longer exist or the existing file would have to be blended together with the un-captioned portion. Given the costs of captioning and the limited, if any, advertising revenue VPOs earn from online video clips and mashups, a regulatory obligation to caption mashups will reduce the incentives of many video programmers to create mashups. Discouraging the production of new online video content benefits no one.

²⁸ 47 U.S.C. § 613(h)(2).

The delays involved with captioning mashups will also discourage their production, as video programmers often want to create and use mashups quickly. If, after their creation, captioning was required, the mashup would likely be sent to a captioning agency. Although certain parties claim they can complete captioning for mashups quickly,²⁹ these claims are unrealistic. The FCC's recent mandates to caption various types of online content mean that a significantly increased amount of content now needs to be captioned. There are still only a small number of quality captioners available, and common sense dictates that at some point the potential of millions of online video clips may overwhelm captioners, or result in lower quality captions. NAB experienced a similar problem when it sent a webinar featuring FCC staff to be captioned by a large captioning agency. Not only did it take twice as long as quoted, but the file was returned with significant captioning problems resulting in major delays while the error was resolved.³⁰ The difficulties of producing timely mashups in light of such delays will discourage many programmers from creating mashups. Until an automated process exists, delays in captioning content will continue to be a serious, real-world problem.

VI. CONCLUSION

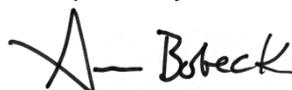
NAB pledges to continue to work together with our members, other industry sectors, the Commission, and the disability community to ensure that all broadcast TV viewers can access video programming previously aired on TV when it subsequently is

²⁹ See, e.g., Letter from Heather York, Vice President, Marketing, VITAC Corporation to Marlene H. Dortch, Secretary, FCC at 2-4, MB Docket No. 11-154 (Apr. 3, 2014).

³⁰ See Comments of the National Association of Broadcasters at 10-13; MB Docket No. 05-231 (July 9, 2014).

delivered using IP. Given the very recent implementation of the IP captioning rules, the multiple compliance deadlines yet to come, and the complexity of the IP ecosystem, broadcasters are expending significant resources to advance the captioning of video clips of news and other material. At the present stage, the Commission can best serve the interests of the deaf and hard-of-hearing community by working with the industry to address remaining challenges and resolve unexpected problems. The resources and efforts of all parties are better directed toward collaboratively improving IP captions under the existing requirements, rather than further restricting timeframes or assigning liability to third parties, which could discourage the online posting of short-form video content either before or after it is televised.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ann West Bobeck". The signature is stylized with a large, looped initial "A" and a long horizontal stroke extending to the right.

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, NW
Washington, D.C. 20036
(202) 429-5430

Jane E. Mago
Jerianne Timmerman
Ann West Bobeck
Justin L. Faulb
Kelly Williams

October 6, 2014