

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION

The National Association of Broadcasters¹ (NAB) hereby replies to comments submitted in response to the Commission's *Further Notice* on Internet protocol (IP) captioning of video clips.² Broadcasters remain committed to furthering access to broadcast content for deaf and hard-of-hearing individuals whether viewed over-the-air or delivered using IP. The new regulations adopted in the Commission's recent Order³ have the potential to benefit the deaf and hard-of-hearing community and all consumers, as Congress intended in the Twenty-First Century Communications and

¹ 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.

² 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 2014).

³ 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 2014) (*Second Order*).

Video Accessibility Act (CVAA).⁴ To ensure, however, that regulations fulfill their purposes and do not have unintended consequences the Commission must allow its recently appointed rules to take effect and study their impact before considering expanding the scope of the rules. The Commission must also be cognizant of its limited authority over online video programming and the importance of providing broadcasters with flexibility in how to increase accessibility of online video clips.

II. THE COMMISSION SHOULD REFRAIN FROM ADOPTING THIRD-PARTY DISTRIBUTOR REQUIREMENTS

TDI calls for expanding the online video clip caption obligations to third-party providers. But, in urging hasty action, TDI completely overlooks the real and significant challenges that this vast expansion entails. While TDI may “believe that requiring third-party distributors to deliver video clips with captions is fundamentally simple,”⁵ that is not the case. Operationally, extending obligations to third parties is very complex.⁶ The complicated nature of the clip captioning process,⁷ the vast number of third-party distributors, and the widespread unauthorized use of online video clips by third parties

⁴ 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.) (CVAA). 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.

⁵ Comments of Telecommunications for the Deaf and Hard-of-Hearing, *et al.*, at 6, MB Docket No. 11-154 (Oct. 6, 2014) (TDI Comments).

⁶ See Comments of the National Association of Broadcasters at 4, MB Docket No. 11-154 (Oct. 6, 2014) (NAB Comments).

⁷ See NAB Comments at 4, 10; Comments of the National Cable and Telecommunications Association at 3, MB Docket No. 11-154 (Oct. 6, 2014) (NCTA Comments).

will combine to make third-party requirements for IP video clips impractical and ineffective.

Unsupported claims that Video Programming Owners (VPOs) should be able to “agree with VPDs and VPPs to similar ‘mechanisms’ as they must in the context of full-length programming to identify video programming subject to the rules”⁸ represent a fundamental misunderstanding of the online video clip environment. VPOs do not have relationships, agreements, or even contact with the vast majority of the innumerable third-party video distributors who may re-use their online content.

Moreover, only a small number of online video distributors air full-length programming. It is much more feasible to “agree” to appropriate mechanisms with a few entities, rather than potentially millions. For example, a Google search for “online video clips” produces 46,000,000 results⁹ with non-traditional companies like NDTV, Stock Video Clips, Premium HD Video Clips, Metacafe, or In.com as some of the top results. The identity of these website owners is often unclear, and the jurisdictions where many of these websites are hosted unknown.

Nor can VPOs control when and where their clips may be played or whether their clip and caption files will play on, or properly interface with, other websites, or with the several apparatus viewers use. VPOs also have no mechanism by which they can identify whether the clips on third-party websites have been previously aired on TV with captions, nor any remedy against the third-party distributor if the clip does not

⁸ TDI Comments at 6.

⁹ See Google Search of “online video clips”, Google.com, *available at* https://www.google.com/webhp?sourceid=chrome-instant&rlz=1C1CHFX_enUS570US570&ion=1&espv=2&ie=UTF-8#q=online+video+clips (last visited Nov. 3, 2014).

appropriately play with captions. In short, no commenter has identified a workable and effective mechanism for enforcing a third-party distributor requirement.

NAB also agrees with NCTA that any third-party obligation could result in significant consumer confusion.¹⁰ There is no way to identify whether a particular clip on a third-party distributor's website should have been captioned, or is captioned. Complaints to the Commission may result in further delay and confusion as the FCC grapples with questions of jurisdiction over certain websites, and struggles to find basic contact information to forward a complaint to the website operator. TDI addresses none of these important practical issues. Thus, the Commission, at the current time, should continue to limit any obligation to websites under VPOs' operational control because the VPO can ensure that clips previously aired on television are captioned and any problems can be identified and resolved quickly.

III. IF THE COMMISSION ADDRESSES ADVANCE CLIPS, IT MUST RECOGNIZE ITS LIMITED AUTHORITY

Consumers rely upon broadcasters to distribute important information and content. Broadcasters have strong incentives to distribute content in a timely fashion, including placing content online before it is aired. Under the clear terms of the CVAA, the FCC lacks authority to regulate the captioning of any video content prior to its airing on television with captions.¹¹ Contrary to TDI's assumption,¹² the Commission cannot

¹⁰ NCTA Comments at 5.

¹¹ See CVAA, § 202(b); NAB Comments at 6-7; NCTA Comments at 6-7.

¹² TDI Comments at 10.

simply ignore statutory limits on its authority and require captioning of advance clips before they air on television with captions.¹³

Broadcasters have and continue to work to increase the amount of captioned clip content for all viewers. Advance clips, which may include news stories that may be televised at a later time or promotional or other content that will never be televised, provide valued content to the viewing public. Although no technology exists to effectively tag, follow, and identify downstream the thousands of advance videos VPOs create and post every day, broadcasters continue their efforts to solve the technological challenges surrounding captioning online video clips. NAB therefore objects in the strongest terms to TDI's unwarranted assertion that VPOs would post advance clips for the purpose of "avoid captioning obligations."¹⁴ In fact, VPOs, including broadcasters, post advance clips to keep the public informed of breaking news and weather, to entertain viewers, and for promotional purposes. Fundamental journalistic and businesses purposes drive VPOs' decisions about posting advance clips.

TDI also incorrectly asserts that VPOs "often" have advanced warning that a clip will be shown on television.¹⁵ Local broadcast television stations often re-write and edit news stories right up to airtime. In addition, stories may be pulled while a newscast is

¹³ See, e.g., *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374-76 (1986) (stating that Court was "unwilling and unable" to "permit" an agency to expand its power in the face of a Congressional limitation on its jurisdiction and that "only Congress can rewrite" a statute.). See also *Railway Labor Executives' Assoc. v. Nat'l Mediation Board*, 29 F.3d 655, 671 (1994) (finding that a suggestion that a Board "possesses plenary authority to act within a given area simply because Congress has endowed it with some authority to act in that area. "We categorically reject that suggestion.").

¹⁴ TDI Comments at iv.

¹⁵ TDI Comments at 11.

on the air. Thus, a broadcaster will not generally know until after airtime if the televised programming is the same audio and video as the advance clip. Again, TDI's unsupported assumption is erroneous.

If an advance clip posted online is subsequently televised with identical video and audio programming, then the Commission must provide a realistic opportunity for the VPO to later caption and replace or, alternatively, add a second version with captions. A programmer must be able to either (1) substitute the uncaptioned clip with a captioned version of the same clip, or (2) post on its website an identified captioned version of the clip alongside the advance clip. If the Commission fails to provide this reasonable flexibility, VPOs will be more likely to simply remove the clip because they cannot comply with a rigid obligation. Providing VPOs with options for increasing the accessibility of advance clips will serve the public interest.¹⁶

IV. MASHUPS DO NOT FALL UNDER THE CVAA AND THE FCC LACKS AUTHORITY TO REGULATE

The CVAA does not give the Commission authority to regulate mashups. A mashup is a completely new file and new video programming. As that new, complete video programming was never "published or exhibited on television with captions," the Commission cannot require VPOs to caption the new mashup online.¹⁷

TDI seems to suggest that the Commission should require the portion of a mashup that was previously televised to be captioned online, but not the portion that

¹⁶ See NAB Comments at 9.

¹⁷ See NAB Comments at 15; see *also* NCTA comments at 10.

was never televised.¹⁸ NAB agrees with NCTA that such a situation would be “disruptive and confusing to consumers.”¹⁹ Captions would appear to turn on and off at random and consumers will not understand why only portions of the mashup is captioned, and will likely complain to the Commission and VPOs regardless of the fact that such a mashup would comply with the rules. Consistent with the CVAA, the Commission should treat mashups as new, independent video programs that must have been televised with captions before online caption obligations attach.

V. ALTERING THE JUST-ADOPTED GRACE PERIOD WOULD BE ARBITRARY AND CAPRICIOUS AND WOULD NOT INCENTIVIZE THE CREATION OF AUTOMATED CAPTIONING TECHNOLOGIES

Last July, the Commission adopted a grace period for clips of live and near-live programming.²⁰ Relying upon a thorough and well-developed record, the Commission found that it had “appropriately balance[d]” industry and consumer advocates’ concerns.²¹ Before the Commission should even consider decreasing or eliminating its “appropriate” and “reasonable” timeframes for captioning IP clips,²² it must allow the rules to take effect.²³ Indeed, given the extremely short time period since adoption of these rules it would be arbitrary and capricious for the Commission to reverse course now on the just approved times frames and grace periods.²⁴

¹⁸ See TDI Comments at 9.

¹⁹ NCTA Comments at 10.

²⁰ *Second Order* at ¶ 30.

²¹ *Id.*

²² *Id.* at ¶¶ 2, 19.

²³ See *Second Order*, Pai Statement at 2.

²⁴ See *Mountain States Tel. and Telegraph Co. v FCC*, 939 F.2d 1021, 1034-35 (D.C. Cir. 1991) (vacating an FCC decision for failing to explain its change in policy,

TDI claims that broadcasters will need no more than one additional year past the current July 2017 date “to develop systems to eliminate the need for any grace period altogether.”²⁵ This claim has no factual basis. Industry has expended significant resources to attempt to resolve the technical problems inherent in online clip captioning. The Commission should recognize that the current deadlines are aggressive and many VPOs will struggle to meet them as they stand.

NAB suggests that the FCC re-assess developments in captioning technology and industry’s ability to caption clips, including live or near-live programming, after the first regulatory benchmark in January 2016. At that point, the Commission will be able to conduct a rational inquiry. At the current time, less than four months since the Commission last examined these issues, no record evidence or marketplace developments justify altering time frames that remain nearly three years in the future. Moreover, TDI’s premise that eliminating any grace period provides an incentive to “develop the necessary technology” to post content immediately upon its publication is deeply flawed.²⁶ VPOs, NAB, and many others have been investing in technology to automate captioning since well before these proceedings began. That effort continues today. The cost of captioning, in both financial and human resources, is more than enough incentive to develop automated solutions.

specifically noted that the Commission has “only *two years* previously” found its earlier policy appropriate) (emphasis added). *See also, Verizon Tel. Companies v. FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009) (finding change of approach by FCC to be arbitrary and capricious because FCC’s “conclusory statements” could not “substitute” for the requisite “reasonable explanation” for its new approach.).

²⁵ TDI Comments at 9.

²⁶ *Id.* at 11.

Only time and experience will lead to an automated breakthrough. For example, Google Inc., a company with vast financial and world-class engineering resources, has been unable to solve the technological riddle of fully-accurate, automated captioning. Regulatory fiat will not solve these complex challenges. The only incentive created is the incentive to remove online content prior to the shortened deadline. This result would benefit no consumers.

VI. CONCLUSION

The record is clear. The Commission should not expand captioning obligations to third-party distributors because of the many challenges associated with identifying these parties, and ensuring the even existence, let alone proper functioning, of clip captions throughout the online ecosystem. The Commission must recognize its limited authority over advance clips and, if it decides to act at this time, it must provide VPOs flexibility in how to make advance clips more accessible. It must also provide an appropriate grace period to ensure VPOs can comply with any new obligation. The Commission lacks authority to regulate mashups, and should decline to do so. It should also resist the calls by some commenters to reconsider the grace periods for live and near-live programming. Nothing has changed in the few months since adoption of the rules to support a modification. Broadcasters remain committed to increasing the accessibility of their content, and will continue to invest resources to do so. Rather than restrict broadcasters' options for promoting accessibility, NAB asks the Commission to empower, through appropriately flexible regulation, broadcasters to succeed.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'J. Mago', written in a cursive style.

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