

## FCC Proposes Closed Captioning Rules for Online Video, Seeks Comment

By Ronald G. London and Brian J. Hurh

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The Federal Communications Commission (FCC) has issued a [Notice of Proposed Rulemaking](#) (NPRM) seeking comment on proposed rules for the closed captioning of video programming delivered via Internet protocol (i.e., “IP video”), under the 21st Century Communications and Video Accessibility Act (CVAA). As discussed in [our advisory on the CVAA](#) and [our overview of the Report](#) by the Video Programming Accessibility Advisory Committee (VPAAC) making recommendations for FCC implementation, the CVAA compels the adoption of rules that require IP video programming to have closed captions if it appeared on TV with captions after the new rules’ effective date.

This proceeding will affect TV stations, cable systems, broadcast and cable networks and virtually every other professional video program producer who is now, or will be in the future, making their programming available on the Internet. With a proceeding so wide-reaching, with a very short comment period given the congressionally-mandated implementation schedule, everyone involved in these businesses needs to know what the FCC is proposing.

The NPRM addresses a variety of topics necessary to adoption and implementation of such regulations. In order to meet the Jan. 12, 2012 deadline imposed by the CVAA, the NPRM requires **comments to be filed within 20 days** after Federal Register publication, and **reply comments 10 days** after the initial comment deadline. The issues raised in the NPRM for comment include, among others, identification of the entities and devices/software within the reach of the CVAA’s captioning requirements, a schedule of deadlines for when various categories of covered IP video must begin including captions, technical standards for IP video, and complaint and waiver procedures. However, the FCC proposes NOT to adopt a technical standard but rather to allow parties to negotiate an appropriate interchange format, in the belief that the standard perceived as best will be adopted by the industry without FCC intervention.

To address the increasing extent to which video is accessed online, including by viewers who are deaf or hearing-impaired, the CVAA charges the FCC with adopting rules to require captioning of IP video programming that was published or exhibited on TV with captions after the effective date of such regulations. As the NPRM notes, IP video can take a number of forms, such as programming delivered to personal computers, tablet devices, cellular phones, game consoles, Blu-ray players, or set top boxes. The CVAA also requires the FCC to include any technical standards, protocols, and procedures needed for the transmission of closed captioning delivered using IP, to ensure that various apparatus are capable of rendering, passing through, or otherwise permitting display of the captions for viewers.

To carry out this mandate, the NPRM seeks comment on rule changes that would:

- ❖ Require video programming owners to send caption files for IP video to video programming distributors and video programming providers along with program files
- ❖ Require video programming distributors and video programming providers to enable the rendering or pass-through of all required captions to the end user
- ❖ Require captioning of IP video to be of at least the same quality as the captioning that the programming had when it appeared on TV
- ❖ Establish deadlines by which categories of covered IP video must be captioned, as follows:
  - Prerecorded and unedited programming subject to the new requirements must be captioned within 6 months of publication of the new rules
  - Live and “near-live” programming subject to the new requirements must be captioned within 12 months of publication of the rules
  - Prerecorded and edited programming subject to the new requirements must be captioned within 18 months of publication of the rules
- ❖ Require video programming owners to provide programming for IP delivery either with captions or with a certification that captions are not required for a stated reason
- ❖ Avoid adopting particular technical standards for IP-delivered video programming, in favor of the industry settling on the best format without FCC intervention
- ❖ Establish procedures by which video programming providers and video programming owners may petition for exemptions from the new requirements based on economic burden
- ❖ Accommodate *de minimis* failures to comply with the new captioning obligations
- ❖ Adopt procedures for complaints alleging violations of the new rules
- ❖ Permit entities to comply with the new requirements by alternate means
- ❖ Identify appropriate requirements for devices subject to the closed captioning requirements

Further details regarding these proposals are provided below.

## ***Entities and Programming Covered by the CVAA Rules and the Obligations They Face***

The CVAA applies broadly to “video programming distributors” (“VPDs”), “video programming providers” (“VPPs”), and “video programming owners” (“VPOs”). The FCC proposes, based on guidance in the statute, to define VPDs and VPPs identically, such that both would include any entity that makes video programming available directly to end users via distribution methods that use Internet protocol. It further proposes to define VPOs as persons or entities that own the copyrights to such programming. It goes on to propose to require VPOs to send program files to VPDs/VPPs with all required captions, and to require in turn that when VPDs/VPPs receive files with the captions, they must include them at the time they make the programs available to end users.

In conjunction with these proposals, the NPRM seeks comment on a variety of issues, including whether to require VPDs/VPPs to provide a mechanism like a button or icon that would allow consumers to easily access captions. It also asks about the consequences of VPOs licensing content to third parties for Internet distribution, as well as the extent to which VPDs/VPPs should be held accountable for a VPO’s failure to provide captions, particularly where VPDs/VPPs should reasonably have known a program they received was required to include captions but the VPO failed to provide them.

As to what IP video is covered, the FCC proposes to apply captioning requirements to “full-length programming,” and seeks comment on what this should mean. In doing so, it proposes to exclude outtakes and video clips (proposing a definition for the former and seeking comment on whether to define the latter based on duration, or other criteria), as well as IP-delivered content that aired on TV only in another country, and not in the U.S. The FCC also seeks comment on how to define the “consumer generated media” that the CVAA statutorily exempts from the class of covered IP video. However, noting the CVAA does not distinguish between programming first airing on TV with captions because FCC rules require as much, and that to which captions were added voluntarily even though a program may have been exempt under those rules, the FCC proposes to require that once programming is captioned on TV, it must be captioned when delivered via IP—even if it otherwise would have been allowed a TV captioning exemption.

As to the quality of captions, existing equipment rules relating to captioning on TV already require certain user controls, including the ability to change text color, opacity, size, font, background color and opacity, character edge attributes, and window color, and the FCC proposes that IP video captioning be of at least the same quality as the television captions and have the same user tools. “Quality” evaluations could include such factors as completeness, placement, accuracy, and timing. Essentially, the quality must meet or exceed the quality of captioning displayed on TV. However, VPDs/VPPs would not be required to improve caption quality but rather would have to simply ensure

the quality does not decline when delivered via IP as compared to when shown on TV (though, to the extent VPDs/VPPs have permission from VPOs to alter the captions to improve the viewing experience, the FCC proposes they be permitted to do so).

### ***Schedule of Deadlines for Compliance***

The NPRM proposes a staggered schedule of deadlines for captioning of IP video published or exhibited on TV with captions after the rules' effective date that would require compliance for programming that is "prerecorded" and not "edited for Internet distribution" within six months after rules are published, compliance for "live" and "near live" programming within 12 months after the rules are published, and compliance for programming that is "prerecorded" and "edited for Internet distribution" within 18 months of publication.

For these purposes, "live programming" would be that both created and presented live on TV, *and* simulcast for Internet distribution as it airs on TV, with "simulcast" meaning "substantially simultaneously" with the performance (so as to allow for a slight delay, such as to facilitate "bleeping" or pixilating objectionable material). "Near-live programming" would be that which is substantively recorded and produced within 12 hours of distribution to TV viewers, with the NPRM inviting comment on how to define "substantively recorded and produced." Building off these definitions, "prerecorded programming" would be that not meeting the definitions of "live" or "near-live," while "edited for Internet distribution" would encompass television programming that is substantially edited prior to Internet distribution. Such "editing" would include deletion of whole scenes or modification of the score from the televised version, but mere changes to the number or duration of ads would not qualify.

### ***Technical Standards and Informational Issues***

The NPRM notes that while there are universal, FCC-mandated technical standards for closed captioning on both analog and digital television, there are currently multiple formats online. Nonetheless, the FCC declines to adopt the VPAAC's proposal for adoption of the Society of Motion Picture and Television Engineers ("SMPTE") Timed Text ("SMPTE-TT") standard. Instead, it proposes to refrain from specifying any particular standard for the interchange or delivery format of IP video, partly because the interchange format involves negotiations between VPOs and VPDs/VPPs that typically require the entities to reach mutually agreeable solutions, and partly in the interest of fostering maximum technological innovation. At the same time, the NPRM seeks comment on whether the FCC *should* specify any particular standard(s) and/or the necessity of doing so, as well as on whether, if a particular standard is adopted, parties should be permitted to petition the FCC to use "alternate means" rather than that standard.

As to other facets of VPO-VPD/VPP interaction, the NPRM seeks comment on how to effectuate the CVAA mandate for the FCC to establish a mechanism to make available to VPDs and VPPs information on video programming subject to the rules on an ongoing basis. The main proposal is to require that VPOs providing covered IP video to VPDs/VPPs must provide each program either with captions, or with a dated certification stating captions are not required for a reason stated therein because, for example, the program is not full-length, is otherwise exempt, or has not been published or exhibited on TV with captions after the rules' effective date (though as to the latter it is noted that while a program may not be subject to captioning requirements as of the effective date of the new rules, it might later become subject if the program is re-run on television with captions after the effective date). If such a rule is adopted, the FCC proposes to require that VPOs keep all certifications current and provide VPDs/VPPs with revised information, and that VPDs/VPPs not be subject to enforcement actions if they rely in good faith on an erroneous VPO certification that they did not know or have reason to know was flawed. The alternative on which the NPRM seeks comment is to rely instead on independent third parties to provide databases of information on all video programming shown on TV with captions after the rules' effective date.

### ***New and Adapted Procedures***

The NPRM also proposes procedural rules and understandings that will underlie the captioning requirements. Insofar as the CVAA requires the FCC to grant full or partial exemptions from captioning obligations in cases where complying is economically burdensome, the NPRM proposes to define "economically burdensome" as imposing significant difficulty or expense, and to allow VPDs/VPPs and VPOs to file petitions with the FCC for exemptions, supported by evidence demonstrating that compliance will be economically burdensome. Factors to be considered are specified by statute and include the nature and cost of captioning the programming, the impact on the operation of the provider or program owner, the provider's or program owner's type of operation, and its financial resources.

The NPRM also proposes to adopt complaint procedures for alleged violations of the IP video captioning rules that are analogous to those the FCC uses for complaints alleging violations of TV closed captioning obligations. Those rules basically specify that programming distributors respond to alleged violations in the first instance, aided by program providers where appropriate, and set out deadlines and steps that apply to complaints and responses. The principal modification here would be dealing with the fact that, whereas some deadlines in the TV captioning complaint rules are based on when a program airs, that concept can have little meaning in the IP video context, where programming may be available for viewing at the time of a viewer's choosing, and the NPRM seeks comment on how to adjust for that reality.

The NPRM also asks whether the FCC should impose contact information requirements on VPDs/VPPs comparable to those applicable to broadcasters and cable/satellite providers, to assist consumers wishing to reach VPDs/VPPs with IP video captioning

concerns or complaints. Further on the subject of enforcement, the CVAA requires that the FCC rules provide that *de minimis* failures to comply shall not be treated as a violation of the regulations, and the NPRM accordingly seeks comment on how to define “*de minimis*” in this context. The FCC proposes it should be based on the particular circumstances of the failure to comply, including the type of failure, the reasons for it, whether it was one-time or ongoing, and how quickly it was remedied.

### **“Apparatus” Issues**

In conjunction with IP video closed captions, the NPRM also addresses Section 203 of the CVAA, which revises current law (47 U.S.C. § 303(u)) to generally require any “apparatus” of “any size” to display or transmit closed captioning, video description and emergency information to persons who are blind or visually impaired. The revision is significant, in that the CVAA only requires compliance “if technically feasible” (there was no such condition under prior Section 303(u)), and it removes the statutory exception for an apparatus with a television screen size of less than 13 inches, instead requiring such apparatus to comply only if “achievable.”

Much of the discussion in the NPRM concerning Section 203 of the CVAA addresses interpretations of statutory terms, such as “apparatus,” which the NPRM has assumed to mean “all hardware that is used in receiving or playing back video programming.” The NPRM also seeks comment on when it is “technically feasible” for an apparatus to comply with Section 203, as well as how to interpret the statutory exceptions under Section 203, such as the meaning of “achievable” (for television screens less than 13 inches), and the scope of “display-only video monitors with no playback capability,” another class of apparatus (basically computer monitors) exempt from Section 203 compliance.

Under Section 203 of the CVAA, the Commission may also waive the requirements for an apparatus (or class of apparatus) that is “primarily designed for activities other than receiving or playing back video programming” or multi-purpose equipment whose “essential utility” is other than video programming. The Commission has requested comments as to the meaning and scope of such hardware, including where video gaming consoles, cellular telephones and tablet devices, which are increasingly used to view video programming, fit into these criteria.

Other Section 203 issues addressed in the NPRM include how to codify the pass-through requirement (subject to an achievable standard) for recording apparatus; regulating interconnection mechanisms and standards to carry closed captions from a source device to consumer equipment, whether over cable or possibly even WiFi and other home networks; performance and display standards as recommended by the VPAAC report; and whether a standard (like SMPTE-TT) is necessary to facilitate compliance with Section 203 of the CVAA.

While final rules for video description and emergency information capability are not required until 18 months after the VPAAC’s report on video description and emergency

information (not yet released), revised rules for the closed captioning capabilities follow the same schedule as the IP video closed captioning proceeding (January 2012). As with the IP video closed captioning rules, compliance with the revised "apparatus" rules will not be required immediately upon the effective date of the final revised rule, but the VPAAC report did not recommend a compliance schedule. However, some members had suggested a compliance date no later than 24 months from when the rules are published in the Federal Register. The Commission seeks comment on whether 24 months is appropriate, or whether Section 203 compliance should follow the 6-18 month compliance schedule for IP video closed captioning.

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The IP video closed captioning NPRM raises a variety of technical and otherwise complex issues that the FCC must resolve by mid-January 2012, a very tight timeframe. As noted, comments are due on the NPRM **20 days** after it appears in the Federal Register, and replies are due just **10 days** after the initial comment deadline. If any of these issues may affect your operations, you might consider filing comments. For more information about this proceeding, or for assistance in filing, please contact any of the Communications attorneys at DWT.

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