

FCC Adopts Closed Captioning Rules for Online Video Programming

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By Maria T. Browne, Brendan Holland, Brian J. Hurh, and Ronald G. London

The Federal Communications Commission (FCC) has adopted a Report and Order (R&O) establishing rules for the closed captioning of video programming delivered via Internet protocol (i.e., IP video), as required by 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 compelled the FCC to adopt rules that require captioning of IP video programming that was published or exhibited with captions on TV after the effective date of such regulations (covered IP video).

The new rules govern 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 programming available online. The rules also impose new requirements on hardware (such as set-top boxes, PCs, smartphones DVD players, Blu-ray and tablets) designed to receive or play back video programming transmitted simultaneously with sound and integrated software. With rules that are so wide-reaching, everyone involved in these businesses needs to understand what the new rules entail.

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 rules adopted by the FCC include technical standards, protocols, and procedures 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.

Summary

Consistent with this mandate, the FCC has adopted rules that:

- Extend to all full-length video programming previously distributed on television with captions to require that captioning appears when such programming is displayed online via IP;
- Establish a two-year transition for uncaptioned, archival IP-delivered content that is shown on TV with captions after the new rules' effective date;
- Require video programming owners to send caption files for covered IP video to video programming distributors and video programming providers along with the program files, or alternatively, inform the distributors—using a mechanism agreed to by the parties—that captions are not required for a particular program;
- 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 covered 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:
 - Programming that is prerecorded and unedited for online distribution, when subject to the new requirements, must be captioned within 6 months of the rules' effective date;
 - Programming that is aired live or “near-live” on TV, when subject to the new requirements, must be captioned within 12 months of the rules' effective date;

- Programming that is prerecorded and edited for online distribution, when subject to the new requirements, must be captioned within 18 months of the rules' effective date;
- Adopt the Society of Motion Picture and Television Engineers (SMPTE) Timed Text format (SMPTE ST 2052-1:2010: "Time Text Format (SMPTE-TT)" 2010 as a safe-harbor interchange and delivery format, but stop short of requiring all covered entities to use this standard;
- Decline to adopt categorical exemptions other than that mandated by the CVAA (i.e., consumer generated programming, which is statutorily exempt);
- 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;
- Decline to adopt specific forfeiture amounts, opting instead to penalize violations based upon the facts and circumstances of each case;
- Permit entities to comply with the new requirements by alternate means; and
- Impose requirements for devices subject to the closed captioning requirements.

Further details regarding these obligations 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 has defined VPDs and VPPs identically, to include any entity that makes video programming available directly to end users via distribution methods that use Internet protocol. The FCC clarified, however, that VPDs/VPPs generally do not include Internet service providers (ISPs) from which end users simply receive Internet access. Nor do the video IP rules change the TV closed captioning rules currently applicable to broadcasters and MVPDs. Consequently, the IP video captioning rules do not apply to (among other things) traditional managed video services that MVPDs provide to their MVPD customers as part of their MVPD service, regardless of the transmission protocol used, as those services are already subject to the TV captioning rules.

VPO/VPD Obligations. VPOs are defined as persons or entities that either (1) license the video programming to a VPD or VPP that makes the programming available directly to end users via IP delivery, or (2) itself acts as the distributor or provider and also possesses the right to license the video programming to a VPD or VPP that makes the programming available directly to end users via IP delivery. This definition acknowledges that multiple copyright owners may possess particular rights in a single piece of video programming, and ensures that a single entity is responsible for fulfilling the VPO's responsibilities. The definition is intended to include entities that have the right to license IP distribution of programming to others, but make the programming available through their own websites, as well as entities that license others to distribute the programming to end users.

Under the new rules, VPOs are required to send program files to VPDs with all required captions. This regulatory scheme differs from the TV captioning rules, which place legal responsibility on programming distributors (MVPDs), which then contractually obligate program producers to include captions. VPDs, in turn, are obligated to "render or pass through" captions, which includes ensuring that any application, plug-in or device that the VPD provides to the consumer is capable of rendering or passing through closed captions. For example, a VPD providing an application that consumers can download on their smartphones must be capable of rendering or passing through captions. In contrast, where a VPD reasonably relies on the captioning display functionality on a device over which it has no control, it has no liability where the device fails or operates improperly.

Covered Programming, Exemptions. The R&O establishes that the IP video captioning requirements apply only to "full-length programming," defined as video programming that appears on TV and is

distributed to end users, substantially in its entirety, via IP. The FCC has excluded outtakes and video clips, as well as IP-delivered content that aired on TV only in another country, and not in the U.S. Video clips, defined as excerpts of full-length video programming, are exempted regardless of length, so long as they are not substantially all of a full-length program or are a full length program simply broken into segments for easier posting/downloading online. Outtakes, or content not used in an edited version of video programming shown on television, are similarly not subject to the rules.

“Consumer generated media,” which is defined as “content created and made available by consumers to online websites and services on the Internet, including video, audio, and multimedia content,” is statutorily exempt from the class of covered IP video. If, however, consumer-generated content is shown on television as part of a captioned full-length program, which a VPD then distributes via IP, then the IP version of the captioned full-length program must include captions.

Conversely, the R&O does not adopt any “categorical” exceptions like those found in the TV captioning rules, such as for programming in languages other than English or Spanish, or for PSAs and other interstitial content. Rather, if television programming is not captioned pursuant to an existing exemption, it need not be captioned when delivered via IP. Programming that appears on TV with captions after the effective date of the IP captioning rules will, however, be subject to the rules, even if the programming was exempt from the TV captioning requirements but was nevertheless captioned voluntarily.

Captioning Standards. The new rules require that IP video captioning be of at least the same quality as TV captions and have the same user tools, which under existing equipment rules relating to captioning on TV, already require controls, such as the ability to change text color, opacity, size, font, background color and opacity, character edge attributes, and window color. “Quality” evaluations also will include such factors as completeness, placement, accuracy, and timing. VPDs/VPPs are not required to improve caption quality, but must ensure that 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 rules permit them to do so). The rules will not hold VPDs or VPOs responsible for quality issues outside their control such as broadband connection speeds or limitations of a particular apparatus. Beyond that, the FCC declined to consider proposals that go beyond implementation of the specific requirements of the CVAA, including other captioning quality issues that may be pertinent to both TV and IP video, which the Commission noted are “linked” and are the focus of an open proceeding on the quality of captions on TV.

Schedule of Deadlines for Compliance

The rules impose a staggered schedule of deadlines for captioning IP video, as follows:

- Programming that is “prerecorded” and not “edited for Internet distribution” must comply within 6 months after the effective date of the rules;
- “Live” and “near live” programming must comply within 12 months;
- Programming that is “prerecorded” and “edited for Internet distribution” must comply within 18 months.

The R&O encourages VPOs and VPDs to make captioned programming available in advance of these deadlines to the extent they are able to do so.

Definitions. The rules define “live programming” as video programming that is shown on television “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” is that which is performed and recorded less than 24 hours before the time it first airs on TV. The FCC clarified that “live” programming means the performance occurs substantially simultaneously with airing *on television*, not necessarily with

IP distribution. It also clarified that programming, such as talk shows performed earlier the same day they air, and thus are “near live,” still qualify as such even if there are segments in the show(s) that are performed and recorded more than 24 hours prior to airing on TV.

Building off these definitions, “prerecorded programming” is all other programming not meeting the definitions of “live” or “near-live,” while “edited for Internet distribution” encompasses programming that is substantially edited prior to Internet distribution. Such “editing” includes deletion of whole scenes or modification of the score from the televised version; simple changes to the number or duration of ads do not qualify as editing.

Archival Programming. With respect to the captioning of archival content, the R&O adopts a two year window during which VPOs may voluntarily (but are not required to) caption archival content—content already available online without captions, but that re-airs on TV with captions. After the two-year window expires, VPOs must then provide VPDs with captioned versions of archival programs within 45 days of when the program is re-aired on TV. Starting three years after the effective date of the rules, the deadline for compliance will drop to 30 days, and after four years, the VPD must update its program file to enable the rendering or pass through of captions within 15 days.

The rules do not prescribe a particular mechanism for tracking or otherwise reporting to VPDs which programs have aired on TV (and/or when). Rather, VPOs and VPDs may mutually agree to any mechanism they wish to manage this process, so long as there is some explanation provided to VPDs as to why captioning is not required for certain programs (e.g., it never aired on TV or it aired on TV without captions due to an exemption). The mechanism agreed upon by the parties must provide adequate information to enable the VPD to identify programming subject to IP captioning requirements on an ongoing basis. VPOs also must provide updated information to VPDs concerning uncaptioned, archival IP-delivered programs pursuant to whatever mechanism the parties agree to use in order for the VPDs to be able to rely on that mechanism in good faith.

While the FCC does not mandate a “certification requirement” to support identification of programming as not requiring captions, the new rules do allow parties to use certifications as one possible mechanism. If a certification is used it must be retained (and potentially produced to the FCC) for one year after the programming is no longer available to end users via IP delivery. If a captioning problem occurs where the VPO and VPD have failed to agree upon an adequate mechanism, both parties may be held responsible by the FCC.

Technical Standards and Informational Issues

The FCC adopted SMPTE-TT as a “safe harbor interchange and delivery format” in order to minimize the need for VPOs to author multiple standards and potentially re-caption programming. Thus, if a VPO provides captions to a VPD using SMPTE-TT, the VPO has satisfied its obligation to deliver captions to the VPD in an accessible format—but it is not a mandated standard. Under the rules, parties may agree to use something other than SMPTE-TT, thus allowing negotiations between VPOs and VPDs/VPPs to reach mutually agreeable solutions. To use a standard different from SMPTE-TT, parties do not need to first request FCC approval, but can simply agree to use that other standard.

New and Adapted Procedures

VPDs/VPPs and VPOs may petition the FCC for exemptions from the captioning obligations in those cases where compliance would be “economically burdensome,” meaning significant difficulty or expense. The particular program is exempt while the petition is pending. The procedure is consistent with the TV captioning rules and the recently adopted Video Description rules. The factors the Commission will consider 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. In addition, insofar as the CVAA provides that entities may meet the IP video captioning requirements through "alternate means than those prescribed by [FCC] regulations," the R&O indicates the Commission will allow such alternate means based on specific requests from parties subject to the IP captioning rules, rather than identifying now what may constitute permissible "alternate means."

The Order also adopts complaint procedures for alleged violations of the IP video captioning rules that are analogous to the TV closed captioning complaint process. Complaints may be made either to the VPD or the FCC. To facilitate complaints directly made to the VPD, the rules require that VPDs/VPPs make contact information available to consumers, just as broadcasters and cable/satellite providers are required to do under current rules. The FCC expects VPDs to "prominently display" such contact information "in a location that is conspicuous" and "in a way that is accessible to all end users of their services."

De minimis failures to comply shall not be treated as a violation of the regulations. Rather than specifying particular criteria that will be applied in making a *de minimis* determination, the FCC will consider any evidence about the particular circumstances and whether the lack of captioning was reasonable, including the type of failure, the reasons for it, whether it was one-time or ongoing, and how quickly it was remedied.

"Apparatus" Issues

Section 203 of the CVAA required the FCC to promulgate rules that would require "apparatus designed to receive or play back video programming transmitted simultaneously with sound...and us[ing] a picture screen of any size be equipped with closed caption decoder circuitry or capability designed to display closed-captioned video programming." The FCC's new "digital apparatus" rules adopt a broad interpretation of "apparatus" to cover both hardware (the device itself) and software (the embedded video player), but only such software installed prior to sale or required by the manufacturer to be installed by the consumer. Third-party video players installed by the consumer, but not required by the manufacturer to enable video playback, are not covered. Covered devices can include those with or without screens, and those that receive, record and/or playback video programming. Consequently, a wide range of devices – cable set-top boxes, televisions, PCs, tablets, and smartphones—as well as removable video play back devices like DVD and Blu-ray players, are covered. Recording devices, in particular, must enable the rendering or pass-through of closed captions.

Scope and Exceptions. All covered devices—regardless of screen size—must comply "if technically feasible," which means physically or technically possible. The FCC noted that, in general, if it is technically feasible to include a video player in an apparatus, it should be technically feasible to include closed captioning functionality as well. There are, however, some limitations to the rules:

- Unlike under the legacy captioning rules for analog and digital receivers, "digital apparatus" with screen sizes less than 13 inches must comply, however, manufacturers of such devices may petition the FCC for a waiver demonstrating that compliance is not "achievable." "Achievable" is defined as, "with reasonable effort or expense, as determined by the Commission," and is equally based on four factors that generally consider the nature and cost of compliance, the technical and economic impact on the manufacturer's operations, the manufacturer's operations, and the accessibility of the manufacturer's other offerings.
- Manufacturers may petition the Commission for a waiver demonstrating that the apparatus in question is "primarily designed" for activities other than receiving or playing back video programming. The Commission thus rejected requests for a blanket waiver for smartphones, specifically, and further held that, to the extent a device is built with a video player, it would be reasonable to conclude that it is covered.

- Professional commercial equipment (e.g., movie theater projectors) and display-only monitors with no playback capability are exempt from the rules.

Technical Compliance. Regarding the technical aspects of the rule, the FCC adopted the VPAAC's recommended "presentation format" for closed captioning, as well as VPAAC's other recommended technical requirements for character font, color, opacity, size, and edge attributes; caption background, opacity, and color; language; and preview/setting retention. Devices that implement the safe harbor SMPTE-TT standard, discussed earlier, will be deemed in compliance with respect to the functionality in these requirements.

Interconnection/Video Outputs. The CVAA also required "interconnection mechanisms," or video outputs, of a covered apparatus to convey from a "source device" to the "consumer equipment" information necessary to "permit or render the display of closed captioning." The final rules clarify that manufacturers must implement closed captioning on all video outputs of a covered apparatus. However, the FCC interpreted the term "permit" to mean that closed captions may be rendered at the source device and carried as "open" captions to the display device, thus allowing HDMI connections, in particular, to satisfy the rules.

Effective Date. Covered apparatus must comply with the new rules within two years from the effective date of the rules, though the FCC expects manufacturers to take accessibility into consideration as early as possible in the design process for new and existing devices. The legacy rules for analog and digital receivers will move from Part 15 to Sections 79.101 and 79.102 of the Commission's rules, respectively, and the new "digital apparatus" rules may be found in new Section 79.103.

For more information about these new rules please contact any of the Communications attorneys at DWT.

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