

January 31, 2012

## FCC Adopts Closed Captioning Rules for IP-Delivered Programming

In accordance with Congress' direction in the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"), the Federal Communications Commission ("FCC") has released a Report and Order ("Order") that adopts rules governing the closed captioning of programming delivered via Internet protocol ("IP").

In late September of last year, the FCC released a Notice of Proposed Rulemaking ("NPRM") proposing a set of rules relating to captioning of IP-delivered programming to apply to "video programming distributors" ("VPDs"), "video programming providers" ("VPPs"), "video programming owners" ("VPOs") and device manufacturers ([See our Client Advisory dated September 23, 2011](#)). The FCC largely adopted the rules as proposed but made some notable changes. The rules adopted in the Order will roll out over a period of time to give affected parties an opportunity to change their practices to come into compliance.

**Rules for VPOs, VPPs and VPDs.** The Order defines VPOs as a person or entity that has the right to license video programming to a VPD or VPP and either licenses such programming to a VPD or VPP or acts itself as a VPD or VPP. The VPO will often, but not always, be the copyright holder for the programming. VPOs will be responsible for sending program files to VPDs and VPPs with captions that have at least the same quality as the television captions provided for such programming. Captions that conform to the Society of Motion Picture and Television Engineers Time Text format will be considered automatically in compliance.

With respect to VPDs and VPPs, the Order adopts the NPRM's proposal to use the same definition for both entities. The Order defines VPDs/VPPs as any person or entity that makes video programming available directly to an end user using IP distribution. Entities merely acting as Internet Service Providers ("ISPs"), providing access to IP-delivered video programming distributed by another entity, will not be considered VPDs/VPPs. Under the new rules,

VPDs/VPPs will be responsible for passing through all captions to the end user and maintaining the quality of the captions transmitted by the VPO. If a VPD/VPP uses an application, device or plug-in to deliver the video, the VPD/VPP is responsible for making sure such a delivery mechanism is capable of passing through the captioning. The VPD/VPP is not responsible for passing through captioning to a third party application, device or plug-in that is used by a consumer but not at the direction of the VPD/VPP. VPDs/VPPs must also make available to consumers contact information for the person responsible for handling the receipt of IP closed captioned complaints.

Going forward, all non-exempt programming that is exhibited on television (either on a broadcast or cable channel) in the United States must be captioned when delivered over IP, in accordance with the following compliance schedule:

- Prerecorded programming that does not undergo any special editing for Internet distribution (modifications to and/or removal of advertisements does not constitute such editing) must be captioned six months after the Order is published in the Federal Register.
- Live programming (programming shown substantially simultaneously with its performance) and near-live programming (programming that is performed and recorded less than 24 hours prior to its being televised) must be captioned twelve months after the Order is published in the Federal Register.
- Prerecording programming that undergoes specialized editing for Internet

distribution must be captioned 18 months after the Order is published in the Federal Register.

The above schedule will apply whenever the VPD/VPP uses software to enable the rendering or pass through of captions. In the event the VPD/VPP uses hardware to perform this function, the VPD must be in compliance by January 1, 2014 with respect to all programming.

IP-delivered programming that previously aired on television prior to the Order's adoption that does not currently contain captions for IP delivery need not be captioned unless such programming is shown on television again after the Order has been released. Such programming then must contain captions when IP-delivered under the following schedule:

- During the first two years after the Order is published in the Federal Register, the programming must be captioned for IP-delivery within 45 days of the program airing on television.
- During the third year after the Order is published in the Federal Register, the programming must be captioned for IP-delivery within 30 days of the program airing on television.
- During and after the fourth year following publication of the Order in the Federal Register, the programming must be captioned for IP-delivery within 15 days of the program airing on television.

VPOs and VPDs/VPPs will be responsible for coordinating to develop a mechanism to ensure that all entities are made aware on an ongoing basis when programming becomes newly subject to the IP-delivered captioning rules. The NPRM had suggested a certification process, but the Order does not mandate certification. In the event that a VPD/VPP relies on a VPO certification that programming need not be captioned, such a certification will only be valid if it explains why captioning is not required and the VPD/VPP can produce the certification to the FCC in the event of a complaint.

**Exemptions and exceptions.** The IP captioning rules only apply to full-length programming, not to clips or outtakes. An "outtake" is defined as content that is not shown in the edited version of the programming as shown on television, while a "video clip" is an excerpt of a larger video presentation. Full-length programs that are divided into multiple parts for IP delivery are not considered video clips and must be captioned.

"Consumer generated media" – video, audio and multimedia content (such as YouTube videos) that is created and made available by members of the public – is also not subject to the rules. However, if consumer generated media is used as part of a larger program that is subject to the IP captioning rules (for instance a news story that incorporates a YouTube video), the consumer generated media must be captioned when the larger program is IP-delivered.

Programming that is subject to one of the categorical exemptions governing the television closed captioning rules is also exempt from the IP captioning rules. However, if the programming that would otherwise be exempt is captioned voluntarily when aired on television, it must be captioned when IP-delivered.

The new rules codify the CVAA's provision granting an exemption to the IP captioning requirement to a VPD/VPP or VPO that can show compliance would be "economically burdensome." Such claims will be evaluated based upon: 1) the nature and costs of compliance; 2) the "impact" of compliance on the provider or programmer's operations; 3) the financial resources of the provider or programmer; and 4) the "type of operations" of the provider or programmer. As is the case with similar requests, the FCC will require the petitioner to make a sufficient showing of burden. Such petitions will be placed on public notice with the opportunity for public comment or oppositions. While the petition is pending, the petitioning party will be exempt from the captioning rules with respect to the specific programming that is the subject of the petition.

In addition, so called "de minimis" violations of the new rules will not be treated by the FCC as violations, though the FCC declined in the Order or new rules to define the term de minimis. Rather, the FCC indicated it would evaluate such claims on a case-by-case basis.

**Device Applicability.** Starting January 1, 2014 all digital apparatus designed to receive or play back video programming transmitted simultaneously with sound that are manufactured in or imported into the United States must be equipped with built-in closed caption decoder circuitry or capability to display IP-delivered closed captioning. On the same date, recording devices designed to record video programming transmitted simultaneously with sound that are manufactured in or imported into the United States must enable the rendering or pass through of IP-delivered closed captioning, the display of which can be activated or deactivated by the user.

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Display-only monitors and equipment that would otherwise meet these parameters but that is typically used as professional or commercial equipment are not subject to the above requirements. Manufacturers of devices with screens less than 13 inches can petition for a full or partial exemption of the rules' requirements if they can demonstrate that compliance cannot be achieved with reasonable effort or expense. Manufacturers can also petition for a full or partial waiver if they can show the apparatus is: 1) primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound; or 2) designed for multiple purposes with the apparatus' essential utility something other than receiving or playing back video programming. Smart phones or tablets would not qualify for such a waiver.

**Enforcement.** The Order adopts a consumer driven enforcement scheme, giving members of the public the option to file complaints regarding possible violations of the IP closed captioning rules with the Commission or directly with the VPD/VPP. Complaints must be filed within 60

days after the date on which the complainant experienced an issue with IP-delivered captioning. Complaints filed with the Commission will be forwarded as necessary to the VPD/VPP and/or VPO for response, which must be received within 30 days after the party receives the complaint. Complaints filed directly with the VPD/VPP must be answered within 30 days, and the complainant will have 30 days from the time the VPD/VPP has to respond to file a complaint with the FCC.

VPDs/VPPs and/or VPOs responding to complaints will be required to file records or documentation that prove compliance with the IP captioning rules. The Order does not set a deadline for the FCC to act on complaints nor does it set a standard penalty for a violation, leaving the FCC with the ability to adjudicate complaints and adopt penalties on a case-by-case basis at its discretion. The FCC's Consumer and Governmental Affairs Bureau will release a consumer advisory at a later date regarding procedures for complaints against device manufacturers.

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