



Virginia Association of Broadcasters Legal Review



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IMPORTANT

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FCC ADOPTS RULES FOR INTERNET CLOSED CAPTIONING

The FCC recently adopted regulations to require closed captioning of certain video programming delivered using Internet Protocol, as required by the Twenty-First Century Communications and Video Accessibility Act. The new rules will affect virtually all television stations who stream local newscasts on their websites or otherwise repurpose broadcast content on the web. As expected, stations will soon be required to display closed captioning for full-length programming delivered over the Internet if that programming was first closed captioned on a broadcast platform after the effective date of the new rules.

The rules will take effect on a staggered schedule (discussed in greater detail below) after their publication in the *Federal Register*, which has not yet occurred. Stations should begin now to evaluate their hardware, software, and workflow processes to determine what steps (and budgetary adjustments) will need to be taken to ensure timely compliance.

What follows is a more detailed discussion of the new rules.

I. Obligations and Exemptions

The new rules impose different obligations on different entities in the chain of programming distribution. The new rules also exempt certain material from the general obligations. The threshold trigger for the new rules is that a station uploads content to the

Internet that was originally broadcast on television with closed captioning. Material that was (1) not broadcast on television or (2) broadcast on television without closed captions is not subject to these new requirements. Here is a discussion of the most salient portions of the FCC's new rules.

* *Program Owners And Distributors.* The Commission's new rules refer to affected entities in terms of "video programming owners," "video programming distributors," and "video programming providers." The rules define a "video programming owner" ("VPO") as, essentially, the person or entity who licenses or has the right to license the video programming for distribution via Internet Protocol. The FCC has combined the statutory terms "video programming distributor" and "video programming provider" into one category—video programming distributor, or "VPD." A VPD is defined as "any person that makes available directly to the end user video programming through a distribution method that uses Internet protocol." A station may be a VPO and a VPD for purposes of the rules, depending on the station's services (when, for example, the station uploads its local newscast to the Internet after broadcast), or sometimes a station may only function as a distributor of the programming (when, for example, the station uploads another programmer's material to the station's website).

* *Requirements To Provide And Pass Through Captions.* The rules will require VPOs to send program files to distributors with all required captions, which the distributor will be required to pass through to the end user. According to the FCC, these obligations will ultimately cause all video programming first captioned on television to have captions on the web unless the programming is otherwise exempted by the rules. When a distributor receives a program file with the required captions, it will in turn be required to include those captions at the time it makes the program file available to end users over the Internet. Notably, stations may be responsible for ensuring that a consumer is able to view the captions through a particular video player or application when it provides the programming using that particular player or application or requires that a consumer download a particular player or application to view the material.

* *Requirement That VPOs Inform Distributors When Captions Are Not Required.* When captions are not required by the FCC's rules because the programming has not been aired on television with captions, VPOs must inform distributors that captions are not required for the particular program. In this way, the FCC places the burden of tracking whether captions are required on the VPO. The FCC has declined to adopt the alternative it previously proposed in this proceeding, which was to impose a certification requirement on VPOs for delivery of programs without captioning. Instead, the parties must agree to a mutually agreeable "mechanism" for disclosure by VPOs to distributors that the program does not require captions. The FCC interprets the word "mechanism" to mean any process, method, or system agreed upon between a VPO and a VPD that makes available to the VPD sufficient information to determine whether captioning is required, such as a database or other process identified by private contract.

* *Exemption For Video Clips And Outtakes.* As required by the federal statute, the Commission's new rules exempt "video clips" and "outtakes" from the online closed captioning requirements. "Video clip" is defined in the rules as an "excerpt of full-length programming." "Outtakes" are defined as "content that is not used in an edited version of video programming shown on television." In other words, the rules will require that when all or "substantially all" of a captioned full-length program is distributed over the Internet, then it must be captioned. The FCC also will require that when a full-length television program is posted online in multiple segments, each segment of the program must still be captioned. (By doing so, the FCC will prevent stations from making an "end-run" around the rules by breaking up full-length programs into segments.) Moreover, the FCC warns that where there is clear evidence that an entity has developed a pattern of attempting to use video clips to evade its captioning obligations, the FCC may find a violation of the rules.

* *Quality Standards.* The new rules demand that VPOs provide captions of at least the same quality as the television captions for the same programming. In turn, VPDs are required to maintain the quality of the captions that they pass through. Under the rules, maintaining quality means maintaining the completeness, placement, accuracy, and timing of the captions. However, neither VPOs nor VPDs will be deemed responsible, for compliance purposes, for quality issues outside of their control, such as deterioration of captioning quality due to broadband connection speeds or other constraints of the apparatus consumers choose to use to view video programming.

* *Exemptions For Economic Burden.* Under the new rules, a VPO will be permitted to petition for a full or partial exemption from the rules based upon a showing that the requirements would be "economically burdensome". The petition process will mirror the FCC's current procedures for "undue burden" exemptions in the television closed captioning context, where the FCC considers several factors including (1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.

* *Foreign Programming.* The requirements only apply to video programming that was published or exhibited on television in the United States with captions. In other words, foreign television programming—even if closed captioned—is excluded from the scope of the FCC's rules.

* *De Minimis Exception.* The new rules indicate that the FCC will not treat a *de minimis* failure to comply with the new rules as a violation. This is similar to the television closed captioning rules.

* *Complaints and Station Contact Information.* The FCC's rules establish procedures for complaints that mirror the procedures in the television closed captioning context. VPDs will also be required to make contact information available to consumers

to submit Internet-related closed captioning complaints, just as they are in the television closed captioning context. The contact information should include the name of a person with primary responsibility for Internet closed captioning issues and who can ensure compliance with the rules, that person's title or office, telephone number, fax number, postal mailing address, and e-mail address. The FCC expects VPDs to "prominently display" the contact information in a way that is accessible to all end users of their services, such as a conspicuously posted notice on the station's website.

* *No New Categorical Exemptions.* Unlike the television closed captioning rules which categorically exempt certain, limited programming from the general closed captioning requirements, these new rules do not contain additional categorical exemptions. Instead, they effectively "piggyback" on the television closed captioning exemptions—if a program was not required to be closed captioned when broadcast on television, it will not be required to be closed captioned when subsequently posted on the Internet (unless it was, in fact, actually captioned when broadcast on television).

II. Schedule for Compliance

The FCC's schedule for implementation of the rules will be triggered by publication of the rules in the *Federal Register*, which has not yet occurred. Once published, the rules become effective, and the requirements will be phased in according to the following schedule:

* *6 Months.* All prerecorded programming that is subject to the new requirements but is not edited for Internet distribution must be captioned by 6 months after the rules become effective if it is first shown on television with captions.

* *12 Months.* All "live" and "near-live" programming that is subject to the new requirements must be captioned by 1 year after the rules become effective if it is first shown on television with captions. For purposes of the rules, "live programming" is defined as "video programming that is shown on television substantially simultaneously with its performance," and "near live" is defined as "video programming that is performed and recorded less than 24 hours prior to the time that it was first aired on television."

* *18 Months.* All prerecorded programming that is edited for Internet distribution and is subject to the new requirements must be captioned by 18 months after the rules become effective if it is first shown on television with captions.

* *Progressive Deadline For Archived Material.* Beginning 2 years from the effective date of the rules, all archived programming that is subject to the new requirements and archived in the distributor's library before it is shown on television with captions must be captioned within 45 days after it is shown on television with captions.

The deadline will accelerate to 30 days beginning 3 years from the effective date of the rules, and to 15 days beginning 4 years from the effective date of the rules.

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If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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