

VIEWER DISABILITY AND TELEVISION ACCESSIBILITY: CLOSED-CAPTIONING AND VIDEO DESCRIPTION REQUIREMENTS IN TODAY'S TELEVISION ENVIRONMENT

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INTRODUCTION

Thanks to the proliferation of television delivery platforms and programming options, today's viewers can access television content through an array of providers and streaming services, watch shows whenever it suits their schedule, and do so on a variety of screens.

For most viewers, this has translated to greater access to television programming, but for those with aural or visual impairments, it has not.¹ Features such as closed-captioning and descriptive narration that are needed by aurally and visually-impaired individuals to enjoy television programming are inconsistent across programs, delivery platforms, and service providers.² Indeed, the circumstances under which and extent to which captioning and video description are legally required depend on a myriad of factors, subject to dozens of exceptions. This has caused confusion within the media industry and claims by viewers that the lack of accessibility features violates telecommunications laws, The Americans With Disabilities Act, and Federal Communication Commission Regulations.³

For example, a 2015 class-action lawsuit against Sony, Fox, Disney, Paramount, Warner Bros., Netflix and Universal Studios alleged that the refusal to caption song lyrics in television shows and movies discriminated against people with hearing impairments.⁴ It further contended that labeling movies and shows (including *Captain America*, *The Godfather*, *X-Men*, and *House of Cards*) as captioned or subtitled was a false or deceptive advertising practice intended to attract deaf or hard of hearing consumers.⁵

¹Federal Communications Commission, *Closed Captioning on Television*, FED. COMMUNICATIONS COMMISSION GUIDE, fcc.gov/consumer-governmental-affair-bureau/closedcaption_FCC%20rules.pdf. Twenty-four million Americans, including individuals with auditory disabilities and the elderly, suffer enough hearing loss that they cannot fully understand television audio. *Id.*; WGHB, Captioning, *Captioning FAQs*, <http://main.wgbh.org/wgbh/pages/mag/services/captioning/faq/>; see also ASHA Leader, *Suit Asks for Closed-Captioning of Songs in Movies, TV Shows*, 20, (Jan. 1, 2016) (approximately 10% of the population is deaf or hard of hearing).

² FCC Consumer Guide, *supra* note 1.

³ See *infra*.

⁴ *Anthony v. Buena Vista Home Entertainment*, Case 2:15-cv-09593-SVW-JPR (C.D. Cal. 2016); Eric Gardner, *Hollywood Studios Beat Lawsuit over Non-captioning of Song Lyrics in Movies and Television* Sept. 29, 2016, <http://www.hollywoodreporter.com/thr-esq/hollywood-studios-beat-lawsuit-captioning-933845>; ASHA Leader, *supra* note 1, at 10.

⁵ ASHA Leader, *supra* note 1, at 10.

John Stanton of the Alexander Graham Bell Association for the Deaf and Hard of Hearing has said that studios try to avoid captioning by claiming that the Copyright Act limits their ability to unilaterally caption song lyrics, but "Courts have made clear that reproducing otherwise copyrighted material for the purpose of making the material accessible to people with disabilities

In 2014, the Greater Los Angeles Agency on Deafness sued CNN for violating the civil rights of disabled people, because CNN's website did not video-describe and caption news and video clips.⁶ Disability advocates have also asserted that antidiscrimination laws and Federal Communications Commission regulations require streaming services and online video hubs such as Netflix⁷, Scribd,⁸ VuDu,⁹ and YouTube to video-describe content.¹⁰

Although the question of whether television (be it the medium or media) must include closed-captioning and video description appears straightforward, the answer is not. No single statute catalogs the rules of disability-accessibility or the media forms and platforms that must be accessible. Instead, the answers are gleaned from a variety of laws, federal regulations, and appellate decisions. Moreover, the coverage, requirements, and exemptions from these rules differ depending on the characteristics of the media, the content provider, the delivery platform, and the viewer.¹¹ Yet, from the perspective of viewers, "watching TV" (or the impediments thereto) is foremost about a type of content on a screen. Consequently, the foci of these already complex laws and regulations, combined with the fact that they lag behind technological innovations in "watching TV," are additional hurdles to comprehending and effectively implementing them.

is not a violation of the federal Copyright Act." John F. Stanton, *Why Movie and Television Producers Should Stop Using Copyright as an Excuse Not to Caption Song Lyrics*, 22 U.C.L.A. ENT. L. REV. 157, 158-58 (2015). Stanton's assertion appears to go too far: Although courts have held that captioning and similar transcriptions for disabled individuals who fall within the protection of the ADA or The Rehabilitation Act usually do not infringe, the Copyright Act does not include an exception for improving accessibility; Instead, the 1996 Chafee Amendment allows enumerated entities to convert certain copyrighted works into specialized formats, such as Braille, for visually-impaired individuals, but does not mention the conversion of copyrighted works for individuals with aural disabilities. 17 U.S.C. § 121.

⁶ *Greater Los Angeles Agency on Deafness v. CNN*, 742 F.3d 414 (9th Cir. 2014).

The lawsuit alleged that this denied disabled individuals equal access to CNN.com's content and services, thereby, denying them their civil rights. *Id.* at 420.

⁷ *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012), *aff'd* 600 Fed. Appx. 508 (9th Cir. 2015); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 203 (D. Mass. 2012).

⁸ *Nat'l Fed'n of the Blind v. Scribd Inc.*, 2015 U.S. Dist. LEXIS 69440 (D. Vt., 2015).

⁹ Kristina M. Launey, *VUDU Agrees to Caption or Subtitle All Online Streaming Video Content in Settlement With NAD*, ADA TITLE III: NEWS AND INSIGHTS (Feb. 11, 2015), <http://www.adatitleiii.com/2015/02/vudu-agrees-to-caption-or-subtitle-all-online-streaming-video-content-in-settlement-with-nad/>.

¹⁰ Kimberlianne Podlas, *Website Accessibility and The Americans with Disabilities Act*, 19 J. Internet L. 3 (2015).

¹¹ "[I]n many cases similar provisions of different statutes are interpreted to impose similar requirements, there are circumstances in which similar provisions are applied differently because of the nature of the covered entity or activity, or because of distinctions between the statutes." 28 C.F.R. § 36.103 (2017), *at* http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm.

I. AUDIO-VISUAL ACCESSIBILITY

Understanding the legal obligations to make television programs and platforms disability-accessible requires understanding two key accessibility mechanisms: closed-captioning and video description, also called descriptive narration.

A. Closed-Captioning

Closed-captioning¹² makes television programming accessible to aurally-impaired viewers.¹³ Captions are on-screen text that relate key audio content, such as dialog, diegetic audio, audience reactions, and the presence of music.¹⁴ If needed to convey content, captions also indicate the tone and manner of speech.¹⁵

Captions can be “open” or “closed.”¹⁶ “Open captions” are shown on screen, and are visible to all viewers;¹⁷ “Closed captions” are encoded in the television signal, and are not visible unless turned on by the viewer.¹⁸ In the late 1970’s, television instituted closed-captions,¹⁹ and in 1976, the FCC reserved line 21 of the vertical blanking interval for their transmission.²⁰

12 Captioning debuted in 1948 in the film *America the Beautiful*, but was not used on American television until the 1970s. Joshua Robare, *Television for All: Increasing Television Accessibility for the Visually Impaired Through the FCC’s Ability to Regulate Video Description*, 63 FED. COMM. L. J. 553, 566 (2011). Yet, even captioned films were not widely available in the United States, until the early 1990s. John F. Waldo, *Captioning: A Long and Winding Road to an Obvious Destination*, 45 VAL. U. L. REV. 1033, 1039 (2011).

13 13 FCC Rcd. 3272 (1997), *recon. granted in part*, 13 FCC Rcd. 19973 (1998) (“1997 FCC Order”); *Closed Captioning for Digital Television (DTV)*, FCC, <https://www.fcc.gov/consumers/guides/closed-captioning-digital-television-dtv> (last updated Sept. 8, 2017).

14 29 F.C.C. Rcd. 2221, 2227 (2014) (hereinafter “2014 Report and Order”); 47 C.F.R. § 79.1(a)(2).

15 FCC Consumer Guide, *supra* note 1; *Captioning FAQ*, WGBH, <http://main.wgbh.org/wgbh/pages/mag/services/captioning/faq/> (last visited Mar. 12, 2018).

16 *Greater L.A. Agency on Deafness*, 742 F.3d at 419; 23 FCC Rcd. 16674, 16675 (2008) (“2008 Declaratory Ruling”).

17 2014 Report and Order, at 2227.

18 *Id.*; *Greater L.A. Agency on Deafness, Inc.*, 742 F.3d at 419; 2008 Declaratory Ruling, at 16674-16675; 11 FCC Rcd. 19214, 19223 (1996).

19 Robare, *supra* note 12, at 566; Sy Dubow, *The Television Decoder Circuitry Act – TV for All*, 64 TEMP. L. REV. 609, 610 (1991).

For a detailed history of the development of captioning methods and technologies, see Waldo, *supra* note 12, at 1039-41.

20 2014 Report and Order, at 2227; 47 C.F.R. § 73.682(a)(22)(i).

Captions on analog television were transmitted on one of the two dedicated channels available to broadcast alternative information, Robare, *supra* note 12, at 566-67, including subtitles. *FCC Consumer Advisory: Video Descriptions and the Digital Television Transition* (“*FCC Consumer Advisory*”), FCC, <http://www.fcc.gov/cgb/consumerfacts/dtvvideodescription.html> (last updated Sept. 8, 2017).

As broadcast transmissions became digital, the FCC implemented standards for caption decoding and display by digital tuners and receivers.²¹ Because digital (ATSC) television encodes in video three streams of audio – two are backward compatible “line 21” captions and one is a set of up to 63 additional caption streams (encoded in EIA-708 format) – there are dozens of audio channels on which to transmit captions (and in multiple languages)²² as well as descriptive narration and other audio information.²³

Television closed-captioning involves two main steps: scripting the captions and transmitting them (with the video) to viewers.²⁴ The process differs depending on the type of programming. Most live or near-live programming utilizes “Real time” or stenocaptioning.²⁵ In this method, a stenographer listens to the broadcast feed and transcribes audio in real time.²⁶ The transcription is added to the video signal, transmitted to the viewer, and appears on-screen within seconds.²⁷ Although stenocaptioning software sometimes mistranslates sound keystrokes as homonyms (such as “him” for “hymn”) or auto-expands keystrokes into incorrect words, it is relatively accurate.²⁸

An automated but less comprehensive method of captioning is ENT, the electronic newsroom technique. As its name implies, ENT is utilized in news and other programming that uses a teleprompter script. Software converts the teleprompter script into closed-caption text and this is broadcast contemporaneously. Because ENT captions are limited to the teleprompter script, however, they do not include any unscripted banter

²¹ 15 FCC Rcd. 16788 (2000) (“2000 DTV Order”); 27 FCC Rcd. 787, 792-94 (2012), *on recon.*, 27 FCC Rcd. at 842-843, 848 (2012) (“IP Captioning Order”); 47 C.F.R. § 79.102. In 2012, § 79.102(a)(3), was amended to include digital televisions 13 inches or smaller (if technically feasible and achievable), and, as of 2014, separately sold DTV tuners. 47 C.F.R. § 79.102(a)(3).

²² Robare, *supra* note 12, at 567-568. Digital transmissions also enable viewers to change the placement, font, and language of captions. *Id.* at 567.

²³ FCC Consumer Advisory: *Video Descriptions and the Digital Television Transition*, FCC, <http://www.fcc.gov/cgb/consumerfacts/dtvvideodescription.html> (last updated Sept. 8, 2017).

²⁴ 2014 Report and Order, at 2227.

²⁵ The National Captioning Institute created the technology for “Real time captioning” in the 1980s. *Captioning FAQ*, WBGH, <http://main.wgbh.org/wgbh/pages/mag/services/captioning/faq/> (last visited Mar. 12, 2018).

²⁶ *Id.*

Caption stenographers do not type individual letters on a standard keyboard, but in shorthand corresponding to sounds, on a specialized keyboard. Computer software then contemporaneously translates this sound stenograph into words. *Id.*

²⁷ 2014 Report and Order, at 2247-48; *Captioning Terms*, NAT’L CAPTIONING INST., <http://www.ncicap.org/viewer-resources/about-captioning/captioning-terms/> (last visited Mar. 13, 2018).

A variation, “roll-up” captions, are authored by a real-time stenographer or individual who repeats audio content into a computerized transcription system. *Id.*

²⁸ *Captioning FAQ*, WBGH, <http://main.wgbh.org/wgbh/pages/mag/services/captioning/faq/> (last visited Mar. 12, 2018); FCC Consumer Guide, *supra* note 1.

or live commentary.²⁹

If programming is pre-recorded or filmed from script, the process is more complex. A shooting script has a unique format and includes text that is not captioned, such as shot indicators, descriptions of visuals and movements, and cues. Consequently, software cannot accurately convert and reformat it into closed-captions, let alone automatically synchronize the captioned text to correspond with the audio track. In any event, to the extent that text can be translated into captions, the locked video seen by viewers is not an exact replica of the script. This means that captioning must wait until the episode's video and audio are finalized. At that point, dialog and key audio is transcribed, synched with the audio track, and saved as a digital caption file. That caption file is then transmitted with the video, and the viewer sees the captions and program as a unified whole.³⁰

B. Subtitles

Subtitles are another type of on-screen text, but they are not an accessibility feature.³¹

Instead, subtitles presume that viewers can hear but do not understand the dialog's language.³² Thus, subtitles are textual translations of foreign-language dialogue (such as *Deutschland 83*'s German), difficult to understand speech (like *Preacher*'s Eugene), or low-decibel dialog (such as that in surveillance video, reality television dialogue, or a hot-mic situation). Inasmuch as they convey audio dialogue as on-screen text, subtitles look like and function somewhat like captions, but they serve a different purpose.³³ (Indeed, subtitles do not relate sounds, tone of speech, or the presence of music.) Television subtitles are typically conveyed using secondary audio programming (SAP), which, like closed

²⁹ 2014 Report and Order, at 2266-68, 2330.

³⁰ Closed-captioning in movie theaters is accomplished differently. Because a film is projected onto a single screen seen by multiple patrons, theatres install systems that individuals use at their seats to access captions or audio services. Waldo, *supra* note 12, at 1040-41. The Rear Window Captioning System (created in 1997) is the best-known method. Patrons use a "reflector" panel (of flat translucent glass or plastic) mounted in front of their seat or in their cup holder. The theatre displays the captions (supplied separately in a digital file) on an LED board mounted on the rear wall of the theater, which reflects the captions to viewers. *Id.*; *Ball v. AMC Entm't, Inc.*, 315 F. Supp. 2d 120, 122-23 (D.C. Cir. 2004).

As screening a film in a theatre is neither television programming nor subject to FCC jurisdiction, captioning in movie theatres is not addressed in this article.

³¹ Stanton, *supra* note 5, at 163.

³² Robare, *supra* note 12, at 568.

³³ Throughout much of the world, the terms "subtitles" and "captions" are used interchangeably, if imprecisely. When English-language media are exported to other countries (and vice versa), their dialog must be translated into the native language. Often the most cost-effective and aesthetically sound method to do so is by adding subtitles (as opposed to dubbing).

captioning, works only when activated by the viewer.³⁴

C. Video Description

Video description, also known as descriptive narration or “audio description of video,” helps make television programming accessible to visually-impaired³⁵ viewers.³⁶ Using voice narration timed to fit pauses in the main audio track, video description relates key visual content, such as physical actions, settings, facial expressions, clothing, and text (e.g., notes, signage).³⁷ It is available on the secondary audio stream (SAP), and must be turned on by the viewer.³⁸

Unlike captioning, which transcribes existing content,³⁹ video description necessitates a new, creative work, to wit, the narration script.⁴⁰ To do so, a describer watches the program, decides what content to narrate (as well as what aesthetic information to note) and how, and crafts a video description script.⁴¹ Next, an actor voices that narration, using a tone appropriate to the program, genre, or scene, and at a speed and cadence timed to the natural silences of the audio.⁴² This vocal recording is synched and mixed with the original (existing) audio to create a full audio track (with description), and that separate file is made available on SAP.⁴³

³⁴ Robare, *supra* note 12, at 568.

³⁵ The Census Bureau estimates that 7,333,805 people are blind or visually impaired. *American Community Survey*, U.S. CENSUS BUREAU, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_B18103&prodType=table (last visited Mar. 13, 2018).

³⁶ 32 FCC Rcd. 5962 (2017) (“2017 Video Description”); 26 FCC Rcd. 11847, 11848 (2011) (“Video Description: Reinstatement Order”); see 47 C.F.R. § 79.3(a)(3).

Boston’s WGBH, a leader in television captioning, devised video description technology in 1990. 2005 *Ann. Rep. to Congress on The Individuals With Disabilities Education Act, Part D*, U.S. DEP’T OF EDUC., 51-52 (2007), <http://www2.ed.gov/about/reports/annual/osep/2005/part-d/idea-part-d-2005.pdf>.

³⁷ 2017 *Video Description*, at 11848, 11850-51..

³⁸ *FCC Consumer Advisory*, *supra* note 20; *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

³⁹ Stanton, *supra* note 5, at 163.

⁴⁰ Robare, *supra* note 12, at 556; *Motion Picture Ass’n of Am., Inc.*, 309 F.3d at 803.

Video description is labor intensive and expensive. 2017 *Video Description*, at 5966. The FCC estimates that the video description of one hour of television ranges from \$2,562.50 to \$4,202.50. *Id.* at n. 36.

⁴¹ *Motion Picture Ass’n of Am., Inc.*, 309 F.3d at 803.

⁴² *Id.* at 803-04; 2017 *Video Description*, at 1-2.

⁴³ *Id.* at 803-06; Robare, *supra* note 12, at 568-69.

II. COMMUNICATIONS ACCESSIBILITY LEGISLATION AND REGULATION

Despite the potential for these and related mechanisms to expand access for disabled individuals, the media and telecommunications industries, among others, historically have been slow to implement them voluntarily.⁴⁴ Recognizing this, over the last 25 years, Congress and federal agencies have enacted a number of laws and regulations prohibiting disability-based discrimination and requiring accessibility accommodations.⁴⁵ The first and most sweeping of these, the Americans With Disabilities Act⁴⁶ (discussed in below), prohibits discrimination by employers, governmental entities, and places of public accommodation, but does not address the accessibility of audio-visual products or platforms.⁴⁷ Instead, Congress tackled this issue in separate telecommunications laws, and empowered the FCC to issue regulations implementing and enforcing them. This combination of statutes and regulations, enhanced by appellate decisions, constitute the rules of television accessibility.

A. Television Decoder Circuitry Act

When Congress passed The Americans With Disabilities Act, it also passed The Television Decoder Circuitry Act of 1990.⁴⁸ Up until the passage of the TDCA, closed-captioning was voluntary, but even if available could not function unless the television set had the technical capabilities to decode and display the captions or the viewer used a set-top box decoder.⁴⁹

The TDCA addressed both parts of the equation: First, it required manufacturers to equip television sets manufactured or sold in the United

⁴⁴ 2014 Report and Order, at 8, 15.

⁴⁵ Laura Rothstein, *Forty Years of Disability Policy in Legal Education and The Legal Profession*, 22 AM. U. J. GENDER, SOC. POL'Y & L., 519, 532-34 (2014); *See generally* Courtney L. Burks, *Improving access to commercial websites under the Americans with Disabilities Act and the Twenty-first Century Communications and Video Accessibility Act*, 99 IOWA L. REV. 363 (2013).

⁴⁶ 42 U.S.C.S. § 12101 et seq. (2009).

⁴⁷ Podlas, *supra* note 10, at 8.

⁴⁸ Pub. L. No. 101-431, 104 Stat. 960 (1990) (codified at 47 U.S.C. §§ 303(u), 330(b)).

⁴⁹ 2014 Report and Order, at 7-8; FCC: *Closed Captioning (DTV)*, at www.fcc.gov/consumers/guides/closed-captioning-digital-television-dtv.

States with closed-captioning capabilities,⁵⁰ and second, it directed the FCC to enact regulations implementing closed-captioning.⁵¹

B. Telecommunications Act

The Telecommunications Act of 1996⁵² built on this foundation.⁵³ It amended the 1934 Communications Act to account for advances in telecommunications technologies, the growth of the industry, and the role telecommunications had come to play in society.⁵⁴ Concluding that additional measures were needed to improve disabled viewers' access to video services and programming, Congress enacted Section 713.⁵⁵ Section 713 established requirements for the closed-captioning of television programming, and directed the FCC to implement regulations ensuring that video programming broadcast on television "is fully accessible through the provision of closed captions."⁵⁶

C. FCC Closed-Captioning Regulations

Abiding this directive, in 1997, the FCC issued regulations mandating closed-captioned for certain television programming and identifying who must ensure that compliant programming reaches viewers.⁵⁷ These have been updated and are detailed below.

As of January 1, 2006, all new,⁵⁸ nonexempt English and Spanish-language "video programming" (and 75% of pre-rule programming⁵⁹)

⁵⁰ 47 U.S.C. § 303(u)(1) (2010).

The TDCA mandated that televisions be equipped with a "captioning chip" enabling viewers to activate captions. Dubow, *supra* note 19, at 616-18.

⁵¹ 47 U.S.C. §§ 303(u), 330(b); 2014 Report and Order, at 7-8; 2000 DTV Order, 15 FCC Rcd. 16788; 47 C.F.R. § 79.102 (articulating technical standards for digital television tuners and receivers).

⁵² Telecommunications Act of 1996, § 305, 47 U.S.C. § 613 (2010).

⁵³ H.R. REP. NO. 104-204, at 113-14 (1995).

⁵⁴ 47 U.S.C. § 151 (1996).

⁵⁵ *Supra* note 53, at 113-14.

47 U.S.C. §§ 613(a)-(g)). Hence, § 305 of the Telecommunications Act added § 713 to the 1934 Communications Act.

⁵⁶ 47 U.S.C. §§ 613(b)(1), (2).

Congress also instructed the FCC to establish deadlines for compliance and exemptions from the closed-captioning mandate. Telecommunications Act § 305, 47 U.S.C. §§ 613(b)-(e) (2010).

In addition, § 713(f)-(h) instructed the FCC to study the implementation of "video description" and report its findings to Congress. *Id.* This is discussed below.

⁵⁷ 47 C.F.R. § 79.1; *1997 FCC Order*, 13 FCC Rcd. at 3273.

The Code of Federal Regulations codifies the general and permanent rules of federal agencies published in the Federal Register.

⁵⁸ 47 C.F.R. § 79.1(a)(5) (analog programming first airing on or after January 1, 1998, and digital programming first airing on or after July 1, 2002).

⁵⁹ 47 C.F.R. §§ 79.1(b)(1)-(4).

must be closed-captioned.⁶⁰ Importantly, “video programming” does not encompass all media on television. Instead, it is defined as “[p]rogramming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and exhibited for residential use.”⁶¹ Therefore, irrespective of whether content was produced by a television studio or transmitted on a television network, if it can be characterized as a television show, it constitutes “video programming.” This includes scripted shows, newscasts, and live sporting events, as well as premium cable and original streaming series from Netflix and Hulu,⁶² and infomercials longer than five minutes.⁶³ It does not include YouTube videos,⁶⁴ movies,⁶⁵ webisodes,⁶⁶ or television advertisements (unless they are longer than five minutes).⁶⁷

Additionally, the FCC Regulations impose a “Pass Through” requirement mandating that existing captions of otherwise exempt programming must be enabled and transmitted to viewers.⁶⁸ In practice, this is quite significant, as the “Pass Through” requirement substantially increases the amount of captioned content available. For example, *Deutschland 83* and *Gomorra*, both broadcast on IFC (after debuting outside of the United States), are in German and Italian, respectively, so are not subject to the caption mandate. Nonetheless, because they already include captions, those captions must be passed through to viewers.

⁶⁰ FCC: *Closed Captioning for Digital Television (DTV)*, at <https://www.fcc.gov/consumers/guides/closed-captioning-digital-television-dtv>.

⁴⁷ C.F.R. §§ 79.1 (b)(1)(i)-(iv) provided for the phase-in of closed-captioning of new programming over a six-year span.

⁶¹ 47 C.F.R. § 79.1(a)(10).

⁶² *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 206-08 (D. Mass. 2012).

As discussed herein, original series from Netflix, Hulu, and amazon video qualify as “video programming,” but because they are transmitted online, rather than broadcast on television, they are not subject to the *television* captioning mandate.

Although the present captioning rules do not expressly consider the situation, presumably, if such online video program is additionally or subsequently telecast, such as CBS All Access’s first episode of its new *Star Trek* prequel or IFC’s airing of *Transparent*, it would fall within the captioning mandate, inasmuch as they are video programming broadcast on television.

⁶³ 47 C.F.R. § 79.1(a)(10).

⁶⁴ 47 C.F.R. § 79.4(a)(2).

⁶⁵ The FCC rules do not cover movies *per se*, but to the extent that a movie constitutes video programming, it may fall within the captioning mandate. 2014 Report and Order, FCC 14-12, at 121-22.

⁶⁶ 47 C.F.R. § 79.4(a)(2).

⁶⁷ 2014 Report and Order, FCC 14-12, at 70-71.

The closed-captioning rule (now) also applies all “on demand” programming not subject to an exemption. 2014 Report and Order, FCC 14-12, at 70.

⁶⁸ 47 C.F.R. § 79.1(c) (obligation to pass through captions of already captioned programs).

The VPD may, however, recaption or reformat the captions. *Id.*

III. CAPTION QUALITY

The initial captioning regulations did not detail the particulars of captions, but, over time, it became clear that captioning quality varied dramatically. Therefore, in 2014, the FCC adopted four Quality Standards for the effectiveness of closed-captioning.⁶⁹ These require that, based on the type of programming and to the fullest extent possible, captions be: (1) accurate; (2) synchronous; (3) complete; and (4) properly placed.

First, captions must accurately convey the audio track's dialogue, diegetic sound, and presence of music (but need not include song lyrics), and identify speakers. Captions cannot paraphrase spoken words, but must match them verbatim, in their original language (or indicate foreign dialog), and, if necessary to convey a speaker's emotions, note the manner and intonation of speech.⁷⁰ Additionally, captions are to relate nonverbal, non-observable information, such as out-of-frame noises, the existence of music, sound effects (e.g., crashes, explosions), and audience reactions.⁷¹

Second, captions must be synchronous in that they must coincide or be synchronized with the corresponding words or audio, and be displayed at a speed that can be read by viewers.⁷²

Third, captions must be complete, running from the beginning through the end of the program. Thus, include tags, "previously on" recaps, or announcements heard by the general audience must be captioned.

Finally, captions must be positioned on the screen so as not to obscure important visual information (e.g., faces, featured text, on-field movement, graphics), or information essential to comprehending a program's content.⁷³ Relatedly, they must be in a legible size and font, and not overlap or extend beyond the edge of the screen.⁷⁴

Compliance with these standards is calibrated to whether the

⁶⁹ 2014 Report and Order, at 3-5.

Framing these as content neutral "quality standards" for the effectiveness of captions, largely avoids the direct regulation of program content. In turn, these standards have only a de minimus impact on the First Amendment rights of broadcasters, distributors, and content creators. See *Gottfried v. FCC*, 655 F.2d 297, 311 (D.C. Cir. 1981) (because captioning is a straight transcription of dialogue into text, captioning requirements do not significantly interfere with program content), *rev'd on other grounds*, *Community Television of S. Cal. v. Gottfried*, 459 U.S. 498 (1983).

⁷⁰ 2014 Report and Order, at 21-22; 1997 Report and Order, 13 FCC Rcd. at 3273.

⁷¹ 2014 Report and Order, at 23.

⁷² *Id.*

Whenever on-demand programming is edited, captions must be reformatted to ensure their synchronization with the edited program. See *Closed Captioning Reconsideration Order*, 13 FCC Rcd. at 20008-09.

⁷³ 2014 Report and Order, at 4-5; FCC Consumer Guide, *supra* note 1.

⁷⁴ FCC Consumer Guide, *supra* note 1; 2014 Report and Order, at 3-5, 19-25.

programming is pre-recorded or live/ near-live.⁷⁵ Pre-recorded programming, that which is produced, recorded, and edited prior to its first airing,⁷⁶ must comply fully with the four standards.⁷⁷ This is because there is an opportunity to write, review, and proof captions prior to airing, and thus, to ensure their accuracy, synchronicity, completeness, and placement.⁷⁸

By contrast, live and nearly-live programming, that which is performed and recorded within 24 hours prior to its first airing, does not present the same opportunities, and is therefore held to a less demanding standard.⁷⁹ Nevertheless, live/near-live programming must employ measures to provide hearing-impaired viewers a television experience comparable to that of hearing viewers.⁸⁰ For example, because advance captioning is superior to contemporaneous (Real Time) captioning, content that can be scripted or captioned in advance (such as pre-taped segments) must be, and visual information, text, and crawls are to be added to segments when ENT is not used.⁸¹ Additionally, as of 2014, ABC, NBC, CBS, and FOX affiliates in top 25 markets, and national cable networks serving at least 50% of MVPD subscriber homes must stenocaption live programming, instead of substituting the less comprehensive ENT captioning.⁸² Other stations must implement “enhanced ENT” and script for teleprompter most news, sports, and weather.⁸³

IV. EXEMPTIONS

Section 79.1(d) exempts several types of programming from the closed captioning mandate. Some of these exemptions are self-implementing, meaning that they apply automatically if enumerated criteria are met.⁸⁴ Other exemptions are obtained by petitioning the FCC.⁸⁵

⁷⁵ FCC Consumer Guide, *supra* note 1.

⁷⁶ 47 C.F.R. § 79.4(a)(9).

⁷⁷ 2014 Report and Order, at 26.

⁷⁸ 2014 Report and Order, at 26; *see also id.* at 28 (commenting on NCTA *Best Practices*).

⁷⁹ 2014 Report and Order, at 5; 47 C.F.R. § 79.4(a)(3),(8).

⁸⁰ 2014 Report and Order, at 5 and IV; § 79.1(a)(3), (4).

⁸¹ 2014 Report and Order, at 5, 77.

The FCC further advises that program templates and partially-captioned program segments be used to make a caption file to “later combine[] simultaneously with the program when it is aired.” 2014 Report and Order, at 77.

⁸² 47 C.F.R. § 79.1(e)(3).

⁸³ 2014 Report and Order, at 5.

⁸⁴ FCC Self Implementing Exemption, at www.fcc.gov/general/self-implementing-exemptions-closed-captioning-rules. Consequently, a provider does not need to seek FCC approval to enjoy the exemption. *Id.*

⁸⁵ CVAA §202(c), amending § 613(d)(3)).

A. Categorical Exemptions

47 C.F.R. §79.1(d) articulates the “self-implementing” categorical exemptions.⁸⁶ Many relate to the type of programming, and automatically exempt programming that is:

- not primarily in English or Spanish⁸⁷
- primarily textual (e.g., program schedules, community announcements)⁸⁸
- primarily non-vocal music⁸⁹
- instructional and produced by a local public television station for use in K-12 and post-secondary schools,⁹⁰ or transmitted by an Educational Broadband Service licensee⁹¹
- locally-produced non-news programming of local interest, with no repeat value (for which ENT captioning is unavailable)⁹²
- broadcast between 2-6 a.m. local time, “the late night hours”⁹³

⁸⁶ Video programming providers that meet any of the following “shall be exempt to the extent specified”:

- (1) Programming subject to contractual captioning restrictions in effect on or before February 8, 1996 (but not any extension or renewal of such contract, for which an obligation to closed caption would constitute breach of contract).
- (2) Video programming or video programming provider for which the captioning requirement has been waived by the Commission on the basis of a para. (f) economic burden petition.
- (3) Programming in languages other than English or Spanish language, except where scripted programming can be captioned using ENT.
- (4) Primarily textual programming or portions thereof for which the content of the soundtrack is displayed visually through text or graphics (e.g., program schedule channels or community bulletin boards).
- (5) Programming distributed to residential households in the “late night hours” between 2 a.m. and 6 a.m. local time. (VPPs providing channels distributed and exhibited in more than one time zone can choose any continuous 4 hour time period between 12 a.m. - 7 a.m. local time).
- (6) Interstitials, promotional announcements and public service announcements that are 10 minutes or less in duration.
- (7) Video programming transmitted by Educational Broadband Service licensee
- (8) Locally produced (by a VPD) and distributed non-news programming with no repeat value, but of local public interest, for which ENT is unavailable. (*See* 1997 R&O, ¶ 158; 1998 Recon Order, ¶ 57-61).
- (9) Programming on new networks for the first four years after beginning operation
- (10) Programming that consists primarily of non-vocal music.
- (11) Where captioning exceeds of 2% of gross revenues received from that channel during the previous calendar year.
- (12) Channels producing annual gross revenues of under \$3,000,000 during the previous calendar year (but for the obligation to pass through already captioned programming).
- (13) Locally produced (by public television stations) educational/ Instructional programming for use in grades K-12 and post-secondary schools.

⁸⁷ 47 C.F.R. § 79.1(d)(3).

⁸⁸ 47 C.F.R. § 79.1(d)(4).

⁸⁹ 47 C.F.R. § 79.1(d)(10).

⁹⁰ 47 C.F.R. § 79.1(d)(13).

⁹¹ 47 C.F.R. § 79.1(d)(7).

⁹² 47 C.F.R. § 79.1(d)(8).

⁹³ 47 C.F.R. § 79.1(d)(5).

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- interstitials, promotional announcements, and public service announcements of 10 minutes or less.⁹⁴

Other exemptions relate to the characteristics of the network or channel providing programming, and automatically exempt programming on a:

- network for the first four years after beginning operations⁹⁵
- channel where captioning expenses would exceed 2% of gross revenues from the previous year⁹⁶
- channel⁹⁷ with annual gross revenues of less than \$3,000,000 the previous year.⁹⁸

B. Individual Exemptions

Alternatively, any party in the video distribution chain, including a video programming provider, video programming producer, or video programming owner that does not fall within a self-implementing exemption may petition the FCC for an individual exemption. Individual exemptions are granted where the petitioner can demonstrate that compliance with the captioning mandate would be economically burdensome.⁹⁹

“Economically burdensome” is defined as “imposing significant difficulty or expense.”¹⁰⁰ In evaluating whether captioning is economically burdensome, the FCC considers: (1) the nature and cost of captioning; (2) its impact on the petitioner’s operations; (3) the petitioner’s financial resources (including income, assets, and expenses);

⁹⁴ 47 C.F.R. § 79.1(d)(6).

⁹⁵ 47 C.F.R. § 79.1(d)(9).

⁹⁶ 47 C.F.R. § 79.1(d)(11).

⁹⁷ The FCC does not define what constitutes a “network” or a “channel” for purposes of the revenue-to-cost, 2014 Report and Order, at 63, or new network exemptions, and definitions of “network” elsewhere in the FCC rules vary. *Id.* at 85-86; see 47 C.F.R. § 73.3613(a)(1) (broadcast network affiliation agreements); 47 C.F.R. § 76.55(f) (cable “must carry”); 47 C.F.R. § 76.5(m) (non-duplication protection for television stations).

⁹⁸ 47 C.F.R. § 79.1(d)(12).

The FCC periodically reevaluates the continued need for and contours of these exemptions. See 2014 Report and Order, FCC 14-12, at 85-88. For example, the FCC adopted the new channel and revenue-related exemptions when the captioning mandate was first announced, because it feared unanticipated captioning costs would deter new networks from going to or remaining on air. 1997 Order, 13 FCC Rcd., at 3346; 2014 Report and Order, FCC 14-12, at 86. Today, captioning is cheaper and anticipated, largely eliminating the need for this exemption. See generally Stanton, *supra* note 5, at 167. In addition, the operative terms “network” and “channel” have different meanings in the digital age, since broadcasters now multicast several streams of programming on the same MHz of spectrum. 2014 Report and Order, at 50, 62-65, 85-87.

⁹⁹ CVA § 202(c), amending § 613(d)(3).

¹⁰⁰ 47 C.F.R. § 79.1(f); § 79.3(d)(2); FCC Encyclopedia, at www.fcc.gov/encyclopedia/economicallyburdensome-exemption-closed-captioning-requirements.

(4) the type and the nature of the operations of the video program provider, and (5) any other relevant information presented by the petitioner.¹⁰¹ The petitioner cannot merely speculate that captioning would be costly, but must submit financial statements, quotes of captioning costs, documents verifying it has sought sponsorships, cost-sharing, or financial assistance from VPDs, and other tangible materials.¹⁰²

Today, individual exemptions are relatively rare. For example, The Home Shopping Club sought an exemption arguing that the cost of captioning unscripted host banter was high in relation to the low cost of its programming, and, in any event, was unnecessary because the textual on-screen product information was all that hearing-impaired viewers needed to make purchasing decisions.¹⁰³ Denying HSC's petition, the FCC explained that notwithstanding the inclusion of textual product information, the spoken dialog "adds information that [otherwise] would be lost to consumers with hearing disabilities."¹⁰⁴ Consequently, HSC was obligated to caption the banter.¹⁰⁵

The few recently granted exemptions involved instances where captioning expenses were shown to approach or exceeded the petitioner's yearly net profits.¹⁰⁶ Nonetheless, even in these cases, the FCC did not wholly excuse the petitioner from captioning, but postponed compliance to a later date. For instance, Christian Video Ministries sought an exemption for its program entitled *Drawing Men to Christ*. Although the Christian Video Ministries realized a small profit one year and a \$3,696.00 loss the next, the FCC granted only a temporary two-year exemption, and set a deadline for captioning compliance.¹⁰⁷

V. CLOSED-CAPTIONING COMPLIANCE

The FCC divides the responsibility for ensuring that programming is closed-caption compliant between "video programming distributors"

¹⁰¹ § 79.3(d)(2)(i)-(iv), (d)(3); 1997 Report and Order, 13 FCC Rcd., at 3363-64; www.fcc.gov/encyclopedia/economicallyburdensome-exemption-closed-captioning-requirements.

¹⁰² 47 C.F.R. § 79.1(f)(9).

For more detail on the procedure for applying for an economically burdensome exemption, see www.fcc.gov/encyclopedia/economicallyburdensome-exemption-closed-captioning-requirements.

¹⁰³ Home Shopping Club Order (2000), at https://apps.fcc.gov/edocs_public/attachmatch/DA-00-1339A1.pdf.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Memorandum on the Kellogg Street Productions Petition for Exemption from Closed Captioning Requirements (Nov. 17, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1323A1.pdf; Memorandum on the Christian Video Ministries (CVM) on the Petition for Exemption from the Closed Captioning Requirements (Nov. 17, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1430A1.pdf.

¹⁰⁷ CVM, *supra* note 106.

(VPDs), the broadcast stations, distributors of multichannel (or other) programming, and other distributors who deliver “video programming directly to [viewer] homes,”¹⁰⁸ “regardless of distribution technology used”¹⁰⁹ or whether they own the programming,¹¹⁰ and the video programming owners (VPOs)¹¹¹ and producers (VPPs)¹¹² of the programming who supply it to distributors.¹¹³

Initially, the FCC placed the responsibility on video programming distributors (VPDs),¹¹⁴ reasoning that because they had the closest connection with viewers, this was the most efficient way to ensure that closed-captioning reached viewer’s homes.¹¹⁵ The FCC did not expect VPDs to perform the captioning, but expected VPDs to negotiate captioning responsibilities with video programming providers (VPPs) and owners (VPOs) who would the FCC presumed would be incentivized to make programming caption-compliant.¹¹⁶ (The FCC noted that because a network typically provides the same programming feed to every VPD, it is more efficient for the VPO or VPP to caption an episode, and then provide that same captioned episode to every VPD, than for each VPD to individually caption every episode it airs.¹¹⁷ Unfortunately, the division of labor the FCC imagined did not materialize.¹¹⁸ This created uncertainty as to who was responsible for what aspects of captioning compliance and, in turn, diminished the quality of captioning.¹¹⁹

¹⁰⁸ 47 C.F.R. § 79.1 (a)(11) defines a “video programming distributor” as: (1) any television broadcast station licensed by the Commission; (2) any multichannel video programming distributor; and (3) any other distributor of video programming for residential reception that delivers programming directly to the home and is subject to the jurisdiction of the FCC.

¹⁰⁹ 13 FCC Rcd., at 3280; 2014 Report and Order, at 36.

¹¹⁰ 47 C.F.R. §79.1(a); 2014 Captioning Order and Report, at 36.

¹¹¹ “Provider” refers to “the specific television station, cable operator, cable network or other service that provides programming to the public,” and “encompasses not only television stations and MVPDs, but also non-broadcast networks and “other services that provide[] programming to the public.” H.R. Rep. at 114.

¹¹² § 79.1(a)(9) (“Any entity that provides video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming”).

¹¹³ 1997 Report & Order, 13 FCC Rcd., at 3286-87.

¹¹⁴ § 79.1(a)(3) (“Any video programming distributor and any other entity that provides video programming and that is intended for distribution to residential households including . . . broadcast or nonbroadcast television network and the owners of such programming”).

¹¹⁵ 1997 Report & Order, 13 FCC Rcd., at 3286-87.

¹¹⁶ *Id.*

¹¹⁷ 2014 Report and Order, at 36.

To illustrate, if USA Network performs the single act of closed-captions an episode of *Mr. Robot*, it can then provide that episode to an infinite number of VPDs. The alternative of requiring each VPD to receive and caption the *Mr. Robot* episode requires more work and combined expense.

¹¹⁸ Because the obligation was placed exclusively on the VPD, VPOs and VPPs could inflate captioning costs or pass them on to the VPD.

¹¹⁹ FCC, Action by Commission, *Closed-Captioning Quality* (2016, February 18), FCC 16-17, at <https://www.fcc.gov/document/closed-captioning-quality-report-and-order-declaratory-ruling-fnprm>.

To address this, in 2016, the FCC amended the regulations.¹²⁰ Regulations now clarify that the VPP or VPO is responsible for ensuring that quality closed-captioning is transcribed and included in programming, while the VPD (broadcaster, cable or internet provider) is responsible for ensuring that those captions are made available and pass through correctly to viewers.¹²¹ Entities that fail to comply with these and other FCC regulations are subject to whatever penalties and corrective actions the FCC deems warranted.¹²² Viewers, however, have no individual cause of action against content distributors or providers who fail to caption programming or meet the Quality Standards.¹²³

VI. TWENTY-FIRST CENTURY COMMUNICATIONS AND VIDEO ACCESSIBILITY ACT

Recognizing the dramatic advances in communications services, equipment, and video programming technologies,¹²⁴ in 2010, Congress enacted the Twenty-First Century Communications and Video Accessibility Act.¹²⁵ The CVAA ensures that individuals with disabilities can utilize twenty-first century communications equipment and programming technologies, such as smartphones and streaming video.¹²⁶

The CVAA is divided into two parts. Title I addresses communications access; It requires advanced communications equipment developers and video programming providers (e.g., internet-based communications technologies and cable providers¹²⁷) to make their communications services, technologies, and products accessible.¹²⁸ Title II focuses on programming access;¹²⁹ It requires: first, that certain video programming¹³⁰ delivered by Internet Protocol (or any successor

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² 47 C.F.R. §79.1(g)(8); *see also* §79.4(e); *IP Captioning Order*, 27 FCC Rcd.

¹²³ *See* 47 C.F.R. § 79.4.

¹²⁴ S. REP. No. 111-386, at 1 (2010); Announcement of CVAA, Town Hall Meeting, 76 Fed. Reg. 21741, 21742 (April 18, 2011).

¹²⁵ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (CVAA), also at <https://www.fcc.gov/general/disability-rights-office>; codified at 47 U.S.C. § 613.

The CVAA, § 613, amended the 1996 Telecommunications Act.

¹²⁶ S. REP. No. 111-386, at 1; *GLAAD v. CNN*, 742 F.3d at 420.

¹²⁷ *IP Captioning Order*, 27 FCC Rcd. at 792-94 (“video programming owners” are those who license content to third-party providers).

¹²⁸ *Id.* at 787, 792-94.

The CVAA also requires that emergency information and user interfaces on remote controls and other digital apparatus for navigating video programming be made accessible to the visually impaired. Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, §§ 202, 204-205 (2010).

¹²⁹ CVAA, 124 Stat. at 2751 [§ 202(a)].

¹³⁰ The statute restricted it to programming televised with captions after the effective date of the

technology¹³¹) be “fully accessible through the provision of closed captions”¹³² and, second, that the FCC implement regulations for the video description of certain television programming.¹³³

VII. FCC REGULATIONS FOR CAPTIONING STREAMING VIDEO

Pursuant to the CVAA, in 2013, the FCC promulgated limited regulations for captioning streaming (IP) programming.¹³⁴ These apply to only: (a) full-length¹³⁵ video programming, (b) that is first exhibited on television, (c) in the United States,¹³⁶ (d) with captions, and (e) subsequently shown online.¹³⁷ The quality of captions must be at least commensurate with that of the television broadcast.¹³⁸ For purposes of online captioning, “live and near-live programming” is defined as programming performed and recorded within 24 hours before its first television airing.¹³⁹

These regulations omit many types of online content.¹⁴⁰ First, the IP mandate covers only television video programming. Accordingly, consumer-generated video, such as YouTube or Vimeo videos,¹⁴¹ movies debuting in theatres (subsequently available to stream online), and web content provided in conjunction with television¹⁴² (e.g., extended

FCC regulations. 47 USC § 613 (c) 2 (A); 2014 Report and Order, at 18-19.

¹³¹ 47 U.S.C. § 613(c).

¹³² CVAA § 202[2] (Video Description and Closed Captioning); 47 U.S.C. § 613(c)(2); *see also* 47 C.F.R. § 79.4(b).

To facilitate this, the CVAA directs VPOs to “send program files to [the video programming distributors] with all required captions.” *IP Captioning Order*, 27 FCC Rcd., at 798; *see also* 2014 Captioning Order, at 18-19.

¹³³ 47 U.S.C. § 613(c); 2014 Captioning Order, at 18-19.

¹³⁴ 47 C.F.R. § 79.4.

¹³⁵ 47 C.F.R. § 79.4(a), (b).

The phase-in of captioning of clips and excerpts of full-length video programming began in January 2016. As of July 2017, straight-lift clips of covered programming also must be captioned. *Id.*

¹³⁶ 47 C.F.R. § 79.4(a)(13).

¹³⁷ Federal Communications Commission, *Captioning of Internet Video Programming*, at <https://www.fcc.gov/consumers/guides/captioning-internet-video-programming>.

¹³⁸ 47 C.F.R. § 79.4(c)(1), (2) (2014).

¹³⁹ 47 C.F.R. § 79.4(a)(8) (2014).

¹⁴⁰ Burks, *supra* note 45, at 383-84.

¹⁴¹ 47 C.F.R. § 79.4(a)(1), (b) (2014).

The CVAA defines “consumer generated media” as “content created and made available by consumers to online websites and services on the Internet, including video, audio and multimedia content.” 47 U.S.C. § 153(14) (2010).

If a consumer-generated YouTube video is shown as part of a closed-captioned, full-length television program, if that captioned episode is later transmitted online, it must include the closed-captions. In the Matter of Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, 27 FCC Rcd. 787 (2012).

¹⁴² 47 C.F.R. § 79.4(b) (2014).

CNN is required to caption only the full-length videos initially broadcast on television. *GLAAD v.*

interviews, “Inside Looks,” stand-alone webisodes such as the Emmy-winning *Fear the Walking Dead: Flight 462*) do not need to be captioned.¹⁴³

Second, “television” programming that did not appear on television, such as original streaming series from Netflix, Amazon,¹⁴⁴ and Hulu¹⁴⁵ are not covered.¹⁴⁶ Third, because programming must have first aired on U.S. television,¹⁴⁷ the IP captioning mandate does not apply to foreign programs like *The Fall* (subsequently streaming on Netflix) and *Poldark* (broadcast on PBS).¹⁴⁸ Fourth, any video programming that is exempt from the television closed-captioning mandate, is exempt from the IP mandate. Finally, only full-length video programming was initially covered.¹⁴⁹ Excerpts and clips¹⁵⁰ of programming were not covered until July 2017, and clips from other media are not covered at all.¹⁵¹

This narrow purview notwithstanding, online video programming may be subject to other regulations that result in its being closed-captioning. Most notably, the IP Pass Through Requirement directs that if uncovered programming already contains captions, the captions must be enabled and passed-through to viewers.¹⁵²

As with television captioning, the obligation is placed on the VPD, but because the delivery platform is different, the definition of VPD is

CNN, 742 F.3d at 421, 423.

¹⁴³ FCC, www.consumercomplaints.fcc.gov.

¹⁴⁴ In August 2017, award-winning *Transparent*, produced by Amazon Studios and available on amazon video, began airing on IFC. Although Amazon video is not required to closed-caption *Transparent* when it streams on the amazon video platform, as non-exempt video programming, IFC would need to caption it when IFC televises it.

¹⁴⁵ Seasons 4-6 of *The Mindy Project*, which are produced by and are available exclusively on Hulu, are not covered, but previous seasons that originally aired on FOX, must be captioned.

¹⁴⁶ 47 C.F.R. § 79.4(b) (2014); 47 U.S.C. § 613(b)(1), (2) (2010).

¹⁴⁷ 47 C.F.R. § 79.4(a)(1) (2014).

¹⁴⁸ 47 C.F.R. § 79.4(a), (b) (2014).

¹⁴⁹ The FCC defines “full-length video programming” as “video programming that appears on television and is distributed to end users, substantially in its entirety, via Internet protocol . . .” 47 C.F.R. § 79.4(a)(2) (2014).

¹⁵⁰ The FCC defines “video clips” as “excerpts of full-length video programming,” regardless of length. 47 C.F.R. § 79.4(a)(12) (2014).

¹⁵¹ 47 C.F.R. § 79.4(a)(2), (12) (2014), 47 C.F.R. § 79.4(b) (2014).

These must be captioned on the following schedule: January 1, 2016 - straight lift clips (a single excerpt with the same video and audio as telecast); January 1, 2017- straight lift montages; July 1, 2017- clips of live and near-live TV programming (to be posted within 12 and 8 hours of telecast, respectively).

The video clips rules do not presently apply to third party websites or apps. 47 C.F.R. § 79.4 (2014).

¹⁵² *IP Captioning Report and Order*, 2012; *IP Captioning Order*, 27 FCC Rcd. at 812; 47 C.F.R. § 79.4(c)(2)(i) (2014).

For example, the base captioning rules do not apply to the Season 3 trailer for *Peaky Blinders* (a U.K. television show) that viewers can watch on YouTube, because it is too short to constitute video programming. Nevertheless, if the trailer already includes closed-captioning, those captions must be passed through. Furthermore, with regard to the program itself, *Peaky Blinders* was first telecast outside of the U.S. so does not fall within the captioning mandate.

somewhat different: Section 79.4 defines a VPD (or video programming provider) as “Any person or entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol.”¹⁵³

A. Exemptions

There are no categorical exemptions from the IP mandate, but the statute provides that programming exempt from the television closed-captioning mandate is not subject to the IP mandate.¹⁵⁴ Additionally, an entity may petition for an individual exemption where compliance would constitute an undue burden, that is a significant difficulty or expense.¹⁵⁵ When evaluating this in the streaming context, the FCC considers not only captioning costs,¹⁵⁶ but also the impact of the action on and the particular website’s financial resources,¹⁵⁷ the overall financial resources and scope of sister sites and parent entities,¹⁵⁸ the operational and fiscal relationship among them,¹⁵⁹ and any legitimate safety and crime prevention concerns.¹⁶⁰

VIII. VIDEO DESCRIPTION

The CVAA also amended Section 713 of the Telecommunications Act to require the FCC to implement video description.¹⁶¹ In 2000, the FCC had issued Video Description regulations, but they were vacated as exceeding the FCC’s authority.¹⁶² The CVAA, thus, provided that

¹⁵³ 47 C.F.R. § 79.4(a)(3) (2014); *IP Captioning*, 27 FCC Rcd., at 793-797, recon. granted in part, Order on Reconsideration and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 8785 (2012).

¹⁵⁴ FCC Consumer Guide (Internet Captioning), *supra* note 137.

¹⁵⁵ 47 U.S.C. § 613 (e) (2010) (“result in undue economic burden”); 28 C.F.R. § 36.104 (2016).

¹⁵⁶ 28 C.F.R. § 36.104(1) (2016); 47 U.S.C. § 613 (e)(1) (2010).

¹⁵⁷ 28 C.F.R. § 36.104(2) (2016); 47 U.S.C. § 613 (e)(2) (2010).

¹⁵⁸ 28 C.F.R. § 36.104(4) (2016); 47 U.S.C. § 613 (e)(3) (2010).

¹⁵⁹ 28 C.F.R. § 36.104(3)-(5) (2016); 47 U.S.C. § 613 (e)(4) (2010).

¹⁶⁰ 28 C.F.R. § 36.104 (2) (2016).

¹⁶¹ CVAA, § 202 (a), (c) (Video Description- Section 713 of the Communications Act of 1934 [47 U.S.C. § 613]).

¹⁶² *Implementation of Video Description of Video Programming*, Report and Order, 15 FCC Rcd. 15230 (2000), recon. granted in part and denied in part, *Implementation of Video Description of Video Programming*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd. 1251 (2001), *vacated sub nom*, *MPAA v. FCC*, 309 F.3d 796 (2002).

When the FCC issued the closed-captioning regulations (pursuant to the Telecommunications Act), it also announced video description regulations. *MPAA v. FCC*, however, found that the FCC possessed no authority to regulate video description. 309 F.3d at 801-02. In so holding, the court explained that whereas § 713(b)’s closed-captioning provisions explicitly instructed the FCC to create regulations ensuring that “video programming . . . is fully accessible through the provision of closed captions,” § 713(f)-(h)’s video description provisions only defined the term “video

authority, and directed the FCC to reinstate its video description regulations¹⁶³ with certain modifications, to wit: that the video description rules be applied prospectively¹⁶⁴ to an updated ranking of networks,¹⁶⁵ be confined to programming transmitted for display on television (i.e., by broadcasters and MVPDs),¹⁶⁶ and exempt live and near-live programming.¹⁶⁷

Accordingly, in 2012, the FCC began implementing video description.¹⁶⁸ This applies to only: (1) the top four commercial broadcast television stations affiliated with ABC, CBS, Fox, and NBC in top 60 markets;¹⁶⁹ and (2) the top five national nonbroadcast networks serving at least 50,000 MVPD-subscriber homes,¹⁷⁰ as of this writing: USA, TNT, TBS, History, and Disney Channel.¹⁷¹ This list is updated every three years,¹⁷² and will next be updated effective July 1, 2018, to reflect Nielsen ratings from October 2016 to September 2017.¹⁷³

Presently, covered broadcasters and MVPDs must video describe 50

description” and instructed the FCC to study “the use of video descriptions on video programming” and submit a report to Congress. *Id.* at 802-03. Tellingly, the statute did not direct further FCC action. *Id.* at 802-03, 807. The court also rejected the argument that the FCC could regulate video description as a “television transmission that only incidentally and minimally affects program content.” *Id.* at 804-06.

¹⁶³ CVAA § 202 (f)(1) (2010) (reinstatement of video description); *see* Implementation of Video Description of Video Programming, *Report and Order*, 15 F.C.C.R. 15230 (2007).

For a history of the FCC’s video description rules and their reinstatement under the CVAA *see* 2014 *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report to Congress, 29 FCC Rcd. 8011 (2014); H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19; S. Rep. No. 111-386, 111th Cong., 2d Sess. at 1.

¹⁶⁴ CVAA §202 (f)(1) (2010).

¹⁶⁵ CVAA §202(f)(2)(B) (2010).

¹⁶⁶ 47 U.S.C. § 613(f)(4)(A) (2010).

¹⁶⁷ CVAA §202(f)(2)(E) (2010).

¹⁶⁸ 47 C.F.R. § 79.3(b)-(c); *Video Description: Reinstatement Order*, *supra* note 37; *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, 26 FCC Rcd. 2975 (2011) (*Reinstatement NPRM*). In July 2017, the FCC announced that updated video description regulations will take effect July 2018. *2017 Video Description*, FCC 17-88 at 1.

¹⁶⁹ The FCC uses Nielsen data, which lists 210 local television markets. 2015-16-dma-ranks, at fcc.gov/consumer (video description); FCC Consumer Guide (Video Description), at <https://transition.fcc.gov/cgb/consumerfacts/videodescription.pdf>.

¹⁷⁰ FCC Consumer Guide (Video Description); *FCC Proposes to Expand Video Description Rules*, FCC OFFICE OF MEDIA RELATIONS, www.fcc.gov/office-media-relations; *Action by the Commission* (2016, March 31), <https://www.fcc.gov/fcc-proposes-rules-expand-video-description-access>.

¹⁷¹ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Order and Public Notice, 30 FCC Rcd. 2071 (2015); *Notice of Proposed Rulemaking*, FCC-11-36A1-pdf.

¹⁷² 47 C.F.R. § 79.3(b)(4) (2011); F.C.C. REP. NO. 17-88 at 2, 11 (2017).

¹⁷³ F.C.C. REP. NO. 17-88 at 2, 11 (2017).

In 2016, the top cable networks were FOX News, ESPN, USA, TBS, and HGTV, Lisa de Moraes, *deadline.com* (Dec. 20, 2016), *Cable Rankings 2016: News Ratings Helps Fox Top ESPN*, at deadline.com/2016/12/cable-rankings-network-ratings-fox-cnn-msnbc-1201873996/.

hours per quarter¹⁷⁴ of either prime-time (8-11 p.m. Monday-Saturday and 7-11 p.m. Sunday¹⁷⁵) or children's programming (that which is targeted at individuals 16 years old and under¹⁷⁶). As of July 1, 2018, covered networks and MVPDs must video describe 87.5 hours per quarter.¹⁷⁷ The additional 37.5 hours, however, may be provided any time between 6 A.M. and 11:59 pm,¹⁷⁸ and a given hour of video described programming can be counted twice toward the hour requirement, once when initially aired, and once if rerun.¹⁷⁹ In addition, mirroring the closed-captioning rules, any existing video description must be passed through, unless it is not technologically feasible to do so.¹⁸⁰

Furthermore, the video description rules cover only networks airing "at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under these rules."¹⁸¹ Therefore, regardless of ratings, if a cable network does not pass the 50-hour per quarter threshold, it does not need to provide video description, and the video description obligation passes to the next-ranked network.¹⁸² For example, because the majority of their programming is live and studio near-live, neither top-ranked FOX News nor ESPN are subject to the video description mandate.¹⁸³ A covered network airing a disproportionate amount of live programming during a quarter (such as during NCAA March Madness or the Olympics), however, does not

¹⁷⁴ 47 C.F.R. § 79.3(b) (2011).

¹⁷⁵ 47 C.F.R. § 79.3(a)(6) (2011).

¹⁷⁶ 47 C.F.R. § 79.3(a)(8) (2011); 47 C.F.R. § 79.3(b)(1) (2011).

¹⁷⁷ F.C.C. REP. NO. 17-88, 1, at 2-4 (2017).

The FCC inferred that since few economic burden petitions were filed from 2012-2016, video description costs must be reasonable. Therefore, in March 2016, it issued a Notice of Proposed Rulemaking to increase the number of hours video-described. Action by Commission, 2016 Action by the Commission March 31, 2016, by Notice of Proposed Rulemaking, FCC 16-37; FCC Office of Media Relations, 2016 FCC Proposes to Expand Video Description Rules, at www.fcc.gov/office-media-relations. In July 2017, the FCC increased video description to 87.5 hours. 2017 Video Description Order. The CVAA provides that the Commission may increase "in total" the hour requirement by no more than 75 percent. 47 U.S.C. § 613(f)(4)(B) (1934).

¹⁷⁸ To avoid ambiguity, the rule refers to 11:59 P.M. rather than midnight. National Institute of Standards and Technology, *Times of Day FAQs*, at <https://www.nist.gov/pml/time-and-frequency-division/times-day-faqs>.

Presumably, the threshold of pre-recorded programming will increase to correspond to the video description increase.

¹⁷⁹ F.C.C. REP. NO. 17-88, at 5 (2017).

Consequently, a network needs only a total of 175 hours of first-run described programming per year to comply with the expanded requirement. *Id.* The FCC estimates this will cost approximately \$315,000 per year. *Id.* at 6.

¹⁸⁰ 47 C.F.R. § 79.3(b)(3) (2011).

¹⁸¹ 47 C.F.R. § 79.3(b)(4); *see* F.C.C. REP. NO. 17-88, at 10-11, 15-16. (2017).

¹⁸² F.C.C. REP. NO. DA 15-295 (2015). Indeed, the top cable networks in 2015 were ESPN, FNC, Disney Channel, History, TBS, TNT, USA, (FCC-11-36A1-pdf); FCC, fcc.gov/updated July 12, 2016; F.C.C. CONSUMER GUIDE, videodescription.pdf.

¹⁸³ In 2011 and 2015, the FCC excused ESPN from video description, saying that it was exactly the type of network the CVAA intended to exempt. F.C.C. REP. NO. DA 15-295 (2015).

extricate itself from its video description obligation. Instead, it can petition the FCC for a waiver for that quarter, conditioned on video describing additional hours during another quarter.¹⁸⁴

To put this video description obligation in context, once exempt “late night hours” are subtracted, there are 20 “closed-captioned hours” per day, 140 per week, and 7,300 per year, per channel.¹⁸⁵ Unless exempt, all video programming shown during this time period, across more than 1,000 channels,¹⁸⁶ must be closed-captioned. Video description, however, is mandated for only four “prime-time” or “children’s” hours per week on just nine networks.¹⁸⁷ Hence, in the course of a year, a hearing-impaired viewer of ABC and CW will receive a combined total of 14,600 hours of closed-captioned programming (7,300 hours x 2 networks), but a visually-impaired viewer will receive only 200 hours of video-described programming, all from ABC. (CW is not a top four commercial network, so is not subject to the video description requirements). If that viewer lives in Juneau, Alaska, the 207th market, they are entitled to none. Even under the new 87.5 hour per quarter requirement, this averages to less than one hour per day of described programming on any given included network.¹⁸⁸

A. Standards for Video Description

Unlike the closed-captioning regulations, the video description regulations do not include detailed guidelines or quality standards. Instead, the specifics of the video description are left to the content provider.¹⁸⁹ As a practical matter, because video description is necessarily subjective,¹⁹⁰ particularized standards would be difficult to articulate, let alone enforce.¹⁹¹ Furthermore, inasmuch as video

¹⁸⁴ F.C.C. REP. NO. 17-88 at 10-11 (2017).

¹⁸⁵ There are 22 “prime-time” hours per week and approximately 1,144 per year.

¹⁸⁶ F.C.C. REP. NO. 17-88, at 4 (2017) (citing to *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, F.C.C. Rep. No. 17-157, at Tbls. 4, 5 (2016)) (264 channels, not including cable, and 900 cable channels).

¹⁸⁷ F.C.C. REP. NO. 17-88, at 25.

¹⁸⁸ *Id.* at 4.

¹⁸⁹ F.C.C. CONSUMER GUIDE, Video Description at 2888-89 (2011).

¹⁹⁰ *Video Accessibility Report*, 11 F.C.C.R. at 19,221; *MPAA v. FCC*, 309 F.3d 796 at 803.

The DC Circuit explained that “video descriptions require a writer to amend a script to fill in audio pauses that were not originally intended to be filled. Not only will producers and script writers be required to decide on what to describe, how to characterize it, and the style and pace of video descriptions,... it is clear that the implementation of video descriptions invariably would entail subjective and artistic judgments that concern and affect program content.” *MPAA v. FCC*, at 803-04; *Video Accessibility Report*, 11 F.C.C.R. at 19, 221.

¹⁹¹ F.C.C. NOTICE NO. 11-36 at 14-15.

description requires that a new creative work be made,¹⁹² it implicates the First Amendment rights of broadcasters and content creators.¹⁹³ Consequently, the more the FCC involves itself in the content of video description or regulations appurtenant thereto, the closer it comes to impermissibly regulating content.¹⁹⁴

B. Exemptions

Because of the narrow scope of the video description mandate, the FCC concluded that categorical exemptions were unnecessary.¹⁹⁵ Instead, a party can petition for exemption on the basis of economic burden.¹⁹⁶ Additionally, as noted above, a network that does not offer at least the requisite number of hours per quarter of pre-recorded prime-time programming is not subject to the video description rules. To illustrate, in 2011 and 2015, the FCC excused ESPN (which airs mostly live and near-live programming) from video description, saying that it was exactly the type of network the CVAA intended to exempt.¹⁹⁷

In 2016, the FCC proposed expanding video description to one additional broadcast network (the CW) and five additional non-broadcast networks, and to implement a no-backsliding rule, such that once a network's ratings caused the video description obligation to kick in, the obligation was permanent.¹⁹⁸ Many in the industry, however, complained that a "no backsliding" rule, which FCC Commissioner Pai called a "'Hotel California' approach to regulation: a network can check out of the upper ranks of viewership any time it likes, but it can never leave [the FCC's] regulatory reach,"¹⁹⁹ would impose significant financial obligations on networks.²⁰⁰ The NAB and National Cable Television Association further asserted that because "the CVAA directed the FCC to reinstate its original rules, which applied to only four broadcast and

¹⁹² *MPAA v. FCC*, 309 F.3d 796 at 803-04; *Report and Order*, 15 F.C.C.R. at 15,278 (Comm'r Powell, dissenting).

¹⁹³ *MPAA v. FCC*, 309 F.3d 796 at 803-04.

¹⁹⁴ *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 651 (1994) (the FCC is not authorized to regulate programming content); *MPAA v. FCC*, 309 F.3d 769 at 803-04; F.C.C. CONSUMER GUIDE, Video Description, 2011, at 2888-89; F.C.C. NOTICE NO. 11-36 at 14-15; *Video Accessibility Report*, 11 F.C.C.R. at 19.

¹⁹⁵ F.C.C. NOTICE NO. 11-36 at 13.

The CVAA explicitly excludes live and near-live programming. CVAA § 713(f)(2)(e).

¹⁹⁶ § 713(f)(2)(C); F.C.C. NOTICE NO. 11-36 at 12.

¹⁹⁷ F.C.C. REP. NO. DA 15-295 (2015).

¹⁹⁸ F.C.C. REP. NO. 16-37 (2016); FCC Office of Media Relations, 2016 FCC Proposes to Expand Video Description Rules, at www.fcc.gov/office-media-relations.

¹⁹⁹ F.C.C. REP. NO. 16-37, at 10-11 (2016).

²⁰⁰ Cablefax, *Video Description* (Response to NPRM) (2016, June 29), at <http://www.cablefax.com/regulation/video-description>.

five non-broadcast networks,”²⁰¹ the FCC had no authority to expand video description to additional networks.²⁰² Ultimately, the FCC abandoned those proposals, but increased the number of hours required (as detailed above).²⁰³

IX. THE AMERICANS WITH DISABILITIES ACT

Although these laws and regulations have substantially improved the accessibility of television media and viewing platforms, a great deal of audio-visual content remains inaccessible to people with disabilities.²⁰⁴ In fact, several 2017 Emmy nominated shows including *The Handmaid’s Tale* (Hulu), *Master of None* (Netflix), and *Transparent* (Amazon Video) are not subject to the captioning or video description requirements. Additionally, viewers have no private cause of action for violations of FCC regulations. Consequently, disabled viewers have looked to general anti-discrimination laws, most notably Title III of the Americans With Disabilities Act (ADA),²⁰⁵ as an alternative legal mechanism to obtain captioning, video description, and other disability-accessibility features.

The Americans with Disabilities Act of 1990 was designed as a comprehensive national mandate to eliminate discrimination against individuals with disabilities.²⁰⁶ It prohibits employers (Title I), public and governmental entities (Title II), and privately-owned places of public accommodation (Title III) from discriminating on the basis of disability.²⁰⁷ Under the ADA, “discrimination” includes both affirmative discriminatory acts as well as the “failure to make reasonable modifications in policies, practices, or procedures, when necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities.”²⁰⁸

²⁰¹ NAB, Jul. 26, 2016, *Reply to FCC Notice of Proposed Rule-Making*, at 11-12 (Jul. 26, 2016), at <https://www.nab.org/documents/filings/VideoDescriptionReplies072616nm.pdf>.

²⁰² *Id.* at 11-13.

²⁰³ *2017 Video Description*, *supra* note 37, at 2-3.

²⁰⁴ Up to 50% of websites are inaccessible to the visually impaired. Jessica Guynn, *For People with Disabilities, Surfing the Web a Daily Struggle*, USA TODAY (Mar. 03, 2016), <http://www.pressreader.com/usa/usa-today-us-edition/20160324/282029031355889>.

²⁰⁵ 42 U.S.C.S. § 12101 (2018).

²⁰⁶ *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001).

To be protected by or obtain a reasonable accommodation under the ADA, an individual must: (a) be disabled within the meaning of the Act; (b) establish that the defendant is covered by the Act; and (c) be discriminated against on the basis of disability. *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008).

²⁰⁷ 42 U.S.C.S. § 12112 (2018); 42 U.S.C. § 12182(a) (2018) (place of public accommodation). The FCC has authority to enforce ADA Title IV’s requirement that telephone systems offer Telecommunication Devices for the Deaf services, 47 U.S.C. § 225, but it has no independent regulatory authority over the Internet.

²⁰⁸ *PGA Tour, Inc. v. Martin*, 532 U.S. at 688; 42 U.S.C.S. § 12182(a) (2018) (“[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods,

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Consequently, covered entities must remove barriers (architectural or technological) to accessibility,²⁰⁹ and provide auxiliary aids and services to enable disabled individuals to take advantage of their services and programs.²¹⁰ This includes providing interpreters, written materials, assistive listening devices, captioning, Braille, voice commands, and descriptive narration, and installing accessibility equipment.²¹¹ If a covered entity unreasonably refuses to provide these, it violates the ADA.²¹²

The ADA requires movie theatres – which are Title III places of public accommodation – to provide captioning, video description, enhanced audio, and related equipment.²¹³ To be clear, the ADA is not concerned with making the movie or product accessible; indeed, the ADA does not require entities to change products (to make them accessible²¹⁴), inventory (to include accessible products), or the fundamental nature of their services.²¹⁵ Instead, the ADA is focused on ensuring that services, advantages, and privileges of covered entities (such as movie theatres) are accessible, so that disabled patrons can take advantage of them services like other patrons do.²¹⁶ In the case of a movie theatre, the appropriate accommodations are providing auxiliary aids and services

services, facilities, privileges, advantages, or accommodations of any place of public accommodation”).

This is because the failure to accommodate an individual with a disability often has the same effect as intentionally excluding that person. *Spector v. Norwegian Cruise Line*, 545 U.S. 119, 128 (2005); *Tennessee v. Lane*, 541 U.S. 509, 532 (2004).

²⁰⁹ *Tennessee v. Lane*, 541 U.S. at 532; 42 USCS §§ 12131, 12143, 12181.

²¹⁰ *PGA Tour, Inc. v. Martin*, 532 U.S. at 688; *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002); Marc Charmatz, et al., *Personal Foul: Lack of Captioning in Football Stadiums*, 45 VAL. U.L. REV. 967 (2011).

²¹¹ 42 U.S.C.S. § 12182 (2018); 2008 ADA Amend. Sec. 4 (1); 28 C.F.R. § 35.104(1) (DOJ regulations defining auxiliary aids to include interpreters, transcription services, written materials, assistive listening devices, open and closed captioning, TDD devices, and videotext displays); *Ball v. AMC*, 246 F. Supp. 2d at 24-26 (describing ADA accommodations in movie theaters).

²¹² 42 U.S.C.S. § 12131 (2018); 42 U.S.C.S. § 12143 (2018); 42 U.S.C.S. § 12181 (2018); §§ 12182(b)(2)(A)(ii), (iii) (2018); Waldo, *supra* note 12, at 1036; *Rendon v. Valleycrest Productions*, 294 F.3d at 1283.

²¹³ *Arizona v. Harkins Amusement Enterprises*, 603 F.3d 666, 669-71 (9th Cir. 2010); *Ball v. AMC*, 246 F. Supp. 2d at 24-26.

In addition, DOJ regulations § 12182(a) require theaters to implement captioning and volume-enhancing listening devices. 28 C.F.R. §§ 36.401, 36.402; *see also* 28 C.F.R. § 36.406(a) (incorporating standards for accessible design); ADA Accessibility Guidelines for Buildings and Facilities, § 4.33 (2004), at <http://www.access-board.gov/adaag/ADAAG.pdf>.

²¹⁴ *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 560 (7th Cir. 1999); *see* §36.307.

²¹⁵ *PGA v. Martin*, 532 U.S. at 688; § 12182(b)(2)(A)(ii); 12201 (f), (h) (covered entity may avoid modifications where “making such modifications would fundamentally alter the nature or content of such goods, services, facilities, privileges, advantages, or accommodations”).

²¹⁶ To be protected by and “disabled” within the meaning of the ADA, an individual must have a substantially limiting impairment. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999). As such, many people who benefit from captioning and video description under telecommunications laws and FCC regulations are not covered by the ADA.

such as captioning, descriptive services, and related equipment.²¹⁷

A. *The ADA and Media Accessibility*

Because the ADA commonly results in captioning and descriptive narration, disabled individuals have sought to bring within its purview streaming and digital/cable services and the audio-visual media available through them. Thus, recent lawsuits have asserted that Title III of the ADA requires movies and television programs, whether exhibited at movie theaters or streamed online, be accompanied by these and related accessibility aids.²¹⁸ Specifically, although the ADA does not include websites, the internet, or digital services among its exhaustive list of covered entities, advocates argue that these are comparable to and provide many of the services of covered “places of public accommodation,”²¹⁹ and have become so central to daily life, that they should be deemed “places of public accommodation” by analogy.²²⁰

A few courts have been sympathetic to this argument. Most notably, a Massachusetts district court declined to dismiss a lawsuit against

²¹⁷ Even when the ADA requires captioning or video description as an accommodation, it does not articulate standards for them. Consequently, the captioning of a movie screened at a theatre might be less comprehensive than captioning of video programming. Telecommunication statutes and FCC regulations also operate differently than the ADA in that they place specific obligations on broadcasters and related VPDs, VPOs, and VPPs to do a specific thing, i.e., caption and or video describe, to enumerated audio-visual products.

²¹⁸ See *supra* notes 4-10; see also *infra* notes 220-55.

²¹⁹ 42 U.S.C.S. § 12181(7) (2018) provides that for purposes of Title III, the following private entities are considered places of public accommodations:

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

²²⁰ See *Nat'l Ass'n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 203 (D. Mass. 2012).

Advocates also contend that had the internet existed when the ADA was passed, Congress would have included it in Title III. *Id.*

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Netflix for failing to caption all titles in its “Watch Instantly” library.²²¹ Citing point-of-sale cases that covered places of public accommodation cannot discriminate in services obtained or delivered outside of their physical premises, the court deduced that an entity did not need any physical premises to be a Title III place of public accommodation.²²² Rather, if a website “falls within a general category listed under the ADA,”²²³ it is a public accommodation, regardless of whether it has a physical location.²²⁴ Consequently, because Netflix was comparable to a “service establishment,” “place of exhibition or entertainment,” and a “rental establishment,” it was a place of public accommodation.²²⁵ Notwithstanding, the court was not convinced that Netflix was responsible for captioning and video-describing its streaming content. Instead, it explained that because much of that content was copyrighted to others, Netflix may not control it or have the ability to make the requested ADA accommodations.²²⁶

Aside from any flaws in the court’s interpretation of the ADA and pertinent Circuit Court opinions, the persuasive authority of this decision is questionable. The Supreme Court has repeatedly stated that a court cannot use what it thinks is an inequitable result to justify an expansive interpretation of a statute; Courts cannot revise legislation “because the text as written creates an apparent anomaly as to some subject it does not address,” or “they think Congress intended something broader.”²²⁷ Nevertheless, the district court did just that, acknowledging that streaming services were not included in the statute, but saying that excusing them would frustrate the ADA’s intent that accommodations adapt to the times.²²⁸ This may be a legitimate policy argument for amending Title III to include the internet, but it ignores distinctions within the statute’s text, concurrent and subsequent legislation that addressed the accessibility of online and broadcast media, and that in 2000 Congress held hearings on whether to expand the ADA to cyberspace, but decided not to do so.²²⁹

Title III articulates an exhaustive list of covered places of public

²²¹ *Nat’l Ass’n of the Deaf v. Netflix*, 869 F. Supp. 2d 196.

²²² *Id.* at 200-01.

²²³ *Id.* at 201.

²²⁴ *Id.* at 200-02.

²²⁵ *Id.* at 201-02.

²²⁶ *Id.* at 202-203.

²²⁷ *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014).

²²⁸ *Netflix*, 869 F. Supp. 2d at 200-02.

The court seemed to reason backwards from the requested accommodation to who could provide it, and then placed on that party an obligation to provide the accommodation.

²²⁹ *Applicability of the Americans with Disabilities Act to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 6 (2000), at www.access-board.gov/sec508/standards.htm.

accommodation, all of which are bricks-and-mortar, physical places.²³⁰ (An entity may also deliver services by other means, such as telephone, but to qualify as a covered place of public accommodation, it must serve customers at a physical location). In fact, when the ADA was passed, there were many non-physical counterparts of the enumerated physical places of public accommodation that provided similar services: mail-order, catalog, door-to-door, and 1(800) telephone sales and services; telephone psychics and sex hotlines. Nonetheless, Congress did not include these as ADA covered entities.²³¹ It is thus evident that Congress wrote the ADA to cover services and entities with physical presences, but to exclude those without.²³²

Further confirming this, in 2000 Congress held hearings on whether it should amend the ADA to apply to cyberspace, but ultimately declined to expand it.²³³ This demonstrates that, first, Congress did not believe the ADA covered cyberspaces, and, second, after consideration, did not want it to.²³⁴ Instead, Congress dealt with the accessibility of telecommunications and online video programming in separate laws, first in the TDCA and later in the CVAA, a law whose name and purpose is to make 21st century communications services and products, such as streaming media, accessible.²³⁵

Indeed, the majority of Circuit courts interpreting Title III have held a “place of public accommodation” necessitates a physical place as a threshold of coverage. These holdings fall into two categories. The

²³⁰ 42 U.S.C.S. §§ 12181(7)(A)-(L) (2018).

²³¹ Podlas, *supra* note 10, at 8; *see also Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012).

²³² Podlas, *supra* note 10, at 8.

This is consistent with similar language in the Civil Rights Act. *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1270 (7th Cir.1993) (interpreting “public accommodation” language). The DOJ also has said that the ADA does not address access to websites, but only physical spaces. Podlas, *supra* note 10, at 8-9.

²³³ *See supra* note 229.

²³⁴ By contrast, Congress amended the Rehabilitation Act to require governmental websites to be disability accessible. *Id.*; 29 U.S.C. 794(d) (federal agency websites must comply with Electronic and Information Technology Accessibility Standards), at www.access-board.gov/sec508/standards.htm. Regulations pertaining to Title II governmental entities also require them to make information, including that “distributed via computers and the Internet,” “available to all members of the public, irrespective of disability,” 28 CFR part 35/§§ 35.160(a), (b)(1), and ensure that such communications are as effective as those with non-disabled peoples. *2010 ADA Standards for Accessible Design*. These actions support the conclusion that Congress chose to address internet and tech-based accessibility *not* through the ADA, but through other laws and agencies.

²³⁵ S. Rep. No. 111-386, at 1 (2010) (Congress enacted the CVAA “to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and to better access video programming”).

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Third,²³⁶ Sixth,²³⁷ Ninth,²³⁸ and Eleventh²³⁹ Circuits require “places of public accommodation” to have physical structures. Accordingly, stand-alone cyberspaces and digital services are not covered by the ADA.²⁴⁰ If, however, a covered physical place offers online services that are integrated with or have a nexus to the physical place (or impede access to it), they must be ADA-compliant.²⁴¹

The First,²⁴² Second,²⁴³ Fourth,²⁴⁴ and Seventh²⁴⁵ Circuits also require a “place of public accommodation” to exist in a physical place, but do not require the services, privileges, or goods in question to be obtained in that physical location. Simply, if an entity (the physical place of public accommodation) is covered by Title III, any services, privileges, and advantages it provides – whether on-site, online, telephonic, digital, or electronic – must be accessible to disabled individuals.²⁴⁶ Hence, a website comes within the purview of the ADA vis-à-vis the covered (physical) place of public accommodation.²⁴⁷ Because both approaches

²³⁶ *Peoples v. Discover Fin. Services, Inc.*, 387 F. App’x 179 (3d Cir. 2010) (public accommodation “is limited to physical accommodations”); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998).

²³⁷ *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997).

²³⁸ *Cullen v. Netflix*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012), *aff’d* 600 Fed. Appx. 508 (9th Cir. 2015); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) (“All the items on this list, however, have something in common. They are actual, physical places where goods or services are open to the public, and places where the public gets those goods or services”).

²³⁹ *Rendon v. Valley Crest Prods.*, 294 F.3d 1279 (11th Cir. 2002); *Kidwell v. Fla. Comm’n on Human Relations*, 2017 U.S. Dist. LEXIS 5828 (M.D. Fla., 2017) (a website is not an ADA place of public accommodation).

²⁴⁰ *See Cullen v. Netflix*, 600 Fed. Appx. 508; *Kidwell v. Fla.*, 2017 U.S. Dist. LEXIS 5828 (M.D. Fla., 2017) (a website is not an ADA place of public accommodation).

²⁴¹ *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F.Supp.2d 946, 953-55 (N.D. Cal. 2006) (the website provided a gateway to, provided a variety of services in conjunction with, and was heavily integrated with Target’s physical stores, so came within purview of the ADA); *Gomez v. J. Lindeberg USA*, 2016 U.S. Dist. LEXIS 187771 (S.D. Fla., 2016) (the defendant’s website allowed customers to purchase clothing online and search for store locations).

²⁴² *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994).

²⁴³ *Leonard F. v. Israel Disc. Bank of N.Y.*, 199 F.3d 99 (2d Cir. 1999).

Although some courts interpret *Pallozzi* to mean that an entity does not need a physical presence to be covered by Title III, the Second Circuit clarified that its holding in *Pallozzi* was “that an insurance office in its dealings with the public is a ‘place of public accommodation’ and is regulated by Title III.” *Id.* at 107.

²⁴⁴ *Noah v. AOL Time Warner*, 261 F. Supp. 2d 532 (E.D. Va. 2003), *aff’d* (4th Cir. 2004).

²⁴⁵ *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) (“The site of the sale is irrelevant . . . What matters is that the good or service be offered to the public”).

²⁴⁶ *Andres v. Blick Art Materials*, 2017 U.S. Dist. LEXIS 121007 (E.D.N.Y. 2017); *Gil v. Winn Dixie Stores, Inc.*, 2017 U.S. Dist. LEXIS 90204 at *20-21(2017) (opinion and Order on Verdict), 242 F. Supp. 3d 1315 (S.D. Fla., 2017) (the services offered through Winn-Dixie’s website, such as online pharmacy management, access to digital coupons automatically linked to a customer’s rewards card, and a store locator are services, privileges, and advantages offered by Winn-Dixie’s stores).

²⁴⁷ Podlas, *supra* note 10; *Gil v. Winn Dixie Stores*, 2017 U.S. Dist. LEXIS 91187 (S.D. Fla., 2017) (Winn-Dixie’s website is heavily integrated with Winn-Dixie’s physical store locations).

require an entity to have a physical place to qualify as a Title III “place of public accommodation,” a website or streaming service unrelated to a covered physical place of public accommodation would not be subject to the ADA under either approach. The difference is that whereas the former requires a nexus between the covered place and its website for the website to fall within the purview of the ADA,²⁴⁸ the latter does not;²⁴⁹ Instead, it treats the website like any other service or privilege that must be accessible.²⁵⁰

Consequently, courts have held that stand-alone websites,²⁵¹ social media sites,²⁵² and digital²⁵³ and streaming services²⁵⁴ are not “places of public accommodation” covered by the ADA.²⁵⁵ Most notably, the Ninth Circuit dismissed an ADA lawsuit against Netflix.²⁵⁶ There, a blind

²⁴⁸ *Parker v. Metro. Life Ins.*, 121 F.3d 1006; *Nat’l Fed’n of the Blind v. Target*, 452 F. Supp. 2d 946 at 949-56 (Target kiosks and website offered customers a variety of services in conjunction with its bricks-and-mortar stores); see generally *Weyer v. Twentieth Century Fox*, 198 F.3d 1104 at 1114 (statute requires “some connection between the good or service complained of and an actual physical place”).

Hence, a website with no connection to a covered physical location is not covered by the ADA. *Gomez v. Bang & Olufsen Am., Inc.*, 2017 U.S. Dist. LEXIS 15457 (S.D. Fla. 2017) (a website wholly unconnected to a physical location is not an ADA place of public accommodation); *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (dismissing complaint because there was no nexus between the website and a physical, concrete place of public accommodation); *Kidwell v. Fla. Comm’n on Human Relations*, 2017 U.S. Dist. LEXIS 5828 (a website is not a public accommodation, and in any event, its inaccessibility did not impede plaintiff’s access to a specific, physical, concrete space).

²⁴⁹ Presumably, a website with a nexus to the covered place would qualify as a service or privilege of the entity.

²⁵⁰ Consistent with this, in 2010, the DOJ issued an Advance Notice of Proposed Rulemaking in which it stated its position that if a private entity meeting the definition of public “accommodations: has a website, the ADA applies to that website. *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43, 460, 464 (July 26, 2010).

Of course, the service in question must be *of* or provided by the covered entity. Thus, in *Stoutenborough v. Nat’l Football League*, hearing-impaired individuals claimed that the NFL’s TV “blackout rule of local football games, discriminated against them in violation of the ADA, as they had no other means of accessing the football game ‘via telecommunication technology.’” 59 F.3d 580, 583 (6th Cir. 1995). Rejecting the contention, the court explained that Title III covered only the services “the public accommodation offers, not [those] which the lessor of the public accommodation offers . . .” *id.* at 582-83.

²⁵¹ *Earll v. eBay, Inc.*, 764 F. Supp.2d 1148 (N.D. Cal. 2011) (places of public accommodation are limited to physical places), *aff’d* 599 Fed. App’x. 695 (9th Cir. 2015); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 534 (E.D. Va. 2003), *affirmed for reasons in Dist. Court opinion* (4th Cir. 2004) – unpublished opinion (online chatroom is not an ADA place of public accommodation).

²⁵² *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011).

²⁵³ *Torres v. AT&T Broadband*, 158 F. Supp. 2d 1035 (N.D. Cal. 2001) (digital cable system is not a place of public accommodation).

²⁵⁴ *Cullen v. Netflix*, 2012 U.S. Dist. LEXIS 97884 (9th Cir. 2012).

²⁵⁵ Podlas, *supra* note 10, at 8-9; see generally *Reno v. ACLU*, 521 U.S. 844, 851 (1997) (describing cyberspace as being “located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet”).

²⁵⁶ *Cullen v. Netflix*, 2012 U.S. Dist. LEXIS 97884; but see *Nat’l Ass’n of the Deaf v. Netflix*,

subscriber sued Netflix, because some of its streaming content was not captioned. The Ninth Circuit dismissed the suit explaining that “websites are not places of public accommodation.”²⁵⁷ Therefore, “[b]ecause Netflix’s services are not connected to any ‘actual, physical place[,]’ it is not subject to the ADA.”²⁵⁸

Courts have employed the same reasoning in rejecting ADA lawsuits against Facebook,²⁵⁹ YouTube,²⁶⁰ and AT&T Broadband.²⁶¹ For instance, a subscriber sued AT&T Broadband because its on-screen channel guide was not accessible to visually-impaired subscribers.²⁶² The court dismissed the complaint, saying that digital cable service was not a place of public accommodation: Instead, the plaintiff “simply turns on his television set and has automatic access to the sounds and images provided by the defendants’ service.”²⁶³

Nevertheless, the act of filing an ADA lawsuit can contribute to significant improvements in streaming accessibility. For example, after news of the Netflix lawsuits spread, Netflix announced that it would expand captioning and produce video description for a significant portion of its streaming library.²⁶⁴ Similarly, VuDu responded to an ADA lawsuit by agreeing to implement a variety of accessibility measures beyond those which would have been required by law.²⁶⁵ Hence, an ADA lawsuit that is unsuccessful in the courtroom may be successful in real life, by bring attention to the needs of underserved consumers and motivate businesses to voluntarily implement accessibility changes.²⁶⁶

869 F. Supp. 2d 196, 202 (website could be place of public accommodation).

²⁵⁷ *Cullen v. Netflix*, 2012 U.S. Dist. LEXIS 97884 at 11.

²⁵⁸ *Cullen v. Netflix*, No. 13-15092 (9th Cir. Apr. 1, 2015) (order affirming district court’s dismissal).

²⁵⁹ *Young v. Facebook*, 790 F. Supp. 2d 1110 at 1115-16 (Facebook operates only in cyberspace so is not a place of public accommodation).

²⁶⁰ *Oullette v. Viacom*, 2011 WL 1882780 (D. Mont. 2011) (YouTube is not a physical place).

²⁶¹ *Torres v. AT&T Broadband*, 158 F.Supp. 2d1035 at 1037-38.

²⁶² *Id.*

²⁶³ *Id.* at 1038.

²⁶⁴ Consent Decree at § 3(b), *Nat’l Ass’n of the Deaf v. Netflix*.

²⁶⁵ Launey, *supra* note 9; *see also* Settlement Agreement Between the United States and edX, Inc., DJ No. 202-36-255 (Apr. 2, 2015); Settlement Agreement, United States and Ahold U.S.A., Inc. and Peapod, LLC, DJ No. 202-63-169 (Nov. 14, 2014); *Nat’l Fed. of the Blind v. United States of America v. HRB Digital LLC and HRB Tax Group, Inc.*, No. 13-cv-10799-GAO (Mar. 25, 2014) (consent decree).

²⁶⁶ In 2013, the National Federation of the Blind sued H&R Block alleging that its website and online tax preparation tools were inaccessible. Soon after the DOJ intervened, “H&R Block agreed to a consent decree under which it would make its website, tax preparation tool, and mobile application conform to the Web Content Accessibility Guidelines (WCAG) 2.0, Level AA.” Minh N. Vu, *Another DOJ Action*, ADA Title III News & Insights (May 21, 2015), <http://www.adatitleiii.com/2015/05/another-doj-action-over-allegedly-inaccessible-websites-and-other-technologies>.

B. “Cross Over” Coverage

Sometimes an accommodation implemented pursuant to the ADA impacts the availability of captioning and video description of television programming or streaming content. As explained above, covered entities must provide disabled individuals equal access to goods, services, advantages, and privileges,²⁶⁷ and if those services include websites, televisions/ monitors, and audio-visual content, they must be accessible. For instance, sports bars, gyms, and public venues (all places of public accommodation) commonly provide on-site televisions or video monitors related to their services or as an added feature for patrons. Similarly, many stores offer customers kiosks or websites through which they can order out-of-stock items or extended sizes, obtain troubleshooting videos (such as Eero’s website which shows how to set up an Eero network) and instructional videos for product use (“Exercising with your Bowflex”)²⁶⁸, place orders for in-store pick-up, or print coupons. Independent of any telecommunications laws or regulations, because these constitute services, privileges, or advantages of covered entities, they must be disability-accessible. Often this translates to captioning, voice narration, or other auxiliary aids.²⁶⁹

Additionally, accommodations implemented to comply with the ADA can cross over to television, online, and streaming platforms. For example, because theatres must make their services accessible, movie studios typically provide digital caption and descriptive narration files with their films. (The content creator is not legally obligated to do this, but it adds value to the film license). When those movies are later transmitted “On Demand” or streaming, because closed-captions and video description exist, they must be Passed Through to viewers (if feasible).

X. APPLYING THE CLOSED-CAPTIONING AND VIDEO DESCRIPTION RULES

As the above details, the closed-captioning and video description obligations, across platforms and types of video (e.g., film, television), are complex. Furthermore, they lag behind both telecommunications technology and viewers’ ever-changing notions of “watching TV.”

²⁶⁷ 42 U.S.C. § 12182(a) (disabled individuals must be provided “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation”).

²⁶⁸ *How Do I Set Up Eero?*, Eero, <https://support.eero.com/hc/en-us/articles/207937603-How-do-I-set-up-eero-> (last visited Mar. 7, 2018).

²⁶⁹ Podlas, *supra* note 10, at 4.

Indeed, from the perspective of viewers, as well as academics and practitioners referencing this article, it is hardly intuitive that the Emmy winning television series *Transparent* is exempt from the closed-captioning mandate or the biggest television event of the year, the Super Bowl, is free of the video-description mandate.

To help clarify how the key laws and regulations apply to today's television environment, the chart below provides examples of types of television content, providers, and platforms, and annotates whether they are required to closed-caption or video describe particular content.

A. Captioning and Video Description Obligations

| Content | Closed-Captions Required ? | Video Description Required ? |
|---------------------------------------|---|---|
| <i>Scandal</i> (ABC, 9 pm) | Yes. All platforms (broadcast, network app, third-party streaming service), because existing captions must be passed through. | Yes, if programming counts toward ABC's quarterly hour requirement. |
| 60 second ad for <i>Scandal</i> | No - ads are not "video programming." Existing captions, however, must be passed through. | No. |
| <i>Crazy Ex-Girlfriend</i> (CW, 8 pm) | Yes for dialog. No for song lyrics (but presence of music must be indicated). All platforms (including day-after-airing on CW app), because existing captions must be passed through. | No - CW is not a Top 4 network. |
| <i>Vikings</i> (HIS, 9 pm) | Yes for English dialog. No for foreign dialog | Yes (through June 30, 2018), if programming counts |

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| | (by must be indicated as foreign dialog). All platforms, because existing captions must be passed through. | toward quarterly hour requirement. As of July 2018, no, if HIS falls out of top-five ranking. |
| <i>The Walking Dead</i> (AMC) | Yes. All platforms, because existing captions must be passed through. | No - AMC is not a Top 5 Cable network. |
| <i>Fear the Walking Dead: Flight 462</i> [webisode] (AMC app; amc.com) | No (is not telecast, and is not “video programming”). Existing captions, however, must be passed through. | No - streaming is not covered. |
| <i>Westworld</i> (HBO, HBO GO) | Yes. All platforms, because existing captions must be passed through. | No – not a Top 5 cable network (and lacks 50% penetration). |
| <i>Keanu</i> (feature film, subsequently shown on HBO or Amazon) | No – does not constitute “video programming.” Under the ADA, however, a digital captioning file will have been created (for screenings in theatres) and exist, and captions must be passed through. | No – does not constitute “video programming.” Under the ADA, however, description narration (i.e., video description) will have been created (for screenings in theatres) exist, and must be passed through, if technically feasible. |
| Capadocca (HBO) | Yes (Spanish language). All platforms, because existing captions must be passed through. | No –not a Top 5 cable network. |
| <i>Transparent</i> (Amazon Video) As of August 2017, airing on IFC | No - Not transmitted on television. Existing captions, however, must be | No - Streaming video is not covered. |

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| | passed through. Yes (when airing on IFC, because it is “video programming”) | |
| <i>The Handmaid’s Tale</i> (Hulu) | No - Not transmitted on television. Existing captions, however, must be passed through. | No - Streaming video is not covered. |
| <i>Peaky Blinders</i> (broadcast on BBC Two, subsequently available on Netflix) | No -Not first broadcast in US. Existing captions, however, must be passed through. | No – neither streaming nor foreign broadcasts are covered. |
| CBS Sunday 1 pm football | Yes, by stenocaptioning. (No, if live streaming on CBS All Access app). | No - daytime programming is not covered; live programming is exempt by statute. |
| CBS primetime football | Yes, by stenocaptioning. (No, if live streaming on CBS All Access app). | No - live programming is exempt by statute. |
| <i>Star Trek</i> (2017) (CBS All Access app) | Yes for episode #1 (because broadcast on CBS, so subject to captioning mandate; In turn, captions must be passed through to IP). No for episodes available exclusively on CBS All Access - Not transmitted on television. Existing captions, however, must be passed through. | Yes, for episode #1, if it counts toward CBS’s quarterly hour requirement. (In turn, video description must be passed through to IP, if technologically feasible). No for episodes available exclusively on CBS All Access - Streaming is not covered. |
| ESPN <i>30 for 30</i> (ESPN) | Yes. | No – Although the program is pre-recorded, ESPN does not reach 50 hour |

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| | | threshold. |
| <i>Black Market: With Michael K. Williams</i> (Viceland) | No – falls within self-implementing exemption for new network. Existing captions, however, must be passed through. | No - Viceland is not a Top 5 Cable network. |
| <i>Gomorra</i> (IFC) | No - Most dialogue is Italian; falls within self-implementing (language) exemption. Existing captions, however, must be passed through. | No -IFC is not a Top 5 Cable network. |

CONCLUSION

Notwithstanding the statutes and regulations devoted to ensuring that television is accessible, they do not cover significant portions of the contemporary television landscape. This observation is neither an accusation that Congress and the FCC have been blind and deaf to the needs of sensory-impaired viewers nor a call for the aggressive expansion of the video description and captioning mandates. Indeed, it is easy to propose that television content, whatever its form, however transmitted, on whichever screen be fully accessible, but it is difficult to implement this, once the myriad of economic, technological, and creative concerns are taken into account. Rather, this is simply a recognition that, because “television” and the ways audiences consume it have expanded so dramatically and quickly, existing rules cannot keep pace with viewers’ needs.

Nonetheless, many of the streaming services and alternative content providers who are reshaping the television medium and industry voluntarily implement accessibility features beyond those required by law. Whether motivated by a desire to capture the pocketbooks and loyalty of underserved disabled consumers, stave regulation, avoid high profile lawsuits, or address the needs of sensory-impaired viewers, the end result is the same: greater access to the growing array of television programming and platforms. Furthermore, due to Pass Through requirements, voluntary closed-captioning and video description enable

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sensory-disabled viewers to access more disability-accessible programming than in the past. The net effect can enhance industry accessibility standards, recalibrate viewer expectations, and pressure others to follow suit.