

**STATEMENT OF
COMMISSIONER PAI
APPROVING IN PART AND CONCURRING IN PART**

Re: *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154.

Voltaire's *La Béguele* opens with an observation invaluable for Commission officials involved in the collaborative arts: “[L]e mieux est l’ennemi du bien,” or “The best [or perfect] is the enemy of the good.” It’s in this spirit that I am voting to approve in part and concur in part in this Order on Reconsideration and Further Notice of Proposed Rulemaking. Although not “the best,” today’s item improves upon the earlier *IP Closed Captioning Order*.¹

Let’s start with the many areas where I agree with my colleagues. To begin with, I support the Commission’s decision to deny TVGuardian’s petition for reconsideration. I also agree with our decision to leave in place the Commission’s determination that video clips shouldn’t be covered by our IP closed captioning rules. Furthermore, I too believe we should clarify that the Commission’s January 1, 2014 compliance deadline applies to the date of an apparatus’s manufacture. Finally, I endorse seeking further comment on whether any synchronization requirements should be placed on apparatus manufacturers.

However, I concur in part because I would interpret the text of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) differently with respect to two issues.

First, I would use a different test to evaluate whether an apparatus is covered by our IP closed captioning rules. The statute only covers devices “*designed to receive or play back video programming.*”² This, in my view, requires more than looking just to an apparatus’s capabilities, the standard adopted in the prior order and reaffirmed today.³ The word “designed” indicates manifested intent,⁴ and interpreting the statute as not requiring *any* measure of intent essentially reads the phrase “designed to” out of the statute.⁵

To be sure, today’s item claims that the Commission looks to “the device’s functionality . . . to determine what the device was designed to accomplish.”⁶ But functionality is not always aligned with intent. Take, for example, the drug commonly known as Propecia. Although it certainly is capable of reversing male pattern baldness, Propecia was not designed for this purpose. Rather, it was developed to

¹ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154, Report and Order, 27 FCC Rcd 787 (2012) (*IP Closed Captioning Order*).

² 47 U.S.C. § 303(u)(1) (emphasis added).

³ *IP Closed Captioning Order*, 27 FCC Rcd at 842, para. 95; Order on Reconsideration and Further Notice of Proposed Rulemaking at para. 5 (*Recon. Order*).

⁴ See Webster’s New International Dictionary 707 (2d ed. 1940) (defining “design” as “to conceive or execute a scheme or plan for the making of anything” or “to plan; to intend”).

⁵ Under the Commission’s interpretation, the result would be the same whether the statute read “apparatus that receives or plays back video programming” or (as it does) “apparatus designed to receive or play back video programming.” See 47 U.S.C. § 303(u)(1).

⁶ *Recon. Order* at para. 7.

treat enlarged prostates.⁷ Similarly, while a credit card can sometimes open locked doors,⁸ I don't think anyone would say that it was designed to do so.

I share my colleagues' concern that a subjective intent test would grant manufacturers too much leeway by allowing them to "evade our requirements by claiming that they did not intend such use."⁹ This is one reason why I favor using an objective intent test to determine whether an apparatus is covered by the statute and our IP closed captioning rules. In particular, we should ask whether a reasonable person would conclude that a device was intended to receive or play back video programming.¹⁰ While a device's functionality would certainly be highly probative evidence in such an inquiry, it would not always be outcome determinative. For example, I do not believe that a reasonable person would conclude that the devices that are the subject of the waivers granted in today's item, such as digital still cameras and baby monitors, were intended to receive or play back video programming.

That said, the Commission today reaches a similar result by taking a different path. In particular, the Commission's application of the "primarily designed" test to grant waivers,¹¹ in which it assesses whether an apparatus's video capability is only incidental, will generally arrive at the same outcome as an objective intent test. So while my preferred approach would give meaning to the phrase "designed to" in the statute and lighten the workload of the Commission and stakeholders in addressing future waiver requests, I think the real-world outcome of today's item is generally acceptable in the context of closed captioning (and definitely an improvement over the status quo).

Second, I would not interpret the CVAA to impose a closed-captioning requirement on removable media players. The statute applies such requirements on "apparatus designed to receive or play back video programming transmitted simultaneously with sound."¹² The word "transmitted" is most logically read to refer to the transmission of programming to the device (*e.g.*, from a cable head-end to a set-top box) rather than from the device to the end user (*e.g.*, from a television to a viewer). That's certainly the usual meaning of the word "transmit" in communications law.¹³ Moreover, absent a clear indication to the contrary, we should hesitate to extend our jurisdiction beyond its traditional bounds. Congress, after

⁷ See Susan Scutti, "Schizophrenic Drugs That Can Kill Antibiotic-Resistant Bacteria," *Medical Daily*, May 17, 2013 ("Propecia, for instance, was originally marketed as Proscar and was intended to treat the benign enlargement of the prostate. After five years on the market, it became known that one of the side effects of Proscar was hair growth on bald men; now it is used to treat male-pattern baldness."), available at <http://www.medicaldaily.com/articles/15661/20130517/schizophrenia-drugs-kill-antibiotic-resistant-bacteria.htm>.

⁸ See, *e.g.*, *The French Connection* (20th Century Fox 1971).

⁹ *Id.*

¹⁰ Similar intent tests are used in other contexts. See, *e.g.*, *Sigma-Tau Pharmaceuticals, Inc. v. Schwetz*, 288 F.3d 141, 146 (4th Cir. 2002) (explaining FDA's objective intent test in assessing drugs, which involves examining both direct expressions by manufacturers and "the circumstances surrounding the distribution of the article").

¹¹ See *Recon. Order* at para. 12.

¹² 47 U.S.C. § 303(u)(1) (emphasis added).

¹³ See, *e.g.*, 47 U.S.C. § 152(a); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 705 (D.C. Cir. 2005) (invalidating certain regulations affecting how DTV devices share content with recording devices because such sharing occurs "after a transmission is complete"); see also, *e.g.*, Webster's New International Dictionary 2692–93 (2d ed. 1940) (defining "transmit" as "to send or transfer from one person or place to another; to forward by rail, post, wire, etc.").

all, does not “hide elephants in mouseholes.”¹⁴ Several other statutory considerations also counsel a more restrained approach with respect to removable media players.¹⁵

Looking at the bigger picture, I also believe that the structure of the CVAA (as well as the Communications Act) suggests that Congress did not intend to impose closed-captioning requirements on DVD and Blu-ray players. Given that distributors of DVDs and Blu-ray discs are under no legal obligation to include closed captioning along with their video programming,¹⁶ it doesn’t seem to me that Congress meant to require DVD and Blu-ray players to display closed captions. Indeed, Blu-ray discs do not even have a standard format for closed captioning.¹⁷

Nevertheless, I appreciate the Commission’s decision today to delay application of the closed-captioning requirements to DVD and Blu-ray players pending resolution of the Further Notice of Proposed Rulemaking on this issue. If we ultimately levy these requirements on removable media players, I hope we do so in a minimally intrusive manner.

Finally, I would like to thank my colleagues for their willingness to incorporate my suggestions and commend Chairwoman Clyburn for her leadership in implementing the CVAA. Less than a month into her tenure as the head of our agency, we have already adopted two items that bring us closer to realizing the statute’s promise. This is a significant accomplishment.

¹⁴ *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001).

¹⁵ For one, the statute uses the past participle “transmitted,” which suggests completed action—*i.e.*, video programming that has already been transmitted simultaneously with sound, not video programming that is being or will be transmitted simultaneously with sound.

For another, before the CVAA amended section 303(u), that section discussed “video programming broadcast simultaneously with sound”—a clear reference to how the device received the programming, not how it was displayed. In amending that statutory term, Congress broadened the provision to encompass non-broadcast transmissions; it seems unlikely that Congress meant not to broaden the provision but to change its fundamental scope. This is especially so in light of the fact that Congress adopted the CVAA to adapt the Communications Act to the “fundamental transformation, driven by growth in broadband,” of the communications marketplace since 1996, House Report 111-563, at 19 (Committee on Energy and Commerce July 26, 2010); Congress was certainly aware of the development of the Sony Betamax, the VCR, the computer diskette, the DVD player, the Zip drive, the USB card, the Blu-Ray player, and other removable media players, but adapting the law to them was not the purpose of the CVAA.

For yet another, this interpretation of “transmitted” cannot be applied coherently to other statutory provisions that use the same term. Section 203 of the CVAA also includes section 303(z) of the Communications Act, and uses parallel language about recording devices—but if a recording device doesn’t play back any video programming (and thus does not itself “transmit” the programming simultaneously with sound to the user), does the question become whether video programming might eventually be transmitted (or is intended to be transmitted) simultaneously with sound? Similarly, section 201(e)(2)(F) of the CVAA requires “a recommendation for the standards, protocols, and procedures used to enable the functions of apparatus designed to receive or display video programming *transmitted* simultaneously with sound (including apparatus designed to receive or display video programming *transmitted* by means of services using Internet protocol) to be accessible to and usable by individuals with disabilities” (emphases added). Under the Commission’s interpretation, how could video programming be “transmitted” to the user “by means of services using Internet protocol”?

¹⁶ See *IP Closed Captioning Order*, 27 FCC Rcd at 846, para. 99 & n.398.

¹⁷ See *Recon Order* at para. 21 & n.78; see also Reply Comments of CEA at 7 n.32.