No. 12-15807

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREATER LOS ANGELES AGENCY ON DEAFNESS, INC., DANIEL JACOB, EDWARD KELLY, and JENNIFER OLSON, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

vs.

CABLE NEWS NETWORK, INC., incorrectly sued as Time Warner Inc.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
District Court Case No. 3:11-cv-03458-LB
The Honorable Laurel Beeler

ANSWERING BRIEF OF APPELLEES GREATER LOS ANGELES AGENCY ON DEAFNESS, INC., ET AL.

DISABILITY RIGHTS ADVOCATES
Laurence W. Paradis, Bar No. 122336
lparadis@dralegal.org
Mary-Lee K. Smith, Bar No. 239086
msmith@dralegal.org
Michael Nunez, Bar No. 280535
mnunez@dralegal.org
2001 Center Street, Fourth Floor
Berkeley, California 94704
(510) 665-8644 • (510) 665-8511 (fax)
(510) 665-8716 (TTY)

Attorneys for Plaintiffs-Appellees, GREATER LOS ANGELES AGENCY ON DEAFNESS, ET AL.

GOLDSTEIN, DEMCHAK, BALLER, BORGEN & DARDARIAN
Linda M. Dardarian, Bar No. 131001
ldardarian@gdblegal.com
Jason H. Tarricone, Bar No. 247506
jtarricone@gdblegal.com
300 Lakeside Drive, Suite 1000
Oakland, California 94612
(510) 763-9800 • (510) 835-1417 (fax)

PETER BLANCK (*pro hac vice*)
pblanck@syr.edu
900 S. Crouse Avenue
Crouse-Hinds Hall, Suite 300
Syracuse, New York 13244-2130

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee Greater Los Angeles Agency on Deafness ("GLAD") makes the following disclosure statement:

GLAD is a non-profit corporation that offers no stock. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Dated: October 18, 2012

Respectfully submitted,

/s/ Linda M. Dardarian

Linda M. Dardarian, CA Bar No. 131001
ldardarian@gdblegal.com
Jason H. Tarricone, CA Bar No. 247506
jtarricone@gdblegal.com
GOLDSTEIN, DEMCHAK, BALLER,
BORGEN & DARDARIAN
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800 • (510) 835-1417 (fax)

Laurence W. Paradis, CA Bar No. 122336
lparadis@dralegal.org
Mary-Lee K. Smith, CA Bar No. 239086
msmith@dralegal.org
Michael Nunez, CA Bar No. 280535
mnunez@dralegal.org
DISABILITY RIGHTS ADVOCATES
2001 Center Street, Fourth Floor
Berkeley, California 94704
(510) 665-8644 • (510) 665-8511 (fax)
(510) 665-8716 (TTY)

Peter Blanck (*pro hac vice*)
pblanck@syr.edu
900 S. Crouse Avenue
Crouse-Hinds Hall, Suite 300
Syracuse, New York 13244-2130

Attorneys For Plaintiffs-Appellees,
Greater Los Angeles Agency on Deafness, et al.

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I. SUMMARY OF THE ARGUMENT

Closed captioning is necessary for deaf and many hard of hearing persons to fully and equally access online news videos at CNN.com. Closed captioning does not interfere with news production or delivery and is invisible to viewers who do not need it. Yet, Appellant Cable News Network ("CNN") does not caption its online videos.

Plaintiffs are deaf or hard of hearing visitors to CNN.com who have been denied full and equal access to CNN.com's videos because of this lack of captioning. Plaintiffs have sued CNN under California's Unruh Civil Rights Act ("Unruh Act") and California's Disabled Persons Act ("DPA") because these laws require CNN to caption the videos on CNN.com for people in California. The Federal Communications Commission's ("FCC's") new regulations for closed captioning on the Internet, and the regulations' authorizing statute, only apply to certain full-length programming previously shown on American television after the regulations' effective date. The FCC regulations do not apply to video clips. Most of the videos on CNN.com are video clips. They are not covered by federal law. Thus, unless Plaintiffs' claims are allowed to proceed, Californians who are deaf or hard of hearing and rely on captions will continue to be excluded from most of CNN's online videos.

CNN's motion to strike Plaintiffs' complaint under California's anti-SLAPP statute is misplaced. The statute's first prong requires the Court to identify the conduct that forms the gravamen of Plaintiffs' complaint and determine whether it is an act in furtherance of free speech. The district court below correctly found that the conduct at issue – CNN's refusal to caption its online videos – is *not* an act in furtherance of CNN's free speech. The court's finding is fully in line with precedents holding that only interference with a defendant's content or content-generating activities satisfies the first prong. Captioning is independent of CNN's content and content-generating activities and thus does not implicate CNN's free speech.

CNN mischaracterizes the analysis that led the district court to reject CNN's first prong argument. Contrary to CNN's assertion, the district court's detailed order sets forth the standards it applied, and those standards are consistent with the language of the anti-SLAPP statute and applicable case law.

If the Court upholds the district court's first prong decision, it need not address the anti-SLAPP statute's second prong. Regardless, Plaintiffs meet that second prong as well since there is at least a probability that Plaintiffs will prevail on their claims. The DPA applies to websites, and CNN's refusal to caption the videos on CNN.com excludes Plaintiffs from having full and equal access to the advantages of that site. Plaintiffs have met any intent requirement under

California's Unruh Act because CNN knows that its refusal to caption the videos on CNN.com excludes Plaintiffs from accessing the advantages of that website. Furthermore, CNN's preemption, dormant Commerce Clause, and First Amendment defenses are all deficient.

II. JURISDICTION

Plaintiffs do not dispute jurisdiction in this case.

III. ISSUES PRESENTED

For the First Prong, the issues are:

(1) Was the district court correct in holding that the principal thrust or gravamen of Plaintiffs' claims is CNN's refusal to caption its online videos, and not CNN's overall "presentation and publication of the news?"

(2) Does CNN's refusal to caption its online videos constitute an act in furtherance of CNN's free speech rights?

(3) Do CNN's factual contentions about its supposed reasons for refusing to provide captions (e.g., alleged inaccuracy, delay, cost, and competitive disadvantage) defeat Plaintiffs' contrary factual evidence as a matter of law, where Plaintiffs' evidence must be accepted as true?

If the Court reaches the Second Prong, the issues are:

(1) Is CNN.com a place to which the public is invited to enjoy news videos, such that CNN's refusal to caption those videos gives rise to liability under the DPA?

(2) Does CNN's knowing and deliberate refusal to caption the videos on CNN.com constitute intentional discrimination under the Unruh Act?

(3) Do Plaintiffs' claims have minimal merit such that Plaintiffs have a probability of prevailing, notwithstanding CNN's preemption, dormant Commerce Clause, and First Amendment defenses?

All applicable statutes, regulations, and Federal Register Notices are attached as an Addendum to this brief.

IV. STATEMENT OF THE CASE

Plaintiffs agree with CNN's description of the case with one exception. Plaintiffs did not sue CNN because CNN waited for FCC rulemaking before beginning to caption its online videos. Rather Plaintiffs sued because CNN simply refused, and continues to refuse, to caption the many videos on CNN.com that are not and will not be covered by federal law, as discussed in Section V.B.

V. STATEMENT OF FACTS

A. Captioning Is Necessary to Provide Persons Who Are Deaf or Hard of Hearing with Access to News Videos at CNN.com.

CNN maintains a website at CNN.com. Appellant's Excerpt of Record ("ER") 528. CNN.com includes online videos. ER 529. Most of the videos are "video clips" that excerpt previously broadcast, full-length videos. ER 521. CNN posts approximately 120 video clips to CNN.com each day and has searchable archives of thousands of these video clips. *Id*. Almost 90% of these videos are clips from television programming. *Id.* The remaining 10% consist of material not shown on television. *Id.* None of the video clips have captions. ER 529. While text articles accompany some of the videos, the text often does not correspond fully with the speech portion of the videos and is not equivalent to captioning. ER 355-56. Other videos have no accompanying text articles. *Id*.

Captioning allows people who are deaf or hard of hearing to understand information presented in online videos. ER 349. Captioning consists of text that is timed to appear on screen as the video is played. ER 339; *see also* 47 C.F.R. § 79.4(a)(6) (captioning is "visual display of speech portion of video programming"). Captioning can be either "open" or "closed." ER 283-84. Open captions are visible to all viewers. Closed captions only appear when a viewer activates a button to turn them on. *Id*. Plaintiffs seek only closed captions. ER 558-59. On the Internet, captions are contained in a separate "file" that can be

posted with or after the original video is posted. ER 338-39. CNN admits that it does not caption any of the videos on its website. ER 529.

Plaintiffs have repeatedly tried to access the speech portions of videos at CNN.com but cannot because they lack captions and the corresponding text article, if it exists, is not an adequate substitute for captioning. ER 349. Plaintiffs wrote CNN seeking closed captioning so they could access the online videos without the need for litigation. ER 350, 376, 378, 380. CNN refused to caption a single online video in response to these requests. ER 382-83.

Plaintiffs have not demanded that CNN adopt any particular type of technology or standard for online captioning. Plaintiffs simply ask that CNN utilize any of a number of existing standards that will provide accurate and usable captions. Plaintiffs also have not demanded that CNN meet any particular schedule for captioning. After remand and a liability finding, Plaintiffs will request the district court to order a captioning schedule that is reasonable based upon the evidence.

B. FCC Regulations Do Not Address Most of CNN's Online Videos.

CNN misconstrues the FCC's rulemaking process for closed captioning of certain Internet-delivered video programming. CNN misleadingly suggests that it faced a choice between involvement in the FCC rulemaking and meeting the demands of this lawsuit. However, there is little overlap between the two. The

FCC's rulemaking was authorized by the Twenty-First Century Communications and Video Accessibility Act ("CVAA"), which does not cover all video programming on Internet websites. *See* ER 387, 403-07. Indeed, it does not cover most of the videos at CNN.com.

The CVAA is an extension of the Telecommunications Act of 1996 ("1996 Act"), which mandated closed captioning of television programs. *See* Publ. L. No. 104-104, Title V, § 713, 110 Stat. 56, 126 (1996) (codified at 47 U.S.C. § 613). Congress passed the CVAA in 2010, amending the 1996 Act "to help ensure that persons with disabilities are able to… better access video programming" displayed on Internet websites by requiring such "video programming" to be captioned. ER 416. The 1996 Act defines "video program" as "programming by, or generally considered comparable to programming provided by a television broadcast station." 47 U.S.C. § 613(h). Congress explicitly stated that the CVAA would only "apply to full-length programming and not to video clips." ER 428-29.

Pursuant to this mandate, the FCC issued regulations on January 13, 2012, which took effect on March 30, 2012. *See* 47 C.F.R. § 79.4; Closed Captioning of Internet Protocol-Delivered Video Programming, 77 Fed. Reg. 19480 (Mar. 30, 2012) ("Internet Closed Captioning Final Rule"). The final FCC regulations require closed captioning of "full-length video programming delivered using

Internet protocol … if the programming is published or exhibited on television in the United States with captions on or after [certain] dates...." 47 C.F.R. § 79.4(b). The regulations define "[f]ull-length video programming" as "video programming that appears on television and is distributed to end users, substantially in its entirety, via Internet protocol, *excluding video clips*." *Id.* § 79.4(a)(2) (emphasis added). "Video clips" are "excerpts of full-length video programming." *Id.* § 79.4(a)(12).

The CVAA's role in federal communications law is simply to ensure that captioned full-length television programming that first airs on American television after March 30, 2012 continues to be captioned when it is subsequently delivered via the Internet.[1] The CVAA does not apply to video clips – most of CNN's online videos.

VI. STANDARD OF REVIEW

Plaintiffs agree that the standard of review is *de novo*. To the extent CNN urges the Court to consider *only* CNN's evidence when analyzing either prong of the anti-SLAPP statute, Plaintiffs disagree. The statute clearly states that "the

[1] Regarding standards, the regulations require that closed captions for video programming delivered online be of "at least the same quality as the television captions provided for the same programming" and provide that the Society of Motion Picture and Television Engineers Timed Text format ("SMPTE-TT") is acceptable and meets this obligation. 47 C.F.R. §§ 79.4(c)(1)(i) & (2)(i). The regulations also allow covered entities to "agree upon an alternative technical format for the delivery of captions" to the distributor. *Id.* § 79.4(c)(1)(i).

court shall consider the pleadings, and *supporting* and opposing affidavits stating the facts upon which the *liability* or defense is based." Cal. Code Civ. P. ("C.C.P.") § 425.16(b)(2) (emphasis added).

VII. THE DISTRICT COURT PROPERLY HELD THAT CNN DID NOT SATISFY THE FIRST PRONG OF CALIFORNIA'S ANTI-SLAPP STATUTE.

California's anti-SLAPP statute applies to "[a] cause of action against a person arising from any act of that person in furtherance of… free speech…." C.C.P. § 425.16(b)(1). The statute requires a two-prong analysis. Under the first prong, this Court must first identify "the defendant's *activity* that gives rise to his or her asserted liability," and then determine "whether that activity constitutes protected speech or petitioning." *Navellier v. Sletten*, 29 Cal. 4th 82, 92 (2002). *Only if that showing is met*, will the court proceed to the second prong to determine whether the complaint "'is both legally sufficient and supported by sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" *Id.* at 88-89.

A. Plaintiffs' Causes of Action Arise from CNN's Refusal to Caption Its Online Videos, Not Its Presentation and Publication of Online News.

To determine whether the anti-SLAPP statute applies, the Court must first "identify[] the allegedly wrongful and injury-producing conduct… that provides the foundation for the claim." *Hylton v. Frank E. Rogozienski, Inc.*, 177 Cal. App. 4th 1264, 1272 (2009) (internal citation omitted). Put another way, the Court must

"examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies…." *Id.* Here the "gravamen" of Plaintiffs' claims is CNN's refusal to caption its online videos. It is not, contrary to CNN's characterization, "CNN's presentation and publication of the news of the day on the Internet…." Opening Br. 32.

CNN attempts to reframe Plaintiffs' complaint as directed at its content or content-generating activities. However, Plaintiffs do not take issue with or seek to change any of the content of CNN's videos or CNN's content-generating activities. Plaintiffs have not sued CNN because Plaintiffs want CNN to add videos about or of interest to deaf persons, nor because Plaintiffs want to stop CNN from showing certain videos. Rather Plaintiffs have sued because CNN's mechanical delivery process for its online news videos excludes persons who are deaf from fully accessing the speech that CNN makes available to the public. This is not an act arising from CNN's right of free speech.

The California Supreme Court and Courts of Appeal have repeatedly held that the first prong of the anti-SLAPP analysis is not met just because the conduct at issue was triggered by or is related in some way to protected activity or expression. "[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity." *City v. Cotati v. Cashman*, 29 Cal. 4th 69, 76-77 (2002); *see also Kolar v. Donahue, McIntosh & Hammerton*, 145 Cal.

App. 4th 1532, 1537 (2006) ("[A] cause of action may be 'triggered by' or associated with a protected act, but it does not necessarily mean the cause of action *arises* from that act."). Rather, "the critical consideration is whether the cause of action is *based on* the defendant's protected free speech." *Navellier*, 29 Cal. 4th at 89.

In many cases, California courts have found the first prong not satisfied where the act underlying plaintiff's cause of action came after defendant's protected activity, but was not itself protected conduct or expression. For example, in *DFEH v. 1105 Alta Loma Road Apartments, LLC*, the court rejected an anti-SLAPP motion because plaintiff's disability discrimination suit against a landlord arose from defendant's decision not to provide an accommodation in an eviction proceeding, not from defendant's filing of eviction proceedings. 154 Cal. App. 4th 1273, 1284, 1288 (2007) ("[T]he gravamen of DFEH's action against [defendant] was one for disability discrimination."). Similarly, in an employment discrimination case, the Court of Appeal rejected an anti-SLAPP motion because the "gravamen of plaintiff's action… was one of racial and retaliatory discrimination, not an attack [on defendants]… for their [protected] evaluations of plaintiff's performance as an employee." *Martin v. Inland Empire Utils. Agency*, 198 Cal. App. 4th 611, 624-25 (2011).

Even though CNN's decision to not caption a news video follows the video's creation and publication, that does not mean that Plaintiffs' cause of action is based on CNN's presentation and publication of the news. *See*, *e.g.*, *City of Cotati*, 29 Cal. 4th at 77-78 (suit did not arise from defendant's speech rights even though it followed a previously filed lawsuit); *Kolar*, 145 Cal. App. 4th at 1537-38 (malpractice action arose from attorney's negligence, not the protected petitioning activities inherent in litigation).

The cases CNN cites fail to support CNN's contention that the gravamen of Plaintiffs' claims centers on CNN's presentation and publication of the news online.[2] CNN's cases simply demonstrate that both the actual exercise of free speech and "conduct in furtherance of free speech" are protected under the anti-SLAPP statute. Opening Br. 30-31 (citing *Leiberman v. KCOP Television*, 110 Cal. App. 4th 156, 166 (2003) (newsgathering furthers news reporting) and *Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir. 2010) (discussion of conduct as free speech)). Plaintiffs do not challenge that proposition, but it is irrelevant here.

Other authorities cited by CNN involved claims that directly targeted newsgathering and publication. *See*, *e.g.*, *Taus v. Loftus*, 40 Cal. 4th 683, 713

[2] *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1149 (S.D. Cal. 2005), is inapposite because the court did not analyze the act underlying the plaintiff's cause of action but rather examined whether the speech was in connection with a public issue. That is a separate element of the first prong test.

(2007) (plaintiff's causes of action sought to impose liability based on defendants' investigating, publishing, and speaking at conferences); *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 679 (2010) (causes of action in complaint were based on acts of designing and publishing an editorial feature). These decisions do not alter the district court's conclusion that the gravamen of Plaintiffs' claims is CNN's refusal to caption its online videos. This is precisely what Plaintiffs target in their complaint. ER 563 (Defendant's "refusal to provide any captioned online video content on CNN.com violates California's Unruh Civil Rights Act… and the California Disabled Persons Act….").[3]

B. CNN's Refusal to Caption Its Online Videos Is Not Conduct in Furtherance of CNN's Free Speech Rights.

After identifying the gravamen of Plaintiffs' complaint, the Court must next determine whether CNN's refusal to caption its online videos furthers free speech. "[T]he defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of… free speech." *City of Cotati*, 29 Cal. 4th at 78.

[3] CNN's *Amici*'s argument that Plaintiffs' causes of action arise from CNN's positions taken during the FCC rulemaking is patently absurd. *Amicus* Br. at 11-13. The gravamen of Plaintiffs' complaint has nothing to do with preventing or affecting CNN's participation in FCC rulemaking. That CNN's refusal to caption was a result of waiting for FCC regulations is disingenuous. *See* Opening Br. at 25. It was clear when Congress passed the CVAA in 2010 that any new regulations would not cover most of CNN's online videos. *See* Section V.B.

The district court correctly held that CNN's refusal to caption does not constitute free speech or an act in furtherance of free speech. ER 9, 18. In the related context of television captioning, the D.C. Circuit recognized, although in dictum, that "[a] captioning requirement would not significantly interfere with program content." *Gottfried v. FCC*, 655 F.2d 297, 311 n.54 (D.C. Cir. 1981), *rev'd in part on other grounds*, 459 U.S. 498 (1983). The FCC has interpreted this finding to mean that "any requirement to provide programming with closed captioning would not violate the First Amendment." *In re Implementation of Video Description of Video Programming*, 15 FCC Rcd. 15230, 15255 (Jan. 18, 2001).

Captioning does not run afoul of the First Amendment because it is merely a "straight translation of dialogue into text." *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 803 (D.C. Cir. 2002) (internal quotation marks omitted). That captioning does not implicate the content of speech is just as true for programming on the Internet as for programming on television. "The caption file is an independent text file" separate from the video file CNN posts to its website. ER 338. "The video file is not altered by the captioning process." *Id*. Captioning is about the mechanics of delivering speech. All that Plaintiffs seek in this action is a transcription of the video-based speech that CNN has chosen to produce and

display on its website. Plaintiffs' action does not seek to change or otherwise affect CNN's speech.

Moreover, captioning is distinct from the content of speech because it can be a post-production, even post-publication, process: "a caption file for a particular video can be added after the video is already online without changing the video file or interfering with the ability to play the video without captioning." ER 339. The mechanics and timing of captioning thus mean that captioning does not affect the content or content-generating activities of CNN's speech. *Compare Duncan v. Cohen*, No. C082243 BZ, 2008 WL 2891065, at *2 (N.D. Cal. July 22, 2008) (defendants' ability to spread their message was not affected or restricted by prohibition on using copyrighted material, thus anti-SLAPP statute did not apply), *with Ingels v. Westwood One Broad. Servs., Inc.*, 129 Cal. App. 4th 1050, 1064 (2005) (plaintiff's attempts to express his views during defendant's radio show affected the show's content, thus anti-SLAPP statute applied).

The reasoning of the Court of Appeal in *All One God Faith, Inc. v. Organic and Sustainable Industry Standards, Inc.*, 183 Cal. App. 4th 1186 (2010), applies equally here. There, the court held that conduct occurring after protected activity is distinct from that protected activity and is not conduct in furtherance of protected speech. *Id.* at 1200, 1203 (while "*formulating* a proposed industry 'organic' standard may constitute protected activity…[the subsequent] *certification*

of products" with the already created standard does not). CNN's refusal to caption its online videos constitutes discriminatory conduct that occurs *after* CNN's online video content has been generated. Thus, as in *All One God Faith*, because captioning (and the refusal to caption) is a distinct act *subsequent* to CNN's generation of content, a refusal to caption is not itself protected free speech.

C. CNN's Refusal to Caption Its Online Videos Is Not an "Editorial" Decision in Furtherance of Free Speech.

CNN characterizes its refusal to caption its online videos as an "editorial" decision, but the evidence that Plaintiffs presented to the district court refutes that claim. CNN asserts that its refusal is based on problems with accuracy, delay, cost, and competitive disadvantage. Opening Br. at 35. However, CNN tries to have it both ways by raising factual issues and then arguing that the district court erred by considering the competing evidence on those issues. *Id.* at 28. As shown below, the district court properly found that this evidentiary dispute could not be resolved as a matter of law and was a matter for determination later in the proceedings.

1. The Court May Consider Both Parties' Evidence During the First Prong Analysis.

The Court may address the evidence concerning captioning's accuracy, speed, and cost under the anti-SLAPP statute's first or second prong. *See, e.g.*, *City of Cotati*, 29 Cal. 4th at 79 ("In deciding whether the 'arising from'

requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'"); *Navellier*, 29 Cal. 4th at 89 (same); *but see Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 820 (2011) (using evidence to support plaintiff's prima facie case on the second prong). The statute clearly requires that the Court consider evidence from *both* CNN and Plaintiffs, whether it does so under the first or second prong.

In considering the evidence, courts must "make no credibility determination regarding plaintiff's allegations, or weigh the merits of his claims." *Martin*, 198 Cal. App. 4th at 625; *see, e.g.*, *Smith v. Adventist Health System/West*, 190 Cal. App. 4th 40, 52 (2010). Further, the court must "accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." *Flatley v. Mauro*, 39 Cal. 4th 299, 326 (2006) (internal citation omitted).[4] Therefore, the evidentiary burden on the non-moving plaintiff is "much like that used in determining a motion for nonsuit, directed verdict or summary judgment."

[4] CNN cites *Governor Grey Davis Committee v. American Taxpayers Alliance*, 102 Cal. App. 4th 449, 458 (2002), for the proposition that "CNN offered substantial evidence that was more than sufficient to satisfy the first prong." Opening Br. 29. However, *Davis* does not address evidentiary assessment under the first prong and says nothing that contradicts the cases cited above. *Davis*, 102 Cal. App. 4th at 459.

New.Net, Inc., v. Lavasoft, 356 F. Supp. 2d 1090, 1099 (C.D. Cal. 2004) (internal citations omitted).

2. The Evidence Shows that Captioning Online Videos Will Not Introduce Inaccuracies Into CNN's News Content.

CNN does not dispute that it can caption its online videos by simply creating three components: a transcript (the text of the speech), the timing (matching the words with the speech portions), and the format of the text (e.g., font, color, length, placement). ER 339, 345. CNN presents no evidence showing that it is incapable of captioning its online videos with the same or better accuracy than its television captions. ER 345.

CNN's argument concerning inaccuracies focuses solely on the conversion of television captioning to online captioning.[5] ER 513 (discussing "mapping" television captions into online captions). CNN asserts that in converting television captions to online captions, it would want to save as much of the existing data from its television captions as possible to avoid "re-formatting and reinserting the captions." ER 276. CNN claims that problems with converting television captioning into online captioning can arise, including "truncated sentences and lost

[5] CNN's supporting declarations, *see* ER 273-334, 508-17, 518-26, state that converting from television captioning to online captioning is problematic because there is no standard for online captioning. That point is now moot since the FCC set the standards for converting captions on full-length television programming when it is shown on the Internet. *See* Section V.B., n.1.

words (or characters)[.]" Opening Br. 35. Such inaccuracies, however, would be a result of using older, inferior "roll-up captioning" for its television captions, which is not always (but still can be) supported by online captioning formats. ER 340.

CNN can avoid these inaccuracies in at least two ways: (1) re-creating the caption file from scratch (as described above), ER 345; or (2) using the original television captioning transcript (the text component of the captioning file) and re-creating the timing and formatting. *Id*. CNN presents no evidence explaining why these two approaches would not resolve any captioning inaccuracies.[6] CNN's only rebuttal is to speculate that re-captioning or re-creating portions of the caption file could be of significant cost. ER 276. This issue is discussed in Section VII.C.4., below.[7]

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[6] CNN argues that it will have to continue to use roll-up captions for its online captioning to "mirror" its television captioning because of the new FCC standard that requires online captioning to be of the same quality as television captioning. This argument is not on point because (1) CNN can continue to use roll-up captioning online when the caption files are re-created (ER 340); and (2) FCC regulations require a provider only to offer online captions *equal or better in quality* to television captions. *See* Section V.B., n.1. They do not require providers to use the same captioning *format* both on television and online.

[7] CNN's reliance on *Kronemeyer* for the proposition that it has a free speech right to refrain from carrying content containing errors is misplaced. *Kronemeyer v. Internet Movie Database, Inc.*, 150 Cal. App. 4th 941 (2007). The issue there was whether plaintiff could demand a change to the content that IMDB included on its website, without regard to accuracy. *Id.* at 947; *see also Ingels*, 129 Cal. App. 4th 1050 (no mention of accuracy); *ARP Pharmacy Servs.v. Gallagher Bassett Servs.*,

3. The Evidence Shows that Captioning Online Videos Does Not Necessitate Delay.

Captioning online videos does not necessitate delay in publishing and presenting CNN's news content. CNN does not dispute that captioning files and video files can be posted separately because captioning involves creating a separate file. ER 339, 524. Moreover, CNN does not dispute Plaintiffs' evidence that caption files can be added after the video file is already online. ER 339. CNN offers no evidence suggesting that it must post the separate caption file at the same time as it posts the video file. In particular, there is no evidence to suggest that for time-sensitive material (e.g., material that loses its relevance if not posted immediately), the video file could not be posted immediately, and the captioning file added later, once it is completed (involving minor delays in access for deaf viewers but no delay for other viewers). ER 339, 346. There also is no evidence indicating that for material that is not time-sensitive, CNN could post the video and caption files simultaneously because captioning takes as little as one hour. ER 346.

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138 Cal. App. 4th 1307, 1315-16 (2006) (decision not based on accuracy since accuracy was not at issue).

4. Cost of Compliance with Generally Applicable Laws Is a Matter of Business, Not of Protected Editorial Discretion; In Any Event, the Costs of Captioning Can Be Minimized If Not Offset by Its Added Value.

Refusing to caption because of cost is a "business decision," ER 514-16, not a protected editorial decision. CNN avers that "[i]ncurring costs to caption news videos at CNN.com would result in the diversion of time and resources currently dedicated to other newsgathering and reporting functionalities." ER 523. CNN argues that its refusal to caption is an editorial decision because it has a free speech right to determine where to spend its resources. Taken to its logical conclusion, this argument would apply to wage and hour laws or virtually any other regulation. Courts have found such logic flawed; the fact that complying with generally applicable laws will divert some of an organization's funds away from its speech activities does not implicate the First Amendment. *See Leathers v. Medlock*, 499 U.S. 439 (1991) (applying sales taxes to the press); *Citizen Pub. Co. v. United States*, 394 U.S. 131 (1969) (applying antitrust laws to the press); *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 184 (1946) (applying the FLSA to the press).

CNN's *Amici* argue that *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), demonstrates that cost of compliance is a factor in determining whether a regulation infringes First Amendment rights. However, when *Tornillo* is read in concert with other Supreme Court decisions, as it must be, *Tornillo* only suggests that courts consider costs of regulations that uniquely and directly regulate the

press. *Id.* at 244, 256-57. As discussed above, the Supreme Court has repeatedly ruled that applying general regulations to the press does not infringe First Amendment rights where those statutes impose costs or restrictions that only incidentally limit First Amendment activities. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."). Thus, in considering cost, *Tornillo* focused on (1) the fact that the regulation targeted newspaper publishers, (2) the content-based nature of the regulation under review, and (3) the fact that compliance would restrict speech by consuming finite space in a printed newspaper. *Tornillo*, 418 U.S. at 256-57.

This case differs from *Tornillo* in all three respects. First, the anti-discrimination laws at issue here are generally applicable to all businesses. *See infra*, Section VIII.E.2. Second, the requirement that CNN caption videos on CNN.com is not content based because it applies to CNN's videos regardless of viewpoint, subject matter, or content. Third, requiring CNN to caption videos on CNN.com will not otherwise restrict CNN's speech because in practice, the viewable space on CNN.com available for CNN to present its speech is nearly limitless.

Regardless, the revenue CNN would gain from captioning can offset captioning's cost. CNN sells ads that show in conjunction with its videos, and the revenue that CNN collects from advertising rises with the number of "views" the ads receive within a specified period. ER 523. The more viewers of CNN's videos (and associated ads) in a time period, the more money CNN will make. *Id.* Additionally, captioned videos online appear more frequently in Internet search engines (e.g., Google, Yahoo) than do non-captioned videos because captions enable search engines to examine the entire video transcript rather than just titles or keyword tags associated with non-captioned videos. ER 340-41. CNN videos appearing more frequently in search results would draw more people to CNN.com and increase CNN's advertising revenue. *Id.* CNN offers no evidence to refute this.

5. CNN's "Competitive Disadvantage" Argument Has No Factual or Legal Basis.

CNN offers no proof that it will be at a competitive disadvantage vis-à-vis other media companies if it captions its online videos. Rather CNN is making the familiar argument among civil rights defendants: "Why must we stop discriminating when other companies are still violating the law?" That other media companies may also be violating the law by failing to provide captions is no defense.

There is no prohibition, based on free speech or other rights, against suing only one party when others are equally liable. CNN cites cases to support its claim that it cannot be singled out with "burdensome and financially taxing requirements." Opening Br. 36. The cases CNN cites are inapplicable. They involve situations where a single media corporation was excluded from reporting on a public function and such exclusion was held to violate free speech rights. Here, captioning would not exclude CNN from reporting on any public function.[8]

D. The District Court Correctly Interpreted the Anti-SLAPP Statute.

1. The Anti-SLAPP Statute Must Be Construed Broadly But Only to Effectuate Its Purpose.

CNN argues repeatedly that the anti-SLAPP statute is to "be construed broadly" and that the district court "chose to ignore the Legislature's broad construction command." Opening Br. 18. However, when quoting from the anti-SLAPP statute, CNN redacts critical language explaining *how* to construe the statute broadly. After plainly stating that the purpose of the original statute and amendments is to prevent "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of

[8] That the larger media industry has filed an *amicus* brief supporting CNN is noteworthy. A ruling requiring CNN to provide captions should influence CNN's competitors to start captioning as well.

grievances," the preamble states, "*To this end*, this section shall be construed broadly." C.C.P. § 425.16(a). (emphasis added).

Both the legislative history and case law underscore that the statute is to be broadly construed to protect the exercise of free speech but not to protect all of a defendant's activities. The Senate Judiciary Committee's Report states: "[t]his bill [introducing the 1997 amendment] would declare the Legislature's intent that the *intent provisions* of Section 425.16 should be construed broadly." ER 188 (emphasis added). California's Supreme Court reinforced this legislative intent, finding "[i]n 1997, the Legislature amended section 425.16, effecting no substantive changes to the anti-SLAPP scheme, but *adding to the preamble* a requirement that the statute, *to achieve its stated ends*, 'shall be construed broadly.'" *Equilon Enters., LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 60 (2002) (emphasis added). Thus, broad construction of the statute was added in 1997 to effectuate the statute's original purpose, not to expand its application to cover any case that is in any way related to protected speech or activity. Additionally, *Amici*'s reliance on C.C.P. section 425.17 is misplaced. The fact that the legislature enacted exceptions to the anti-SLAPP statute does not mean that courts are relieved of the duty to determine whether the first prong of the anti-SLAPP statute applies, as CNN's *Amici* imply.

Courts have also held that broad construction does not lessen the threshold showing on the first prong. As California's Supreme Court has held, the "arising from" requirement is not always easily met. *Id.* at 66. If courts so loosely interpreted the arising from prong, defendants could use the anti-SLAPP statute to eradicate a plethora of valid claims. *See*, *e.g.*, *Duncan*, 2008 WL 2891065, at *3 (the anti-SLAPP statute must have limits; otherwise every copyright infringement suit involving a film would be subject to the anti-SLAPP statute); *DFEH*, 154 Cal. App. 4th at 1288 (anti-SLAPP not intended to create safe harbor for discrimination).

2. CNN and Its *Amici* Misrepresent the District Court's Reasoning.

CNN and its *Amici* try to make hay out of a single comment by the district court taken out of context from one of two hearings below. That comment – that the court's view was very narrow – was made in response to CNN's counsel's bold assertion at oral argument that as a media company, CNN automatically met the first prong requirements. ER 73 (arguing that "as a practical matter," anytime the media are involved, the first prong is automatically satisfied); *see also*, ER 4-6, 28. However, the district court clarified later at the hearing that she was applying the anti-SLAPP statute as broadly as possible: "Because I don't want the record to at all suggest anything other than I'm construing the anti-SLAPP statute as broadly as I can, as it's supposed to be." ER 50. Further, the district court's detailed written

order makes clear that the court applied a broad construction of the statute. *See, e.g.*, ER 12-13.

In addition, contrary to CNN's and its *Amici's* contentions, the district court never applied an intent to chill requirement. Opening Br. 21-22; *Amicus* Br. 4-5. The court simply recognized that there is a difference between (1) requiring a defendant to prove that plaintiff's lawsuit was brought with an intent to chill defendant's free speech; and (2) a court's efforts to determine the statute's purpose or intent. The courts have disallowed the first. *Equilon*, 29 Cal. 4th at 67; *City of Cotati*, 29 Cal. 4th at 75-76. The district court acknowledged this in its order. ER 6-7. All references CNN cited where the district court purportedly required an intent to chill actually focused on "the point of the anti-SLAPP statute…," ER 26; "the purpose of the anti-SLAPP statute," ER 59; "the whole intent of the California Legislature in enacting the anti-SLAPP statute," ER 61; and "what the SLAPP statute was aimed at," ER 85.

Moreover, contrary to the assertions of CNN and *Amici*, the district court did not introduce a new creation-of-speech test. CNN and *Amici* take out of context several places in the transcript where the court references the creation of speech. Opening Br. 22; *Amicus* Br. 6. Yet nowhere in the order does the court create a new test. The court merely categorizes the cases so as to apply precedent to a case of first impression. ER 9 (listing categories). Additionally, unlike the compelled

speech cases, CNN has spoken to the general public through its online videos, and captions merely transcribe that existing speech.

Furthermore, the district court did not exempt discrimination cases from the anti-SLAPP statute. Again misconstruing the court, CNN states that the court found: "the legislature did not intend to cover… discrimination claims like the ones here." Opening Br. 24. However, the court actually found that "[a]pplying the statute here… extends the scope of the statute to claims that the legislature did not intend to cover, *including* discrimination claims like the ones here." ER 14 (emphasis added). The court simply meant that discrimination cases such as this action, where plaintiffs are not challenging defendant's speech, are *examples* of situations where the anti-SLAPP statute is inapplicable.

Finally, the district court's written decision does not rely on the potential award of attorney's fees and costs against Plaintiffs. *See* Opening Br. at 26. CNN's counsel initiated the only mention of the issue at the hearing, accusing the court of letting attorneys' fees and costs drive the analysis. ER 83. The court responded to CNN's accusation, saying that "[t]hey are not." *Id.*

VIII. PLAINTIFFS HAVE A PROBABILITY OF PREVAILING ON THEIR CLAIMS AND CAN OVERCOME ALL OF CNN'S DEFENSES.

To show a "probability of prevailing" under the anti-SLAPP law's second prong, Plaintiffs must demonstrate only that their claims have "minimal merit."

Navellier, 29 Cal. 4th at 94-95; *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 291 (2006) ("[T]he anti-SLAPP statute requires only a minimum level of legal sufficiency and triability."). The plaintiff's burden is low because "to satisfy due process, the burden placed on the plaintiff must be compatible with the early stage at which the motion is brought and heard." *Wilcox v. Super. Ct.*, 27 Cal. App. 4th 809, 824 (1994), *disapproved on other grounds by Equilon*, 29 Cal. 4th 53. *See* Section VII.C.1. Plaintiffs satisfy this minimal burden.

A. Plaintiffs Have a Probability of Prevailing on Their DPA Claim Because the Statute Applies to Non-Physical Places.

CNN's assertion that California's Disabled Persons Act ("DPA") does not apply to websites ignores the DPA's broad language and remedial purpose, and court decisions that have applied the DPA to websites. The DPA states that "[i]ndividuals with disabilities shall be entitled to *full and equal* access, as other members of the general public, to accommodations, advantages, facilities… and privileges of… places of public accommodation… *and other places to which the general public is invited*." Cal. Civ. Code ("C.C.") § 54.1(a)(1) (emphasis added).

The legislature intended the DPA to "make certain that physically handicapped persons will be able to fully participate in the social and economic life of California…." Letter from State Sen. Grunsky (June 24, 1968) (Mot. to Take Judicial Notice ("MJN"), Ex. C); *see also* Legislative Counsel's Digest, S. 369 (1968) (MJN Ex. A); Cal. Gov. Code § 19230(a). Accordingly, the DPA must be

broadly construed. *See Hankins v. El Torito Rests., Inc.*, 63 Cal. App. 4th 510, 523 (1998) (the DPA's "broad language" reflects "legislative intent to afford broad protection and maximize the incentive for compliance in order to achieve access for disabled individuals"); *Arnold v. United Artists Theatre Circuit, Inc.*, 866 F. Supp. 433, 438 (N.D. Cal. 1994) ("California courts have applied a canon of broad construction to civil rights statutes generally, and to § 51 [the Unruh Act] and § 54.1 [the DPA] in particular."). The DPA, like other California statutes, must be given "a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature…." *Renee J. v. Super. Ct.*, 26 Cal. 4th 735, 744 (2001) (internal quotation marks omitted). In light of legislative intent and the broad interpretation to be accorded the DPA, CNN.com is surely a "place" to which the public is "invited," particularly given the increasing importance of the Internet.

Although most DPA cases involve access to physical places of public accommodation, the California Court of Appeal has noted that "the statute may also be construed as requiring equal physical access to a non-tangible location such as an internet site." *Turner v. Am. Ass'n of Med. Colls.*, 167 Cal. App. 4th 1401, 1412 (2008). That the statute applies beyond just physical locations is demonstrated by an amendment to the DPA, when the legislature added "telephone facilities" to the list of places covered in order to "require telephone utilities to

produce devices which transmit and receive visible typewritten messages over telephone lines…" and encourage the widespread use of TTY devices for Californians who are deaf. Assembly Comm. on Health, Analysis, S. 823 at 1 (1977) (MJN Ex. B); C.C. § 54.1(a)(1). The legislature defined "telephone facilities" in a way that made clear it did not refer to physical places, such as phone booths or telephone company offices, but rather to "tariff items and other equipment and services." C.C. § 54.1(a)(2).

In *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000), this Court addressed the "places" listed in Title III of the Americans with Disabilities Act ("ADA") to determine the scope of that statute's coverage. This Court held that because Title III includes examples only of "actual, physical places" – such as inns, theaters, bakeries, museums, and zoos – the "principle of *noscitur a sociis* requires that the term, 'place of public accommodation' …" be defined by the company it keeps and must be limited to physical places. *Id.* The same principle applied here demonstrates that the California legislature's inclusion of "telephone facilities" in the DPA necessarily broadened the scope of the catch-all phrase "and other places to which the general public is invited" to include non-physical locations. *See Nat'l Fed'n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1198 (N.D. Cal. 2007) (inclusion of "telephone facilities" suggests the DPA

"cannot be limited solely to physical places," therefore the DPA applies to Internet websites).

CNN mistakenly relies primarily on district court decisions discussing the more limited scope of the ADA, *not the DPA*, to argue that the DPA "applies only to facilities and physical places open to the public." Opening Br. 56. CNN misrepresents the holding of *Target* because the quotation that CNN takes from the *Target* decision addressed the definition of "place of public accommodation" in the ADA, not the DPA. *See Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006). CNN also misrepresents the holding of *Cullen v. Netflix, Inc.*, __ F. Supp. 2d __, No. 5:11-cv-0199, 2012 WL 2906245, at *4 (N.D. Cal. July 13, 2012), by again citing to the part of that decision which addressed the scope of the ADA, not the DPA. What makes CNN's citations to these cases even more misleading is that both courts, in fact, held that the DPA, unlike the ADA, *does apply to websites* whether or not they have any nexus to a physical place. In a later decision, the *Target* court held that "the broad language of the DPA comfortably encompasses websites as 'places to which the general public is invited.'" *Target*, 582 F. Supp. 2d at 1198. Similarly, in the very same decision cited by CNN, the *Cullen* court relied on *Target* to find that the DPA applies to websites. *Cullen*, 2012 WL 2906245, at *4.

Additionally, CNN's suggestion that the DPA only prohibits outright denials of physical access ignores the statute's plain language, which imposes liability on any defendant "who denies or interferes with admittance to *or enjoyment of* the public facilities" to which the DPA applies. C.C. § 54.3(a) (emphasis added). The statute thus bars denial of physical access (admittance) and enjoyment of the public places once they are accessed. Moreover, "among the 'places' enumerated in the DPA is entitlement to 'advantages,' which clearly is not affixed to any particular physical location." *Target*, 582 F. Supp. 2d at 1198.

The cases CNN cites are not to the contrary. *Turner* acknowledged that while the focus of the DPA is on physical access to public places, "the statute may also be construed as requiring equal physical access to a nontangible location such as an internet site," and relied upon *Target* to support that finding. *Turner*, 167 Cal. App. 4th at 1412. *Turner* reiterates that the DPA entitles individuals with disabilities to "full and equal access, as other members of the general public," to advantages of places to which the general public is invited. *Id.* at 1412-13. Here, the general public is invited to CNN.com to enjoy the videos that are one of the primary "advantages" of that site. The general public is given full access to those videos. By contrast, people who are deaf or hard of hearing are completely excluded from the videos' audio components. Captioning is therefore essential to

afford Plaintiffs full and equal access to the advantages that CNN.com makes available to the general public.

The other cases cited by CNN involve access to physical places and do not address whether the DPA applies to non-physical places. *Urahausen v. Longs Drug Stores Cal., Inc.*, 155 Cal. App. 4th 254, 261 (2007); *Madden v. Del Taco, Inc.*, 150 Cal. App. 4th 294, 301-02 (2007). Moreover, CNN's physical access argument has been dispelled by the California Court of Appeal, which held that the DPA prohibits the maintenance of a policy "unrelated to any structural impediment, which results in the denial of full and equal access by a disabled individual to a public accommodation." *Hankins*, 63 Cal. App. 4th at 523-24. This application of the DPA is consistent with findings that "California's disability protections are broader than federal protections." *Colmenares v. Braemar Country Club, Inc.*, 29 Cal. 4th 1019, 1027 (2003); Cal. Gov. Code § 12926.1(a) ("[T]his state's law has always, even prior to passage of the [ADA], afforded additional protections.").[9] CNN's assertion that the DPA only applies to physical places and not websites is contrary to California law and policy.

[9] Inexplicably, CNN cites the DPA's definition of "full and equal access," but this definition applies only to transportation and is inapplicable here. C.C. § 54.1(a)(3); Opening Br. 55.

B. Plaintiffs Have a Probability of Proving Intentional Discrimination Under the Unruh Act.

Because Plaintiffs do not make a claim under the ADA, the parties agree that for Plaintiffs to prevail on their Unruh Act claim, they have to prove that CNN's refusal to caption its online videos constitutes intentional discrimination. Neither the Unruh Act itself nor the California Supreme Court has set a standard for proving intent. *Munson v. Del Taco*, 522 F.3d 997, 1003 (9th Cir. 2008). However, state and federal case law support a definition of intentional discrimination as something less than discriminatory animus.

The California Court of Appeal has upheld a finding of intentional discrimination under the Unruh Act without any finding of discriminatory animus. *Hankins*, 63 Cal. App. 4th at 518. There, defendant had a policy of denying customers the use of an accessible employee-only restroom, requiring all customers to use the patron restroom upstairs on the second floor. The court held that plaintiff sufficiently alleged intentional discrimination by pleading that defendant had "denied accessible restroom facilities" to people with disabilities and "acted with 'knowledge of the effect [its conduct] was having on'" those individuals. *Id.* The court further held that "a combination of [the restaurant's] policy and the physical layout of its premises" violated the Unruh Act. *Id.; accord Modern Dev. Co. v. Navigators Ins. Co.*, 111 Cal. App. 4th 932, 941, 943 (2003)

(suggesting that intending a facility to be configured as it is satisfies Unruh Act intent requirement).

This Court has suggested that intentional discrimination under the Unruh Act consists of knowledge that a protected right is substantially likely to be infringed upon, and a failure to act upon that knowledge – "deliberate indifference." *Green v. San Diego Unified Sch. Dist.*, 226 Fed. Appx. 677, 679 (9th Cir. 2007) (relying on decisions applying deliberate indifference to claims for damages under the Rehabilitation Act and Title II of the ADA). This Court has found that in the disability access context, the deliberate indifference standard "is better suited to the remedial goals of Title II of the ADA than is the discriminatory animus alternative…." *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001). Other circuits have adopted this standard of intent for recovery of damages under federal access laws. *See, e.g.*, *Bartlett v. N.Y. State Bd. of Law Examiners*, 156 F.3d 321, 331 (2d Cir. 1998), *vacated on other grounds by* 527 U.S. 1031 (1999) ("In the context of the Rehabilitation Act, intentional discrimination against the disabled does not require personal animosity or ill will."); *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011).

California's disability access laws are intended to be more protective of people with disabilities than the ADA. *Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1030-31 (9th Cir. 2003); Cal. Gov. Code § 12926.1(a). It would therefore be

inappropriate to require a higher standard than deliberate indifference to prove intentional discrimination under the Unruh Act. Plaintiffs' evidence demonstrates that CNN knows that people who are deaf or hard of hearing need captions to fully and equally access the videos on CNN.com, and CNN has chosen to not provide those captions. ER 79, 99, 350, 514-15.[10] This is intentional discrimination in violation of the Unruh Act.

CNN erroneously asserts that it escapes liability under the Unruh Act because its no-caption policy is facially neutral and has only a disparate impact on people who are deaf. On the contrary, CNN's policy is facially discriminatory. The Court of Appeal in *Hankins* squarely rejected this same argument, holding that the policy of denying all customers access to the employee-only restroom resulted in intentional discrimination because patrons who were not physically disabled could use the restaurant's second floor restroom but disabled customers could use nothing. *Hankins*, 63 Cal. App. 4th at 518.

Like the California Court of Appeal in *Hankins*, this Court has recognized that a policy of maintaining barriers to accessibility – such as a policy of not providing a wheelchair ramp in addition to steps, or not providing captioning in

[10] Although CNN suggests that deaf visitors may go to accompanying articles to obtain information provided in the videos, the articles often do not provide the same content as the videos, and many videos are not accompanied by articles. ER 353-56. CNN knows this.

addition to audio speech – does not treat everyone the same: "a courthouse that was accessible only by steps could not avoid ADA liability by arguing that everyone – including the wheelchair bound – has equal access to the steps." *Arizona v. Harkins Amusement Enter., Inc.*, 603 F.3d 666, 672 (9th Cir. 2010); *see also Target*, 582 F. Supp. 2d at 1206.

Similarly, without captioning, people who can hear can access the speech portions of videos on CNN.com, but deaf and hard of hearing visitors are singled out for exclusion from those same videos. Plaintiffs do not, as CNN argues, "have the same access to CNN.com as everyone else." Opening Br. 59. CNN made a deliberate decision to present the news through videos that use speech that is essentially off-limits to the deaf. CNN could have chosen to present the news solely through non-auditory means such as printed articles and photos. CNN could have chosen to include Deaf visitors in the full experience of the website by captioning its videos. Instead, CNN chose to exclude Plaintiffs from the full benefits of its website by presenting videos without captions. Those conscious decisions are the essence of intentional discrimination. *See Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002) ("[B]y its very terms, facial discrimination is 'intentional.'").

The disparate impact cases on which CNN relies are inapposite. In those cases, there was no evidence of intentional discrimination and the challenged

policy applied equally to everyone rather than excluding only people in a protected class. *See Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142 (1991) (Unruh Act does not bar a minimum income requirement for apartment rentals that applied alike to all persons); *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224 (2007) (Unruh Act does not apply to cable provider's facially neutral practice of packaging music services with television programming). *Cullen* is inapt because the district court did not address whether deliberate indifference satisfies the Unruh Act, and found there was no intentional discrimination because Netflix has been captioning its video content at an increasing rate since 2008. *Cullen*, 2012 WL 2906245, at *5. That is not the case here.

C. Plaintiffs' Claims Under the Unruh Act and DPA Are Not Preempted by the 21st Century CVAA.

1. The CVAA and FCC Regulations Do Not Occupy the Field of Closed Captioning on the Internet.

All preemption cases "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted) (emphasis added); *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (same). When it enacted the CVAA, Congress neither expressed nor implied an intent to preempt discrimination claims under state law. Instead, the language of the CVAA, the scope of the FCC's

implementing regulations, and the presence of savings clauses in the Federal Communications Act all demonstrate that Congress did not intend to usurp Plaintiffs' state law claims.

a. The CVAA and FCC Regulations Do Not Pervasively Cover Captioning of the Videos on CNN.com.

"Field preemption is implied when the scheme of federal regulation in a particular field is so *pervasive* as to leave no room for the States to supplement it." *Bank of Am. v. City & Cnty. of S.F.*, 309 F.3d 551, 560 (9th Cir. 2002) (emphasis added); *see also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (same). However, "the mere existence of a detailed regulatory scheme does not by itself imply preemption of state remedies." *Keams v. Tempe Technical Inst., Inc.*, 39 F.3d 222, 226 (9th Cir. 1994). When analyzing field preemption, courts define the field narrowly, at the level of "the specific area covered by the [] claim at issue." *Martin v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 809 (9th Cir. 2009); *see also Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 613–14 (1991) (federal pesticide law did not preempt local ordinance requiring a permit for the application of pesticides because the law "addresse[d] numerous aspects of pesticide control in considerable detail" but "le[ft] substantial portions of the field vacant," including an affirmative permit scheme).

Neither the CVAA nor FCC "pervasively" regulates the field at issue here: closed captioning of the videos on CNN.com. *See Gade*, 505 U.S. at 98. Contrary

to CNN's contention, the CVAA and its implementing regulations hardly constitute an all-embracing scheme for uniformly regulating "the area of closed captioning on the Internet." Opening Br. 42. As set forth in Section V.B., Congress enacted the CVAA to ensure that certain full-length television programs that are shown with captions on American television retain captions when the programs are delivered via Internet protocol. 47 U.S.C. §§ 613(c)(2)(A) & (h). The CVAA and FCC regulations do not regulate video clips, videos that were shown on television with captioning before March 30, 2012, or videos that were not shown on American television, which are most of the videos on CNN.com. *Id.*; 47 C.F.R. § 79.4. Thus, neither the CVAA nor its implementing regulations preempt Plaintiffs' state law claims.

b. The Absence of Federal Regulations Covering Videos on CNN.com Does Not Imply that State Law Is Preempted.

Given that field preemption arises with *pervasive* federal regulation of the specific area covered by the claim at issue, field preemption cannot also arise out of the *absence* of federal regulation. As with other statutory schemes, Congress chose to do some things with the CVAA and not others. If that alone were enough to demonstrate pre-emptive intent, states would have little left to regulate. Thus, CNN is wrong when it asserts that Congress' decision to not regulate video clips on websites "has just as much preemptive force as its decision to impose standards on full-length programming." Opening Br. 44.

As the Supreme Court explained, "[i]t is quite wrong" to view an agency's "decision not to adopt a regulation" "as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002). A decision by Congress to *not* regulate will only be preemptive if that was Congress' clear and manifest purpose, expressed through an "authoritative" statement from Congress or the relevant agency that "takes on the character of a ruling that no such regulation [by the federal government or the states] is appropriate." *Id.* at 66-67.

Sprietsma bears many similarities to the case at hand. There, the Coast Guard was authorized to adopt regulations concerning recreational boat safety, and it considered but declined to adopt a regulation requiring propeller guards on motorboats. *Id*. *Sprietsma* held that the Coast Guard's decision to take no action "leaves the [state] law as to propeller guards exactly as it had been." *Id.* at 65.[11] "Thus, although the Coast Guard's decision not to require propeller guards was undoubtedly intentional and carefully considered, it does not convey an 'authoritative' message of a federal policy against propeller guards." *Id.* at 67. To

[11] Moreover, the possibility that the federal agency may regulate the particular issue in the future is not preemptive. *Sprietsma*, 537 U.S. at 65. Thus, even if the FCC may in the future address closed captioning of video clips, that would not now prevent state law from applying. *See also Ray v. Atl. Richfield*, 435 U.S. 151, 172 (1978) (until regulations issue that preempt state law, "the State's requirement need not give way under the Supremacy Clause.").

have preemptive effect, the Coast Guard must "take the further step of deciding that, as a matter of policy, the States . . . should not impose some version of propeller guard regulation." *Id.*

Although the decision by Congress and the FCC not to cover video clips was intentional, it does not convey an "authoritative" message of a federal policy against captioning video clips and other videos that are not aired on American television with captions on or after March 31, 2012. Congress' decision to not regulate these videos is fully consistent with an intent to preserve state regulatory authority. *Id.* at 65. Moreover, neither Congress nor the FCC took the further step of telling the States to not require captioning on videos posted on the Internet. Thus, Congress' decision not to regulate these videos demonstrates that the field at issue here is not fully occupied, and the states have "ample room" "to supplement federal efforts." *Mortier*, 501 U.S. at 613-14.

c. <u>The Savings Clauses in the 1996 Act and FCA Make Clear Congress' Intent to Not Preempt State Law with Respect to Online Videos.</u>

The "ample room" that the CVAA and FCC regulations leave for the Unruh Act and DPA to require captioning of online videos is reinforced by the savings clauses in the 1996 Act and the Communications Act of 1934 ("FCA"), 47 U.S.C. § 414. The 1996 Act, which the CVAA amends, expressly preserves other federal *and state laws*:

> NO IMPLIED EFFECT.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

1996 Act, Title VI, § 601(c)(1) (47 U.S.C. § 152 historical and statutory notes; attached hereto in Addendum).

The 1996 Act's savings clause – left untouched by Congress when it enacted the CVAA – clearly evidences Congress's desire to leave intact the rights and remedies available to Plaintiffs under existing state and federal laws, absent an express provision to the contrary. *See, e.g., AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1328 (11th Cir. 2000), *vacated by* 260 F.3d 1320 *and dismissed by* 264 F.3d 1314 (11th Cir. 2001) (1996 Act's broad savings clause "means what it says: the [Telecommunications Act] shall not be construed to have any implied effect on *any*" other law). The 1996 Act was enacted nearly a century after the Unruh Act, *In re Cox*, 3 Cal. 3d 205, 213-218 (1970), and approximately 30 years after the DPA, *Gunther v. Lin*, 144 Cal. App. 4th 223, 239 (2006). Those state laws were preserved by the 1996 Act's savings clause.

As CNN admits, "the presence of a savings clause that preserves states' rights tends to preclude federal preemption." Opening Br. 41. However, CNN not only ignores these savings clauses but affirmatively insists, incorrectly, that "neither Section 713 [the 1996 Act, 47 U.S.C. § 613] nor any other relevant provision of the Federal Communications Act provides such a 'savings clause.'"

Opening Br. 41. CNN improperly relies on *Qwest Corp. v. Arizona Corp. Commission*, 567 F.3d 1109, 1118 (9th Cir. 2009) and *Verizon New England, Inc. v. Maine PUC*, 509 F.3d 1, 7 (1st Cir. 2007) to support its claim. Neither of these cases deals with captioning of television programming or the savings clause quoted above. They instead concern conditions on local telecommunications competition, an activity that Congress expressly reserved for the FCC. These cases have no bearing on the 1996 Act's separate, sweeping savings clause that supports the application of state civil rights laws to captioning videos on Internet websites.

Furthermore, the savings clause contained in the FCA, of which both the 1996 Act and the CVAA are part, reinforces Congress' intent to preserve the application of state law to telecommunication issues. The FCA's savings clause provides that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. Dispelling CNN's notion that the FCA broadly preempts state law's application to telecommunications, the Ninth Circuit has explained that the FCA's savings clause "is fundamentally incompatible with complete field preemption; if Congress intended to preempt the entire field of telecommunications regulation, there would be nothing for section 414 to 'save,' and the provision would be mere surplusage." *In re NOS Commc'ns*, 495 F.3d 1052, 1058-59 (9th Cir. 2007) (applying savings

clause to statutes that did not exist when FCA was enacted). These savings clauses allow California law to cover all of the videos on CNN.com.

d. Congress' Granting the FCC Exclusive Jurisdiction Over CVAA Violations Does Not Imply an Intent to Preempt State Law.

Congress' grant of exclusive jurisdiction to the FCC to decide complaints under the CVAA and FCC regulations is not "compelling evidence" of anything relevant here. *See* Opening Br. 40. Plaintiffs are not seeking to enforce the 1996 Act, the CVAA, or the FCC's implementing regulations. Instead, Plaintiffs seek to enforce state laws that the 1996 Act explicitly preserves.

Congress gave the FCC exclusive jurisdiction to enforce complaints that video programming providers or owners have violated the CVAA or 1996 Act *only*. *See* 47 U.S.C. § 613(j) ("The Commission shall have exclusive jurisdiction with respect to any complaint *under this section*.") (emphasis added). The FCC cannot have exclusive jurisdiction to resolve claims arising under laws, like the Unruh Act and DPA, that it lacks authority to enforce.[12] *United States v. W. Pac.*

[12] CNN cites *United States v. Michigan National Corp.*, 419 U.S. 1 (1974), and *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954), for the proposition that when Congress vests a federal agency with exclusive jurisdiction over a plaintiff's complaint initially brought in court, the court has to dismiss the action. That principle has no application here, because Congress did not give the FCC exclusive jurisdiction over the factual claims (captioning video clips and original content on CNN.com) or legal subject matter (violation of California disability rights laws) alleged in Plaintiffs' complaint.

R. Co., 352 U.S. 59, 63 (1956) (exclusive jurisdiction only applies where a claim is cognizable in the first instance by an administrative agency alone.). Plaintiffs' claims therefore cannot be brought before the FCC. But they can be brought in court.

Contrary to CNN's assertion, when Congress enacted the CVAA it did not strip courts of jurisdiction to enforce other laws that may apply to websites, even if the same material on a website is covered by the CVAA or FCC regulations. As recognized in the *Zulauf* case so heavily relied upon by CNN, different disability access statutes can "co-exist." *Zulauf v. Ky. Educ. Television*, 28 F. Supp. 2d 1022, 1023 (E.D. Ky. 1998) (1996 Act did not give FCC exclusive jurisdiction over claims seeking closed captioning of educational television programming; plaintiffs retained a right to sue under the ADA and Rehabilitation Act despite existence of FCC's administrative complaint procedure).[13] *See also Nat'l Ass'n of the Deaf v. Netflix, Inc.*, __ F. Supp. 2d __, No. 11-cv-30168, 2012 WL 2343666,

[13] Nevertheless, because there was complete overlap between the plaintiff's discrimination claims under the ADA and the Rehabilitation Act and his rights under the 1996 Act, and resolution of plaintiffs' civil rights claims required interpretation of the 1996 Act and the FCC's implementing regulations, the court required plaintiff to exhaust his remedies under the 1996 Act before proceeding with a civil rights lawsuit. *Zulauf*, 28 F. Supp. 2d at 1023. *Zulauf* is inapplicable here because Plaintiffs' claims involve state laws and videos that are not covered by the CVAA administrative claim filing process. *See* 47 U.S.C. § 613(c)(2). Forcing Plaintiffs to seek relief from the FCC under the CVAA before allowing them to proceed under California law would be futile.

at *7 (D. Mass. June 19, 2012) (citing *Zulauf* to support the conclusion that "there is no indication that the CVAA, unlike the [1996] Act, extinguishes private rights of action under the ADA for closed captioning of video programming on the Internet."). This finding was reinforced by the court in *Netflix*, which also found that "the existence of an administrative complaint procedure under the CVAA is entirely consistent with a private right of action under the ADA for the same wrong." *Id.*

The same is true here. Like the ADA and Rehabilitation Act, the Unruh Act and DPA can co-exist with the CVAA. When enacting the CVAA, Congress did not modify or repeal the 1996 Act's savings clause, and it did not expressly supersede state law, as would be required to overcome the savings clause. Thus, there is no indication that the CVAA extinguishes private rights of action for closed captioning of video programming on the Internet, whether those programs are covered by the CVAA or not. *See Netflix*, 2012 WL 2343666, at *7. The Court must presume that Congress intended the CVAA and state civil rights laws to co-exist.

2. Plaintiffs' Claims Are Not Barred by the Doctrine of Conflict Preemption.

"A high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Chamber of Commerce v. Whiting*, 563 U.S. __, 131 S. Ct. 1968, 1985 (2011) (plurality opinion). Conflict preemption

applies only "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade*, 505 U.S. at 98 (internal citations and quotations omitted); *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) (same, finding state law not conflict-preempted by the FCA). Moreover, conflict preemption is only found where actual, not hypothetical, conflicts exist. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 499 (9th Cir. 1984) (this Court "enjoins seeking out conflicts between state and federal regulation where none clearly exists") (internal quotation marks omitted). "When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

a. CNN Can Physically Comply with Captioning Requirements Under FCC Regulations and State Law.

Compliance with the CVAA, FCC regulations, and California law is not "a physical impossibility." *Gade*, 505 U.S. at 98. The videos currently on CNN.com consist primarily of material that falls outside the CVAA and FCC regulations. Nothing in the CVAA forbids covered entities like CNN from captioning those videos. Thus, to the extent Plaintiffs seek to impose a duty on CNN that does not exist under the CVAA, this does not constitute an irreconcilable conflict. CNN has

not shown that complying with California law would be in any way inconsistent with its obligations under the CVAA, let alone a "physical impossibility."

Even if the CVAA's subject matter somewhat overlaps with the Unruh Act and DPA, and even if the Court were to hold that the statutes "to some extent impose different [captioning] requirements," "none of these differences create a 'positive repugnancy' between two laws." *Netflix*, 2012 WL 2343666, at *7 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)). Full-length television programming that is redistributed over the Internet is covered under regulations for which the FCC has established a schedule of compliance deadlines (ranging from September 30, 2012 to March 30, 2014, depending on the type of programming, when it is shown on television, and whether it is already in the video distributor's library). 47 C.F.R. § 79.4(b). However, the FCC "encourage[s] Video Programming Owners and Video Programming Distributors to make captioned programming available in advance of the applicable deadlines, to the extent they are able to do so." Internet Closed Captioning Final Rule, 77 Fed. Reg. at 19493.

To the extent that CNN.com shows full length programming to which the FCC regulations apply, the trial court could find, after the parties have conducted discovery and the court has considered evidence of CNN's technological and economic capabilities, that the deadlines set forth under federal law are reasonable

for compliance with California law as well. Alternatively, the court could find that CNN is capable of complying with a shorter time line. "While the schedule established by FCC undoubtedly reflects informed decisions regarding the technological and economic difficulties of captioning, the FCC time line reflects only minimum compliance standards that apply to a diverse industry. Not all of the concerns motivating the FCC's schedule will necessarily apply… in this particular case." *Netflix*, 2012 WL 2343666, at *6. Additionally, the CVAA does not prohibit earlier compliance. Thus, neither approach would create a physically impossible conflict between California law and the CVAA.

As for the videos not covered by the CVAA (e.g., video clips, full-length programming that showed on television with captions before the FCC's effective dates, and videos not shown on American television), the court may order a schedule that corresponds with the deadlines set forth in the FCC regulations for similar content or direct CNN to comply with shorter or longer deadlines. As the court in *Netflix* held, none of these options would create a physically impossible conflict. The trial court has discretion to set appropriate deadlines under the circumstances.

Second, there is no physically irreconcilable conflict in captioning standards under the CVAA or state law. The Unruh Act and DPA do not prescribe any particular standards for making videos accessible to people who are deaf or hard of

hearing. They therefore do not conflict with FCC regulations, which impose a performance standard requiring closed captions that are "of at least the same quality" as the captions presented when the program is broadcast on television. 47 C.F.R. §§ 79.4(c)(1)(i) & (2)(i). California law affords the trial court discretion to adopt this same performance standard, as appropriate, taking into consideration CNN's technological and economic circumstances.

FCC regulations also establish a framework for granting individual exemptions from the closed captioning rules upon the provider's showing that closed captioning would be economically burdensome. Nothing in the Unruh Act or DPA prevent the trial court from adopting a similar approach for determining whether CNN has to caption any of the content on CNN.com.

b. Applying State Law to Require Captioning of CNN's Online Videos Does Not Impede Congress' Purpose in Enacting the CVAA.

Any supposed conflict between the purpose of the Unruh Act and DPA and the purpose of the CVAA is illusory. *See Netflix*, 2012 WL 2343666, at *6. Congress' purpose in enacting the CVAA was to "update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming." *See* ER 416. Rather than impede this objective, state anti-discrimination law reinforces and expands upon federal standards by requiring entities like CNN to

provide equal access to all of their online videos to people with disabilities. Given that both the CVAA and California's disability rights laws have the same purpose of expanding captioning on the Internet, Plaintiffs' captioning claims are not barred by conflict preemption.

CNN's conflict argument rests largely upon its insistence that Congress' "purpose" in passing the CVAA was to impose "uniformity in the area of closed captioning." Opening Br. 42. But the word "uniformity" in relationship to "closed captioning standards" appears nowhere in the CVAA or its legislative history, and this alleged "purpose" finds no basis in the FCC's implementing regulations.[14] It is also at odds with the FCC's regulatory structure, which imposes no single technical captioning standard. *See* Section V.B.1., above.

The CVAA and FCC regulations do not preempt Plaintiffs' state law claims.

D. The Application of California's Disability Access Laws to CNN's Website Does Not Violate the Dormant Commerce Clause.

The "central rationale" of the dormant Commerce Clause doctrine is to prohibit laws meant to protect local economic interests. *S.D. Myers, Inc. v. City*

[14] CNN only finds support for its "uniformity" assertion in *Zulauf*, which interprets the 1996 Act, not the CVAA. *Zulauf*, 28 F. Supp. 2d at 1023. Whether or not Congress intended in 1996 to promote uniformity of closed captioning of broadcast television programs, Congress expressed no such intent in 2010 when it enacted the CVAA for full-length television programming offered over the Internet. ER 301; Internet Closed Captioning Final Rule, 77 Fed. Reg. at 19490.

and Cnty. of S.F., 253 F.3d 461, 466 (9th Cir. 2001). Assuming that the dormant Commerce Clause is applicable, the Court must "determine whether the challenged California laws discriminate against out-of-state entities," *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 524 (9th Cir. 2009), or directly regulate interstate commerce, *S.D. Myers*, 253 F.3d at 466-67. "A statutory scheme can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect." *LensCrafters*, 567 F.3d at 525 (internal quotation marks omitted). If the challenged laws are not discriminatory, they may still be invalidated if the burden they place on interstate commerce outweighs their benefits. *Id.* at 528.

CNN does not argue that the Unruh Act or DPA facially or purposefully discriminate against out-of-state entities, and it does not show that the Unruh Act or DPA discriminate in practical effect or place an undue burden on interstate commerce.

1. The Unruh Act and DPA Do Not Have a Discriminatory Effect on or Directly Regulate Interstate Commerce.

Applying California law to the videos on CNN.com will not have the effect of directly discriminating against or regulating out-of-state entities. "To determine whether the laws have a discriminatory effect it is necessary to compare" an out-of-state entity with a similar in-state entity. *Id.* at 525. Here, the statutes apply equally to California-based and non-California news websites that operate in

California. CNN does not argue that it is treated differently from in-state news providers. The Unruh Act and DPA do not have the effect of discriminating against out-of-state entities. *Id.* at 525, 527-28.

Relying on an inapt analogy, CNN argues that caption requirements would directly regulate CNN's dissemination of news taking place wholly outside California. In *Healy v. The Beer Institute, Inc.*, upon which CNN's position is based, the Supreme Court held that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders…," such as where a statute has the effect of dictating the price of goods sold entirely in another state. 491 U.S. 324, 336 (1989); *see also Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003). That is not the case here. Unlike *Healy*, the Unruh Act and DPA apply only to CNN's news videos as they are viewed by California visitors[15] and do not dictate prices or the appearance of CNN.com in other states. *Target*, 452 F. Supp. 2d at 961 (distinguishing *Healy*). The laws do not apply to conduct occurring wholly outside California.[16]

[15] The Unruh Act expressly protects persons within the State of California. *See* C.C. § 51(b) (applying to "all persons within the jurisdiction of this state"). The DPA does not purport to extend to conduct outside of California. *See* C.C. § 54.1.

[16] In addition, CNN's argument that the video content is disseminated solely from outside California is specious, as CNN acknowledges that CNN.com is staffed in part by employees at CNN's offices in Los Angeles. ER 520.

CNN asserts that it would not be "feasible" for CNN to create a website specifically for California visitors that would comply with captioning requirements under state law. Opening Br. 53. CNN's position "rests on an impoverished understanding of the architecture of the Internet," Jack Goldsmith & Alan Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 787 (2001); *Target*, 452 F. Supp. 2d at 961. CNN could avoid any impact of California's accessibility laws on videos viewed by visitors from other states by channeling California visitors to a California-specific website or to specific videos.

CNN's mere assertion that it is not "feasible" to do so does not meet CNN's burden of showing that requiring CNN to caption its Internet-based videos under state law would have a discriminatory effect on interstate commerce. For example, in holding that a state false advertising law did not violate the dormant Commerce Clause, a California Court of Appeal relied on factual findings that "technology exists to separate [a] California website from the ROW [rest-of-the-world] website established by a company." *People ex rel. Brown v. PuriTec*, 153 Cal. App. 4th 1524, 1532 (2007), *cert denied*, 128 S. Ct. 2068 (2008) (internal quotation marks omitted; alterations in original). Thus, a company doing business online "could and can easily structure its websites" to provide specific information to California

customers without interfering with its online business in other states. *Id.*; *see also Target*, 452 F. Supp. 2d at 961.[17]

CNN relies on a single declaration to support its argument that it cannot create web content solely for California visitors. ER 520-26. However, that declaration states merely that doing so will create additional work, not that CNN is incapable of doing so.[18] ER 524. The declarant also has not been subject to cross-examination, and discovery about current technology has not yet commenced.

CNN also relies on an older case involving a statute that specifically targeted the Internet and created the risk of criminal prosecution for content providers in other states, issues that are not presented by the Unruh Act and DPA. *Dean*, 342 F.3d at 99, 103. The Second Circuit recognized that then-existing technology limitations were "central" to its decision in *Dean*. *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 195 (2d Cir. 2007); *see also PuriTec*, 153 Cal. App. 4th at 1533.

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[17] Similarly, in 2000 a French court required Yahoo! Inc. to use geographical screening technology, relying on evidence that "such technology could at present filter out French users with a ninety percent accuracy rate." Goldsmith & Sykes, *supra*, at 825-26. Such technologies "allow[] the provider to tailor content to comply with differing regulations in each geographical unit." *Id.* at 811. Although in 2001 the technologies were not 100% accurate, *see id.*, the California Court of Appeal apparently found the technologies sufficiently accurate in 2007. *PuriTec*, 153 Cal. App. 4th at 1532.

[18] CNN already operates a Mexican website and other country- and language-specific websites. *See* www.cnn.com (last visited Oct. 12, 2012).

The technical difficulty in *Dean* was also due to the age verification requirements of state law which are not present here. *Dean*, 342 F.3d at 99.

CNN cannot demonstrate that California laws necessarily regulate the content of websites viewed in other states. If CNN chooses "to conform all of [its websites] to California law, that is a voluntary business decision, not a mandatory legal one." *PuriTec*, 153 Cal. App. 4th at 1532; *Target*, 452 F. Supp. 2d at 961-62 (applying Unruh Act and DPA to national retailer's website does not regulate conduct wholly outside California).

2. The Local Benefits of Requiring Captioning on CNN.com Exceed Any Limited Burden on Interstate Commerce.

Because the Unruh Act and DPA do not have a discriminatory effect on interstate commerce, the Court should next consider the balancing test under *LensCrafters*. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). CNN bears the burden of establishing the excessive burden in relation to the local benefits. *LensCrafters*, 567 F.3d at 528.

CNN does not argue that California lacks a legitimate interest in opposing discrimination and increasing access for people with disabilities. It instead argues that any benefits will be minimal because FCC regulations will govern the videos

on CNN.com. As explained earlier, this is untrue; FCC regulations do not apply to most of the videos on CNN.com. *See* Section V.B. If neither the Unruh Act nor DPA apply to CNN's online videos, deaf and hard of hearing viewers in California will be excluded from full and equal access to those videos. Accordingly, the local benefits of applying state law to CNN.com will be substantial. Indeed, it has long been established that states have a compelling interest in prohibiting discrimination to protect their "citizenry from a number of serious social and personal harms." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). In part due to this interest, state anti-discrimination laws have been upheld against Commerce Clause challenges even where interstate interests are at stake. *Colo. Anti-Discrimination Comm'n v. Cont'l Air Lines, Inc.*, 372 U.S. 714, 721-22 (1963) ("We are not convinced that commerce will be unduly burdened if Continental is required by Colorado to refrain from racial discrimination in its hiring of pilots in that State.").

Regarding the burden on interstate commerce, CNN asserts the need for industry-wide captioning standards and the increased costs of doing business in California. These concerns, however, apply equally to in-state and out-of-state entities disseminating online videos. As the Second Circuit held, "to run afoul of the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 109 (2d

Cir. 2001); *see also Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994).

CNN's alleged concerns that state law runs afoul of industry-wide captioning standards are also wholly conclusory because the Unruh Act and DPA merely require access. They do not prescribe specific captioning standards that might conflict with industry standards. And there is no concern that California law will conflict with other state laws because no other state requires CNN.com to maintain an *inaccessible* website.

Even if California's accessibility laws had a slight burden on interstate commerce or extraterritorial effect, it could be eliminated through technology that permits online entities to identify instantly the geographic location of a computer and route the user to a California-specific website. *PuriTec*, 153 Cal. App. 4th at 1532; *Target*, 452 F. Supp. 2d at 961. That CNN might choose not to create a separate California website and instead offer captioned videos to viewers in all states does not mean there is an impact on out-of-state commerce. *Sorrell*, 272 F.3d at 110 (statute does not mandate out-of-state conduct merely "because the manufacturers are unwilling to modify their production and distribution systems to differentiate between" one state and another); *Target*, 452 F. Supp. 2d at 961 ("[E]ven if Target chooses to change its entire website in order to comply with

California law, this does not mean that California is regulating out-of-state conduct.").

CNN complains that the burden of complying with California law is heavy because it impacts CNN's First Amendment activities, but unlike the laws at issue in *Dean* and *ACLU v. Johnson*, 194 F.3d 1149, 1161-62 (10th Cir. 1999), California's statutes seek to provide greater access to CNN's speech, not restrict it. Moreover, neither case held that a burden on interstate commerce is accorded more weight if it implicates First Amendment activities. CNN cites as a burden the cost and work required to provide captions for California visitors. *See* Opening Br. 54; ER 524. But in-state entities also bear these costs, and "the dormant Commerce Clause does not protect a particular company's profits." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1152 & n.11, 1154 (9th Cir. 2012). Accordingly, the substantial benefits to deaf and hard of hearing Californians outweigh these illusory "burdens." The dormant Commerce Clause does not stand in the way of Plaintiffs' civil rights.

E. Plaintiffs' Causes of Action Do Not Violate the First Amendment.

1. Closed Captioning Does Not Alter, Compel or Regulate Speech.

Courts and regulatory agencies have long established that closed captioning of broadcast television does not violate First Amendment rights, and CNN fails to advance any rationale why that reasoning would not apply here. As discussed in

Section VII.B., the D.C. Circuit and the FCC have rejected the argument that requiring captions on television would violate speech rights by regulating content. *Gottfried*, 655 F.2d at 311 n.54; *Implementation of Video Description of Video Programming*, 15 FCC Rcd. at 15255. More recently, the D.C. Circuit endorsed closed captioning requirements as permissible under the First Amendment because captioning is merely "a simple transcript, a precise repetition of the spoken words." *Motion Picture Ass'n*, 309 F.3d at 803. Although the relationship between captioning on the Internet and the First Amendment is a question of first impression, the D.C. Circuit's reasoning applies with equal force here.

That CNN raises no First Amendment concerns regarding the FCC's new Internet captioning regulations under the CVAA underscores the fact that closed captioning does not hinder free speech. Opening Br. 7, 11 (CNN intends to comply with FCC regulations). The FCC has concluded that closed captioning of certain full-length videos posted on the Internet does not tread on First Amendment rights. *See* 47 C.F.R. § 79.4(b). This is consistent with the D.C. Circuit's reasoning, discussed above. CNN has failed to identify any reason that requiring captions for video clips – most of CNN's online videos – impermissibly burdens speech while requiring captions on full length videos does not. As with television captioning and captioning full-length video programming on the Internet, CNN must merely provide a transcript of the speech that its video clips contain to

effectively caption those clips. This does not infringe CNN's First Amendment rights.

a. Plaintiffs' Action Does Not Compel CNN to Speak to or Associate with People Who Are Deaf.

CNN further suggests that the Court should strike Plaintiffs' action because it would compel CNN to speak to the deaf "in ways it otherwise would not, in violation of the First Amendment." Opening Br. 49. CNN's suggestion is grounded in inapposite cases. Unlike *Ingels*, Plaintiffs are not forcing CNN to broadcast Plaintiffs' views, include deaf individuals in CNN's videos, report on issues of interest to the deaf community, or alter in any other way the content of speech contained in its online videos. 129 Cal. App. 4th at 1074. As noted above, captioning will not alter in any way the content of CNN's speech; it will simply make that speech accessible to Plaintiffs. CNN also cites *Long v. Valentino*, but that case generally lends support to Plaintiffs' position. 216 Cal. App. 3d 1287, 1297 (1989) (a speaker may be liable under the Unruh Act for the consequences of his speech without infringing the speaker's First Amendment rights).

b. The Unruh Act and DPA Do Not Restrict Speech Activities.

The Unruh Act and DPA do not serve as "prior restraints" on speech. "The term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur. . . court orders that actually forbid speech activities

[] are classic examples of prior restraints.'" *Alexander v. United States*, 509 U.S. 544, 550 (1993) (internal citations omitted). Here, the relief Plaintiffs seek would not forbid any speech. Plaintiffs seek declaratory and injunctive relief requiring CNN to "ensure that the benefits and advantages offered by CNN.com are fully and equally enjoyable to persons who are deaf or have hearing loss in California." ER 566. They do not seek to forbid CNN from engaging in any expressive activities in the future, nor require CNN to obtain prior approval for any expressive activities. *See Alexander*, 509 U.S. at 550-51.

Moreover, as already discussed, generally applicable statutes like the Unruh Act and DPA that regulate business activity do not implicate CNN's First Amendment interests merely because CNN would incur costs to comply with those laws. *See* Section VII.C.4.

2. If It Does Regulate Speech, a Captioning Requirement Is at Most Content Neutral and Narrowly Tailored to Serve Important Governmental Interests

If this Court concludes that requiring closed captioning burdens speech at all, then requiring captioning is at most a content neutral restriction. Laws that do not actually favor or disfavor, or have the purpose of favoring or disfavoring, particular viewpoints or ideas are content neutral. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642-43 (1994) (hereafter *Turner I*). "[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in

most instances content neutral." *Id.* at 643. Content-neutral regulations will be sustained if the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

To the extent the DPA and Unruh Act regulate CNN's speech by regulating the format in which it provides its videos on CNN.com, this regulation would be content neutral because these laws do not actually favor or disfavor, or have the purpose of favoring or disfavoring, particular ideas or viewpoints. First, the Unruh Act and the DPA aim to regulate business activities generally. *See* C.C. § 51(a) (regulating "all business establishments of every kind whatsoever"); *id.* § 54.1 (regulating a variety of public places and "other places to which the general public is invited"). Second, these laws apply to online videos regardless of the subject matter, viewpoint, or speaker. Finally, online captions are stored in a separate file from the video file and do not alter video content. ER 338.

Requiring that CNN caption its online videos furthers California's legitimate state interests. *Ward*, 491 U.S. at 799. California has a legitimate—indeed a compelling—interest in preventing arbitrary discrimination against deaf or hard of hearing individuals who seek full and equal access to online news.

Furthermore, requiring closed captioning here would not burden more speech than is necessary, or any speech, to advance these interests. Closed

captioning is the only way to provide deaf Californians with access to the online videos at CNN.com. No less restrictive means exist to provide this access. CNN asserts, as excessive burdens on speech, that requiring closed captioning will produce editorial errors, result in undue costs, delay the delivery of news, and unleash a technological parade of horrors that will limit or impair its first amendment protected newsgathering activities. As discussed in Section VII.C., the facts do not support these claims. Even if providing captions does result in some net cost to CNN, California's compelling interest in ensuring that persons who are deaf or hard of hearing are integrated into society would significantly outweigh the burden on CNN. *See Ward*, 491 U.S. at 799 (statute under review need not be the "least restrictive or least intrusive" means of furthering the government's interest).

CNN uses *Turner I* to argue that Plaintiffs' requested relief would fail intermediate scrutiny, but *Turner I* is inapposite. *Turner I* involved a First Amendment challenge to a "must carry" law which required cable television providers to "devote a portion of their channels to the transmission of local broadcast television stations." 512 U.S. at 626. These provisions "reduce[d] the number of channels over which cable operators exercise[d] unfettered control, and they render[ed] it more difficult for cable programmers to compete for carriage on the limited channels remaining." *Id.* at 637.

California antidiscrimination law does not regulate speech in this manner. There is nothing to suggest that providing closed caption files would limit in any way the amount of video news that CNN can post to its website. Unlike cable or broadcast television, websites are not meaningfully limited in the amount of content a company can post. Moreover, closed captioning will not reduce the amount of content that CNN can display on each of its web pages. The only viewable space CNN would need to devote to closed captioning would be a button in the corner of CNN.com's media player. ER 337-38. One who does not click on that button sees only the video, without captions. ER 338. Also, there is no suggestion that closed-captioning will impair CNN's ability to compete for visitors to CNN.com, or for an audience for its news reporting. ER 340-41.

Plaintiffs' requested relief survives First Amendment scrutiny.

IX. CONCLUSION

For all of the foregoing reasons, Plaintiffs ask the Court to affirm the district court's order denying CNN's motion to strike.

Dated: October 18, 2012

Respectfully submitted,

/s/ Linda M. Dardarian

Linda M. Dardarian, CA Bar No. 131001
ldardarian@gdblegal.com
Jason H. Tarricone, CA Bar No. 247506
jtarricone@gdblegal.com
GOLDSTEIN, DEMCHAK, BALLER,
BORGEN & DARDARIAN
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800 • (510) 835-1417 (fax)

Laurence W. Paradis, CA Bar No. 122336
lparadis@dralegal.org
Mary-Lee K. Smith, CA Bar No. 239086
msmith@dralegal.org
Michael Nunez, CA Bar No. 280535
mnunez@dralegal.org
DISABILITY RIGHTS ADVOCATES
2001 Center Street, Fourth Floor
Berkeley, California 94704
(510) 665-8644 • (510) 665-8511 (fax)
(510) 665-8716 (TTY)

Peter Blanck (*pro hac vice*)
pblanck@syr.edu
900 S. Crouse Avenue
Crouse-Hinds Hall, Suite 300
Syracuse, New York 13244-2130

Attorneys For Plaintiffs-Appellees,
Greater Los Angeles Agency on Deafness, et al.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 12-15807

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (check appropriate option):

☐ This brief complies with the enlargement of brief size permitted by Ninth Circuit Rule 28-4. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is _____ words, _____ lines of text or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

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☐ This brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 29-2(c)(2) or (3) and is _____ words, _____ lines of text or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/ Linda M. Dardarian

("s/" plus typed name is acceptable for electronically-filed documents)

Date: October 18, 2012

[1] If filing a brief that falls within the length limitations set forth at Fed. R. App. P. 32(a)(7)(B), use Form 6, Federal Rules of Appellate Procedure.

Certificate of Compliance Pursuant to
Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6)

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Word in 14-point font size and Times New Roman type style.

Dated: October 18, 2012

Respectfully submitted,

/s/ Linda M. Dardarian

Linda M. Dardarian, CA Bar No. 131001
ldardarian@gdblegal.com
Jason H. Tarricone, CA Bar No. 247506
jtarricone@gdblegal.com
GOLDSTEIN, DEMCHAK, BALLER,
BORGEN & DARDARIAN
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800 • (510) 835-1417 (fax)

Laurence W. Paradis, CA Bar No. 122336
lparadis@dralegal.org
Mary-Lee K. Smith, CA Bar No. 239086
msmith@dralegal.org
Michael Nunez, CA Bar No. 280535
mnunez@dralegal.org
DISABILITY RIGHTS ADVOCATES
2001 Center Street, Fourth Floor
Berkeley, California 94704
(510) 665-8644 • (510) 665-8511 (fax)
(510) 665-8716 (TTY)

Peter Blanck (*pro hac vice*)
pblanck@syr.edu
900 S. Crouse Avenue
Crouse-Hinds Hall, Suite 300
Syracuse, New York 13244-2130

Attorneys For Plaintiffs-Appellees,
Greater Los Angeles Agency on Deafness, et al.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiffs-Appellees Greater Los Angeles Agency on Deafness, Inc., *et al*. are unaware of any related cases currently pending in this Court.

Dated: October 18, 2012

Respectfully submitted,

/s/ Linda M. Dardarian

Linda M. Dardarian, CA Bar No. 131001
ldardarian@gdblegal.com
Jason H. Tarricone, CA Bar No. 247506
jtarricone@gdblegal.com
GOLDSTEIN, DEMCHAK, BALLER,
BORGEN & DARDARIAN
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800 • (510) 835-1417 (fax)

Laurence W. Paradis, CA Bar No. 122336
lparadis@dralegal.org
Mary-Lee K. Smith, CA Bar No. 239086
msmith@dralegal.org
Michael Nunez, CA Bar No. 280535
mnunez@dralegal.org
DISABILITY RIGHTS ADVOCATES
2001 Center Street, Fourth Floor
Berkeley, California 94704
(510) 665-8644 • (510) 665-8511 (fax)
(510) 665-8716 (TTY)

Peter Blanck (*pro hac vice*)
pblanck@syr.edu
900 S. Crouse Avenue
Crouse-Hinds Hall, Suite 300
Syracuse, New York 13244-2130

Attorneys For Plaintiffs-Appellees,
Greater Los Angeles Agency on Deafness, et al.

CERTIFICATE OF SERVICE

I hereby certify that on the date hereof a copy of the foregoing was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 18, 2012

Respectfully submitted,

/s/ Linda M. Dardarian

Linda M. Dardarian, CA Bar No. 131001
ldardarian@gdblegal.com
Jason H. Tarricone, CA Bar No. 247506
jtarricone@gdblegal.com
GOLDSTEIN, DEMCHAK, BALLER,
BORGEN & DARDARIAN
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800 • (510) 835-1417 (fax)

Laurence W. Paradis, CA Bar No. 122336
lparadis@dralegal.org
Mary-Lee K. Smith, CA Bar No. 239086
msmith@dralegal.org
Michael Nunez, CA Bar No. 280535
mnunez@dralegal.org
DISABILITY RIGHTS ADVOCATES
2001 Center Street, Fourth Floor
Berkeley, California 94704
(510) 665-8644 • (510) 665-8511 (fax)
(510) 665-8716 (TTY)

Peter Blanck (*pro hac vice*)
pblanck@syr.edu
900 S. Crouse Avenue
Crouse-Hinds Hall, Suite 300
Syracuse, New York 13244-2130

Attorneys For Plaintiffs-Appellees,
Greater Los Angeles Agency on Deafness, et al.

ADDENDUM OF
FEDERAL AND CALIFORNIA STATUTES AND REGULATIONS

Exh.	Description
1.	47 U.S.C.A. Section 152
2.	47 U.S.C. Section 414
3.	47 U.S.C. Section 613
4.	47 C.F.R. Section 79.4
5.	77 Fed. Reg. 19480, 19490, 19493 (2010)
6.	Cal. Civ. Code Section 51
7.	Cal. Civ. Code Section 54.1
8.	Cal. Civ. Code Section 54.3
9.	Cal. Code Civ. P. Section 425.16
10.	Cal. Code Civ. P. Section 425.17

EXHIBIT 1

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter I. General Provisions (Refs & Annos)

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

CREDIT(S)

(June 19, 1934, c. 652, Title I, § 2, 48 Stat. 1064; 1946 Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat.

1352; Apr. 27, 1954, c. 175, § 1, 68 Stat. 63; Feb. 21, 1978, Pub.L. 95-234, § 5, 92 Stat. 35; Oct. 30, 1984, Pub.L. 98-549, § 3(a), 98 Stat. 2801; Nov. 21, 1989, Pub.L. 101-166, Title V, § 521(2), 103 Stat. 1193; July 26, 1990, Pub.L. 101-336, Title IV, § 401(b)(1), 104 Stat. 369; Dec. 20, 1991, Pub.L. 102-243, § 3(b), 105 Stat. 2401; Aug. 10, 1993, Pub.L. 103-66, Title VI, § 6002(b)(2)(B)(i), 107 Stat. 396.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1954 Acts. Senate Report No. 1090, see 1954 U.S.Code Cong. and Adm.News, p. 2133.

1978 Acts. Senate Report No. 95-580, see 1978 U.S.Code Cong. and Adm.News, p. 109.

1984 Acts. House Report No. 98-934 and Statements by Legislative Leaders, see 1984 U.S.Code Cong. and Adm.News, p. 4655.

1989 Acts. Statement by President, see 1989 U.S.Code Cong. and Adm.News, p. 733-7.

1990 Acts. House Report No. 101-485 and House Conference Report No. 101-596, see 1990 U.S.Code Cong. and Adm.News, p. 267.

1991 Acts. Senate Report No. 102-178, see 1991 U.S. Code Cong. and Adm. News, p. 1979.

1993 Acts. House Report No. 103-111 and House Conference Report No. 103-213, see 1993 U.S. Code Cong. and Adm. News, p. 378.

References in Text

For definition of Canal Zone, referred to in subsec. (a), see section 3602(b) of Title 22, Foreign Relations and Intercourse.

Subchapter V-A, referred to in subsec. (a), is 47 U.S.C.A. § 521 et seq.

Codifications

Directory language of Pub.L. 101-336 calling for the substitution of “sections 224 and 225” for “section 224” was incapable of literal execution. The amendment was executed, as the probable intent of Congress, by substituting “sections” for “section” preceding “223 or” and by substituting “224 and 225” for “224” following “223 or”.

Words, "the Philippine Islands or", preceding "the Canal Zone", were omitted from this section on authority of 1946 Proc. No. 2695, issued pursuant to section 1394 of Title 22, Foreign Relations and Intercourse, which recognized the independence of the Philippine Islands as of July 4, 1946. 1946 Proc. No. 2695 is set out as a note under section 1394 of Title 22.

Amendments

1993 Amendments. Subsec. (b). Pub.L. 103-66, § 6002(b)(2)(B)(i), inserted "and section 332 of this title," after "inclusive,".

1991 Amendments. Subsec. (b). Pub.L. 102-243 substituted reference to sections 223 through 227 of this title, inclusive, for reference to sections 223 or 224 and 225 of this title.

1990 Amendments. Subsec. (b). Pub.L. 101-336 inserted reference to section 225 of this title.

1989 Amendments. Subsec. (b). Pub.L. 101-166 substituted "section 223 or 224" for "section 224".

1984 Amendments. Subsec. (a). Pub.L. 98-549, § 3(a)(1), inserted provision making this chapter applicable with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable persons which relate to such service, as provided in subchapter V-A of this chapter.

Subsec. (b). Pub.L. 98-549, § 3(a)(2), substituted "section 301 of this title and subchapter V-A of this chapter" for "section 301 of this title".

1978 Amendments. Subsec. (b). Pub.L. 95-234 substituted "Except as provided in section 224 of this title and subject" for "Subject".

1954 Amendments. Subsec. (b). Act Apr. 27, 1954 made it clear that intrastate communication service, whether by "wire or radio", would not be subject to the Commission's jurisdiction over charges, classifications, etc., and added cls. (3) and (4).

Effective and Applicability Provisions

1989 Acts. Section 521(3) of Pub.L. 101-166 provided: "The amendments made by this subsection [probably means this section, amending subsec. (b) of this section and section 223 of this title] shall take effect 120 days after the date of enactment of this Act [Nov. 21, 1989]."

1984 Acts. Amendment by Pub.L. 98-549 effective 60 days after Oct. 30, 1984, except where otherwise expressly provided, see section 9(a) of Pub.L. 98-549, set out as a note under section 521 of this title.

1978 Acts. Section 7 of Pub.L. 95-234 provided that: "The amendments made by this Act [enacting section 224 of this title amending this section and section 503 and 504 of this title, repealing section 510 of this title, and enacting provision set out as a note under section 609 of this title] shall take effect on the thirtieth day after the date of enactment of this Act [Feb. 21, 1978]; except that the provisions of sections 503(b) and 510 of the Communications Act of 1934 [section 503(b) and 510 of this title], as in effect on such date of enactment [Feb. 21, 1978], shall continue to constitute the applicable law with the respect to any act or omission which occurs prior to such thirtieth day."

Applicability of Consent Decrees and Other Law

Pub.L. 104-104, Title VI, § 601, Feb. 8, 1996, 110 Stat. 143, provided that:

"(a) Applicability of amendments to future conduct.--

"(1) AT&T Consent Decree.--Any conduct or activity that was, before the date of enactment of this Act [Feb. 8, 1996], subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act [this chapter as amended by the Telecommunications Act of 1996, Pub.L. 104-104, Feb. 8, 1996, 110 Stat. 56, for distribution of which see Short Title note set out under section 609 of this title] and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

"(2) GTE Consent Decree.--Any conduct or activity that was, before the date of enactment of this Act [Feb. 8, 1996], subject to any restriction or obligation imposed by the GTE Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

"(3) McCaw Consent Decree.--Any conduct or activity that was, before the date of enactment of this Act [Feb. 8, 1996], subject to any restriction or obligation imposed by the McCaw Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and subsection (d) of this section and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

"(b) Antitrust laws.--

"(1) Savings clause.--Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act [Telecommunications Act of 1996, Pub.L. 104-104, Feb. 8, 1996, 110 Stat. 56, for distribution of which see Short Title note set out under section 609 of this title] shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

"(2) Repeal.--[Par. (2) repealed subsection (a) of section 221 of this title].

"(3) Clayton Act.--[Par. (3) amended section 18 of Title 15, Commerce and Trade].

"(c) Federal, State, and local law.--

"(1) No implied effect.--This Act and the amendments made by this Act shall not be construed to modify, im-

pair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

"(2) State tax savings provision.--Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 [sections 542 and 573(c) of this title] and section 602 of this Act [set out as a note under this section].

"(d) Commercial mobile service joint marketing.--Notwithstanding section 22.903 of the Commission's regulations (47 C.F.R. 22.903) or any other Commission regulation, a Bell operating company or any other company may, except as provided in sections 271(e)(1) and 272 of the Communications Act of 1934 as amended by this Act [sections 271(e)(1) and 272 of this title] as they relate to wireline service, jointly market and sell commercial mobile services in conjunction with telephone exchange service, exchange access, intraLATA telecommunications service, interLATA telecommunications service, and information services.

"(e) Definitions.--As used in this section:

"(1) AT&T Consent Decree.--The term 'AT&T Consent Decree' means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82-0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

"(2) GTE Consent Decree.--The term 'GTE Consent Decree' means the order entered December 21, 1984, as restated January 11, 1985, in the action styled United States v. GTE Corp., Civil Action No. 83-1298, in the United States District Court for the District of Columbia, and any judgment or order with respect to such action entered on or after December 21, 1984.

"(3) McCaw Consent Decree.--The term 'McCaw Consent Decree' means the proposed consent decree filed on July 15, 1994, in the antitrust action styled United States v. AT&T Corp. and McCaw Cellular Communications, Inc., Civil Action No. 94-01555, in the United States District Court for the District of Columbia. Such term includes any stipulation that the parties will abide by the terms of such proposed consent decree until it is entered and any order entering such proposed consent decree.

"(4) Antitrust laws.--The term 'antitrust laws' has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)) [section 12(a) of Title 15], except that such term includes the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13 et seq.) [sections 13, 13a, 13b, and 21a of Title 15], commonly known as the Robinson-Patman Act, and section 5 of the Federal Trade Commission Act (15 U.S.C. 45) [section 45 of Title 15] to the extent that such section 5 applies to unfair methods of competition."

Preemption of Local Taxation With Respect to Direct-to-Home Services

Pub.L. 104-104, Title VI, § 602, Feb. 8, 1996, 110 Stat. 144, provided that:

"(a) Preemption.--A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.

"(b) Definitions.--For the purposes of this section--

"(1) Direct-to-home satellite service.--The term 'direct-to-home satellite service' means only programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite.

"(2) Provider of direct-to-home satellite service.--For purposes of this section, a 'provider of direct-to-home satellite service' means a person who transmits, broadcasts, sells, or distributes direct-to-home satellite service.

"(3) Local taxing jurisdiction.--The term 'local taxing jurisdiction' means any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.

"(4) State.--The term 'State' means any of the several States, the District of Columbia, or any territory or possession of the United States.

"(5) Tax or fee.--The terms 'tax' and 'fee' mean any local sales tax, local use tax, local intangible tax, local income tax, business license tax, utility tax, privilege tax, gross receipts tax, excise tax, franchise fees, local telecommunications tax, or any other tax, license, or fee that is imposed for the privilege of doing business, regulating, or raising revenue for a local taxing jurisdiction.

"(c) Preservation of State authority.--This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State."

CODE OF FEDERAL REGULATIONS

Access charges, see 47 CFR § 69.1 et seq.

Amateur radio services, see 47 CFR § 97.1 et seq.

Aviation services, see 47 CFR § 87.1 et seq.

Cable television service, see 47 CFR § 76.1 et seq.

Commission organization, delegation of authority, see 47 CFR § 0.201 et seq.

Extension of lines and discontinuance of services by carriers, see 47 CFR § 63.01 et seq.

Radio broadcast services, see 47 CFR § 73.1 et seq.

LAW REVIEW COMMENTARIES

Americans with Disabilities Act: An overview of the employment provisions. Thomas S. Christopher and Charles M. Rice, 33 S.Tex.L.Rev. 759 (1992).

Constitutionality of requiring telephone companies to protect their subscribers from telemarketing calls.

EXHIBIT 2

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter IV. Procedural and Administrative Provisions
§ 414. Exclusiveness of chapter

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

CREDIT(S)

(June 19, 1934, c. 652, Title IV, § 414, 48 Stat. 1099.)

HISTORICAL AND STATUTORY NOTES

References in Text

This chapter, referred to in text, was in the original "this Act", meaning Act June 19, 1934, c. 652, 48 Stat. 1064, as amended, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

EXHIBIT 3

Effective: October 8, 2010

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter VI. Miscellaneous Provisions

§ 613. Video programming accessibility

(a) Commission inquiry

Within 180 days after February 8, 1996, the Federal Communications Commission shall complete an inquiry to ascertain the level at which video programming is closed captioned. Such inquiry shall examine the extent to which existing or previously published programming is closed captioned, the size of the video programming provider or programming owner providing closed captioning, the size of the market served, the relative audience shares achieved, or any other related factors. The Commission shall submit to the Congress a report on the results of such inquiry.

(b) Accountability criteria

Within 18 months after February 8, 1996, the Commission shall prescribe such regulations as are necessary to implement this section. Such regulations shall ensure that--

(1) video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captions, except as provided in subsection (d) of this section; and

(2) video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions, except as provided in subsection (d) of this section.

(c) Deadlines for captioning

(1) In general

The regulations prescribed pursuant to subsection (b) shall include an appropriate schedule of deadlines for the provision of closed captioning of video programming once published or exhibited on television.

(2) Deadlines for programming delivered using Internet protocol

(A) Regulations on closed captioning on video programming delivered using Internet protocol

Not later than 6 months after the submission of the report to the Commission required by subsection (e)(1) of the Twenty-First Century Communications and Video Accessibility Act of 2010, the Commission shall revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.

(B) Schedule

The regulations prescribed under this paragraph shall include an appropriate schedule of deadlines for the provision of closed captioning, taking into account whether such programming is prerecorded and edited for Internet distribution, or whether such programming is live or near-live and not edited for Internet distribution.

(C) Cost

The Commission may delay or waive the regulation promulgated under subparagraph (A) to the extent the Commission finds that the application of the regulation to live video programming delivered using Internet protocol with captions after the effective date of such regulations would be economically burdensome to providers of video programming or program owners.

(D) Requirements for regulations

The regulations prescribed under this paragraph--

(i) shall contain a definition of "near-live programming" and "edited for Internet distribution";

(ii) may exempt any service, class of service, program, class of program, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment;

(iii) shall clarify that, for the purposes of implementation, of this subsection, the terms "video programming distributors" and "video programming providers" include an entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol;

(iv) and describe the responsibilities of video programming providers or distributors and video program-

ming owners;

(v) shall establish a mechanism to make available to video programming providers and distributors information on video programming subject to the Act on an ongoing basis;

(vi) shall consider that the video programming provider or distributor shall be deemed in compliance if such entity enables the rendering or pass through of closed captions and makes a good faith effort to identify video programming subject to the Act using the mechanism created in (v); and

(vii) shall provide that de minimis failure to comply with such regulations by a video programming provider or owner shall not be treated as a violation of the regulations.

(3) Alternate means of compliance

An entity may meet the requirements of this section through alternate means than those prescribed by regulations pursuant to subsection (b), as revised pursuant to paragraph (2)(A) of this subsection, if the requirements of this section are met, as determined by the Commission.

(d) Exemptions

Notwithstanding subsection (b) of this section--

(1) the Commission may exempt by regulation programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming;

(2) a provider of video programming or the owner of any program carried by the provider shall not be obligated to supply closed captions if such action would be inconsistent with contracts in effect on February 8, 1996, except that nothing in this section shall be construed to relieve a video programming provider of its obligations to provide services required by Federal law; and

(3) a provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would be economically burdensome. During the pendency of such a petition, such provider or owner shall be exempt from the requirements of this section. The Commission shall act to grant or deny any such petition, in whole or in part, within 6 months after the Commission receives such petition, unless the Commission finds that an extension of the 6-month period is necessary to determine whether such requirements are economically burdensome.

(e) Undue burden

The term "undue burden" means significant difficulty or expense. In determining whether the closed captions necessary to comply with the requirements of this paragraph would result in an undue economic burden, the factors to be considered include--

(1) the nature and cost of the closed captions for the programming;

(2) the impact on the operation of the provider or program owner;

(3) the financial resources of the provider or program owner; and

(4) the type of operations of the provider or program owner.

(f) Video description

(1) Reinstatement of regulations

On the day that is 1 year after October 8, 2010, the Commission shall, after a rulemaking, reinstate its video description regulations contained in the Implementation of Video Description of Video Programming Report and Order (15 F.C.C.R. 15,230 (2000)), recon. granted in part and denied in part , (16 F.C.C.R. 1251 (2001)), modified as provided in paragraph (2).

(2) Modifications to reinstated regulations

Such regulations shall be modified only as follows:

(A) The regulations shall apply to video programming, as defined in subsection (h), insofar as such programming is transmitted for display on television in digital format.

(B) The Commission shall update the list of the top 25 designated market areas, the list of the top 5 national nonbroadcast networks that have at least 50 hours per quarter of prime time programming that is not exempt under this paragraph, and the beginning calendar quarter for which compliance shall be calculated.

(C) The regulations may permit a provider of video programming or a program owner to petition the Commission for an exemption from the requirements of this section upon a showing that the requirements contained in this section be economically burdensome.

(D) The Commission may exempt from the regulations established pursuant to paragraph (1) a service, class of services, program, class of programs, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment.

(E) The regulations shall not apply to live or near-live programming.

(F) The regulations shall provide for an appropriate phased schedule of deadlines for compliance.

(G) The Commission shall consider extending the exemptions and limitations in the reinstated regulations for technical capability reasons to all providers and owners of video programming.

(3) Inquiries on further video description requirements

The Commission shall commence the following inquiries not later than 1 year after the completion of the phase-in of the reinstated regulations and shall report to Congress 1 year thereafter on the findings for each of the following:

(A) Video description in television programming

The availability, use, and benefits of video description on video programming distributed on television, the technical and creative issues associated with providing such video description, and the financial costs of providing such video description for providers of video programming and program owners.

(B) Video description in video programming distributed on the Internet

The technical and operational issues, costs, and benefits of providing video descriptions for video programming that is delivered using Internet protocol.

(4) Continuing Commission authority

(A) In general

The Commission may not issue additional regulations unless the Commission determines, at least 2 years after completing the reports required in paragraph (3), that the need for and benefits of providing video description for video programming, insofar as such programming is transmitted for display on television, are greater than the technical and economic costs of providing such additional programming.

(B) Limitation

If the Commission makes the determination under subparagraph (A) and issues additional regulations, the Commission may not increase, in total, the hour requirement for additional described programming by more than 75 percent of the requirement in the regulations reinstated under paragraph (1).

(C) Application to designated market areas

(i) In general

After the Commission completes the reports on video description required in paragraph (3), the Commission shall phase in the video description regulations for the top 60 designated market areas, except that the Commission may grant waivers to entities in specific designated market areas where it deems appropriate.

(ii) Phase-in deadline

The phase-in described in clause (i) shall be completed not later than 6 years after October 8, 2010.

(iii) Report

Nine years after October 8, 2010, the Commission shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report assessing--

(I) the types of described video programming that is available to consumers;

(II) consumer use of such programming;

(III) the costs to program owners, providers, and distributors of creating such programming;

(IV) the potential costs to program owners, providers, and distributors in designated market areas outside of the top 60 of creating such programming;

(V) the benefits to consumers of such programming;

(VI) the amount of such programming currently available; and

(VII) the need for additional described programming in designated market areas outside the top 60.

(iv) Additional market areas

Ten years after October 8, 2010, the Commission shall have the authority, based upon the findings, conclusions, and recommendations contained in the report under clause (iii), to phase in the video description regulations for up to an additional 10 designated market areas each year--

(I) if the costs of implementing the video description regulations to program owners, providers, and distributors in those additional markets are reasonable, as determined by the Commission; and

(II) except that the Commission may grant waivers to entities in specific designated market areas where it deems appropriate.

(g) Emergency information

Not later than 1 year after the Advisory Committee report under subsection (e)(2) is submitted to the Commission, the Commission shall complete a proceeding to--

(1) identify methods to convey emergency information (as that term is defined in section 79.2 of title 47, Code of Federal Regulations) in a manner accessible to individuals who are blind or visually impaired; and

(2) promulgate regulations that require video programming providers and video programming distributors (as those terms are defined in section 79.1 of title 47, Code of Federal Regulations) and program owners to convey such emergency information in a manner accessible to individuals who are blind or visually impaired.

(h) Definitions

For purposes of this section, section 303, and section 330 of this title:

(1) Video description

The term “video description” means the insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.

(2) Video programming

The term “video programming” means programming by, or generally considered comparable to programming

provided by a television broadcast station, but not including consumer-generated media (as defined in section 153 of this title).

(j) [FN1] Private rights of actions prohibited

Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

CREDIT(S)

(June 19, 1934, c. 652, Title VII, § 713, as added Feb. 8, 1996, Pub.L. 104-104, Title III, § 305, 110 Stat. 126; amended Oct. 8, 2010, Pub.L. 111-260, Title II, § 202, 124 Stat. 2767; Oct. 8, 2010, Pub.L. 111-265, § 2(6) to (11), 124 Stat. 2795.)

[FN1] So in original. No subsec. (i) enacted.

Current through P.L. 112-174 (excluding P.L. 112-140, 112-141, and 112-166) approved 9-20-12.

END OF DOCUMENT

EXHIBIT 4

Effective: August 6, 2012

Code of Federal Regulations Currentness
Title 47. Telecommunication
Chapter I. Federal Communications Commission (Refs & Annos)
Subchapter C. Broadcast Radio Services
Part 79. Closed Captioning and Video Description of Video Programming (Refs & Annos)

➡ § 79.4 Closed captioning of video programming delivered using Internet protocol.

(a) Definitions. For purposes of this section the following definitions shall apply:

(1) Video programming. Programming provided by, or generally considered comparable to programming provided by, a television broadcast station, but not including consumer-generated media.

(2) Full-length video programming. Video programming that appears on television and is distributed to end users, substantially in its entirety, via Internet protocol, excluding video clips or outtakes.

(3) Video programming distributor or video programming provider. Any person or entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol.

(4) Video programming owner. Any person or entity that either:

(i) Licenses the video programming to a video programming distributor or provider that makes the video programming available directly to the end user through a distribution method that uses Internet protocol; or

(ii) Acts as the video programming distributor or provider, and also possesses the right to license the video programming to a video programming distributor or provider that makes the video programming available directly to the end user through a distribution method that uses Internet protocol.

(5) Internet protocol. Includes Transmission Control Protocol and a successor protocol or technology to Internet protocol.

(6) Closed captioning. The visual display of the audio portion of video programming pursuant to the technical specifications set forth in this part.

(7) Live programming. Video programming that is shown on television substantially simultaneously with its performance.

(8) Near-live programming. Video programming that is performed and recorded less than 24 hours prior to the time it was first aired on television.

(9) Prerecorded programming. Video programming that is not "live" or "near-live."

(10) Edited for Internet distribution. Video programming for which the television version is substantially edited prior to its Internet distribution.

(11) Consumer-generated media. Content created and made available by consumers to online Web sites and services on the Internet, including video, audio, and multimedia content.

(12) Video clips. Excerpts of full-length video programming.

(13) Outtakes. Content that is not used in an edited version of video programming shown on television.

(14) Nonexempt programming. Video programming that is not exempted under paragraph (d) of

this section and, accordingly, is subject to closed captioning requirements set forth in this section.

(b) Requirements for closed captioning of Internet protocol-delivered video programming. All nonexempt full-length video programming delivered using Internet protocol must be provided with closed captions if the programming is published or exhibited on television in the United States with captions on or after the following dates:

(1) September 30, 2012, for all prerecorded programming that is not edited for Internet distribution, unless it is subject to paragraph (b)(4) of this section.

(2) March 30, 2013, for all live and near-live programming, unless it is subject to paragraph (b)(4) of this section.

(3) September 30, 2013, for all prerecorded programming that is edited for Internet distribution, unless it is subject to paragraph (b)(4) of this section.

(4) All programming that is already in the video programming distributor's or provider's library before it is shown on television with captions must be captioned within 45 days after the date it is shown on television with captions on or after March 30, 2014 and before March 30, 2015. Such programming must be captioned within 30 days after the date it is shown on television with captions on or after March 30, 2015 and before March 30, 2016. Such programming must be captioned within 15 days after the date it is shown on television with captions on or after March 30, 2016.

(c) Obligations of video programming owners, distributors and providers.

(1) Obligations of video programming owners. Each video programming owner must:

(i) Send program files to video programming distributors and providers with captions as required by this section, with at least the same quality as the television captions provided for the same programming. If a video programming owner provides captions to a video programming distributor or provider using the Society of Motion Picture and Television Engineers Timed Text format (SMPTE ST 2052–1:2010, incorporated by reference, see § 79.100), then the VPO has fulfilled its obligation to deliver captions to the video programming distributor or provider in an acceptable format. A video programming owner and a video programming distributor or provider may agree upon an alternative technical format for the delivery of captions to the video programming distributor or provider.

(ii) With each video programming distributor and provider that such owner licenses to distribute video programming directly to the end user through a distribution method that uses Internet protocol, agree upon a mechanism to inform such distributors and providers on an ongoing basis whether video programming is subject to the requirements of this section.

(2) Obligations of video programming distributors and providers. Each video programming distributor and provider must:

(i) Enable the rendering or pass through of all required captions to the end user, maintaining the quality of the captions provided by the video programming owner and transmitting captions in a format reasonably designed to reach the end user in that quality. A video programming distributor or provider that provides applications, plug-ins, or devices in order to deliver video programming must comply with the requirements of § 79.103(c) and (d).

(ii) With each video programming owner from which such distributor or provider licenses video programming for distribution directly to the end user through a distribution method that uses Internet protocol, agree upon a mechanism to inform such distributor or provider on an ongoing basis whether video programming is subject to the requirements of this section, and make a good faith effort to identify video programming subject to the requirements of this section using the agreed upon mechanism. A video programming distributor or provider may rely in good faith on a certification by a video programming owner that the video programming need not be

captioned if:

(A) The certification includes a clear and concise explanation of why captioning is not required; and

(B) The video programming distributor or provider is able to produce the certification to the Commission in the event of a complaint.

(iii) Make contact information available to end users for the receipt and handling of written closed captioning complaints alleging violations of this section. The contact information required for written complaints shall include the name of a person with primary responsibility for Internet protocol captioning issues and who can ensure compliance with these rules. In addition, this contact information shall include the person's title or office, telephone number, fax number, postal mailing address, and email address. Video programming distributors and providers shall keep this information current and update it within 10 business days of any change.

(3) A video programming provider's or owner's de minimis failure to comply with this section shall not be treated as a violation of the requirements.

(d) Procedures for exemptions based on economic burden.

(1) A video programming provider or owner may petition the Commission for a full or partial exemption from the closed captioning requirements of this section, which the Commission may grant upon a finding that the requirements would be economically burdensome.

(2) The petitioner must support a petition for exemption with sufficient evidence to demonstrate that compliance with the requirements for closed captioning of video programming delivered via Internet protocol would be economically burdensome. The term "economically burdensome" means imposing significant difficulty or expense. The Commission will consider the following factors when determining whether the requirements for closed captioning of Internet protocol-delivered video programming would be economically burdensome:

(i) The nature and cost of the closed captions for the programming;

(ii) The impact on the operation of the video programming provider or owner;

(iii) The financial resources of the video programming provider or owner; and

(iv) The type of operations of the video programming provider or owner.

(3) In addition to these factors, the petitioner must describe any other factors it deems relevant to the Commission's final determination and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements of this section including, but not limited to, text or graphic display of the content of the audio portion of the programming. The Commission will evaluate economic burden with regard to the individual outlet.

(4) The petitioner must electronically file its petition for exemption, and all subsequent pleadings related to the petition, in accordance with § 0.401(a)(1)(iii) of this chapter.

(5) The Commission will place the petition on public notice.

(6) Any interested person may electronically file comments or oppositions to the petition within 30 days after release of the public notice of the petition. Within 20 days after the close of the period for filing comments or oppositions, the petitioner may reply to any comments or oppositions filed.

(7) Persons who file comments or oppositions to the petition must serve the petitioner with copies of those comments or oppositions and must include a certification that the petitioner was served with a copy. Any petitioner filing a reply to comments or oppositions must serve the commenting or opposing party with a copy of the

reply and shall include a certification that the party was served with a copy. Comments or oppositions and replies shall be served upon a party, its attorney, or its other duly constituted agent by delivering or mailing a copy to the party's last known address in accordance with § 1.47 of this chapter or by sending a copy to the email address last provided by the party, its attorney, or other duly constituted agent.

(8) Upon a finding of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements.

(9) Persons filing petitions and responsive pleadings must include a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

(10) The Commission may deny or approve, in whole or in part, a petition for an economic burden exemption from the closed captioning requirements of this section.

(11) During the pendency of an economic burden determination, the Commission will consider the video programming subject to the request for exemption as exempt from the requirements of this section.

(e) Complaint procedures.

(1) Complaints concerning an alleged violation of the closed captioning requirements of this section shall be filed in writing with the Commission or with the video programming distributor or provider responsible for enabling the rendering or pass through of the closed captions for the video programming within sixty (60) days after the date the complainant experienced a problem with captioning. A complaint filed with the Commission must be directed to the Consumer and Governmental Affairs Bureau and submitted through the Commission's online informal complaint filing system, U.S. Mail, overnight delivery, or facsimile.

(2) A complaint should include the following information:

(i) The name, postal address, and other contact information of the complainant, such as telephone number or email address;

(ii) The name and postal address, Web site, or email address of the video programming distributor, provider, and/or owner against which the complaint is alleged, and information sufficient to identify the video programming involved;

(iii) Information sufficient to identify the software or device used to view the program;

(iv) A statement of facts sufficient to show that the video programming distributor, provider, and/or owner has violated or is violating the Commission's rules, and the date and time of the alleged violation;

(v) The specific relief or satisfaction sought by the complainant; and

(vi) The complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), email, or some other method that would best accommodate the complainant).

(3) If a complaint is filed first with the Commission, the Commission will forward complaints satisfying the above requirements to the named video programming distributor, provider, and/or owner, as well as to any other video programming distributor, provider, and/or owner that Commission staff determines may be involved. The video programming distributor, provider, and/or owner must respond in writing to the Commission and the complainant within 30 days after receipt of the complaint from the Commission.

(4) If a complaint is filed first with the video programming distributor or provider, the video programming distributor or provider must respond in writing to the complainant within thirty (30) days after receipt of a closed captioning complaint. If a video programming distributor or provider fails to respond to the complainant

within thirty (30) days, or the response does not satisfy the consumer, the complainant may file the complaint with the Commission within thirty (30) days after the time allotted for the video programming distributor or provider to respond. If a consumer re-files the complaint with the Commission (after filing with the distributor or provider) and the complaint satisfies the above requirements, the Commission will forward the complaint to the named video programming distributor or provider, as well as to any other video programming distributor, provider, and/or owner that Commission staff determines may be involved. The video programming distributor, provider, and/or owner must then respond in writing to the Commission and the complainant within 30 days after receipt of the complaint from the Commission.

(5) In response to a complaint, video programming distributors, providers, and/or owners shall file with the Commission sufficient records and documentation to prove that the responding entity was (and remains) in compliance with the Commission's rules. Conclusory or insufficiently supported assertions of compliance will not carry a video programming distributor's, provider's, or owner's burden of proof. If the responding entity admits that it was not or is not in compliance with the Commission's rules, it shall file with the Commission sufficient records and documentation to explain the reasons for its noncompliance, show what remedial steps it has taken or will take, and show why such steps have been or will be sufficient to remediate the problem.

(6) The Commission will review all relevant information provided by the complainant and the subject video programming distributors, providers, and/or owners, as well as any additional information the Commission deems relevant from its files or public sources. The Commission may request additional information from any relevant entities when, in the estimation of Commission staff, such information is needed to investigate the complaint or adjudicate potential violation(s) of Commission rules. When the Commission requests additional information, parties to which such requests are addressed must provide the requested information in the manner and within the time period the Commission specifies.

(7) If the Commission finds that a video programming distributor, provider, or owner has violated the closed captioning requirements of this section, it may employ the full range of sanctions and remedies available under the Communications Act of 1934, as amended, against any or all of the violators.

(f) Private rights of action prohibited. Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

[77 FR 19515, March 30, 2012; 77 FR 46632, Aug. 6, 2012]

SOURCE: 62 FR 48493, Sept. 16, 1997; 65 FR 54811, Sept. 11, 2000; 65 FR 56801, Sept. 20, 2000; 77 FR 19515, March 30, 2012, unless otherwise noted.

AUTHORITY: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 330, 544a, 613, 617.

47 C. F. R. § 79.4, 47 CFR § 79.4

Current through October 11, 2012; 77 FR 62132

END OF DOCUMENT

EXHIBIT 5

RULES and REGULATIONS

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 15 and 79

[MB Docket No. 11-154; FCC 12-9]

Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010

Friday, March 30, 2012

*** The requested pages begin below ***

***19480** ACTION: Final rule.

SUMMARY: Pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, the FCC revises its regulations to require closed captioning of IP-delivered video programming that is published or exhibited on television with captions after the effective date of the new regulations. The FCC also imposes closed captioning requirements on certain apparatus that receive or play back video programming, and on certain recording devices. This action will better enable individuals who are deaf or hard of hearing to view IP-delivered video programming, as Congress intended.

DATES: Effective April 30, 2012, except for §§ 79.4(c)(1)(ii), 79.4(c)(2)(ii) through (iii), 79.4(d)(1) through (4) and (d)(6) through (9), 79.4(e)(1) through (6), and 79.103(b)(3) through (4), which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the Federal Register announcing the effective date for those sections. The incorporation by reference of certain publications listed in the rules is approved by the Director of the Federal Register as of April 30, 2012. Written comments on the Paperwork Reduction Act (PRA) modified information collection requirements must be submitted by the public, OMB and other interested parties on or before May 29, 2012.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding pertaining to Section 202 of the CVAA, contact Diana Sokolow, Diana.Sokolow@fcc.gov, of the Policy Division, Media Bureau, (202) 418-2120. For additional information on this proceeding pertaining to Section 203 of the CVAA, contact Jeffrey Neumann, Jeffrey.Neumann@fcc.gov, of the Engineering Division, Media Bureau, (202) 418-7000. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams at 202-418-2918, or via the Internet at PRA@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, FCC 12-9, adopted on January 12, 2012 and released on January 13, 2012, and the Erratum thereto, released on January 30, 2012. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., CY-A257, Washington, DC 20554. This document will also be available via ECFS (http://www.fcc.gov/cgb/ecfs/). (Documents will

be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street SW., Room CY-B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an email to fcc504@fcc.gov or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Paperwork Reduction Act of 1995 Analysis

This document contains modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in this Report and Order as required by the Paperwork Reduction Act of 1995, Public Law 104-13.In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. We did not receive any comments specifically addressing this issue. In the present document, we have assessed the effects of the new requirements on small businesses, including those with fewer than 25 employees, in the Final Regulatory Flexibility Analysis ("FRFA") below.

Summary of the Report and Order

I. Introduction

1. Pursuant to our responsibilities under the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"),[FN1] this Report and Order adopts rules governing the closed captioning requirements for the owners, providers, and distributors of video programming delivered using Internet protocol ("IP").[FN2] This Report and Order also adopts rules governing the closed captioning capabilities of certain apparatus on which consumers view video programming. Closed captioning is the visual display of the audio portion of video programming, which provides access to individuals who are deaf or hard of hearing. Prior to the adoption of the CVAA, the Communications Act of 1934, as amended (the "Act"), required the use of closed captioning on television, but not on IP-delivered video programming that was not part of a broadcaster or multichannel video programming distributor ("MVPD") service. That changed with the enactment of the CVAA, which directed the Federal Communications Commission ("Commission") to revise its regulations to require closed captioning of IP-delivered video programming that is published or exhibited on television with captions after the effective date of the new regulations. Further, the CVAA directed the Commission to impose closed captioning requirements on certain apparatus that receive or play back video programming, and on certain recording devices. The rules we adopt here will better enable individuals who are deaf or hard of hearing to view IP-delivered video programming, as Congress intended. Moreover, we believe these benefits of our rules to deaf or hard of hearing consumers will outweigh the affected entities' costs of compliance.

> FN1 Public Law 111-260, 124 Stat. 2751 (2010). See also Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).
>
> FN2 The CVAA defines "Internet protocol" as including "Transmission Control Protocol and a successor protocol or technology to Internet protocol."Public Law 111-260, sec. 206(5).

2. As discussed in Section III below, we adopt the following closed captioning requirements for the owners, providers, and distributors of IP-delivered video programming under Section 202(b) through (c) of the CVAA. Specifically, we adopt rules that will:

• Specify the obligations of entities subject to Section 202(b) by:

Requiring video programming owners to send required caption files for IP-delivered video programming to video programming distributors and providers along with program files;

***19490** concern raised by commenters that VPDs and VPOs may be held responsible for variations in quality caused by outside factors. It also mitigates the concerns raised by certain commenters that quality requirements could be subjective and time-consuming because the quality standard is based on the objective quality characteristics of the actual closed captions used for the televised version of the programming, which are readily apparent. We reject commenters' argument that regulation of caption quality would raise First Amendment concerns. As explained above, the quality standards we adopt here are based upon the quality of the television captions provided for that programming. Thus, our quality standards impose no greater burden than our television closed captioning requirements, which the DC Circuit has already suggested are constitutional. We do not expect that this quality requirement will create disincentives to making video programming available online, since it merely requires VPOs to provide captions comparable to those available for television distribution. Although some commenters suggest that a decision to impose quality standards here would be inconsistent with the lack of television closed captioning quality standards, in fact, the Commission has a proceeding pending on the caption quality of television programming.[FN39] Further, the IP closed captioning regime differs from the television closed captioning regime since the television closed captioning rules require that captions be created in the first instance, whereas in the IP context, captions are only required for IP-delivered video programming that has already been published or exhibited on television with captions. We believe that quality standards are appropriate in the IP context to prevent VPOs or VPDs from degrading the quality of the captions that actually appeared on television when the same programming is distributed with captions via IP. The record provides no basis for concluding that it is unreasonable to expect VPOs and VPDs to at least maintain the same quality with respect to programming distributed via IP, since we will not hold VPOs and VPDs responsible for quality effects that result from outside factors. To the extent any VPO or VPD believes that the quality requirement is economically burdensome, it may file an exemption petition.

> FN38 As we gain experience with the application of these rules, we may revisit the issue.
>
> FN39 See Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc. Petition for Rulemaking, FCC 05-142, 70 FR 56150, Sept. 26, 2005 (issued in response to a Petition for Rulemaking filed by the TDI Coalition on July 23, 2004). See also Consumer & Governmental Affairs Bureau Seeks to Refresh the Record on Notices of Proposed Rulemaking Regarding Closed Captioning Rules, DA 10-2050, 75 FR 70168, Nov. 17, 2010.

38. We are not persuaded that any of the alternate approaches to caption quality proposed by commenters would be preferable to the approach adopted herein. Specifically, CEA proposes the adoption of "specific minimum technical requirements * * * if achievable," which proposal focuses improperly on the "achievability" language of Section 203 of the CVAA rather than on regulations specific to VPOs and VPDs pursuant to Section 202 of

the CVAA. Other commenters also propose a "functional equivalence" quality standard, which Microsoft describes as having a focus on "[e]ssential equality in function rather than exact equality with respect to all the features and capabilities."We find that such an approach is amorphous and does not offer any benefits not provided by the quality standard adopted herein.

39. We encourage VPDs to improve caption quality to enhance accessibility, if doing so is not constrained or prohibited by copyright law or private agreement. AT&T expresses concern that "[e]ncouraging VPPs/VPDs to edit captions could create inconsistencies in the quality of programming from one medium to another," which is not an issue when the VPO handles edits for all media simultaneously. In the NPRM, the Commission explained that it did not intend to require VPDs to improve caption quality, but rather, to allow them to do so if they had any necessary permission. Some commenters express the view that copyright concerns should not prevent a VPD from improving caption quality. Some commenters argue that improving caption quality for an IP-delivered video program would be a non-infringing fair use of the video under copyright law. In contrast, other commenters assert that copyright law generally would prevent a VPD from improving caption quality. We see no need to determine in this proceeding whether a VPD may, consistent with copyright law, improve caption quality without the consent of a VPO. We expect that VPOs and VPDs will typically agree through their contractual negotiations about the appropriate extent, if any, of VPD improvement to a VPO's caption file.[FN40]

> FN40 In the NPRM, the Commission contemplated that a requirement for captions of IP-delivered video programming to be of at least the same quality as captions of television programming would require IP-delivered captions to include the same user tools, such as the ability to change caption font and size. We believe that the issue of user tools is better suited to our discussion of requirements for devices subject to Section 203 of the CVAA than the present discussion of requirements for VPOs and VPDs pursuant to Section 202(b) of the CVAA.

4. Video Programming Subject to Section 202(b)

40. In the paragraphs below, we define the types of programming that are subject to the IP closed captioning rules. We generally adopt the definitions proposed in the NPRM but modify some of them, as discussed below. As proposed in the NPRM, we also limit our rules to programming aired with captions on television in the United States.

41. Video programming. We adopt the NPRM's proposal to codify the CVAA's definition of "video programming" in our rules. Section 202(a) of the CVAA defines "video programming" as "programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 3)." [FN41] The Senate and House Committee Reports did not elaborate on the term "video programming," and commenters generally did not further explore the meaning of the term. We agree with the suggestion by Consumer Groups that programming "that was published or exhibited on television" by definition constitutes "video programming," since anything that was published or exhibited on television must be provided by, or be comparable to programming provided by, a television broadcast station.[FN42]

> FN41 47 U.S.C. 613(h)(2). This definition of "video programming" is almost identical to the definition set forth in Section 602(20) of the Act. See 47 U.S.C. 522(20) (defining "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast

station").

FN42 The Act and our rules establish that programming aired by MVPDs is "video programming." See, e.g., 47 U.S.C. 522(13) (an MVPD "makes available for purchase * * * multiple channels of video programming"); 47 CFR 76.5(a) (cable television system is "designed to provide cable service which includes video programming"); id. 76.1000(e) (defining MVPD as an entity that makes available for purchase multiple channels of video programming).

42. Consumer-generated media. We also adopt the NPRM's proposal to codify the CVAA's definition of "consumer-generated media" in our rules. Section 3 of the Act, as revised by the CVAA, defines "consumer-generated media" as "content created and made available by consumers to online Web sites and services on the Internet, including video, audio, and multimedia content."The Senate and House Committee Reports did not elaborate on the definition, but certain commenters made proposals concerning the proper scope of "consumer-generated media" with regard to the new IP closed

***19493** burdensome to meet the deadlines may petition for an exemption. The CVAA directs us, in adopting a schedule of deadlines, to "tak[e] into account whether such programming is prerecorded and edited for Internet distribution, or whether such programming is live or near-live and not edited for Internet distribution. "Thus, by adopting multiple deadlines for different types of programming, the schedule of deadlines adopted herein takes into account the concerns that Congress directed the Commission to consider. We encourage VPOs and VPDs to make captioned programming available in advance of the applicable deadlines, to the extent they are able to do so.

53. As we discuss above, VPDs that provide applications, plug-ins, or devices to consumers have an obligation under Section 202 to ensure that those applications, plug-ins, or devices render or pass through closed captions to subscribers. In many cases, compliance with this obligation would require the VPD to design consumer devices or software running on such devices to render or pass through closed captions. If a VPD uses software to enable the rendering or pass through of captions, the VPD is responsible only for software it deploys after the applicable compliance dates discussed in paragraph 51 above. We believe this limitation is warranted as we do not believe it is appropriate to require VPDs to provide new versions of software if the VPD did not otherwise intend to do so.[FN46] If a VPD relies on hardware to enable the rendering or pass through of closed captions, the VPD must meet the compliance deadline of January 1, 2014. We believe this time period is appropriate because it is consistent with our analysis under Section 203.[FN47] We note that, while the achievability standard of Section 203 of the CVAA does not apply to Section 202, VPDs that find it economically burdensome to meet their obligations may file an exemption petition, as discussed below.[FN48]

FN46 We will consider upgrades to VPD software to be new applications. If a VPD is unable to meet all of the captioning requirements for such upgrades, it may request an exemption due to economic burden, as discussed in Section III.C.1 below.

FN47 The same rationale for the two-year apparatus deadline applies to these VPD requirements.

FN48 We clarify that when a VPD seeks an economic burden exemption from the requirements discussed in this paragraph, we will consider the exemption petition

with regard to the specific feature(s) and device(s) for which implementing the captions purportedly would be economically burdensome, as discussed in Section IV.B (Achievability, Purpose-Based Waivers, and Display-Only Monitor Exemption), below.

54. The CVAA also requires the Commission's regulations to "contain a definition of 'near-live programming' and 'edited for Internet distribution."' In the NPRM the Commission sought comment on definitions of "live programming," "near-live programming," "prerecorded programming," and "edited for Internet distribution." We explain below how we have defined these terms. The Commission proposed to apply these definitions solely to rules applicable to IP closed captioning pursuant to the CVAA. We conclude that the definitions we adopt herein for the terms "live programming," "near-live programming," "prerecorded programming," and "edited for Internet distribution" apply solely to our regulation of IP closed captioning, as explained further below.

55. Live Programming. We adopt the definition of "live programming" proposed in the NPRM. The Commission proposed to define "live programming" as video programming that is shown on television substantially simultaneously with its performance. This definition is comparable to the definition of "live programming" adopted in the recent Video Description Order, which was "programming aired substantially simultaneously with its performance," [FN49] with a slight modification to clarify that in the IP closed captioning context, the performance occurs substantially simultaneously to its airing on television, not necessarily to the IP distribution. The Commission explained in the NPRM that the phrase "substantially simultaneously" contemplates that live programming may include a slight delay when it is shown on television. Some commenters express their support for the proposed definition of "live programming." Examples of programming that may fit within the definition of "live programming" are news, sporting events, and awards shows.

FN49 Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, FCC 11-126, 76 FR 55585, Sept. 8, 2011 ("Video Description Order").

56. We decline to adopt rules specifically addressing simulcast programming, that is, programming that is shown simultaneously on television and the Internet. Rather, live and near-live television programming that is simulcast shall be subject to the live and near-live programming compliance deadline, and prerecorded programming that is simulcast shall be subject to the prerecorded programming compliance deadlines. As we explained in the NPRM, we do not believe that the VPAAC, by mentioning simulcast programming in its definition of "live programming," meant to encompass a "simulcast" in which prerecorded programming is shown on television and the Internet simultaneously.[FN50] We do not believe that our decision to apply the "live" and "near-live" deadlines to the simulcast of live and near-live programming will, as NAB claims, create a significant barrier to the distribution of live or near-live programming over the Internet. Rather, we expect that the compliance deadline of 12 months from the date of publication in the Federal Register for "live" and "near-live" programming will provide a sufficient period of time within which VPOs and VPDs can develop processes or methods to ensure the immediate closed captioning of simulcasts of live and near-live programming. We note that programming aired on television substantially simultaneously with its performance would not lose its status as "live programming" by being simulcast via IP. We disagree with NCTA's suggestion that simultaneous streaming of prerecorded programming on television and the Internet should have the same compliance schedule as live programming. NCTA has not explained why a longer deadline is necessary for the simulcast of pre-recorded programming, and the record contains no evidence justifying a longer deadline.

FN50 We understand that a simulcast may involve either live programming or prerecorded programming. It strains common understanding of the phrase "live programming" to think that the VPAAC intended to extend the definition of that phrase to programming that is shown on television and the Internet simultaneously.

57. Near-Live Programming. We adopt the same definition of "near-live programming" that the Commission adopted in the Video Description Order, with one modification discussed below.[FN51] In the NPRM, the Commission proposed to define "near-live programming" as "video programming that is substantively recorded and produced within 12 hours of its distribution to television viewers."Instead, we will define "near-live programming" as "video programming

77 FR 19480-01, 2012 WL 1048800 (F.R.)
END OF DOCUMENT

EXHIBIT 6

Effective: January 1, 2012

West's Annotated California Codes Currentness
Civil Code (Refs & Annos)
Division 1. Persons (Refs & Annos)
Part 2. Personal Rights (Refs & Annos)

§ 51. Unruh Civil Rights Act; equal rights; business establishments; violation

(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.

(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

(c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation or to persons regardless of their genetic information.

(d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(e) For purposes of this section:

(1) “Disability” means any mental or physical disability as defined in Sections 12926 and 12926.1 of the Government Code.

(2)(A) “Genetic information” means, with respect to any individual, information about any of the following:

(i) The individual's genetic tests.

(ii) The genetic tests of family members of the individual.

(iii) The manifestation of a disease or disorder in family members of the individual.

(B) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(C) "Genetic information" does not include information about the sex or age of any individual.

(3) "Medical condition" has the same meaning as defined in subdivision (h) of Section 12926 of the Government Code.

(4) "Religion" includes all aspects of religious belief, observance, and practice.

(5) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(6) "Sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation" includes a perception that the person has any particular characteristic or characteristics within the listed categories or that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics within the listed categories.

(7) "Sexual orientation" has the same meaning as defined in subdivision (r) of Section 12926 of the Government Code.

(f) A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (P.L. 101-336 [FN1]) shall also constitute a violation of this section.

CREDIT(S)

(Added by Stats.1905, c. 413, p. 553, § 1. Amended by Stats.1919, c. 210, p. 309, § 1; Stats.1923, c. 235, p. 485, § 1; Stats.1959, c. 1866, p. 4424, § 1; Stats.1961, c. 1187, p. 2920, § 1; Stats.1974, c. 1193, p. 2568, § 1; Stats.1987, c. 159, § 1; Stats.1992, c. 913 (A.B.1077), § 3; Stats.1998, c. 195 (A.B.2702), § 1; Stats.2000, c. 1049 (A.B.2222), § 2; Stats.2005, c. 420 (A.B.1400), § 3; Stats.2011, c. 261 (S.B.559), § 3; Stats.2011, c. 719 (A.B.887), § 1.5.)

[FN1] For public law sections classified to U.S.C.A., see U.S.C.A. Tables.

Current with urgency legislation through Ch. 876 of 2012 Reg.Sess. and all propositions on 2012 ballots.

END OF DOCUMENT

EXHIBIT 7

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Civil Code (Refs & Annos)
Division 1. Persons (Refs & Annos)
Part 2.5. Blind and Other Physically Disabled Persons (Refs & Annos)

§ 54.1. Access to public conveyances, places of public accommodation, amusement or resort, and housing accommodations

(a)(1) Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, medical facilities, including hospitals, clinics, and physicians' offices, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats, or any other public conveyances or modes of transportation (whether private, public, franchised, licensed, contracted, or otherwise provided), telephone facilities, adoption agencies, private schools, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

(2) As used in this section, "telephone facilities" means tariff items and other equipment and services that have been approved by the Public Utilities Commission to be used by individuals with disabilities in a manner feasible and compatible with the existing telephone network provided by the telephone companies.

(3) "Full and equal access," for purposes of this section in its application to transportation, means access that meets the standards of Titles II and III of the Americans with Disabilities Act of 1990 (Public Law 101-336) [FN1] and federal regulations adopted pursuant thereto, except that, if the laws of this state prescribe higher standards, it shall mean access that meets those higher standards.

(b)(1) Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to all housing accommodations offered for rent, lease, or compensation in this state, subject to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

(2) "Housing accommodations" means any real property, or portion thereof, that is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home, residence, or sleeping place of one or more human beings, but shall not include any accommodations included within subdivision (a) or any single-family residence the occupants of which rent, lease, or furnish for compensation not more than one room therein.

(3)(A) Any person renting, leasing, or otherwise providing real property for compensation shall not refuse to permit an individual with a disability, at that person's expense, to make reasonable modifications of the existing

rented premises if the modifications are necessary to afford the person full enjoyment of the premises. However, any modifications under this paragraph may be conditioned on the disabled tenant entering into an agreement to restore the interior of the premises to the condition existing prior to the modifications. No additional security may be required on account of an election to make modifications to the rented premises under this paragraph, but the lessor and tenant may negotiate, as part of the agreement to restore the premises, a provision requiring the disabled tenant to pay an amount into an escrow account, not to exceed a reasonable estimate of the cost of restoring the premises.

(B) Any person renting, leasing, or otherwise providing real property for compensation shall not refuse to make reasonable accommodations in rules, policies, practices, or services, when those accommodations may be necessary to afford individuals with a disability equal opportunity to use and enjoy the premises.

(4) Nothing in this subdivision shall require any person renting, leasing, or providing for compensation real property to modify his or her property in any way or provide a higher degree of care for an individual with a disability than for an individual who is not disabled.

(5) Except as provided in paragraph (6), nothing in this part shall require any person renting, leasing, or providing for compensation real property, if that person refuses to accept tenants who have dogs, to accept as a tenant an individual with a disability who has a dog.

(6)(A) It shall be deemed a denial of equal access to housing accommodations within the meaning of this subdivision for any person, firm, or corporation to refuse to lease or rent housing accommodations to an individual who is blind or visually impaired on the basis that the individual uses the services of a guide dog, an individual who is deaf or hearing impaired on the basis that the individual uses the services of a signal dog, or to an individual with any other disability on the basis that the individual uses the services of a service dog, or to refuse to permit such an individual who is blind or visually impaired to keep a guide dog, an individual who is deaf or hearing impaired to keep a signal dog, or an individual with any other disability to keep a service dog on the premises.

(B) Except in the normal performance of duty as a mobility or signal aid, nothing contained in this paragraph shall be construed to prevent the owner of a housing accommodation from establishing terms in a lease or rental agreement that reasonably regulate the presence of guide dogs, signal dogs, or service dogs on the premises of a housing accommodation, nor shall this paragraph be construed to relieve a tenant from any liability otherwise imposed by law for real and personal property damages caused by such a dog when proof of the same exists.

(C)(i) As used in this subdivision, "guide dog" means any guide dog that was trained by a person licensed under Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code or as defined in the regulations implementing Title III of the Americans with Disabilities Act of 1990 (Public Law 101-336).

(ii) As used in this subdivision, "signal dog" means any dog trained to alert an individual who is deaf or hearing impaired to intruders or sounds.

(iii) As used in this subdivision, "service dog" means any dog individually trained to the requirements of the individual with a disability, including, but not limited to, minimal protection work, rescue work, pulling a wheelchair, or fetching dropped items.

(7) It shall be deemed a denial of equal access to housing accommodations within the meaning of this subdivision for any person, firm, or corporation to refuse to lease or rent housing accommodations to an individual who is blind or visually impaired, an individual who is deaf or hearing impaired, or other individual with a disability on the basis that the individual with a disability is partially or wholly dependent upon the income of his or her spouse, if the spouse is a party to the lease or rental agreement. Nothing in this subdivision, however, shall prohibit a lessor or landlord from considering the aggregate financial status of an individual with a disability and his or her spouse.

(c) Visually impaired or blind persons and persons licensed to train guide dogs for individuals who are visually impaired or blind pursuant to Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code or guide dogs as defined in the regulations implementing Title III of the Americans with Disabilities Act of 1990 (Public Law 101-336), and persons who are deaf or hearing impaired and persons authorized to train signal dogs for individuals who are deaf or hearing impaired, and other individuals with a disability and persons authorized to train service dogs for individuals with a disability, may take dogs, for the purpose of training them as guide dogs, signal dogs, or service dogs in any of the places specified in subdivisions (a) and (b). These persons shall ensure that the dog is on a leash and tagged as a guide dog, signal dog, or service dog by identification tag issued by the county clerk, animal control department, or other agency, as authorized by Chapter 3.5 (commencing with Section 30850) of Division 14 of the Food and Agricultural Code. In addition, the person shall be liable for any provable damage done to the premises or facilities by his or her dog.

(d) A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section, and nothing in this section shall be construed to limit the access of any person in violation of that act.

(e) Nothing in this section shall preclude the requirement of the showing of a license plate or disabled placard when required by enforcement units enforcing disabled persons parking violations pursuant to Sections 22507.8 and 22511.8 of the Vehicle Code.

CREDIT(S)

(Added by Stats.1968, c. 461, p. 1092, § 1. Amended by Stats.1969, c. 832, p. 1664, § 1; Stats.1972, c. 819, p. 1465, § 1; Stats.1974, c. 108, p. 223, § 1; Stats.1976, c. 971, p. 2269, § 1; Stats.1976, c. 972, p. 2272, § 1.5; Stats.1977, c. 700, p. 2256, § 1; Stats.1978, c. 380, p. 1128, § 12; Stats.1979, c. 293, p. 1092, § 1; Stats.1980, c. 773, § 1; Stats.1988, c. 1595, § 2; Stats.1992, c. 913 (A.B.1077), § 5; Stats.1993, c. 1149 (A.B.1419), § 4; Stats.1993, c. 1214 (A.B.551), § 1.5; Stats.1994, c. 1257 (S.B.1240), § 2; Stats.1996, c. 498 (S.B.1687), § 1.5.)

[FN1] 42 U.S.C.A. § 12101 et seq.

Current with urgency legislation through Ch. 876 of 2012 Reg.Sess. and all propositions on 2012 ballots.

END OF DOCUMENT

EXHIBIT 8

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Civil Code (Refs & Annos)
Division 1. Persons (Refs & Annos)
Part 2.5. Blind and Other Physically Disabled Persons (Refs & Annos)
§ 54.3. Violations; liability

(a) Any person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in Sections 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under Sections 54, 54.1 and 54.2 is liable for each offense for the actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than one thousand dollars ($1,000), and attorney's fees as may be determined by the court in addition thereto, suffered by any person denied any of the rights provided in Sections 54, 54.1, and 54.2. “Interfere,” for purposes of this section, includes, but is not limited to, preventing or causing the prevention of a guide dog, signal dog, or service dog from carrying out its functions in assisting a disabled person.

(b) Any person who claims to be aggrieved by an alleged unlawful practice in violation of Section 54, 54.1, or 54.2 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code. The remedies in this section are nonexclusive and are in addition to any other remedy provided by law, including, but not limited to, any action for injunctive or other equitable relief available to the aggrieved party or brought in the name of the people of this state or of the United States.

(c) A person may not be held liable for damages pursuant to both this section and Section 52 for the same act or failure to act.

CREDIT(S)

(Added by Stats.1968, c. 461, p. 1092, § 1. Amended by Stats.1976, c. 971, p. 2270, § 2; Stats.1976, c. 972, p. 2274, § 2.5; Stats.1977, c. 881, p. 2650, § 1; Stats.1981, c. 395, § 1; Stats.1992, c. 913 (A.B.1077), § 7; Stats.1994, c. 1257 (S.B.1240), § 4; Stats.1996, c. 498 (S.B.1687), § 2.3.)

Current with urgency legislation through Ch. 876 of 2012 Reg.Sess. and all propositions on 2012 ballots.

END OF DOCUMENT

EXHIBIT 9

C

Effective: January 1, 2011

West's Annotated California Codes Currentness
Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 6. Of the Pleadings in Civil Actions
Chapter 2. Pleadings Demanding Relief (Refs & Annos)
Article 1. General Provisions (Refs & Annos)
§ 425.16. Anti-SLAPP motion

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, 11130.5, or

54690.5 [FN1].

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and " defendant" includes "cross-defendant" and " respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

CREDIT(S)

(Added by Stats.1992, c. 726 (S.B.1264), § 2. Amended by Stats.1993, c. 1239 (S.B.9), § 1; Stats.1997, c. 271 (S.B.1296), § 1; Stats.1999, c. 960 (A.B.1675), § 1, eff. Oct. 10, 1999; Stats.2005, c. 535 (A.B.1158), § 1, eff. Oct. 5, 2005; Stats.2009, c. 65 (S.B.786), § 1; Stats.2010, c. 328 (S.B.1330), § 34.)

[FN1] So in enrolled bill. Probably should be "54960.5".

Current with urgency legislation through Ch. 876 of 2012 Reg.Sess. and all propositions on 2012 ballots.

END OF DOCUMENT

EXHIBIT 10

C

Effective: January 1, 2012

West's Annotated California Codes Currentness
Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 6. Of the Pleadings in Civil Actions
Chapter 2. Pleadings Demanding Relief (Refs & Annos)
Article 1. General Provisions (Refs & Annos)

➡➡ § 425.17. Legislative findings and declarations regarding California Anti-SLAPP Law; application of § 425.16

(a) The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16.

(b) Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:

(1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.

(2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.

(3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

(c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:

(1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or con-

duct was made in the course of delivering the person's goods or services.

(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

(d) Subdivisions (b) and (c) do not apply to any of the following:

(1) Any person enumerated in subdivision (b) of Section 2 of Article I of the California Constitution or Section 1070 of the Evidence Code, or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public.

(2) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.

(3) Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.

(e) If any trial court denies a special motion to strike on the grounds that the action or cause of action is exempt pursuant to this section, the appeal provisions in subdivision (i) of Section 425.16 and paragraph (13) of subdivision (a) of Section 904.1 do not apply to that action or cause of action.

CREDIT(S)

(Added by Stats.2003, c. 338 (S.B.515), § 1. Amended by Stats.2011, c. 296 (A.B.1023), § 36.5.)

Current with urgency legislation through Ch. 876 of 2012 Reg.Sess. and all propositions on 2012 ballots.

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