

OVERVIEW OF CLOSED CAPTIONING REQUIREMENTS AND JANUARY 2008 COMPLIANCE REMINDER November 19, 2007

Summary

Closed captioning obligations apply to most television programming and have been increasing over time. This memo provides an overview of those obligations.

Currently, 100% of all English language programming produced after January 1, 1998 must be closed captioned, unless it is subject to one of the exemptions discussed below. The next closed captioning benchmark occurs on **January 1, 2008**. As of that date, 75% of all English language programming that was produced *prior to* January 1, 1998 must be closed captioned per channel, per calendar quarter. This new benchmark applies to both analog programming and digital programming, unless one of the exemptions described below applies.

FCC Definitions

"Closed Captioning" The visual display of the audio portion of any video programming. Such visual display must be compliant with the Commission's rules (Section 15.119 for analog receivers and Section 15.122 for digital receivers).

"Pre-Rule Programming" Pre-rule video programming consists of analog programming first published or exhibited before January 1, 1998 and digital programming first aired before July 1, 2002.

“New Programming” New video programming consists of analog programming first published or exhibited on or after January 1, 1998 and digital programming first aired on or after July 1, 2002.

“Nonexempt Programming” Nonexempt programming is video programming that is not exempt from the closed captioning requirements pursuant to either a self-implementing exemption under the FCC's rules or an exemption granted by the FCC based on undue burden.

"ENT" Electronic newsroom technique, or "ENT," is the use of scripts (usually used for teleprompters) instead of live closed captioning during live programming, most commonly news. Television stations and MVPDs (e.g., cable and satellite) are permitted to use ENT in their news programming, rather than complete closed captioning, except for the owned and affiliated television stations of the four major networks serving the top 25 DMAs, and the nonbroadcast networks serving at least 50% of all homes subscribing to MVPDs. Those entities must close caption news programming.

"Pass Through" The affirmative obligation to deliver, or "pass through," captioning which is contained in video programming intact in a format which may be displayed by compliant receivers.

Closed Captioning Benchmarks

New English Language Programming. As of January 1, 2006, 100% of all new nonexempt English language programming must be captioned.

Pre-Rule English Language Programming. As of January 1, 2003, 30% of all pre-rule nonexempt English language programming had to be captioned per channel, per calendar quarter. *Beginning on January 1, 2008, 75% of all pre-rule nonexempt English language programming must be captioned per channel, per calendar quarter.*

New Spanish Language Programming. Between January 1, 2007 and December 31, 2009, a video programming distributor must provide captions for the lesser of (a) an average of 1350 hours per calendar quarter of captioned Spanish language programming, or (b) all of its new nonexempt Spanish language programming. Beginning on January 1, 2010, 100% of all new nonexempt Spanish language programming must be provided with captions.

Pre-Rule Spanish Language Programming. As of January 1, 2005, 30% of all pre-rule nonexempt Spanish language programming had to be captioned per channel, per calendar quarter. Beginning on January 1, 2012, 75% of all pre-rule nonexempt Spanish language programming must be captioned per channel, per calendar quarter.

Self-Implementing Exemptions

Any video programming or video programming providers (including television broadcasters) that meet one of the following criteria is automatically exempt from the FCC's closed captioning requirements to the extent specified.

1. Programming shown between 2 a.m. and 6 a.m. local time;
2. Programming in languages other than English or Spanish;
3. Primarily textual programming (*e.g.*, program schedule channels or community bulletin boards);
4. Commercials that are five minutes or less in duration;
5. Locally produced and distributed non-news programming with no repeat value (*e.g.*, local parades and secondary school sports);
6. Programming shown on a new network for the first four years of the network's operations;
7. Public service announcements, promotional announcements, and interstitials (*i.e.*, programming of brief duration used as a bridge between two longer programs) that are ten minutes or less in duration;
8. Primarily non-vocal musical programming;

9. Instructional programming that is locally produced by public television stations for use in grades K-12 and post secondary schools (Note: this exemption only covers programming narrowly distributed to individual educational institutions);
10. Programming for which captioning expenses would exceed 2% of a channel's gross revenues received during the previous calendar year; and
11. Programming providers with an annual gross revenue less than \$3 million during the previous calendar year.

Self-implementing exemptions do not relieve a program provider from the pass through obligation.

Exemptions Based on Undue Burden

A video programming provider, producer or owner may petition the Commission for a full or partial exemption from the closed captioning requirements. The Commission may grant exemptions, in whole or in part, for a channel of video programming, a category or type of video programming, an individual video service, a specific video program, or a video programming provider if it finds that the closed captioning requirements will result in an “undue burden” – *i.e.*, significant difficulty or expense. In making this determination, the FCC will consider the following factors:

1. The nature and cost of closed captioning for the programming;
2. The effect on the operation of the provider or program owner;
3. The financial resources of the provider or program owner;
4. The type of operations of the provider or program owner; and
5. Any available alternatives that might constitute a reasonable substitute for the closed captioning requirements, such as text or graphic display of the content of the audio portion of the programming.

To date, the Commission has received many petitions for exemption but it has granted very few of them. Under the Commission's procedures, from the time that a petition for

exemption is filed, the program or provider in question is exempt from the closed captioning requirements subject to the petition until, or unless, the Commission denies the request. Thus, the mere filing of such a petition is a "self-implementing" exemption, although temporary.

Emergency Situations

The FCC requires that all video programming distributors that provide emergency information do so in a format that is accessible to people who are deaf, hard of hearing, blind or have low vision. Significantly, this requirement applies to all video programming distributors, including those that fall within one of the closed captioning exemptions discussed above.

Examples of the types of emergencies about which “emergency information” may be broadcast include, among other things, tornadoes, hurricanes, floods, earthquakes, icing conditions, heavy snows, widespread fires, terrorism-related events, discharge of toxic gases, widespread power failures, civil disorders, school closings and changes in school bus schedules resulting from such conditions, and warnings and watches of impending changes in weather. “Emergency information” is information about a current emergency intended to help protect life, health, safety, or property (*i.e.*, critical details regarding the emergency and how to respond to the emergency). This may include, for example, information on road closures and evacuations, location of emergency shelters, and advisories to viewers on possible health concerns from air pollution caused by wildfires.

Although this rule applies to emergency information that is primarily intended for an audience in the geographic area in which the emergency is occurring, there are times when emergency information pertaining to a matter of national importance also will be of local concern, and thus should be made accessible. For example, this could include providing information to unaffected areas sheltering individuals displaced by a large-scale disaster.

In the case of persons who are deaf or hard of hearing, emergency information that is provided in the audio portion of the programming must be provided using closed captioning or other methods of visual presentation, such as open captioning, crawls, scrolls, or thorough graphics that appear on the screen. Emergency information provided by means other than closed captioning must not block any closed captioning, and closed captioning must not block any emergency information provided by means other than closed captioning. Ideally, all emergency programming is captioned. However, if that is not possible under certain circumstances, while clearly it serves the public interest for stations to cover emergencies as rapidly as possible, they should begin captioning as quickly as possible once coverage commences.

In the case of persons with vision difficulties, the critical details of the emergency information must be made aurally accessible whenever such information is provided during regularly scheduled newscasts, unscheduled newscasts that preempt regularly scheduled programming, or during continuing coverage of a situation.¹ Under this rule, broadcast stations and MVPDs are not required to provide in an accessible format all of the information about an emergency situation that they are providing to viewers visually. Rather, only the visual information intended to further the protection of life, health, safety and property must be accessible.² In addition, if the emergency information is being provided in the video portion of programming that is *not* a regularly scheduled newscast or a newscast that interrupts regular programming (*e.g.*, the programmer provides emergency information through “crawling” or “scrolling” during regular programming), this information must be accompanied by an aural tone (commonly, *beep...beep...beep*). This tone is to alert persons with vision disabilities that the

¹ The Commission envisions that affected broadcast stations will aurally describe the emergency information in the main audio as part of their ordinary broadcasting.

² In determining whether particular details need to be made accessible, the Commission will permit programmers to rely on their own good faith judgments.

broadcaster is providing emergency information, and alert such persons to tune to another source, such as radio, for more information. The FCC does not mandate the nature of the tone or how often the tone must be broadcast.

A local broadcast licensee is responsible for complying with the emergency situation closed captioning requirements regardless of the delivery technology used to deliver its signals to consumers. The pass-through obligation applies to emergency information.

Due to the implementation of 100% closed captioning for new nonexempt English language programming, which occurred on January 1, 2006, television stations that are not permitted by FCC rules to count captions using ENT are required to close caption all new nonexempt programming, including breaking news and emergency alerts. In other words, for these non-ENT stations, critical details of emergency information *must be closed captioned*. This means, for example, that a network affiliate in the Atlanta DMA must be ready to close caption when it interrupts regularly scheduled programming to provide breaking news.

In smaller markets, stations may use ENT for their live programming, but keep in mind that if the ENT method does not automatically caption non-scripted news, the provider must either caption or make the emergency information accessible by some form of visual presentation (*e.g.*, graphics, scrolls or crawls). In addition, a distributor in a market that is permitted to use ENT, but does not use ENT for its live programming, must caption its emergency information. Providing emergency information in a visual format other than closed captioning is not sufficient in this case. Rather, closed captioning is required.

The Commission recognizes that in an emergency situation it may not be feasible for video programmers on short notice to secure captioning resources and immediately provide closed captioning. Accordingly, during an emergency situation, the FCC should permit a *de*

minimis or reasonable failure to caption emergency information so long as critical emergency information is provided by some other method of visual presentation. What is *de minimis* or reasonable may be affected by the nature and extent of the emergency situation.³ In order to ensure that programmers are neither deterred from providing viewers with vital emergency information nor are penalized for doing so, the Commission intends to defer to the good faith determinations of programmers in this regard.⁴

Video programmers should assess whether they are able to obtain captioning resources on short notice and, if not, make good faith efforts to secure captioning resources and provide closed captioning within a reasonable period of time. In particular, the FCC urges stations to take the following steps to ensure that they will be able to obtain closed captioning resources quickly:

1. Enter into arrangements or contracts with services that are capable of generating closed captions on very short notice to ensure prompt availability;
2. Establish internal policies requiring immediate contact to such closed captioning services as one of a station's top priorities for exhibiting emergency information;
3. Maintain visible postings, including the relevant contact information, on newsroom televisions to remind the staff responsible for initiating the production of emergency programming to contact the closed captioning service immediately;
4. Maintain a labeled speed-dial button on telephones in the newsroom with a direct connection to the captioning service;
5. Distribute an emergency visual presentation policy to all employees on a regular basis; and
6. Train employees regarding all visual presentation policies.

³ For example, to the extent that a weather emergency makes it more difficult for programmers to secure live captioning resources, a longer period of time without captioning should be *de minimis* and reasonable.

⁴ The Commission has indicated that it will not second-guess determinations made by video programmers in emergency situations so long as their determinations were made in good faith.

Conclusion

The FCC has been very active with respect to monitoring and enforcing closed captioning compliance, and has recently fined TV stations up to \$10,000 each for failing to comply with the closed captioning rules. Television stations should be planning for full implementation of closed captioning services, unless one of the general exemptions applies or a petition is filed with the FCC. Providing closed captioning is relatively costly, so stations should prepare their budgets accordingly. If you have any questions, or if you would like further information about the closed captioning requirements, please contact Dave O'Connor at 1-888-688-8500 or david.oconnor@hklaw.com.

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