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## Television for All: Increasing Television Accessibility for the Visually Impaired Through the FCC's Ability to Regulate Video Description Technology

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# Television for All: Increasing Television Accessibility for the Visually Impaired Through the FCC's Ability to Regulate Video Description Technology

Joshua S. Robare\*

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## I. INTRODUCTION

Many people take for granted the relatively simple action of sitting down at the end of the day and turning on the television. They can relax and let wave after wave of sounds and images wash over them, relieving their stress and tension. Regardless of whether the dial is set to sports or a soap opera, news or nonsense, drama or comedy, television is something that has become part of the fabric of almost every person's life. However, there are a significant number of people in the United States who are unable to enjoy this activity. The U.S. judicial system has created a "have and have-not" dichotomy when it comes to persons with disabilities enjoying television. As a result of the D.C. Circuit's 2002 decision in *Motion Picture Association of America, Inc. v. Federal Communications Commission*, the FCC is allowed to regulate closed captioning, forcing television manufacturers and broadcasters to implement technology that will allow deaf Americans to enjoy television more fully.<sup>1</sup> In the same decision, the court found that the FCC did not have power to promulgate regulations regarding video descriptions<sup>2</sup> that would allow blind and seeing-impaired Americans to have a more complete television experience, similar to those without a disability.<sup>3</sup>

The Survey of Income and Program Participation is a national survey that collects data on a regular basis to identify the percentage of the American population with hearing loss or deafness.<sup>4</sup> This survey has found that "1 in 20 Americans are currently deaf or hard of hearing. In round numbers, nearly 10,000,000 persons are hard of hearing and close to 1,000,000 are functionally deaf."<sup>5</sup> Americans who suffer from hearing loss

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1. *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

2. Video descriptions help the seeing impaired have a more complete entertainment experience by articulating the action taking place on screen during breaks in a program's natural audio track; they describe key visual elements and action that cannot be picked up by listening to the dialogue alone. JACLYN PACKER & CORINNE KIRCHNER, WHO'S WATCHING? A PROFILE OF THE BLIND AND VISUALLY IMPAIRED AUDIENCE FOR TELEVISION AND VIDEO vii (1997), available at <http://www.afb.org/Section.asp?SectionID=3&TopicID=135&DocumentID=1232#intro>. Important elements such as the movement of a character on the show, what a scene looks like, and nuanced character interactions would all be captured by video descriptions.

3. *Motion Picture Ass'n*, 309 F.3d at 807.

4. Ross E. Mitchell, *How Many Deaf People Are There in the United States? Estimates from the Survey of Income and Program Participation*, 11 J. OF DEAF STUD. & DEAF EDUC., 112, 112 (2006).

5. *Id.*

or complete deafness have become the “haves” when it comes to the FCC’s ability to provide a satisfactory television experience; since 1993, the FCC has taken steps to make sure that closed captioning<sup>6</sup> is available to as many Americans as possible.<sup>7</sup> The ability of the FCC to help those with hearing problems is in stark contrast to its ability to help those with seeing problems through the use of video descriptions. Allowing the FCC to regulate video descriptions would help the 25.2 million Americans who have reported problems seeing, many of whom are unable to see at all.<sup>8</sup>

This Note argues that the time has come to take action and increase availability of video descriptions. Part II of this Note examines the court’s decision in *Motion Picture Association of America*. It considers both the views of the visually impaired community and the entertainment industry leading up to the court’s decision. Part II further examines the major justifications that the court used in reaching its decision. Part III begins by exploring why the lack of video description technology is a problem. As a result of the decision in *Motion Picture Association of America*, closed captioning and video description have been placed in juxtaposition to one another. This Section explores the divergence in treatment between the two and whether those differences justify their disparity in treatment under the current regulatory scheme. The Section ends by looking at the changes available for video description technology as a result of the digital transition and how the change affects the ease of implementing the technology. Part IV of this Note explores two possible solutions to the problem. The first solution requires the government to provide brief financial support to the video description industry in an effort to make it self-sustaining. The second solution suggests passing legislation similar to the proposed Twenty-First Century Communications and Video Accessibility Act, which aims to restore the FCC’s ability to regulate video descriptions.

## II. REACHING THE DECISION

Several important factors led to the decision in *Motion Picture Association of America*. The 1996 amendments to the Communications Act of 1934 started a chain reaction of events within the FCC. It was not until the decision in *Motion Picture Association of America* that key questions about video descriptions were answered. The court had to look not only at

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6. Closed captioning displays the words being spoken on screen as text so persons with hearing disabilities can read what actors are saying and still enjoy a television program.

7. *FCC Consumer Facts: Closed Captioning*, FED. COMM. COMMISSION, <http://www.fcc.gov/cgb/consumerfacts/closedcaption.html> (last visited Feb. 22, 2011).

8. *Facts and Figures on Adults with Vision Loss*, AM. FOUND. FOR THE BLIND, <http://www.afb.org/Section.asp?SectionID=15&TopicID=413&DocumentID=4900> (last visited Feb. 22, 2011).

how video descriptions were made, but also at the inherent power that the FCC was granted by Congress to carry out its duties.

*A. The Effects of the 1996 Telecommunications Act*

The holding in *Motion Picture Association of America* was largely influenced by the 1996 Telecommunications Act. The Act, which amended the Communications Act of 1934 changed the FCC's control over programming accessibility by adding provisions about both closed captioning and video descriptions.<sup>9</sup> The first five subsections, refer to the FCC's powers relating to closed captioning; only the last two deal with video descriptions.<sup>10</sup> The provisions relating to closed captioning required the FCC to make a full report to Congress, create regulations specifying actions that the television industry needed to make to implement closed captioning technology, and create a timeline specifying when the new technology needed to be in place.<sup>11</sup> The last two subsections dealing with video descriptions were extremely brief in comparison to their closed captioning counterparts.<sup>12</sup> The Act merely defined the term video description and called on the FCC to make a report and present it to Congress.<sup>13</sup>

Examining the congressional record of the Act does little to clear up whether Congress intended to grant the FCC equal power to regulate closed captioning and video descriptions. With regard to video descriptions, the House version of the bill included the following language:

The report shall assess appropriate methods for phasing video descriptions into the marketplace, technical and quality standards for video descriptions, a definition of programming for which video descriptions would apply, and other technical and legal issues. Following the completion of this inquiry the Commission may adopt regulations it deems necessary to promote the accessibility of video programming to persons with visual impairments.<sup>14</sup>

The last sentence of this excerpt would seem to support the contention that Congress did not intend for there to be disparate treatment of closed captioning and video description, but instead wanted the FCC to be able to create and enforce rules and regulations regarding both. This is further supported by the concluding lines in the congressional record on the topic, which read: "It is the goal of the House to ensure that all Americans

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9. Telecommunications Act of 1996, § 713(a)-(g), Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 613(a)-(g)).

10. *Id.*

11. *Id.*; see also *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 799 (D.C. Cir. 2002).

12. See 47 U.S.C. § 613(f)-(g) (1996).

13. *Id.*

14. 142 CONG. REC. 1441, 1955 (1996).

ultimately have access to video services and programs, particularly as video programming becomes an increasingly important part of the home, school and workplace.”<sup>15</sup> When the House and Senate were working to reach the final version of the bill, the conference committee excluded the language about the FCC’s power to create and enforce regulations regarding video descriptions,<sup>16</sup> although the record is unclear as to why.

Despite the statutory differences, the FCC initially attempted to treat video descriptions and closed captioning the same. The FCC was acting under the belief that Congress had passed the bill hoping to bring universal access to television, regardless of disability.<sup>17</sup> After the passage of the Act, the FCC required cable operators, broadcasters, satellite distributors, and other multichannel video programming distributors to close caption their television programs.<sup>18</sup> The FCC created a transition schedule that required an increasing amount of programming to include closed captioning each year.<sup>19</sup>

The FCC also began creating requirements and timetables for video descriptions. These requirements stated that broadcasters affiliated with the ABC, CBS, Fox, and NBC would be required to provide video descriptions for a minimum of fifty hours per calendar quarter of prime-time or children’s programming.<sup>20</sup> The requirements additionally applied to other television providers who had 50,000 or more subscribers.<sup>21</sup>

Forecasting the challenges it would face in court, the FCC itself was divided on whether it had the authority to make the changes to video description requirements. It was a close three-to-two vote by the FCC Commissioners in favor of creating and enforcing the regulations.<sup>22</sup> In his dissenting opinion, Commissioner Michael K. Powell said that the FCC lacked authority because, “Congress spoke to video description in section 713(f), and purposely limited the Commission to studying the issue and reporting to Congress . . . .”<sup>23</sup> Commissioner Powell specifically looked at

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15. *Id.*

16. *See id.* at 1956.

17. The FCC voted three to two to adopt rules requiring certain video programmers to supplement certain programming with video descriptions. *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796, 800 (D.C. Cir. 2002). The FCC concluded that it possessed the statutory authority to adopt these rules. *Implementation of Video Description of Video Programming, Report and Order*, 15 F.C.C.R. 15230, paras. 57–61 (2007) [hereinafter *Report and Order*].

18. *FCC Consumer Facts*, *supra* note 7.

19. *Id.*

20. *See Report and Order*, *supra* note 17, at para. 6.

21. *See id.*

22. *Motion Picture Ass’n*, 309 F.3d at 800.

23. Press Statement, Comm’r Michael K. Powell, Comm’r of the FCC, *Dissenting in Part, Implementation of Video Description of Video Programming 1* (Jul. 21, 2000),

the actions of the conference committee in striking the provisions regarding the FCC's authority to pass video description regulations as making it "abundantly clear that Congress specifically considered granting discretionary authority to the FCC to promulgate video description rules and elected not to do so."<sup>24</sup>

The majority of the Commissioners did not find the fact that Congress took out the clause as dispositive of its intent to prevent the FCC from making rules regarding video descriptions. The majority stated:

While this history indicates that section 713 [of the Telecommunications Act of 1996] should not be construed to authorize a Commission rulemaking, the history does not indicate that section 713 should be construed to prohibit such a rulemaking, given our otherwise broad powers to make rules, as expressed in sections 4(i) and 303(r) of the Act. Had Congress intended to limit our general authority, it could have expressly done so, as it has elsewhere in the Act.<sup>25</sup>

The majority further relied on the Supreme Court's earlier categorization of the Telecommunications Act of 1996 as an amendment to the 1934 Act rather than freestanding legislation.<sup>26</sup> Thus, it argued, the FCC's authority in the original legislation was not supplanted and the FCC could still make regulations that may be necessary in the public interest.<sup>27</sup>

The arguments espoused by both the majority and minority FCC Commissioners were reargued when the matter was litigated in front of the court in *Motion Picture Association of America*. The arguments of the dissenting Commissioners helped shape the main points of the Motion Picture Association of America and heavily influenced the outcome of the case.

### *B. Initial Reception to the Video Description Regulations—the Battle Begins*

When the FCC opened up the proposed video description regulations for comment, the new provisions received a mixed reception. The American Council of the Blind applauded the FCC for these efforts and also offered its expertise.<sup>28</sup> The Council believed that the regulations were necessary and could also be accomplished with minimal financial burden

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available at <http://www.fcc.gov/Speeches/Powell/Statements/2000/stmkp015.html>.

24. *Id.* at 2.

25. *Report and Order*, *supra* note 17, at para. 58. For the Supreme Court's categorization, see *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 377–78 (1999).

26. *Report and Order*, *supra* note 17, at para. 59.

27. *Id.* at para. 60.

28. Letter of American Council of the Blind, Implementation of Video Description of Video Programming, FCC MM Docket No. 99-339 (rel. Feb. 1, 2000).

on the television industry.<sup>29</sup> Television providers, such as DIRECTV, felt that the FCC lacked statutory authority and were worried that new regulations would impair their ability to stay competitive with cable providers.<sup>30</sup> Among DIRECTV's main concerns was the financial burden that would be placed on it.<sup>31</sup> The new laws required the use of secondary audio channels that only approximately one third of DIRECTV's channels supported.<sup>32</sup> It was not long before the voices of dissent turned into legal challenges against the FCC's ability to mandate video descriptions.

The Motion Picture Association of America (MPAA) was among a handful of organizations that challenged the FCC's authority to regulate video descriptions. The MPAA argued that the FCC did not have the power under the Telecommunications Act of 1996 to regulate video descriptions, and no other existing provisions granted it such power.<sup>33</sup> At the core of the MPAA's argument was the belief that the FCC did not have unlimited authority to act as it saw fit with respect to all aspects of television transmissions.<sup>34</sup>

The court in *Motion Picture Association of America* considered the two main arguments the FCC had relied on its *Report and Order*. The FCC's first argument was that its authority to regulate video description came from the same set of provisions in the Telecommunications Act of 1996 that gave it the power to regulate closed captioning.<sup>35</sup> Its second argument was that its power to regulate came from a combination of section 1, section 2(a), and section 4(i) of the Communications Act of 1934. Taken together they argued that the FCC possessed the ability to regulate video descriptions inherently.<sup>36</sup>

After comparing the closed captioning and video description provisions of the Telecommunications Act of 1996, the court found the FCC's first argument unpersuasive.<sup>37</sup> Instead, the court found it persuasive that Congress decided not to include language about the power to regulate video description despite choosing to do so for closed captioning. The court stated:

The difference in the language employed in [the sections relating to closed captioning] makes it clear that subsection (f) is not intended to

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29. *Id.* at 7.

30. Comments of DIRECTV, Inc. at 2, Implementation of Video Description of Video Programming, FCC MM Docket No. 99-339 (rel. Feb. 25, 2000).

31. *Id.* at 5-8.

32. *Id.* at 2-3.

33. *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 798 (D.C. Cir. 2002).

34. *Id.* at 798.

35. *Id.* at 802-03.

36. *Id.*

37. *Id.* at 802.



provide a mandate for video description requirements. Subsection (f) neither parallels the closed captioning mandate contained in subsection (b) nor suggests that Congress provided the FCC with discretionary authority to adopt video description rules.<sup>38</sup>

Section 713(b) of the 1996 Act says that the FCC shall create the necessary regulations, and those regulations shall ensure that “video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captions . . . .”<sup>39</sup> In contrast, the language of section 713(f) is nowhere near as empowering. It allows the FCC to “commence an inquiry to examine the use of video descriptions on video programming . . . .”<sup>40</sup> The section mentions the creation of a report and the conducting of an inquiry, while never specifically mentioning any other action.<sup>41</sup>

The *Motion Picture Association of America* court subsequently rejected the second argument made by the FCC in its *Report and Order*<sup>42</sup>, where the FCC relied on the enabling provisions of the 1934 Communications Act: “The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”<sup>43</sup> The FCC believed that this statutory authority was enough to give it the discretion to regulate video descriptions. The court discarded the FCC’s argument that nothing in the Amendments to the Telecommunications Act prohibited it from making regulations regarding video descriptions—the Act simply did not mention a positive right to create them.<sup>44</sup> It was the FCC’s position that because of these provisions—and because closed captioning and video descriptions were so similar—its power to regulate one indicates the power to regulate the other.<sup>45</sup>

The court found that allowing the FCC to mandate video descriptions should not be allowed because unlike closed captioning, “[v]ideo description is not a regulation of television transmission that only incidentally and minimally affects program content; it is a direct and significant regulation of program content. The rules require programmers to create a second script.”<sup>46</sup> The court believed that closed captioning

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38. *Id.*

39. Telecommunications Act of 1996, § 713(b), Pub. L. No. 104-104, 110 Stat. 126 (codified at 47 U.S.C. § 613(b)).

40. Telecommunications Act of 1996, § 713(f) (codified at 47 U.S.C. § 613(f)).

42. *See id.*

43. *Report and Order*, *supra* note 17, at para. 54.

44. Communications Act of 1934, § 4(i), ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. § 154(i)) (2006).

45. *Motion Picture Ass’n of Am., Inc. v. FCC*, 309 F.3d 796, 801–02 (D.C. Cir. 2002).

46. *See id.* at 803.

*Id.*

requirements were simplistic because all that was necessary was the creation of a transcript of what the actors were saying on screen.<sup>47</sup> The statutory provisions would be easy for a studio to implement because they require only that a studio recreate the script containing all of the words that were spoken on screen.<sup>48</sup>

In contrast, the court found the process needed to create video description technology easily distinguishable from closed captioning because video description would require the creation of a new script, hiring of additional actors, and review by a producer to make sure that the content fit with the feel of the show.<sup>49</sup> The court felt that all of these additional actions added up to a change in program content and imposing an additional financial burden on television studios.<sup>50</sup> Since video description regulation would impact program content, the court held that it fell outside the purview of the FCC,<sup>51</sup> which was created to “regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex . . . .”<sup>52</sup> The court interpreted the phrase “all the people of the United States” to refer only to geographic location and not those with disabilities.<sup>53</sup>

The court rejected the FCC’s 47 U.S.C. § 154(i) argument by analogizing it to the “necessary and proper” clause in the Constitution.<sup>54</sup> The court decided that it was not a standalone clause and must be read in conjunction with all other parts of the code;<sup>55</sup> the FCC cannot promulgate regulations without express authority from another source.<sup>56</sup>

The decision did leave open the possibility that with congressional approval, the FCC would be able to pass regulations mandating video descriptions regardless of the effect they would have on content.<sup>57</sup> From the holding, one could infer that it would take an express act of Congress to

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47. *Id.*

48. *Id.*

49. *Id.*

50. *See id.* (explaining that video descriptions require a producer to evaluate the program, a new script, and new actors as opposed to closed captioning which is simply a straight translation of the dialog into text which already exists in the form of the script).

51. *See id.* at 804.

52. Communications Act of 1934, § 1, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151) (2006) (establishing the FCC).

53. *Motion Picture Ass’n*, 309 F.3d at 804.

54. *Id.* at 806.

55. *Id.*

56. *Id.*

57. Sarah M. Preis, *To Regulate or Not to Regulate: The FCC’s Authority to Regulate Online Copyright Infringement Under the Communications Act*, 2008 U. CHI. LEGAL F. 535, 546–47 (2008).

overcome the current interpretation of the 1996 Telecommunications Act. The court found that “[a]fter originally entertaining the possibility of providing the FCC with authority to adopt video description rules, Congress declined to do so. This silence surely cannot be read as ambiguity resulting in delegated authority to the FCC to promulgate the disputed regulations.”<sup>58</sup> Congress would need to reverse its position on the importance of video description and pass new legislation giving the FCC discretion similar to what it has for closed captioning.

### III. CONFLICT AND CHANGES

Even before the decision came down in *Motion Picture Association of America*, video descriptions were a contentious topic. Different factions within the visually impaired community could not agree on what regulations needed to be created and how extensive they should be. To understand the need for action to be taken to remedy the current status of video description technology and the ability of the FCC to regulate it, it is important to understand the barrier that the lack of video descriptions poses to the safety and socialization of the visually impaired community. Changes in television technology after the court’s decision and the transition to digital television could serve as a catalyst for change in the legal landscape. Digital television might be able to assuage many of the problems that conflicting parties had over the idea of video description regulations.

#### A. *Why Is This a Problem?*

It is December in Michigan and you are home for the night. You are sitting on the couch with your feet bundled up in cozy slippers, a mug of hot chocolate in your hands. As you begin to watch your favorite program, you hear the annoying “beep, beep, beep” and look down to read a winter storm warning scrolling across the bottom of the screen. As annoyed as you are about the obnoxious beeping sound that interrupted your sitcom, you are grateful to know that maybe tomorrow would not be the best day to plan on driving and that you need to make back-up plans for the kids in case school is canceled. However, if you are blind, you have no idea of what the warning accompanying the beeping says.

One of the reasons the initial regulations lacked overwhelming support from the seeing-impaired community was that it did not solve one of its major concerns. Some considered the more pressing issue to be access to safety information, which was scrolled across the screen in times of emergency. In its comment to the FCC about video description

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58. *Motion Picture Ass’n*, 309 F.3d at 806.

regulations, the National Federation of the Blind condemned:

the lack of access to emergency weather and news information scrolled across the bottom of the screen; the lack of access to the identities of talking heads in national and local news broadcasts; the lack of access to sports scores for [their] local team; or the lack of access to printed information during commercials some of which are health-related and display vital phone numbers.<sup>59</sup>

The Federation expressed its concern that equal access to this information would not be provided unless mandated by the FCC.<sup>60</sup> The Federation was also concerned that the initial attempt at regulation was focused solely on what the blind community would enjoy, instead of on what it needed.<sup>61</sup>

The comments of the National Federation of the Blind differed from those of the American Federation for the Blind. The American Federation for the Blind pointed out that equal access to all television was important for the seeing impaired of all ages for myriad reasons:

Whether the viewing experience is educational or entertaining, people who are blind or visually impaired are usually denied access to the full message, unless, of course, video programming is described. For children, such disenfranchisement may mean immediate exclusion from social interaction with their sighted peers. Without video description, blind children and adults alike are denied the opportunity to learn things such as the nuances of body language, the significance of costume or dress, and much more—important concepts which a sighted child or adult learns easily through visual observation.<sup>62</sup>

The foundations of these arguments are easy to comprehend. Everyday people talk about what they watched on television the night before. Bonding over favorite television programs or touching news stories is a regular occurrence for people of all ages across the social spectrum. Without being able to see action on the screen, the visually impaired lose out on the chance to form bonds with those around them.

The positions of the National Federation of the Blind and the American Federation for the Blind both help to illustrate why there is a need for video description services to be regulated by the FCC. Video description services are needed to ensure universal access to important information that is presented nonaudibly during broadcasts. This information is needed for both health and safety reasons, but because of the cost of the technology, it is unlikely that it would be implemented unless it is mandated. Ensuring the safety of others during disasters and inclement

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59. Comments of the National Federation of the Blind at 1, Implementation of Video Description of Video Programming, FCC MM Docket No. 99-339 (rel. Feb. 23, 2000).

60. *Id.* at 2.

61. *Id.*

62. Comments of Alan Dinsmore on Behalf of American Foundation for the Blind at 2, Implementation of Video Description of Video Programming, FCC MM Docket No. 99-339 (rel. Feb. 24, 2000) [hereinafter American Foundation for the Blind Feb. 2000 Comments].

weather is morally important and video descriptions provide the government with an opportunity to do that.

People can also use broadcast television for a number of other things—it provides an opportunity to fit in socially, and to take part in normal human activities. Although those who are seeing impaired can still participate in “water cooler” conversation, they cannot fully participate because they cannot fully experience television. The descriptions can also help children socialize normally by picking up visual cues transcribed in video descriptions. These socialization cues are facets of human interaction that children would otherwise have missed. Action must be taken through FCC regulations or other remedies to fix these problems.

### *B. The Effect of Video Descriptions on the Television Industry*

When the proposed regulations relating to video descriptions opened for comment, many advocacy groups and businesses with a stake in the television industry commented on the positive and negative effects the regulations could have. The comments made by these groups illustrated the effects that video description regulations would have on the entertainment industry as a whole, and specifically on the television industry. Citizens with other disabilities, as well as networks and television studios, were all concerned with the overall impact of the regulations.

The group TDI (formally Telecommunications for the Deaf and Hard of Hearing, Inc.)<sup>63</sup> supported the proposed actions of the FCC, but was concerned that they did not go far enough.<sup>64</sup> TDI felt that previous reports and studies by the FCC had not yielded significant progress in television access to the blind in the preceding five years.<sup>65</sup> It hoped that the FCC would increase the scope of its proposals and decide that all television had to have video descriptions.<sup>66</sup> TDI believed that the regulations were an adequate first step for the FCC to be taking, but hoped that video description regulations would extend further in the future.<sup>67</sup>

The National Cable Television Association (NCTA), in its comment, joined with others in criticizing the FCC, arguing that it was overstepping

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63. TELECOMM. FOR DEAF & HARD OF HEARING, INC., <http://www.tdi-online.org/> (last visited Feb. 22, 2011). “TDI is a national consumer organization that seeks to represent the interest of the twenty nine million Americans who are deaf, hard of hearing, late deafened and deaf-blind.” Reply Comments of Telecommunications for the Deaf, Inc. at 2, Implementation of Video Description of Video Programming, FCC MM Docket No. 99-339 (rel. Feb. 25, 2000) [hereinafter TDI Reply Comments].

64. TDI Reply Comments, *supra* note 63, at 2–3.

65. *Id.* at 3.

66. *Id.*

67. *Id.* at 2–3.

its mandate.<sup>68</sup> The NCTA additionally decried the expansive cost that cable providers would face.<sup>69</sup> It did not believe that the necessary infrastructure had been developed to provide any type of meaningful access to video descriptions.<sup>70</sup> In addition to the lack of infrastructure and cost, the NCTA was concerned about the time pressure that it would place its members under.<sup>71</sup>

Television networks like A&E Television<sup>72</sup> were similarly concerned with the effects of the regulations. They cited their concern over the FCC's lack of statutory authority to create the regulations and also the increased cost to noncable networks like themselves.<sup>73</sup> A&E stated:

Video description is a developing service that faces many obstacles before it can become successful, and the industry has had only limited experience with the service. Moreover, the proposed rules would impose a disproportionate burden on cable networks, the economics of which are vastly different from the large broadcast networks.<sup>74</sup>

A&E viewed the efforts as morally praiseworthy but not something that was worthy of a mandate.<sup>75</sup>

Another comment came from the Narrative Television Network (NTN).<sup>76</sup> It reiterated the importance of implementing the regulations and stated its belief that the timetables proposed by the FCC would be adequate.<sup>77</sup> NTN said that “[v]isually impaired people, including those who own and operate NTN, have been waiting for many years to be able to enjoy the many benefits of accessible television and movie programming.”<sup>78</sup>

These comments illustrate the wide total effect that video descriptions

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68. Reply Comments of National Cable Television Association at 2–6, Implementation of Video Description of Video Programming, FCC MM Docket No. 99-339 (rel. Mar. 29, 2000) [hereinafter National Cable Television Mar. 2000 Reply Comments].

69. *Id.* at 7–9.

70. *Id.* at 6–7.

71. *Id.* at 7–9.

72. “A&E Television Networks (“AETN”) . . . [is] an independent cable programmer offering the A&E Network, The History Channel, The BIOGRAPHY® Channel and History Channel International.” Comments of A&E Television Network at 5, 16, Implementation of Video Description of Video Programming, FCC MM Docket No. 99-339 (rel. Feb. 25, 2000) [hereinafter A&E Comments].

73. *Id.* at 5–14, 16–19.

74. *Id.* at iii.

75. *See id.* at 2–3.

76. The Narrative Television Network (NTN) was “founded in 1988 by [the] blind and visually impaired” and has been a leader in making television programming and movies accessible to the visually impaired. Comment of Narrative Television Network at 2, Implementation of Video Description of Video Programming, FCC MM Docket No. 99-339 (rel. Feb. 22, 2000).

77. *Id.* at 4–5.

78. *Id.*

would have on the many branches of the television industry. Smaller networks would be forced to come up with a way to fund the video description process. However, even A&E recognized that this was a praiseworthy goal.<sup>79</sup> If a method of funding could be found and Congress gave the FCC the statutory authority to make video description regulations, the main arguments of the opposition would be alleviated.

### C. *Showdown: Video Description Versus Closed Captioning*

The technology used to create closed captioning for television is vastly different from the technology required for video descriptions. These differences helped to frame the battle that took place in 2002 when the FCC lost the ability it believed it possessed to regulate video description implementation. Not only is the technology different but also video descriptions require additional costs that closed captioning does not. However, with technology changes over the past eight years, technology might not have been a factor if the same battle took place today. Many of the comments to the initial legislation included concerns over the cost of video description technology—but with that concern assuaged, one obstacle in the path of new legislation may have been removed.

Closed captioning allows viewers to read dialog that actors and commentators are saying on the screen. The “closed” in closed captioning means that the captions are not visible to everyone, and can be turned on or off.<sup>80</sup> Captioning has been used since 1948 when the film *America the Beautiful* was captioned.<sup>81</sup> Captioning for television was first publicly previewed in 1971, and the FCC set aside channels for it in 1976.<sup>82</sup> The process requires an operator to translate what is being said into text. Closed captioning is usually done before a show airs, but technology now allows a translator to work live, and type the transcription as it happens. Before the transition to digital television, closed captioning was accomplished using EIA-608.<sup>83</sup> Technology originally allowed broadcasting of the closed

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79. See A&E Comments, *supra* note 72, at 2–3.

80. See FCC Consumer Facts, *supra* note 7.

81. *Captioned Movie Access Advocacy–Timeline*, NAT’L ASS’N OF DEAF, <http://www.nad.org/issues/technology/movie-captioning/timeline> (last visited Feb. 22, 2011).

82. Mary Bellis, *Closed Captioning*, ABOUT.COM: INVENTORS, <http://inventors.about.com/library/inventors/blclosedcaptioning.htm> (last visited Feb. 22, 2011).

83. See Sarkis Abrahamian, *EIA-608 and EIA-708 Closed Captioning*, EVERTZ–RESOURCES & PRESENTATIONS, [http://www.evertz.com/resources/eia\\_608\\_708\\_cc.pdf](http://www.evertz.com/resources/eia_608_708_cc.pdf) (last visited Feb. 22, 2011). EIA-608 is named after the Electronic Industries Alliance which is a professional organization that created the technology. The Alliance ceased operations on December 31, 2010. EIA, <http://www.eaus.org/eia/site/index.html> (last visited Feb. 22, 2011).

captions on one designated caption channel and was usually devoted to English translations.<sup>84</sup> This has recently expanded to allow multiple captioning channels to be used, so that captions can be created in multiple languages.<sup>85</sup>

Closed captioning technology has been required on all televisions larger than thirteen inches since the passage of the Television Decoder Circuitry Act of 1990.<sup>86</sup> Because it has been so widely mandated, there has been a significant incentive for television broadcasters to find cost-effective ways of captioning. Through the Telecommunications Act of 1996, the FCC mandated an eight-year phase-in for captioning of programs airing for the first time.<sup>87</sup> “As of January 1, 2006, all ‘new’ English language programming . . . first published or exhibited on or after January 1, 1998, and digital programming first aired on or after July 1, 2002, must be captioned, with some exceptions.”<sup>88</sup> The FCC also requires that old programs be captioned as well—those that were created and broadcast before the creation of the Act.<sup>89</sup>

Closed captions are sent over the normal broadcast signal. Before the digital transition, signals were sent at a slow rate, allowing only sixty symbols to be sent per second.<sup>90</sup> This low signal rate meant that captions could be transmitted in color, but would still appear in black and white on the bottom of the screen. The text would be able to appear in up to four rows.<sup>91</sup>

Closed captioning technology has advanced with the transition to digital television have allowing for many advances. The change in technology has allowed the captions to shift from only appearing in the top or bottom third of the screen to appearing anywhere on the screen, which allows viewers to be able to easily discern who is talking on screen.<sup>92</sup> The change also allows closed captioning to be displayed in a number of new languages because it

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84. See Scott Allen, *A Brief History of Closed Captioning*, MENTAL\_FLOSS, (Sept. 3, 2009, 10:51 AM), <https://www.mentalfloss.com/blogs/archives/33518>; see also *TechFacts: Information About Captioning for Video Professionals, Volume 3—Closed Captioning: The State of the Art*, MEDIA ACCESS GROUP WGBH, <http://main.wgbh.org/wgbh/pages/mag/resources/archive/techfacts/cctechfacts3.html> (last visited Feb. 22, 2011) [hereinafter *TechFacts*].

85. *Id.*

86. Abrahamian, *supra* note 83.

87. See Closed Captioning & Video Description of Video Programming, *Report and Order*, 13 F.C.C.R 3272, para. 12 (1997).

88. *FCC Consumer Facts*, *supra* note 7.

89. *Id.*

90. *TechFacts*, *supra* note 84.

91. *Id.*

92. *Id.*



allows for the use of new characters.<sup>93</sup> Television shows in Chinese, Thai, Japanese, Korean, and Arabic can all be captioned now.<sup>94</sup>

Video description technology has not existed for nearly as long as closed captioning. It was first invented and used in 1990 by WGBH, a public television station in Boston.<sup>95</sup> The recorded descriptions of key visual elements were broadcast over a third audio channel.<sup>96</sup> Although the technology is relatively new, the idea has been around for a long time.<sup>97</sup>

The process of making the script for video descriptions is much more involved than that of closed captioning. Instead of involving just one translator, video description is a team effort. First, a group of describers watch the program and write down the key visual elements, then they turn these elements into a script.<sup>98</sup> Next, they have to edit and time each of the elements in order to fit them into the natural pauses of a program.<sup>99</sup> Then, a post-production supervisor reviews the script and edits it for continuity, clarity, and style.<sup>100</sup> Finally, the script has to be recorded and matched with the video to complete the whole track.<sup>101</sup>

Prior to the digital transition, television providers conveyed video descriptions to viewers by using secondary audio programming (SAP).<sup>102</sup> SAP is also used for a number of things in addition to video descriptions, such as presenting the same program in a different language.<sup>103</sup> Like closed captioning, SAP works only when activated.<sup>104</sup> Most televisions manufactured after 1995 have SAP technology capabilities.<sup>105</sup> It is also possible to get a portable SAP receiver if your television is not equipped

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93. *What Are "708" and "608"?*, CPC: HOME E-CAPTIONING, <http://www.cpcweb.com/hdtv/708.htm> (last visited Feb. 22, 2011).

94. *Id.*

95. B.J. Cronin & S.R. King, *The Development of the Descriptive Video Services*, NAT'L CENTER TO IMPROVE PRAC. SPECIAL EDUC. THROUGH TECH., MEDIA AND MATERIALS, <http://www2.edc.org/NCIP/library/v&c/Cronin.htm> (last visited Feb. 22, 2011).

96. *Id.*

97. *Id.*

98. "In the 1960s, some attempts were made to fill in the gaps for Star Trek programs through audio cassettes. In the 1970s, a former radio broadcaster began describing movies over a Philadelphia radio station. In 1981, Margaret Pfanstiehl began describing live theatrical performances in Washington, DC." *Id.*

99. *DVS@:FAQ: What Is the Process of Descriptive Video Service?*, MEDIA ACCESS GROUP WGBH, <http://main.wgbh.org/wgbh/pages/mag/services/description/dvs-faq.html> (last visited Feb. 22, 2011).

100. *Id.*

101. *Id.*

102. Closed Captioning and Video Description of Video Programming, *Report*, 11 F.C.C.R. 19214, para. 94 (1996).

103. *Information About Secondary Audio Programming*, ACCESS DOME, <http://www.accessdome.com/com-sap/sap.general.asp> (last visited Feb. 22, 2011).

104. *Id.*

105. *Id.*

with one.<sup>106</sup>

The cost of video description can vary depending on how complicated the project is and how much extra work must go into creating the video descriptions. For a television station broadcasting a two-hour feature film, the cost can range from \$8,000 to \$12,000.<sup>107</sup> For hour-long television programs, the cost is only around \$3,400.<sup>108</sup> Most of these costs are incurred post production, long after production of the movie or television show has been completed.<sup>109</sup> When commenting on the proposed FCC regulations for video descriptions, before they were found to be outside of the FCC's purview, the American Foundation for the Blind suggested that cost could be reduced if video descriptions were rolled into the regular production budgets of television shows and movies.<sup>110</sup> Studios would not have to create an additional script, hire new writers, or hire new producers, because they would be able to use the same ones that were already working on the principle production.

Today only a handful of shows are broadcast with video descriptions available to viewers. Many of these programs are on PBS,<sup>111</sup> but there are also a tiny number on the major network stations. Four of CBS's top shows—*NCIS*, *NCIS: LA*, *Criminal Minds*, and *CSI: Crime Scene Investigation*—are broadcast with video descriptions,<sup>112</sup> and on Fox, the only show with video descriptions available is *The Simpsons*.<sup>113</sup> NBC and ABC do not offer any shows with video descriptions.<sup>114</sup>

#### D. *The Transition to Digital Television's Effect on Video Descriptions*

On June 12, 2009, the transition to digital television was completed and all television stations are now broadcasting in digital format.<sup>115</sup> This

106. *Id.*

107. American Foundation for the Blind Feb. 2000 Comments, *supra* note 62, at 4.

108. *Id.*

109. *Id.*

110. *Id.* at 4–5.

111. *PBS September/October/November/December 2010/January and February 2011*, MEDIA ACCESS GROUP WGBH, <http://main.wgbh.org/wgbh/pages/mag/services/description/ontv/pbs-schedule.html> (last visited Feb. 22, 2011).

112. *DVS® on CBS*, MEDIA ACCESS GROUP WGBH, <http://main.wgbh.org/wgbh/pages/mag/services/description/ontv/cbs-schedule.html> (last visited Feb. 22, 2011).

113. *Fox Schedule*, MEDIA ACCESS GROUP WGBH, <http://main.wgbh.org/wgbh/pages/mag/services/description/ontv/fox-schedule.html> (last visited Feb. 22, 2011).

114. Kim McAvoy, *Stations Must Bear Cost of Service for Blind*, TV NEWS CHECK (Sept. 1, 2010), <http://www.tvnewscheck.com/article/2010/09/01/44899/stations-must-bear-cost-of-service-for-blind>.

115. *FCC Consumer Advisory: Video Descriptions and the Digital Television Transition*,

transition has had a significant impact on the accessibility of current video description services and the implementation of future video description services.

The transition to digital television has increased the number of audio channels that can be used to broadcast video descriptions.<sup>116</sup> Where there used to be only one or two channels available to broadcast alternative information, there are now six. Before the digital transition, broadcast stations had to choose between including video descriptions and broadcasting in alternative languages; that problem no longer exists. The FCC explained the difference in encoding:

Because digital television encodes audio in a different manner than the encoding used in analog television, digital television does not utilize a SAP channel to transmit video descriptions. The digital television standards provide for two types of main audio service and six types of associated services, including associated services for people with vision disabilities.<sup>117</sup>

The change is good for television stations because now they can broadcast in multiple languages and also reserve an alternative audio channel for video descriptions. The networks will not have to alienate any of their consumers by excluding the medium in which the consumers would want to enjoy a program.

Despite its benefits, the transition to digital television has caused some problems, especially for those who were already relying on video. People with older televisions encountered a problem during the transition because digital televisions encode audio differently than analog televisions.<sup>118</sup> Without purchasing a converter box their televisions had no way to process the new digital audio signal. Not all converters on the market are able to make the conversion,<sup>119</sup> leaving some seeing impaired people with no way to use the video description services. The government created a coupon program to alleviate some of the costs faced by those unable to make the transition.<sup>120</sup> Similar problems are faced by those members of the hearing impaired community who are dependent upon closed captioning.<sup>121</sup> The problem, however, is greatly diminished for

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FED. COMM. COMMISSION, <http://www.fcc.gov/cgb/consumerfacts/dtvvideodescription.html> (last visited Feb. 22, 2011).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. See *FCC Consumer Advocacy: Closed Captioning and Digital-to-Analog Converter Boxes for Viewing Free Over-the-Air Programming on Analog Televisions*, FED. COMM. COMMISSION, [http://www.fcc.gov/cgb/consumerfacts/CC\\_converters.html](http://www.fcc.gov/cgb/consumerfacts/CC_converters.html) (last visited Feb. 22, 2011).

members of that community since all televisions since 1993 larger than thirteen inches can display closed captions.<sup>122</sup> Those who received closed captions through their televisions are still able to do so after the transition.<sup>123</sup> Only those with televisions smaller than thirteen inches or televisions made before 1993 have to put full faith in the converter boxes.

An additional problem caused by the conversion is the requirement that the visually impaired learn how to access the video description services in a new way. Customers will have to figure out how to access the additional audio streams through a button on the remote or through a menu on the television,<sup>124</sup> either of which poses obvious challenges for the seeing impaired. It might be a challenge for people with disabilities to figure out how to do this, but it would seemingly present no larger of a problem than figuring out how to access video descriptions to begin with. This is not a difficulty faced by members of the deaf community who have to figure out the new way to access closed captioning, since they can view the on-screen menus.

The digital transition carries with it a unique opportunity to stimulate the video description market or impose mandatory regulations. The transition has made access to additional audio channels easy. Broadcasters can broadcast video descriptions in addition to alternative languages. Digital technology is also in high demand, and the government can take this opportunity to impose requirements for that technology.

#### IV. SOLUTIONS TO THE CURRENT SITUATION

As a result of the digital video transition and other technological advances, it is an ideal time for the regulation of video description technology. There are two different paths that the government could take to ensure that television programs and emergency information will be accessible to the millions of blind or seeing impaired in the United States. The first option is to increase the financing of video description services. This financing would provide an incentive for major studios to implement the technology and the system would eventually become self-sustaining. The second approach is to pass federal regulations that would place video description technology on equal footing with closed captioning.

##### A. *Stimulating the Video Description Market*

In August 2009, FCC Commissioner Michael Copps held a town hall meeting discussing the digital transition and the FCC's efforts to increase

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122. *Id.*

123. *Id.*

124. *FCC Consumer Advocacy: Video Descriptions and the Digital Television Transition*, *supra* note 115.

access to television for people with disabilities.<sup>125</sup> Although video description technology was not the focus of the meeting, the subject came up during a question about funding. Karen Peltz Strauss, the Deputy Chief of the Consumer and Governmental Affairs Bureau at the FCC, who oversees the FCC's disability and consumer access programs and policies,<sup>126</sup> said that one of the biggest remaining concerns with video description technology was the cost.<sup>127</sup> In order to successfully increase access to video description technology, efforts need to be made to lower costs for networks and studios.

According to WGBH, the pioneer of video description technology, no commercial television program has offered video descriptions without public funding until recently.<sup>128</sup> Both WGBH and NTN receive major funding from the Department of Education.<sup>129</sup> In 2005, the Department of Education provided a grant to NTN in the amount of \$800,000.<sup>130</sup> The purpose of the funding was to help the network describe an additional 750 hours of educational television for children.<sup>131</sup> WGBH also received a grant for \$800,000 in 2005 from the Department of Education.<sup>132</sup> Although these amounts seem substantial when compared to existing funding of video descriptions, the amount would have to dramatically increase to support all major networks.

By increasing the amount of funding granted to organizations like WGBH and NTN, the government could offset the start-up costs and learning curve that major networks would encounter trying to start their own video describing programs from scratch. Allowing networks to initially outsource the video description process to those with experience (such as WGBH and NTN who would be receiving government funding) would expand the number of shows with video descriptions, help the

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125. Kevin Taglang, *FCC Townhall Addresses Broadband Opportunities for Individuals with Disabilities*, BENTON FOUND. (Aug. 20, 2009), <http://benton.org/node/27266>.

126. Press Release, FCC, FCC Chairman Genachowski Names Karen Peltz Strauss as Deputy Chief in Consumer Bureau (Mar. 12, 2010), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296832A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296832A1.pdf).

127. See Taglang, *supra* note 125.

128. Comments of CPB WGBH National Center for Accessible Media at 33, Implementation of Video Description of Video Programming, FCC MM Docket No. 99-339 (rel. Dec. 1, 1999) [hereinafter CPB WGBH National Center for Accessible Media Dec. 1999 Comments].

129. Jaclyn Packer, *Video Description in North America*, in 237 COLLOQUE INSERM: NEW TECHNOLOGIES IN THE EDUCATION OF THE VISUALLY HANDICAPPED 103, 105-106 (Dominique Burger ed., 1996); U.S. DEP'T OF EDUC., 2005 ANN. REP. TO CONGRESS ON THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, PART D, 51 (2005), <http://www2.ed.gov/about/reports/annual/osep/2005/part-d/idea-part-d-2005.pdf>.

130. U.S. DEP'T OF EDUC., *supra* note 129, at 52.

131. *Id.*

132. *Id.* at 51.

service expand to additional markets, and increase the demand for the services. Over time, mainstream studios, such as CBS, ABC, and NBC, would be able to develop their own full-time video description services in-house. Studios would no longer be wary of developing video descriptions because the market for their consumption would have been established. They would also be able to cut costs by doing the descriptions themselves because they could integrate the descriptions with the production process.

In addition, the visually impaired would feel more socially connected to others, as this would expand their cultural knowledge base. They would be able to better take part in water cooler conversations the next day at school and work. Similar, children with visual impairments would not have to feel left out because they missed the big show that was on the night before. More people watching would translate into additional revenues for studios. Studios would be able to further tap into the 25.2 million Americans who report vision loss.<sup>133</sup> An increase in the number of viewers would increase the amount of money they could charge advertisers for ad space, and increase their profits.

The increase in the number of secondary audio channels available on digital televisions will serve to benefit television stations in a number of ways. First, stations no longer have to choose between providing video descriptions and broadcasting a program in different languages. Second, stations can now broadcast emergency information on one of the secondary audio channels, instead of requiring visually impaired viewers to search for the information from another source. Networks that provide such a service would in turn receive increased loyalty from members of the visually impaired community.

Although the cost of descriptive technology could be high, there is also a huge opportunity for profit. Since video description technology is not currently widely utilized by studios, it would be economically advantageous to compete in that market. The concerns that currently exist about entering the market would no longer be warranted because there would be a guarantee that the technology would be used. There is a potential gain of between five and twenty-one billion dollars in revenue for the cable industry.<sup>134</sup> Some of this gain would have to be used to offset the

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133. *Facts and Figures on Adults with Vision Loss*, AM. FOUND. FOR BLIND, <http://www.afb.org/Section.asp?SectionID=15&TopicID=413&DocumentID=4900> (last visited Feb. 22, 2011).

134. Reply Comments of Helen Harris and Descriptive Theatre Vision at 2, Implementation of Video Description of Video Programming, FCC MM Docket No. 99-339 (rel. Mar. 27, 2000) (“[J]ust take [for] example the revenue generated from cable. If a subscriber pays \$60 a month for cable service, that equals over \$700 a year. Our figures show that there are 30 million people who can avail themselves of description. If those 30 million would subscribe, that would be \$21 billion dollars additional revenue. Cut that in

additional expenses incurred by show producers and broadcasters, but that expense would not be significant enough to prevent net gain by the industry.

Market stimulation can be seen in the deal that was formed between WGBH and Sony Pictures Home Entertainment.<sup>135</sup> According to the press release, “Descriptive Video Service provides carefully crafted narration of key visual elements inserted into natural pauses in dialogue. Key visual elements are those which viewers with vision loss would ordinarily miss and include actions, costumes, gestures, facial expressions, scene changes and onscreen text.”<sup>136</sup> Recognizing that there are over twelve million movie fans with vision loss,<sup>137</sup> this partnership opens up the home movie market to a wider range of people. Mainstream movies such as *Up*, *Zombieland*, *Julie & Julia*, and *Couples Retreat* were released on DVD and included descriptive narration.<sup>138</sup> Through similar partnerships, television studios could expand their audiences. Knowing that television programs would include video descriptions as a secondary option within a broadcast would garner more consumers from the seeing impaired community.

Once television programs include video descriptions, further opportunities will exist for studios to profit. Just like other consumers, members of the blind and seeing impaired community would purchase their favorite transcribed television shows on DVD. Video description would also have the potential to increase profits once shows were sold into syndication. Television programs with video descriptions included would have a built-in following that networks could rely upon.

The federal government would not need to continue financing video description technology forever. The government would only need to provide enough capital to get video description technology off the ground and increase awareness of its availability.<sup>139</sup> This would stimulate the market and enable it to become self-sustaining; the initial capital would serve to “prime” the video description “pump.”<sup>140</sup> In its comments, WGBH

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half, and it’s \$10 billion dollars. Cut that in half again, and it’s still \$5 billion dollars additional revenue that the vision impaired could contribute to the income of someone participating in description.”)

135. Press Release, Media Access Group at WGBH, Sony Pictures Home Entertainment Partners with WGBH Media Access Group to Deliver Descriptive Video Service® on Home Video Titles (Sept. 3, 2009), <http://main.wgbh.org/wgbh/pages/mag/about/news/sony.html>.

136. *Id.*

137. *Id.*

138. *Accessible DVDs, MEDIA ACCESS GROUP WGBH*, <http://main.wgbh.org/wgbh/pages/mag/resources/accessible-dvds.html> (last visited Feb. 22, 2011).

139. See CPB WGBH National Center for Accessible Media Dec. 1999 Comments, *supra* note 128, at 30–31 (describing how such an approach has worked in the past).

140. This has been evidenced by the success of several public broadcast stations that

cited the various public broadcast producers that have utilized video description technology for several years with funding from federal grants and now no longer require such support.<sup>141</sup> In its original comment to the FCC proposed regulations, WGBH stated, “[w]hile major PBS stations in all of the top 20 markets carry DVS, so do many smaller member stations, some in the bottom 20 markets. Clearly if small and perennially hard-pressed public television stations can uncover the resources to add SAP-broadcast capability, so can most commercial stations.”<sup>142</sup>

The transition to digital television has served to diminish the cost of implementing video description technology, one of the chief concerns of the parties that opposed the FCC’s initial creation of the regulations.<sup>143</sup> Under the old analog system of video description, it was costly to mix the video descriptions with the regular audio.<sup>144</sup> The capabilities of new digital receivers reduce that cost. Under the old analog format, viewers had to pick between either the regular broadcast audio or the alternative audio. This all-or-nothing approach existed in part because the channels were typically used for broadcasting in a different language. Today, as a result of the digital transition, broadcasters can transmit multiple streams of video on a single channel at one time.<sup>145</sup> Where there was once only one option under the old format, broadcasters now have more audio channels to provide the service.<sup>146</sup>

Therefore, while finding enough initial funding poses a significant barrier to the implementation of video description technology, there are clear financial benefits in doing so. Stations that use video descriptions would realize an increase in revenue and could also realize an increase in viewership of their described shows, both of which would please commercial sponsors. The development and implementation of the technology would also increase the profits of the companies that create them.

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similarly received federal grants, as described by WGBH in its comments. *Id.* at 30.

141. *Id.* at 25–26, 30–31.

142. *Id.* at 14 (internal citations omitted).

143. *See, e.g.*, National Cable Television Mar. 2000 Reply Comments, *supra* note 68, at 7–9.

144. *See* CPB WGBH National Center for Accessible Media Dec. 1999 Comments, *supra* note 128, at 34.

145. Peter H. Putnam, *The Basics of Digital Television*, AV Sci. F. (Mar. 24, 2004), <http://www.avforum.com/hdtvfaq/HDTV-FAQ.htm>.

146. *FCC Consumer Advisory: Video Descriptions and the Digital Television Transition*, *supra* note 115.



### *B. Federal Regulation Mandating Implementation of Video Description Technology*

Through the introduction of new legislation, the federal government could firmly establish that the FCC has the power to regulate video descriptions. This solution would address both aspects of the problem by mandating access to emergency information, as well as requiring closed captioning of television programs.

Now is the perfect time to reassess the FCC's authority to regulate video descriptions. Representative Edward Markey, a Democrat from Massachusetts, has introduced a bill in the U.S House of Representatives titled the Twenty-First Century Communications and Video Accessibility Act (Twenty-First Century Act).<sup>147</sup> The bill is cosponsored by fifty-three other representatives.<sup>148</sup> Representative Markey is the chairman of the House Subcommittee on Telecommunications and the Internet.<sup>149</sup> In promoting the bill, Representative Markey said, "Now we're full-blown into this digital era, and we, in general, need to upgrade the laws that ensure that there is accessibility for all the people who use these new technologies."<sup>150</sup> The legislation illustrates that this is truly a bipartisan issue.<sup>151</sup> As of the writing of this Note, the Twenty-First Century Act had passed the House with a roll call vote resulting in 348 Ayes, 23 Nays, and 61 Present/Not Voting.<sup>152</sup> Despite passing in the House of Representatives, the Twenty-First Century Act still would have to go through several legislative steps to become law.

The Twenty-First Century Act is comprehensive and addresses many of the challenges faced by those with disabilities relating to new and changing technology. In addition to addressing these many issues, the Act firmly establishes the right of the FCC to regulate video descriptions.<sup>153</sup> By granting the FCC that power, the Act ensures that the needs of the blind and seeing impaired can be addressed as technology continues to advance.

Beyond giving the FCC the power to regulate broadcasters, the Twenty-First Century Act takes a number of other important steps to help the blind and seeing impaired community, including efforts to make

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147. *H.R. 3101: Twenty-First Century Communications and Video Accessibility Act of 2010*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-3101#at> (last visited Feb. 22, 2011).

148. *Id.*

149. Kim Hart, *Access Denied: The Blind or Deaf Can Feel Left Behind as the Tools of Technology Advance*, WASH. POST, June 19, 2008, at D01.

150. *Id.*

151. *See id.*

152. *H.R. 3101: Twenty-First Century Communications and Video Accessibility Act of 2010*, *supra* note 147.

153. H.R. 3101, 111th Cong. § 202(a) (2010).

television and other video technology easier to use. The Act authorizes the FCC to investigate ways to make onscreen television menus and other interfaces easier for those with disabilities to use.<sup>154</sup> Current regulations require that televisions with screens larger than thirteen inches must be able to broadcast closed captioning; this Act would further require those televisions to support video descriptions.<sup>155</sup>

For video descriptions, the Act basically turns back the clock to before the decision in *Motion Picture Association of America, Inc. v. Federal Communications Commission*. The Act “authorizes the FCC to promulgate additional rules to (1) ensure that video description services can be transmitted and provided over digital TV technologies, (2) require non-visual access to on-screen emergency warnings and similar televised information and (3) increase the amount of video description required.”<sup>156</sup> Mandating that emergency information be broadcast aurally addresses one of the biggest concerns faced by the seeing impaired community—this ensures that members of this community will have increased access to safety information that will prove invaluable in times of emergency.

Passage of the Twenty-First Century Act would be taking a huge leap in solving all of the problems resulting from the lack of video description technology in television today. Although many specific details would still have to be addressed—such as the timetable for implementation—the Act would build upon the successful model of closed captioning to ensure success.

Even if the Twenty-First Century Act is not passed, it is still an ideal time to reconsider the results in *Motion Picture Association of America* and the repercussions it has had for the seeing impaired community. The transition to digital television presents the perfect opportunity to implement a change that would increase the safety and quality of life for the seeing impaired. Even without a congressional act, financing can be secured to stimulate a change in practices of major television studios.

## V. CONCLUSION

The decision in *Motion Picture Association of America, Inc. v. Federal Communications Commission* had far-reaching consequences that have significantly impacted the lives of seeing impaired Americans. When the FCC lost the power to mandate implementation of video descriptions, members of the seeing impaired community lost the ability to enjoy things

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154. H.R. 3101, 111th Cong. § 204(a) (2010).

155. H.R. 3101, 111th Cong. § 203(a) (2010).

156. *21st Century Communications and Video Accessibility Act*, NAT’L ASS’N OF DEAF, <http://www.nad.org/issues/civil-rights/communications-act/21st-century-act> (last visited Feb. 22, 2011).

most people take for granted. Because of the cost of creating video descriptions a majority of shows on television do not have them. Similarly, because networks are not required to have the technology in place, people with see impairments are not informed of vital emergency information that scrolls across television screen.

Some of the concerns expressed by the Supreme Court would no longer be a barrier to wide implementation of video description technology. Technological advances have made it easier and cheaper than ever for television studios to use video descriptions in their programs. The digital transition has transformed the broadcast television landscape opening up options to broadcasters that were not available even a few years ago.

As a result of the switch from analog to digital television, there are now two solutions to this issue. The first solution would be to financially stimulate the video description market—the government could help create video description services for television programs that would eventually become self-sustaining. Small public broadcasters having been describing video for years with help from federal grants. Over time they have increased the efficiency and lowering the cost of the process. Networks would be able to rely on their knowledge base on knowhow as they were launching their own video description services.

The second solution would be to create federal regulations mandating video descriptions. New regulations passed would not only serve to allow greater enjoyment of television programs, but would also allow for increased social integration, and access to vital emergency information. The *21st Century Communications and Video Accessibility Act* has been introduced and passed in the House of Representatives, although it has not yet become law. Either of these two courses of action has the potential to prevent the damage caused by the court's decision in *Motion Picture Association of America* from continuing to disadvantage the visually impaired.