Before the
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Communications, Technology and the Internet

Hearing on H.R. 3101
The 21st Century Communications and Video Accessibility Act of 2009

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Chairman Boucher, Ranking Member Stearns and members of the Subcommittee, thank you for this opportunity to testify on the important issue of access to new technologies by persons with disabilities. I am proud to represent over 2,000 American technology companies, who in a short period of time both individually and collectively, have changed how all Americans access information, entertainment and education.

The technology innovations which have brought us wireless, the Internet, PCs, digital radio, MP3, HDTV, broadband and narrow band have quickly transformed society. Moreover, technology innovation has been the one American bright spot in what otherwise is a challenging economy. As I travel around the world and meet with industry and government, they look to the United States with envy as the leader in technology and innovation. Indeed, our nation has produced more innovation connected to communication and the Internet than all the other nations in the world combined. Today, America is the home to every significant Internet company and most of the world's great microchip and technology companies. But every big company started as a little company and we must be careful of doing anything which makes it more difficult for a new company to enter the market.

Our American dream is based on the power of new ideas, new inventions and a better way of doing things. Simply put, we need to protect the special sauce that is American innovation and leadership.

At CEA, we believe our national future is tied to our ability to remain the most innovative nation on earth. We urge you as policymakers to recognize our national strength in innovation and examine policies through the lens of whether it is good or bad for innovation and thus for our economic future. Indeed, the Innovation Movement we launched less than one year ago has attracted over 60,000 Americans and its singular focus is advocating for policies conducive to innovation.

Among these policies is the ability of manufacturers to have flexibility in designing products. We continue to applaud the 1985 Supreme Court decision in the Sony Betamax case which found that products are legal if they have significant legal uses. Without this finding, many of the technologies we experience today would not have been developed or sold, as they were opposed by one group seeking to design products a specific way: so they could not record.

When government has stepped in narrowly to meet a specific purpose, we have had a good result. One successful example is the closed captioning requirement. Although my predecessor opposed it over 20 years ago when Congressman Markey first proposed it, I was pleased to work with Congressman Markey who then changed the proposal to give manufacturers flexibility in implementing the requirement. The result is that captioning comes in various ways through industry agreed-upon standards. The trick here was a narrowly defined purpose, flexibility and options which allowed manufacturers to distinguish their products from each other. The initial costs were high but they became unnoticeable to the consumer as intense

competition, the shift to digital and the use of standards without patent complications allowed the cost increase to be absorbed in the deflationary spiral of consumer electronics.

Another excellent example of a strategic government industry partnership is the shift to digital television. By all accounts, the United States has the best standard and the smoothest transition to digital. Almost all Americans now enjoy the sounds and beauty of digital television. In both of these examples of success, the FCC allowed all interested stakeholders to arrive at the best technical solution through a deliberate, open standards process with appropriate obligations on both the content source and the receiver.

An example of a less successful governmental technology requirement is the v-chip. This well-meaning effort to help parents keep children from viewing inappropriate content was based on a CEA voluntary proposal. Rushed through Congress as a mandate, it used proprietary technology, resulting in expensive and time-consuming litigation, as well as an unclear purpose. Without competition among manufacturers –as it was a mandate – along with an overly complex ratings system, the result is a system which few parents use. Innovation in parental control technology has happened through market forces entirely outside the congressionally mandated v-chip solution.

Today, we understand the desire and compelling case for expanding the access of technology to Americans with disabilities. However, the legislation before us - H.R. 3101- is extremely broad in its scope; chilling innovation and the entry of new products. More, it ignores the great number of products on the market which serve the needs of many in the disability community.

According to CNET, which allows product searches by accessible features, 190 wireless phones are hearing aid compatible, 401 are TTY compatible, 1,244 have vibrating alert capability, five allow audible battery alert and 304 have voice control capability. CNET product reviews also provide device comparison charts for caption-enabled mobile media devices ranging from Blackberries to iPhones and the Sling Player Mobile, as well as wireless carrier guidance for accessible products and services and GPS software and devices for the visually impaired.

I will be specific about our concerns and how we suggest the bill be changed to meet the laudatory goal of encouraging a marketplace where all Americans have access to the miracles of modern communication. But America must also have a goal of encouraging innovation and not creating new barriers to entrepreneurs. Therefore, our objective is to meet the needs of disabled Americans and meet our national focus on the free market as the greatest innovation creator. We are also edging up against the bounds of physics and engineering, and the reality that the increasingly common handheld devices can only have screens so large or so many special function keys or buttons. We strongly believe it is not an appropriate government role to mandate any of these functions, keys, buttons or designs.

As currently drafted, H.R. 3101 does not take into account the ever-changing dynamic of Internet-based services and devices. We are no longer living in a world of single function devices. Internet-based voice, video and data services and equipment involve a diverse and symbiotic ecosystem of content providers, service providers, software applications and network edge devices. Each part of the distribution chain must cooperate to provide the end user with an acceptable result. The legislation's attempt to adapt old regulations established to apply to primary function services and devices, such as Section 255 and FCC's closed captioning rules, to

new multi-function devices will not produce the desired results, and will only impede the advancement of new technologies and accessible features.

Bringing new products to market involves numerous variables and requires balancing technical limitations with trade-offs, flexibility and creativity. The development of new products is highly time-driven, but it also is an iterative process, with new features being added or removed constantly in a series of small development and testing cycles determining what capabilities, dimensions, and other factors can realistically be put into a product that is capable of competing successfully in a highly competitive market.

If developments in each of these cycles were viewed against a set of difficult-to-meet standards as required by H.R. 3101, and the cost – from detailed record-keeping at all stages of product design and implementation to justify business decisions, to administrative and legal proceedings – of potentially huge liability, the innovation of new products and services would slow to a halt. The impact on small business entrepreneurs – many whom are CEA member- would be especially challenging.

As introduced, Title I of H.R. 3101 would require many current and future Internet-based voice, video and data services and devices to be accessible to all people with disabilities. Coupled with a heightened undue burden standard, one can only imagine if the iPhone or the Internet itself would have ever been brought to market if H.R. 3101 was current law.

We strive to ensure no American is left behind, but we also need the flexibility to develop new products that address the needs of all consumers. Given the multiple, sometimes conflicting, needs of persons with different levels of ability, it is important that manufacturers have flexibility which will ultimately lead to a greater number and variety of products to meet

different user needs. Manufacturers are simply unable to incorporate all accessibility features into all products without compromising the function and affordability of products.

The approach set forth in H.R. 3101, requiring all service and devices to be accessible with the FCC developing and mandating technical standards for such accessible features would not result in more products being accessible or more innovative designs. Rather, it would result in overly burdensome compliance costs, less variety of products and would hinder United States competitiveness in the global market.

As an alternative, we have suggested amendatory language expanding the scope of voice and messaging communications services and applications, beyond what is required under current law. These proposed amendments would provide certainty to service providers and manufacturers as to the extent of their obligations. This language would help to ensure that there are choices in the marketplace for devices with certain accessible functions, but not require all devices to incorporate all functions.

Further, it is a core CEA belief that the development of technical standards must be left to consensus-based industry standards bodies, rather than government agencies or Congress alone. Such groups are open to participation by non-industry members, and constitute the best and most efficient way to approach industry-wide issues, while at the same time protecting innovation.

Another problematic provision of the bill is that it retains the outdated "accessibility-followed-by-compatibility" regime of Section 255 coupled with the **heightened undue burden standard**. Today's software-based telecom and media devices continue to progress in the area of compatibility or interoperability with software-based assistive technologies. However, Section

255 of the Telecommunications Act of 1996 does not recognize these applications as a legitimate means to comply with its accessibility requirements.

Currently, whenever it is not readily achievable to incorporate accessibility features into a product or service, the manufacturer or provider is required to ensure that the equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable.

When Section 255 was written, the only types of assistive technologies available for mobile and wireline phones were items such as TTYs and handset amplifiers. Mainstream accessories and software for mobile devices, such as a Bluetooth keyboard or Code Factory Mobile Speak are now extending the boundaries of software and hardware peripherals that provide benefits as assistive technology. As an alternative, CEA proposes a cleaner "either-or" option that would allow industry to address consumers' needs in a more effective and flexible manner.

We are also concerned about the scope and intrusiveness of the reporting obligations and believe that the industry and the FCC must be afforded flexibility with respect to the content and format of any reports. Alternatively, CEA proposed an annual officer certification that would help to ensure that accessibility issues are a high level corporate policy and provide for protection of proprietary information.

The complaint resolution requirements in H.R. 3101 would effectively require the FCC to give accessibility complaints priority over all other complaints, regardless of merit, in order to meet the 180-day statutory deadline. The legislation would also give accessibility complainants mandamus rights unavailable in any other context, and empower the FCC to issue cease and

desist orders. CEA has proposed a more administratively realistic one-year period for resolving complaints that also provides the FCC sufficient remedial authority short of imposing a particular technical solution or standard.

The monetary forfeiture provisions of § 104(b) impose forfeiture amounts that are excessive and represent a substantial departure from current law, which for due process reasons imposes lesser amounts for businesses who are not ordinarily subject to FCC jurisdiction.

Further, the absence of a third party liability limitation is of particular concern given the market prevalence of third party applications that may or may not meet the accessibility needs of an individual user. The broad scope of the legislation, as well as the restrictions on impeding "content" transmitted via advanced communications, creates uncertainty regarding providers' and manufacturers' obligations to provide accessible products and applications. CEA proposes that the legislation clarify that advanced communications manufacturers and providers are liable only for the products and services they design and control.

Under Title II of the bill, the FCC is directed to develop regulations through a Notice of Inquiry and subsequent rulemaking that would require all devices to render closed captioning, video description and emergency alert information. Mandating the incorporation of technical standards and features to render closed captioning and video description without any consideration of the impact it would have on the other functions of or costs of a multipurpose device would undoubtedly stifle innovation.

As an alternative, CEA has proposed the development of an advisory committee consisting of all affected stakeholders working together to develop industry-led technical solutions for IP-based video programming services and devices. After the advisory committee

completes its work and develops suggested solutions, the advisory committee would then determine whether to recommend that the FCC promulgate rules to accomplish the recommended solutions. For any such requirements, the FCC would also be afforded flexibility to exempt certain Internet-based video programming services and devices.

It is also important to note that we are working on solutions for closed captioning of video content distributed over broadband networks. Last November, an Ad Hoc Group was formed by a Technical Committee of the Society of Motion Picture and Television (SMPTE) to continue the efforts of the Internet Captioning Forum and develop a voluntary industry standard. Group participants include content providers, broadcasters, captioning and subtitling solution providers, professional equipment manufacturers and consumer electronics manufacturers. SMPTE has reached out to the disability community and established formal liaison with COAT to exchange information, solicit feedback and ensure the needs of disabled individuals are taken into account during the development of this standard. The Ad Hoc Group expects to complete work on its first set of standards in 2010.

Finally, the bill requires a prescriptive list of user interfaces on devices, such as closed captioning buttons on remote controls and audio output of on-screen menus. The industry is working on solutions to make user interfaces more easily accessible. CEA recently established a new group to develop a recommended practice to make remote controls more usable by the visually impaired. We strongly believe it is not appropriate for the government to be in the product design business down to the level of individual buttons and functions.

Over the past year, we have met regularly with members of COAT to gain a better understanding of the problems they are attempting to solve with this legislation. Through these

meetings, in addition to gaining a better understanding of their concerns that has helped us craft suggested amendments to H.R. 3101, it became clear that there is need for better communication of the accessible products and services that are available in the marketplace. With this in mind, we applaud the provision establishing a clearinghouse of information on the availability of accessible products and services. The development and promotion of a clearinghouse would provide great value to the disabled community, who may not know what solutions are available. Additionally, it would provide an inventory of accessible technology available in the marketplace, enabling us to determine where we are meeting the needs of the disabled community and where we need to do better.

We are encouraged by the recent establishment of the FCC's Accessibility and Innovation Forum that will provide an ongoing collaborative discussion between diverse stakeholders to promote innovative solutions to access broadband communication technologies. The FCC also recently announced that they plan to launch an online clearinghouse to serve as an information source for accessible technologies, services and resources. Further, CEA has been an active participant in the FCC Consumer Advisory Committee and the FCC Digital Closed Captioning and Video Description Technical Working Group.

In closing, we have and will continue our efforts to ensure that all Americans are able to reap the benefits of new and emerging communications technologies. However, due to the layers of complexity inherent in the legislation and the limitations it would place on the advancement of all new technologies, we do not believe, as currently drafted, it is the right approach. We have submitted suggested alternative language that improves accessibility to Internet-based communication and video technologies while balancing the need to allow innovation to flourish.

We look forward to working with all interested stakeholders on a legislative approach that reflects the rapid innovation of our market with the desire to ensure that these products and services are accessible to persons with disabilities.