

20th Anniversary of the Americans with Disabilities Act

The ADA and Movie Captioning: A Long and Winding Road to and Obvious Destination

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THE ADA AND MOVIE CAPTIONING: A LONG AND WINDING ROAD TO AN OBVIOUS DESTINATION

John F. Waldo*

I. INTRODUCTION

For over a century,¹ movies have been America's favorite evening out.² Yet since the advent of "talkies," wherein the audience can hear the actors speaking on film, movies have been inaccessible to a substantial number of people³—those with hearing loss of such a degree that even while using the Assistive Listening Devices movie theaters are required to furnish they cannot understand movie dialogue.⁴

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¹ Bob Mondello, *100th Anniversary of First U.S. Movie Theater*, NAT'L PUB. RADIO (June 17, 2005), <http://www.npr.org/templates/story/story.php?storyId=4707873>.

² Industry statistics indicate that in 2009, box office ticket sales totaled \$10.6 billion. *Total U.S. & Canada Box Office Grosses*, NAT'L ASS'N THEATER OWNERS, <http://www.natonline.org/statisticsboxoffice.htm> (last visited Jan. 29, 2011).

³ Estimates of the number of people with significant hearing loss vary according to the reporting method used and the definition of hearing loss. Arguably, the most reliable estimate comes from a study at Johns Hopkins University that used actual audiometric (hearing test) data from a large, random sample of the U.S. adult population. See Yuri Agrawal et al., *Prevalence of Hearing Loss and Differences by Demographic Characteristics Among U.S. Adults*, 168 ARCHIVES INTERNAL MED. 1522, 1524 (2008) (reporting in Table 1 that in a sample from 1999 to 2004, 7.8% of adults aged twenty to sixty-nine have a hearing loss in both ears that interferes with their ability to understand speech to the point that it is considered "handicapping," rather than merely inconvenient by the American Academy of Otolaryngology); see also ROBERT A. DOBIE, MEDICAL-LEGAL EVALUATION OF HEARING LOSS 90 (2000) (explaining testing methodologies and medical consensus as to when hearing loss becomes material and handicapping).

⁴ Movie theaters built or significantly altered after 1993 with fifty or more fixed seats are required to have volume-enhancing listening devices. See 28 C.F.R. §§ 36.401, 36.402 (2010); see also 28 C.F.R. § 36.406(a) (2010) (incorporating the standards for accessible design); ADA Accessibility Guidelines for Buildings and Facilities, § 4.33 (2004), available at <http://www.access-board.gov/adaag/ADAAG.pdf>. Those devices benefit individuals with mild hearing loss, but may be insufficient for people with more significant losses or those who are deaf altogether. *Ball v. AMC Entm't, Inc.*, 246 F. Supp. 2d 17, 23 n.17 (D.D.C. 2003); see, e.g., U.S. ACCESS BD., BULL. NO. 9B: FOR INSTALLERS, ASSISTIVE LISTENING SYSTEMS 1-2 (Aug. 2003), available at <http://www.access-board.gov/adaag/about/bulletins/pdf/als-installer.pdf> (explaining that the most common forms of hearing loss affect the ability to hear higher-frequency sounds, including the consonants that shape and give meaning to speech). Many people with hearing loss hear voices at normal or near-normal volume but

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Making movie soundtracks accessible to people with hearing loss is technically simple. Dialogue, song lyrics, and other pertinent aural information—like a “gunshot” or “door closing”—is put into written form and then displayed as captions, allowing viewers to “hear” with their eyes.⁵

The Americans with Disabilities Act of 1990 (“ADA”),⁶ aimed at incorporating people with disabilities into the mainstream of American life,⁷ requires that businesses such as movie theaters implement available measures to make their services accessible to people with disabilities. Captioned movies for people with hearing loss would seem to be precisely the kind of accommodation that the ADA envisioned, but twenty years after the Act’s passage, only a tiny fraction of the movies being shown in American theaters are accessible. This situation is attributable to the intransigence of the large corporate-owned theater chains, overly narrow judicial interpretations of the ADA, the failure of the statute itself, and the relevant federal agency’s failure to define critical terms.

For a number of reasons, 2010 appears likely to be the tipping point in the quest for meaningful access to the movies. Court decisions in the first half of the year significantly increased the legal pressure to provide captioned films. As the year ended, the long-awaited “digital revolution”⁸ was finally getting under way, enabling at least some theaters to make captioned films available at a cost low enough to moderate some of the theaters’ historic resistance to captioning.

cannot understand what is being said. *Id.* Because comprehension rather than volume is the problem, simply increasing the volume is, in many cases, not a sufficient solution. *Id.* at 2.

Many individuals who do not actually understand speech are still able to communicate aurally, at least in some circumstances. Awareness of context and visual cues allow people with hearing loss to follow the general drift of what is being said even without full understanding of the words being spoken. But in the author’s experience as a person with a significant hearing loss, those coping mechanisms are insufficient at a movie, principally because the essence of drama or especially comedy arises when something unexpected is said. Those critical punch lines and plot turns are what a person with hearing loss is likely to miss.

⁵ See, e.g., *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 668 (9th Cir. 2010) (accurately describing current methods of captioning movies).

⁶ 42 U.S.C. §§ 12101–12213 (2006 & Supp. II 2008).

⁷ *Id.* § 12101(a)(1) (Supp. II 2008) (“The Congress finds that . . . physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination . . .”).

⁸ See *infra* notes 51–52 and accompanying text (discussing a case in which the use of digital technology was considered). Rather than using celluloid reels, movies are being distributed as digital data packages. Thus, “film” may go the way of “records,” and be replaced in part or in whole by digital data.

Furthermore, after years of indecision, the United States Department of Justice (“DOJ”), empowered to issue regulations governing “public accommodations” such as movie theaters,⁹ issued an Advance Notice of Proposed Rulemaking in which it proposed a movie-captioning requirement.¹⁰

Although the DOJ’s entry into the fray was most welcome, the specific proposal was disappointing in that it would require only half of the nation’s theater screens to show captioned films and would phase implementation of that requirement over a five-year period beginning one year from the date the regulations are finally adopted.¹¹ On a positive note, the DOJ indicated that it may modify some of its regulations dealing with how movie captioning is done. Specifically, the DOJ is considering permitting, and perhaps even encouraging, open captioning—a delivery mode that is both inexpensive and appeals to a significant segment of the population with hearing loss.

This Article will begin by discussing the structure of the ADA as it applies to access to public places for people with hearing loss and the particular snippet of legislative history that pertains to movie theaters.¹² Second, this Article discusses how the dilemma created by a legislative history that arguably conflicts with the language of the statute, combined with the ADA’s own vagueness, led to a number of judicial decisions negating any captioning requirement.¹³ Third, this Article discusses the case that reversed that trend.¹⁴ Fourth, this Article critically examines the DOJ’s proposed captioning rule, questions whether the proposal is consistent with the ADA’s language, and suggests a regulatory approach that would advance the DOJ’s objectives of transparency and ease of administration while still being consistent with the ADA’s language.¹⁵ Finally, this Article encourages the DOJ to promote multiple forms of movie captioning.¹⁶

⁹ See 42 U.S.C. § 12182.

¹⁰ See §§ 12182, 12186(b) (empowering the DOJ to enforce the ADA); Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. 43,467 (proposed July 26, 2010) (to be codified at 28 C.F.R. pt. 36) (explaining that the DOJ is considering a revision in its regulations regarding the ADA as it relates to movie-captioning).

¹¹ Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. at 43,474.

¹² See *infra* Part II (discussing the ADA and movie captioning).

¹³ See *infra* Part III (reviewing early cases on movie captioning requirements under the ADA).

¹⁴ See *infra* Part IV (explaining how the *Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc.* decision changed movie captioning jurisprudence).

¹⁵ See *infra* Part V (discussing the DOJ’s proposed captioning rule).

¹⁶ See *infra* Part VI (urging the DOJ to take action).

II. THE ADA AND MOVIE CAPTIONING

Congress passed the ADA in 1990, intending for it to serve as a “comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹⁷ The ADA doesn’t simply forbid discriminatory acts, it also forbids omissions that have a discriminatory result. Just as covered employers are required to make “reasonable accommodations” to otherwise qualified employees to enable them to work at parity with a non-disabled employee,¹⁸ privately owned “public accommodations,” such as a “motion picture house [or] theater”¹⁹ covered by Title III of the ADA, must undertake certain affirmative acts to make their goods and services accessible to people with disabilities.²⁰

The provision pertinent to movie captioning is the requirement that public accommodations offer “auxiliary aids and services.”²¹ These are defined by example as including “qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments”²² when the absence of those aids and services effectively denies disabled individuals “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations” offered by the business.²³

Although the motive and intent of the ADA may have been inspired by civil rights legislation,²⁴ its economic justification is similar to no-fault tort law, especially workers’ compensation and products liability law. These bodies of law recognize that no matter how much care is exercised, a number of injuries will occur. Rather than requiring the injured individual to bear all the consequences—essentially telling the victim of the fortuitous accident that it is his or her tough luck—no-fault law shifts the financial consequences to the enterprises involved. These enterprises bear the financial burden, not because they are collectively at fault, but because they are able to distribute the loss throughout their

¹⁷ 42 U.S.C. § 12101(b)(1) (2006).

¹⁸ *Id.* § 12112(b)(5)(A).

¹⁹ *Id.* § 12181(7)(C).

²⁰ *Id.* §§ 12112(b)(5)(A), 12181(7), 12181–89.

²¹ *Id.* § 12182(b)(2)(A)(iii). Discrimination includes failure to furnish auxiliary aids and services. *Id.*

²² *Id.* § 12102(1)(A).

²³ *Id.* § 12182(a) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”).

²⁴ See, e.g., MARK C. WEBER, UNDERSTANDING DISABILITY LAW 2 (2007) (“The Americans with Disabilities Act might be viewed as the culmination of activism and political efforts inspired by a civil rights, integrationist approach to disability.”).

industry and through the mechanism of liability insurance. The cost of insurance will, in turn, presumably become a routine cost of doing business, incorporated into their price structure and thereby part of the price paid for the product.²⁵

The ADA operates in a similar manner. It treats disability as a “casualty” that occurs without fault. Rather than explaining to disabled individuals that the frequent consequences of disability—exclusion and isolation—are their “tough luck,” the ADA states that where feasible measures exist to mitigate the effects of that disability, businesses covered by the Act should take those measures at their own expense. Although insurance cannot be used as a cost-distribution mechanism, the fact that very similar access requirements apply to all firms operating similar businesses may make it possible for individual firms to adjust their prices to reflect the cost of providing access without sustaining a competitive disadvantage. Assuming all competitors are under equal pressure to adhere to the legal requirements of becoming accessible to the disabled, those requirements should be no more onerous than other non-discretionary operating costs, such as electricity, that equally affect every market participant.

The ADA seems often regarded as unfair by the public and the bench, either because its loss-spreading mechanism is not explicitly articulated, or because the cost and difficulty of providing accommodations is frequently exaggerated.²⁶ Some opponents view the cost of compliance as a form of punishment that should not be inflicted upon a business not at fault. Furthermore, that perception has been enhanced by well-publicized abuses, particularly in California, where a few individuals turned access litigation into something of a cottage industry, a situation for which the ADA was erroneously blamed.²⁷ As a

²⁵ See generally RESTATEMENT (SECOND) OF TORTS § 402A (1965) (“[P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained . . .”).

²⁶ See, e.g., Walter Olson, *ADA 20th Anniversary*, CATO@LIBERTY.ORG (July 26, 2010: 3:42 PM), <http://www.cato-at-liberty.org/adas-20th-anniversary/>. While some politicians, notably Kentucky Senator Rand Paul, have called for repeal of the ADA, *supra*, it apparently remains rather popular in Congress, as indicated by the passage of the ADA Amendments Act of 2008, Pub. L. No. 110-325 (codified at 42 U.S.C. §§ 12101-12213), in which Congress explicitly overruled a number of U.S. Supreme Court decisions that had narrowed the scope of the act. The statute passed the House of Representatives by a 402 to 17 vote, and passed the Senate by unanimous consent. Sidebar, *The ADA Restoration Basics*, AM. ASS’N PEOPLE WITH DISABILITIES, <http://adarestoration.blogspot.com/> (last visited Jan. 29, 2011).

²⁷ The ADA permits private parties to seek injunctive relief only, not damages, for violation of accessibility provisions of the ADA. JONATHAN R. MOOK, *AMERICANS WITH DISABILITIES ACT: PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES* § 6.02[5] (1996).

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result, access claims have frequently been treated with unwarranted skepticism.²⁸

The requirement to provide auxiliary aids and services is far from absolute. Rather, the requirement exists “unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”²⁹ In essence, Congress said auxiliary aids and services must be provided unless doing so would cost too much, but Congress provided no guidance as to what “too much” might be. That omission, deliberate or otherwise,³⁰ has had the unfortunate consequence of making ADA access claims highly contentious. With no guidance, the business can assert in good faith that providing access would be an “undue” burden or a “fundamental” alteration to its existing structure, while those requesting access can assert the contrary. It is not surprising that busy courts, rather than trying to define “undue burden” with no guidance, reach unexplained conclusions or look for alternative ways to dispose of the case.³¹

California’s Unruh Act, however, states that any violation of the ADA is a violation of the Unruh Act, and permits a plaintiff to recover minimum damages of \$4000 per day. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 731 (9th Cir. 2007). Some plaintiffs in wheelchairs would file numerous suits against restaurants toward the end of the one-year limitations period, then demand settlements of \$4000 per day of uncorrected violations. One particularly notorious plaintiff was judicially declared to be a vexatious litigant and was required to seek court permission before filing suits. *Molski v. Mandarin Touch Restaurant*, 347 F. Supp. 2d 860, 868 (C.D. Cal. 2004), *aff’d sub nom. Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007), *reh’g denied*, 521 F.3d 1215 (9th Cir. 2008).

²⁸ See *Evergreen Dynasty Corp.*, 521 F.3d at 1217 (Berzon, J., dissenting) (upholding a vexatious litigant declaration even though the panel and the district court “both expressly concede that [Molski’s numerous lawsuits] are probably meritorious”).

²⁹ 42 U.S.C. § 12182(b)(2)(A)(iii) (2006).

³⁰ As is often the case, the ADA was weakened considerably during congressional negotiations, frequently to ease the burden that the statute might impose on small businesses. A proposal to define the closely related concept of “undue hardship” as threatening an employer’s continued existence was rejected during the debate. See Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 172 n.514 (2003). Professor Stein’s article discusses the obligation of employers to furnish “reasonable accommodations” to employees, but some of his reasoning is at least inferentially relevant to questions involving the provision of access. *Id.* at 79.

³¹ The cases that have actually attempted to quantify or even fully describe what might constitute an “undue burden” are neither consistent nor helpful. On the one hand, the “undue hardship” that relieves an employer of the need to provide reasonable accommodations to an employee, is a concept closely akin if not identical to the “undue burden” concept. Compare 28 C.F.R. § 36.104 (2010) (defining “undue burden”), with 42 U.S.C. § 12111(10) (defining “undue hardship”). Indeed, the Eastern District of Texas declared “undue hardship” in passing to be “a concept approaching financial ruin.” See *Anderson v. Gus Mayer Bos. Store*, 924 F. Supp. 763, 781 (E.D. Tex. 1994) (applying this definition, despite the fact that it was reportedly rejected during Congressional debate).

To further complicate matters, a House of Representatives report on the ADA contains a snippet dealing specifically with captioned movies. The report explains that “[o]pen-captioning, for example, of feature films playing in movie theaters, is not required by this legislation.”³² Nevertheless, that same report goes on to state that future technological “advances may require public accommodations to provide auxiliary aids and services in the future which today would not be required because they would be held to impose undue burdens on such entities.”³³

At the time the ADA was enacted, the issue of captioned movies was somewhat academic. The movie theaters did not and could not caption the movies themselves, and the studios were under no obligation to caption their product. Thus, other than subtitled foreign films, there was simply no captioned product available in 1990.

That situation began to change in 1993 when Tripod Captioned Films, an independent non-profit company, and Insight Cinemas, a successor organization, undertook to borrow movie prints, prepare captions that were then laser-burned onto the prints, and then distribute the prints to theaters.³⁴ Those captioned prints could be played on any projector, and the captions were “open,” meaning visible to everyone in the audience. Due to the fact that very few movies were captioned, very few prints of those movies were available out of the few movies that were captioned. Any captioned prints would not become available until several weeks after the movie opened, and those theaters that were willing to show the captioned prints generally only scheduled one or two showings, normally on weeknights.³⁵

On the other hand, the Eighth Circuit concluded that an accommodation that would have cost \$95 per week was an undue burden on an enterprise whose operating revenue was \$9500 per month. *Roberts v. Kinder Care Learning Ctrs, Inc.*, 86 F.3d 844, 846 (8th Cir. 1991). Somewhere in the middle is the puzzling case of *Alford v. City of Cannon Beach*, a case arising out of an Oregon district court in which the court states that the appropriate financial variable is gross revenue. No. CV-00-303-HU, 2002 WL 31439173, at *9 (D. Or. Jan. 15, 2002). The court further states that the question of whether an accommodation that would cost 2.7% of gross revenue is an undue burden is a question of fact, but that because the accommodation would consume over 60% of net revenue, it was unreasonable. *Id.* Suffice it to say that the sparse case law on the subject provides little guidance to courts, businesses, claimants, or their attorneys.

³² H.R. REP. NO. 101-485 (II), at 108 (1990), reprinted in 1990 U.S.C.A.N. 303, 391.

³³ *Id.*

³⁴ *Captioned Movie Access Advocacy-Timeline*, NAT’L ASS’N DEAF, <http://www.nad.org/issues/technology/movie-captioning/timeline> (last visited Jan. 31, 2011) [hereinafter NAT’L ASS’N DEAF]; *Tripod Captioned Films Timeline, 1993–1999* (on file with author); Alma Freeman, *A Year of Insight*, IN FOCUS, Nov. 2003, <http://www.natoonline.org/infocus/03november/insight.htm>.

³⁵ *Cornilles v. Regal Cinemas*, No. Civ. 00-173-AS, 2002 WL 31440885, at *6 (D. Or. Jan. 3, 2002) (noting the limited availability of open-captioned films and also explaining that the

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Captioning technology changed dramatically in 1997 when the Media Access Group at WGBH public television in Boston developed and patented the Rear Windows Captioning System ("RWC"). The captions are displayed in mirror image on an LED reader-board mounted on the rear wall of the theater. Patrons wishing to see the captions pick up a transparent plastic reflector—about the depth and twice the width of an automobile rear-view mirror—mounted on a flexible gooseneck that either sits on the floor or fit into the cup-holder. By adjusting the reflector, viewers can place the captions either directly below or actually on the movie print.³⁶ These are "closed" captions, visible only to people who requested the reflector.³⁷ Notably, RWC does not require a separate film print. The captions are placed on a computer disc distributed free of charge to theaters. All a theater must do is simply install the necessary equipment and pay an annual licensing fee.³⁸

Shortly thereafter, a system was developed to show open captions without requiring a separate print. Under this method, the captions, contained on the same compact disc as the closed captions, are projected from a separate projector and superimposed on the screen.³⁹ The captions can be either turned on or off for any given showing.⁴⁰ While some people with hearing loss have favored open captions,⁴¹ the theaters believe that hearing audiences find open captions distracting and undesirable.⁴² As a result, those theaters showing open-captioned

defendants showed every available open-captioned film for as long as the film was available, which resulted in captioned films at least "once a month" in Portland, Oregon).

³⁶ See *Making Movie Theatres Accessible to Disabled Audiences*, WGBH NAT'L CENTER FOR ACCESSIBLE MEDIA (Nov. 13, 2010), <http://ncam.wgbh.org/mopix/> (providing a picture of RWC in operation).

³⁷ *Ball v. AMC Entm't, Inc.*, 315 F. Supp. 2d 120, 122 (D.D.C. 2004).

³⁸ *Id.* at 123.

³⁹ See *DTS Access: FAQ for Patrons*, MANN THEATRES (Nov. 13, 2010), <http://www.manntheatres.com/docs/dts-css-faq.pdf> (describing the system, which is known as DTS-CSS).

⁴⁰ *Id.*; see *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 668 (9th Cir. 2010) (accurately describing modern open captioning but erroneously suggesting that captions are turned on or off depending upon patron request); see also *Making Movie Theatres Accessible to Disabled Audiences*, *supra* note 36 (explaining that most theaters that use open captions determine in advance which showings will be captioned and which will not and advertise the captioned showings in advance).

⁴¹ *Ball*, 315 F. Supp. 2d at 127 (describing objections to proposed settlement calling for closed captioning).

⁴² Comments of National Association of Theatre Owners, Notice of Proposed Rulemaking, CRT Docket No. 106, 13–14 (Aug. 18, 2008) [hereinafter National Association of Theatre Owners Comments], available at <http://www.regulations.gov/#!documentDetail;D=DOJ-CRT-2008-0015-2646> (last visited Dec. 22, 2010) ("Both open and closed captioning currently entail significant costs—the former primarily as a function of

movies do not utilize the captions for every showing but instead offer limited show times, generally at off-peak hours.⁴³

As the display methods were developed and improved, more studios began cooperating with WGBH by furnishing advance copies of their movies. This allowed WGBH to prepare the captions in time for the movie opening. As a result, the number of movies available with captions has increased dramatically, rising from a total of two releases in 1997, including *The Jackal* and *Titanic*,⁴⁴ to virtually all major-studio releases today.⁴⁵

demonstrable rejection of captioned movies by patrons without a hearing disability, and the latter primarily as a function of the substantial cost of the technology itself.”).

These comments were made in response to a 2008 proposal to require some form of movie captioning. At that time, the DOJ deferred the question, but currently the DOJ is raising the movie-captioning issue again in the Advance Notice of Proposed Rulemaking discussed later in this Article.

⁴³ The great majority of open-captioned movies are shown by theaters owned and operated by Regal Cinemas, the nation’s largest theater circuit, which operates under the names Regal, Edwards, and United Artists. A nationwide listing of captioned movies is available online at <http://www.regmovies.com/nowshowing/opencaptionedshowtimes.aspx> (last visited Jan. 31, 2011). Regal generally shows open-captioned rather than closed-captioned movies. It has equipped roughly 190 of its 560 theater complexes with some captioning capability. This normally includes a single auditorium, and never more than two auditoriums. Thus, roughly 200 of its 6739 auditoriums, or a shade less than 3%, are equipped to show open-captioned movies.

Regal’s normal pattern is twelve open-captioned showings per week. It usually shows the first movie of the day on Friday—normally a late-morning movie. On Saturday, the mid-afternoon showing is captioned. On Sunday, the late-morning and late-evening (usually beginning at 9 p.m. or later) shows are captioned. On Monday and Wednesday, the late-morning and “prime time” evening show is captioned. On Tuesdays and Thursdays, the captioned shows are the mid-afternoon and the late evening showings. With no evening and only one afternoon showing on weekends, this schedule is not particularly appealing to working families with children.

This pattern arose as a result of Regal’s settlement with the New Jersey Attorney General, who required Regal to present four captioned showings each weekend, including one evening showing. Settlement Agreement at 3–4, *Harvey v. Anschutz Corp.*, No. C-97-04 (N.J. Super. Ct. Ch. Div.) (on file with author). But the agreement defined “weekend” as Friday, Saturday, and Sunday, and defined “evening” as any show beginning after 5:30 p.m. and before 10 p.m. *Id.* at 3. Regal satisfied the letter, if not the spirit, of the agreement by choosing the last Sunday evening showing—generally beginning after 9 p.m.—as its weekend evening show.

⁴⁴ For information about movies available with captions, see the Media Access Group website, available at <http://ncam.wgbh.org/mopix/aboutproject.html> (last visited Jan. 30, 2011).

⁴⁵ All movie captioning today is done by businesses affiliated with WGBH. E-mail from Mary Watkins of WGBH, to author, (Oct. 5, 2010: 3:33 PM) (on file with author); see *All MoPix Films*, WGBH NAT’L CENTER FOR ACCESSIBLE MEDIA (Nov. 13, 2010), <http://ncam.wgbh.org/mopix/mopixmovies.html> (listing the current releases and all past releases for which captions have been prepared).

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III. THE COURTS AND MOVIE CAPTIONING: EARLY CASES, MIXED RESULTS

When the theaters were slow to install and use captioning equipment, people with hearing loss went to court. In the first case, *Cornilles v. Regal Cinemas*,⁴⁶ the plaintiffs were nothing if not ambitious. Plaintiffs sought to certify a class of “[a]ll deaf individuals in the United States,”⁴⁷ and asked that all theaters owned by three major corporations be required to install the RWC system or a comparable auxiliary aid.

The case was dismissed on summary judgment. Although the magistrate’s recommendations contained an array of debatable legal conclusions,⁴⁸ the dispositive fact was that, at the time of the trial, all the defendants were obtaining and showing every open-captioned film available for as long as the print was available to them.⁴⁹ Even though that resulted in only one captioned showing per month, the magistrate found that more movies were available in the open-captioned format than the RWC format.⁵⁰ Moreover, the theaters successfully introduced another complicating factor: their plan to abandon film altogether and receive and display films using digital technology. Therefore, the theaters asserted that this would render RWC obsolete.⁵¹ The magistrate thus concluded that it would be “unduly burdensome” to force the theaters to make the RWC format available “when such action will not immediately increase the number of films available to Plaintiffs and

⁴⁶ *Cornilles v. Regal Cinemas*, No. Civ. 00-173-AS, 2002 WL 31440885 (Jan. 3, 2002) (magistrate’s recommendations on motion for summary judgment), *adopted in part*, 2002 WL 31469787 (March 19, 2002); *see also* *Cornilles v. Regal Cinemas*, No. Civ. 00-173-AS, 2000 WL 1364236 (D. Or. Sept. 12, 2000) (decision ruling on a motion to dismiss).

⁴⁷ *Cornilles*, 2000 WL 1364236, at *1.

⁴⁸ *Cornilles*, 2002 WL 31440885, at *6.

⁴⁹ *Id.* The *Cornilles* court’s acknowledgment that the ADA only requires physical access to the facility and that the theater’s “inventory,” which the ADA does not regulate, consists only of non-captioned films, appears no longer to be valid in light of *Arizona ex. rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666 (9th Cir. 2010). The “inventory” argument, however, may have been defensible at the time when showing a captioned movie required the theater to obtain a separate print.

⁵⁰ *Cornilles*, 2002 WL 31440885, at *7.

⁵¹ For an extensive discussion on the digital-conversion issue, see the Department of Justice’s Advance Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Disability, Movie Captioning and Video Description, 75 Fed. Reg. 43,467, 43,473 (proposed July 26, 2010) (to be codified at 28 C.F.R. pt. 36); *Digital Projection in Theaters Slowed By Dispute*, NAT’L PUB. RADIO (March 21, 2007), <http://npr.org/templates/transcript/transcript.php?storyId=9047637>. The NPR report notes that replacing 35mm film with digital data transmitted over the internet would save the movie studios substantial sums of money, and that as a result, the studios and theaters were arguing over how the cost of converting theaters to digital projection should be shared.

when the technology installed may become obsolete in the next three to five years.”⁵²

The district court only adopted the magistrate’s recommendation related to ultimate cost, declaring that “anticipated costs of \$6 million to \$36 million per defendant is unreasonable as a matter of law.”⁵³ Although the court noted that this finding was made in the context of limited availability of RWC product and advancing technology, the blanket assertion that the costs were an undue burden as a matter of law—a statement made without any form of economic analysis—has the unfortunate result of broadening rather than narrowing the case holding.

Plaintiffs fared considerably better in another captioning case, arising out of the U.S. District Court for the District of Columbia, by reducing the scope of their demand.⁵⁴ In *Ball v. AMC Entertainment*,⁵⁵ the plaintiffs restricted their complaint to the Washington, D.C. metropolitan area and asked only that “a fair number of” screens be equipped to show RWC movies.⁵⁶ Additionally, the plaintiffs conceded that the theaters were neither required to caption the movies nor restricted to showing movies for which captions were available—the demand was only that the theaters obtain and use the caption disc when they showed movies for which captions were available.⁵⁷

The district court denied the defense’s motion for summary judgment. The court ruled that nothing in the ADA or the implementing regulations precludes requiring closed-captioned movies.⁵⁸ The court rejected the argument that the theater’s “goods and services” are non-captioned movies, stating that closed-captioned movies do not change the movie-going experience for other viewers and therefore do not affect the services offered to the public.⁵⁹ The court acknowledged that the question of whether showing captioned movies would impose an undue burden was a factual question, and proceeded to reject the premise supported by the *Cornilles* case that captioning could be an undue burden as a matter of law. The court went on to distinguish *Cornilles* by

⁵² *Cornilles*, 2002 WL 31440885, at *7.

⁵³ *Cornilles v. Regal Cinemas*, 2002 WL 31469787, at *1 (D. Or. Mar. 12, 2002).

⁵⁴ See generally Comment, *Civil Rights – Americans with Disabilities Act – District Court Approves Settlement Requiring Movie Theaters To Provide Closed Captioning for Deaf and Hard-Of-Hearing People*—*Ball v. AMC Entertainment Inc.*, 315 F. Supp. 2d 210 (D.D.C. 2004), 118 HARV. L. REV. 1777 (2005) (articulating the view that litigation success was inversely related to the scope of the requested relief was set out persuasively in Comment).

⁵⁵ 246 F. Supp. 2d 17 (D.D.C. 2003).

⁵⁶ *Id.* at 21 n.10. The court subsequently approved the settlement after a fairness hearing. *Ball v. AMC Entm’t Inc.*, 315 F. Supp. 2d 120 (D.D.C. 2004).

⁵⁷ *Ball*, 246 F. Supp. 2d at 21 n.10.

⁵⁸ *Id.* at 24.

⁵⁹ *Id.* at 25–26.

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noting that while the plaintiffs in *Cornilles* asked that all theaters in the country be equipped to show captioned movies, the plaintiffs in the case at bar limited their request to a "fair number" of theaters in a discrete geographic area.⁶⁰

After the court denied summary judgment, the parties began negotiations and eventually agreed that defendants would install six RWC units in their theaters within twelve months, along with six additional units in the following twelve months.⁶¹ Because it was a class-action case, the settlement was subject to a fairness hearing, where it came under considerable fire from a number of individuals and organizations representing the deaf community.⁶²

The principal objection was to RWC as the selected accommodation; many of the protestors preferred open captions.⁶³ The court dismissed the objections and approved the settlement, noting first that the adverse legislative history would make it difficult for any court to require open captioning.⁶⁴ While conceding that RWC might not provide a deaf individual with a movie-going experience equal to that of a hearing person,⁶⁵ the court said the settlement would provide greater access to movies in the Washington D.C. metropolitan area than was available anywhere else and could potentially "set the standard for what other communities, at a very minimum, should be offering."⁶⁶

The hope that other courts would view the *Ball* case settlement as a minimum standard did not materialize. In *Todd v. American Multi-Cinema, Inc.*,⁶⁷ the plaintiffs again got overly ambitious. Not only did they ask that all theaters be equipped to show captioned movies, but they also sued the movie studios themselves, contending that the failure to caption all their films was a denial of the First Amendment rights of people with hearing loss. After dismissing the suit against the movie studios,⁶⁸ the court granted summary judgment to the movie theaters, declaring that the plaintiffs had not introduced specific evidence to refute the defendants' assertions that captioning would constitute an undue burden.⁶⁹ Then, as an alternative holding, the court said that the

⁶⁰ *Id.* at 26 & n.22.

⁶¹ *Ball*, 315 F. Supp. 2d at 126 (ruling on fairness hearing).

⁶² *Id.* at 124-25.

⁶³ *Id.* at 127.

⁶⁴ *Id.* at 129-30.

⁶⁵ *Id.* at 132.

⁶⁶ *Id.*

⁶⁷ 2004 WL 1764686 (S.D. Texas, Aug. 5, 2004).

⁶⁸ *Todd v. Am. Multi-Cinemas, Inc.*, 222 F.R.D. 118, 123 (S.D. Texas 2003) (ruling on motion to dismiss).

⁶⁹ *Todd*, 2004 WL 1764686, at *4. The court noted that it would cost Regal Cinemas, the nation's largest theater chain, an estimated \$76,837,500 to equip all of its theaters to show

ADA requires only equal physical access but not equal enjoyment, a conclusion that seemingly ignores the requirement for auxiliary aids and services.⁷⁰

Over the next two years, settlements in movie-captioning cases brought by the New Jersey and New York attorneys general required defendant theaters to equip one screen in most of their multiplexes to show captioned films.⁷¹ In retrospect, it appears that the states settled for too little, particularly given the fact that the theaters were reporting a robust financial condition to their investors yet pleading poverty at the same time to the courts. Evidently, when the states generally balanced the expense and time of litigation and the possibility that a court might adopt the *Todd* no-captioning rationale, they decided to settle for what the theaters were willing to give. Essentially, all the theaters voluntarily would do what they had already agreed to do in the *Ball* case. Contrary to the *Ball* court's hope, the agreement in that case effectively set a ceiling, rather than a floor, on movie access.⁷²

captioning. *Id.* Yet in 2003, the year prior to the court's opinion, Regal paid dividends of \$789.3 million—ten times the amount of converting every theater to show captioned movies. Regal Entertainment Group, Annual Report (Form 10-K) (March 16, 2004), at 6. Also, between 1997 and 2003, Regal had spent over \$2 billion to upgrade and expand their theaters. *Id.* A more searching inquiry into the “undue burden” claim might have raised the question of whether expenses that can be covered by a fractional reduction in dividends can ever be construed as an “undue burden,” much less declared to be so essentially as a matter of law simply because the cost involved is significant.

⁷⁰ *Todd*, 2004 WL 1764686, at *4. The court bolstered that conclusion by citing the legislative history to the effect that theaters are encouraged—but not required—to show captioned movies, and said that if the ADA were interpreted to require captioning, then it would be mandatory rather than permissive. *Id.* This appears to be a situation where ambiguous legislative history was given precedence over statutory language.

⁷¹ The New Jersey case required thirty-nine closed-captioned installations at thirty-five different movie complexes and one open-captioned installation at each Regal multiplex with ten or more screens. The New York settlement resulted in roughly 3% of the state's movie screens being equipped to show captioned movies. NAT'L ASS'N DEAF, *supra* note 34 (information is accessible by scrolling down to the year labeled “2005”).

⁷² A recent settlement in a Massachusetts case brought by that state's attorney general ups the ante but only a little. It provides that theaters will equip 10% of their auditoriums to show captioned films, rounded up to the nearest whole number. *Three National Movie Theater Chains Agree to Increase Accessibility for Hearing and Visually Impaired* (July 29, 2010), http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2010_07_29_movie_theater_agreements&csid=Cago (displaying the settlement agreements at hand). Although not finalized until July 29, 2010, the attorney who worked on the case informed the author that in fact, the terms were negotiated prior to the Ninth Circuit decision in the *Harkins* case discussed *infra* notes 80–85 and accompanying text, the first appellate court case to deal with movie captioning. At the time of the negotiations, then, Massachusetts had to acknowledge that the lower-court decision in the *Harkins* case, which said that theaters have no obligation whatsoever to provide captioning, might be affirmed, a possibility that significantly moderated the attorney general's settlement

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IV. THE COURTS AND MOVIE CAPTIONING: THE TIDE TURNS

If it were possible to find a worse movie-access case than *Todd* from the point of view of people with hearing loss, it came from an Arizona district court in a case brought by that state's attorney general: *Arizona ex. rel. Goddard v. Harkins Amusement Enterprises, Inc.*⁷³ The state in that case alleged that the Harkins theater chain violated both the ADA and state disability law by failing to provide either captioned movies or descriptive videos for the visually impaired.⁷⁴ The court granted a motion to dismiss for failure to state a claim. Without reaching the undue burden question,⁷⁵ the court declared that the ADA does not require businesses to alter their mix of products or services. The court relied on several cases stating that the ADA does not regulate the content of insurance policies.⁷⁶ Furthermore, each of those aforementioned cases in turn cited the DOJ commentary to the effect that the ADA does not require bookstores to stock Braille books, thus further supporting the court's overall conclusion that the ADA does not require an alteration of products or services.⁷⁷ The court explained that, in the case at bar, captions would alter movies by converting auditory elements into visual,⁷⁸ thereby altering the composition of the theater's inventory. Additionally, relying on both the legislative history and regulatory interpretations stating that the ADA does not require open-captioned movies, the court ultimately concluded that the ADA also did not require closed-captioned movies.⁷⁹

position. Telephone Interview with Adam Hollingsworth, Assistant Attorney General, Civil Rights Division, Massachusetts (Aug. 10, 2010).

⁷³ 548 F. Supp. 2d 723 (D. Ariz. 2008), *aff'd in part, rev'd in part*, 603 F.3d 666 (9th Cir. 2010).

⁷⁴ *Harkins Amusement Enters.*, 548 F. Supp. 2d at 726. Video descriptions augment the soundtrack by providing descriptions of what is happening on the screen during natural pauses in the dialogue. *Id.* at 729. The descriptions are heard through headsets available upon request to visually impaired patrons. *Id.*

⁷⁵ *Id.* at 727. For purposes of the motion to dismiss, defendants did not argue that providing captions and descriptions would constitute an undue burden. *Id.*

⁷⁶ See generally *id.* (citing *McNeil v. Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000), *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000), and *Doe v. Mutual of Omaha Ins., Co.*, 179 F.3d 557 (7th Cir. 1999)). The author has been unable to locate any cases dealing with the product-content question that arose in any context other than claims that a provision in an insurance policy was discriminatory.

⁷⁷ *Id.* at 728–29. This DOJ commentary to the effect that retailers do not need to alter their inventory to provide products accessible to people with disabilities has provided the basis for the so-called “inventory” argument that the theaters have used in every movie-captioning case.

⁷⁸ *Id.* at 729.

⁷⁹ *Id.* at 731.

Nevertheless, on appeal, the Ninth Circuit reversed important aspects of the district court's decision.⁸⁰ The Ninth Circuit articulated that, while the ADA may not generally regulate the content of goods or services sold, the specific requirement to provide auxiliary aids and services is an exception to that general rule.⁸¹ Therefore, captions and descriptions are mandated by the ADA unless the theater can demonstrate that providing captions and descriptions constitute a fundamental alteration or impose an undue burden.⁸² Without taking an explicit position on whether the legislative history's reference to open captions overrode the statutory requirement that auxiliary aids and services be provided,⁸³ the court held that theaters are entitled to rely on the DOJ's statements that open captions are not required⁸⁴ until and unless that position changes. Moreover, the court further held that the possible distraction open captions could pose for a hearing audience would provide a rational basis for treating the forms of captioning differently. Therefore, the *Harkins* court ultimately concluded that open captions are not required.⁸⁵

A critical factor in the *Harkins* case is that the DOJ filed an amicus curiae brief on the side of the plaintiffs.⁸⁶ While being deliberately vague about open captioning,⁸⁷ the DOJ argued that closed captions, which are auxiliary aids and services within the meaning of the ADA,⁸⁸ are merely a means by which a theater's service of screening movies is delivered and do not alter the content of the service.⁸⁹ The DOJ also took sharp issue with the theaters' efforts to analogize their situation to a bookstore

⁸⁰ *Arizona ex rel Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666 (9th Cir. 2010).

⁸¹ *Id.* at 672.

⁸² *Id.* at 675.

⁸³ The Department of Justice's amicus brief, discussed *infra* notes 84, 86-90 and accompanying text, was equally vague on the open-caption question.

⁸⁴ The explicit statement that open captions are not required is contained in the explanatory appendix stating that "[m]ovie theaters are not required by § 36.303 to present open-captioned films." Brief of United States as Amicus Curiae Supporting Appellants and Urging Reversal at 8, *Harkins Amusement Enters.*, 603 F.3d 666 (No. 08-16075), available at <http://www.justice.gov/crt/about/app/briefs/azharkins.pdf>.

⁸⁵ *Harkins Amusement Enters.*, 603 F.3d at 673.

⁸⁶ Brief of United States as Amicus Curiae Supporting Appellants, *supra* note 84, at 8.

⁸⁷ See *id.* at 12, 26. Noting that open captioning, at the time of ADA's passage, required physical possession of one of the limited numbers of separate captioned prints, the DOJ stated that the appellate court should not apply "the House Report's outdated discussion of open-captioning to all types of presently available captioning," at least hinting that the legislative history in the House Report might not even preclude requiring modern open captioning. *Id.* at 26.

⁸⁸ *Id.* at 12.

⁸⁹ *Id.* at 17.

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not being required to stock Braille books. The DOJ explained that because the studios supply the captions on discs, the theaters' "inventory" is in fact captioned movies. The appropriate analogy, the DOJ argued, was to a bookstore that had Braille books in stock but refused to sell them.⁹⁰

The *Harkins* case was remanded for further proceedings. While the appellate opinion stated that the theaters could raise both the fundamental alteration and undue burden defenses,⁹¹ the DOJ stated explicitly in its amicus filing that closed captions "in no way alter a theater's service (i.e., screening movies) for persons without sensory disabilities."⁹² Assuming the DOJ adheres to that position and that its interpretation receives appropriate deference from the lower court, the issue on remand appears to be one of simple economics—how much can the theaters afford to spend to provide captioning?⁹³

⁹⁰ *Id.* at 21.

⁹¹ *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 675 (9th Cir. 2010).

⁹² *Id.*; Brief of United States as Amicus Curiae Supporting Appellants, *supra* note 84, at 30.

⁹³ The outcome was essentially identical in a similar movie-captioning case filed in Washington State by the Washington State Communication Access Project, a non-profit membership corporation, against five corporate theater owners in King County (metropolitan Seattle). See Plaintiff's Motion for Partial Summary Judgment Against Defendants Regal, AMC, Cinemark, Silver Cinemas and Lincoln Square, Wash-CAP v. Regal Cinemas, Inc., No. 09-2-06322-2-SEA (King Cty. Super. Ct. Feb. 24, 2010) (on file with author); Wash-CAP v. Regal Cinemas, Inc., No. 09-2-06322-2-SEA (King Cty. Sup. Ct. May 4, 2010) (order granting in part and denying in part Plaintiff's motion for summary judgment) (on file with author). The author represented the plaintiff in that case. The case relied exclusively on Washington State's Law Against Discrimination. *Id.* (utilizing WASH. REV. CODE ANN. §§ 49.60-.60.401 (West 2008)). The case also relied on the statute's implementing regulations, which require public businesses like movie theaters to make "reasonable accommodation to the known physical, sensory, or mental limitations of a person with a disability." WASH. ADMIN. CODE § 162-26-080(1) (2011). According to the statute, reasonable accommodation is defined as "action, reasonably possible in the circumstances, to make the regular services of a place of public accommodation accessible," and "accessible" is defined as "usable or understandable." *Id.* § 162-26-040(2).

The ADA is explicitly non-preemptive. 42 U.S.C. § 12201(b) (2006) ("Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter."). Washington also takes a very strong position to the effect that its state law is separate from and independent of the ADA, legislatively nullifying the state supreme court's attempts to give ADA decisions controlling effect in interpreting state law. See WASH. REV. CODE ANN. § 49.60-.60.401 (West 2008) (repudiating through legislation state supreme court decision *McClarty v. Totem Electric*, 137 P.3d 844 (Wash. 2006) and affirming the independent nature of state law). Although the *Harkins* case was on appeal, we took the position that its resolution should not affect the decision in our case.

V. THE DEPARTMENT OF JUSTICE PROPOSES A CAPTIONING RULE

In July of 2010, and apparently timed to coincide with the twentieth anniversary of the ADA's passage,⁹⁴ the DOJ issued an Advance Notice of Proposed Rulemaking concerning movie captioning⁹⁵ that was consistent with the approach it took in the *Harkins* case. In its Advance Notice, the DOJ proposed a requirement that half of all theater screens be equipped to show closed-captioned and video-described movies over a five-year period, which would require modification of about 10% of theater screens per year.⁹⁶

The DOJ noted that approximately 88% of the first-run movies released by major studios are captioned, but only 1% or less of the movie showings across the country are captioned.⁹⁷ This discrepancy between availability and deployment of captions exists, according to the DOJ, because the theaters have not purchased and installed the necessary display equipment.⁹⁸ The DOJ recognized that the captioning question has become intertwined with the pending industry conversion to digital display, in which motion pictures cease to exist as film and instead become digital files.⁹⁹ The theaters generally request that any captioning requirement be abated pending that conversion, partly because captioning may be less expensive when done with digital projection. Indeed, open captioning costs nothing. Additionally, theaters wish to

The court in *Wash-CAP* granted plaintiff's Motion for Partial Summary Judgment, agreeing that the defendant theaters were required to do what was reasonably possible to make the movie soundtracks understandable, which the court will determine after a trial on the merits. *Wash-CAP*, No. 09-2-06322-2-SEA, at 3-4 (order granting in part and denying in part Plaintiff's motion for summary judgment). The *Harkins* decision was released four days previous to the King County decision, but the judge indicated to the parties in our case that she was ready to rule and that further briefing on the *Harkins* decision would not be useful. *Id.*

While the question of what is "reasonably possible in the circumstances" appears to have both technical and economic dimensions, the availability of multiple forms of captioning suggests that there are no technical barriers to making soundtracks understandable and therefore the question in the *Wash-CAP* case will essentially be the same question as is presented by the *Harkins* remand—how much can the theaters afford?

⁹⁴ The proposed regulations first appeared online on July 23, 2010, the day the Department of Justice had a number of events to commemorate the passage of the ADA. Dep't of Justice, *Disability Rights Online News*, ADA (Sept. 2010), <http://www.ada.gov/newsltr0910.pdf>.

⁹⁵ See Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. 43,467 (proposed July 26, 2010) (to be codified at 28 C.F.R. pt. 36) (notifying the public about the regulations).

⁹⁶ *Id.* at 43,474.

⁹⁷ *Id.* at 43,472-73.

⁹⁸ *Id.* at 43,473.

⁹⁹ *Id.*

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postpone the captioning requirement due to some uncertainty about whether the equipment used to show captions in a film format can be used with digital projection.¹⁰⁰ In response, however, the DOJ explained that digital conversion has been anticipated for many years, yet its ultimate timing remains open to question. In essence, while the DOJ acknowledged that digital conversion would facilitate captioning and that captioning can be provided in either the film or digital format, it ultimately concludes that access should not be delayed until the conversion occurs.¹⁰¹

Many individuals and organizations who advocate for people with hearing loss were pleased that the DOJ was actively involving itself in the movie-captioning issue, but were puzzled by the proposal's implicit statement that 50% access will be "good enough."¹⁰² Under the language of the ADA, the obligation to provide auxiliary aids and services persists "unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden."¹⁰³ By placing the burden squarely on the entity alone, it seems abundantly clear that the ADA calls for individualized determinations of whether each specific company would find that providing the requisite aids and services is unduly burdensome for any particular business.

The rub, obviously, is that while the structure of the statute is clear, the words "undue burden" provide very little guidance. As noted previously, Congress might as well have said, "do this unless it would cost too much."¹⁰⁴ Not surprisingly, opinions about how much expense is "too much" vary considerably, depending on whether one would be burdened by the expense or benefited by the resulting accommodation. While the DOJ has, through regulation, provided a laundry list of factors

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² The DOJ also published updated Title III regulations. As part of its economic analysis, the DOJ noted that increased accessibility has important but intangible benefits for people with disabilities by reducing "feelings of being stigmatized as different or inferior from being relegated to use other, less comfortable or pleasant elements of a facility." Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,244 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 36). The author has some difficulty reconciling the acknowledgement that lesser treatment is inherently stigmatizing and therefore damaging, with a proposal that would permit theaters to effectively exclude individuals with hearing loss from half of their facilities.

¹⁰³ 42 U.S.C. § 12182(b)(2)(A)(iii) (2006).

¹⁰⁴ See 28 C.F.R. § 36.104 (2010) (providing that the regulatory definition of "undue burden" is "significant difficulty or expense"). The regulation provides alternate verbiage but no greater clarity. *Id.*

that should be considered,¹⁰⁵ none of those factors suggest answers to the ultimate question of how much is too much. Consequently, facilities asked to provide aids and services can and do say with perfect sincerity that the cost would impose an “undue burden,” with an emphasis on the “burden” part, while parties requesting the accommodation can and do say with equal sincerity that although the aids and services are not free, the burden of providing them is not “undue.”

The result of this standardless defense is extraordinarily high transaction costs relative to the expense of the benefit ultimately provided. In the *Ball* case, for example, the theaters ultimately agreed to equip sixteen theaters to show captioned films. Based on estimates that the theaters used in other cases,¹⁰⁶ that cost would have been roughly \$12,500 per theater, or \$200,000 total.¹⁰⁷ Yet, according to the *Ball* court’s decision at the fairness hearing, the defendants agreed to pay the plaintiffs’ attorneys’ fees of \$260,000 in addition to what they paid their own attorneys.¹⁰⁸ Thus, the defendants spent considerably more on legal fees than they ultimately spent on access.

Because of the high transaction costs, an impulse to create a transparent and readily applied performance test as a measure of the theater’s obligations is understandable and highly laudable. But that desire for transparency and ease of administration cannot justify

¹⁰⁵ 28 C.F.R. § 36.104 (2010). The regulation provides the following:

Undue burden means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered include—

- (1) The nature and cost of the action needed under this part;
- (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Id.

¹⁰⁶ *Todd v. American Multi-Cinema, Inc.*, 2004 WL 1764686, at *2 n.5 (S.D. Tex. Aug. 5, 2004).

¹⁰⁷ *Id.*

¹⁰⁸ *Ball v. AMC Entm’t, Inc.*, 315 F. Supp. 2d 120, 126 n.12 (D.D.C. 2004).

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scuttling the individualized, resource-based “undue burden” standard¹⁰⁹ and substituting a performance-based standard that might require too much of some firms and too little of others. Instead, the DOJ ought to look for a transparent test based on the regulatory definition of “undue burden” as involving “significant” expense. The author believes such a resource-based standard can be developed.

In its most recent revision of the Title III regulations, the DOJ proposed a small-business “safe harbor” provision related to the statutory requirement that businesses remove architectural barriers in existing buildings where doing so is “readily achievable.” The proposal was to define “readily achievable” as being 1% or less of the business’s gross annual revenue.¹¹⁰ The DOJ abandoned the proposal, somewhat reluctantly, it appears,¹¹¹ for a number of reasons. First, both industry and advocacy groups were opposed; the former because they believed 1% of gross revenue was “too substantial,”¹¹² and the latter because they believed it would permit some small businesses to do less than they could readily achieve.¹¹³ Second, there was a concern that any revenue-based yardstick would become a floor as well as a ceiling, possibly leading to demands for the removal of insubstantial barriers simply because the establishment had spent less than the safe harbor amount.¹¹⁴ Third, there was a concern that the plan would require significant record-keeping and that disclosure of the relevant financial information could be burdensome and intrusive.¹¹⁵ Finally, there was a concern that applying the same financial yardstick to different industries with very different economics would produce unfair and arbitrary results.¹¹⁶

¹⁰⁹ In the controversial case of *Sutton v. United Airlines*, the Supreme Court stated that the determination of whether an individual was “disabled” within the meaning of ADA demanded an individualized inquiry, and said that DOJ guidelines were invalid because they would treat certain conditions on a generalized, group basis rather than as individuals. 527 U.S. 471, 483 (1999). Although Congress legislatively overturned the *Sutton* results in the ADA Amendments Act of 2008, the case still stands for the limited proposition that the DOJ cannot substitute a generalized approach when ADA requires individualized, case-by-case decision-making. See 42 U.S.C. § 12101(a)(4) (Supp. II 2008); *Sutton*, 527 U.S. at 483.

¹¹⁰ Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,293 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 36).

¹¹¹ *Id.* at 56,295.

¹¹² *Id.* at 56,294.

¹¹³ *Id.* After thirty years as a practicing attorney, the author has come to believe that equally fervent opposition from both sides may indicate that a proposal has considerable merit.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Although a revenue-based safe harbor might have been an unworkable standard for defining the obligation of many different types of small businesses to remove barriers, those difficulties largely disappear in the very specific context of movie captioning. The author therefore urges the DOJ to strongly consider declaring that a fixed percentage of gross revenue spent to install and maintain captioning equipment is presumptively a “due,” rather than an “undue” burden, and is therefore presumptively required under the ADA.

The business community’s principal objection to the proposed safe harbor provision is that it is based on gross revenue, and a more reasonable approach would be a safe harbor based on net revenue “so that operating expenses are offset.”¹¹⁷ That objection, however, misses the fundamental point that providing access is, in itself, an operating expense or a cost of doing business. Moreover, net revenue is an elusive concept subject to considerable variation depending upon the way the business is organized and the accounting method used. Many small businesses never actually show a net profit—they spend what they make, much of it on salaries.¹¹⁸

As the DOJ suggested,¹¹⁹ and with which the author concurs, any revenue-based standard should be nothing more than a rebuttable presumption. A business that cannot spend the presumptive amount would be free to assert that doing so would constitute an undue burden. Still, that business would continue to bear the burden of proof on that issue, just as is the case presently under the statute. If, on the other hand, the business had spent the presumptive amount, the burden would then shift to the claimant to demonstrate that spending more would not constitute an undue burden. This approach would not override the statutory “undue burden” standard, but it would provide some guidance to the courts when answering the critical question embodied in the statutory standard regarding how much is “too much.”

If a rule based on gross revenue were adopted, the obvious question becomes what that rule should be, or in other words, how much is “too much.” The DOJ’s 1% proposal related to the removal of architectural barriers, which the ADA requires only to the extent “[r]eadily achievable,” a standard the DOJ defines in its regulations as capable of being “carried out without much difficulty or expense.”¹²⁰ “Undue burden,” though, clearly requires more, as the regulations define it as

¹¹⁷ *Id.* at 56,294.

¹¹⁸ *Id.* at 56,295.

¹¹⁹ *Id.* at 56,294.

¹²⁰ 28 C.F.R. § 36.104 (2009).

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“significant difficulty or expense.”¹²¹ Although neither the statute nor any regulations provide specific guidance on what the difference is between “significant expense” and “without great expense,” a 2:1 ratio does not seem unreasonable as a starting point for discussion.¹²² On that basis, the author would propose that an appropriate proportion of gross revenue presumed to constitute an “undue burden” should be 2% annually. A greater expense would presumptively constitute an undue burden; a lesser expense would not.

Any presumptive guideline should both allow and require access expenses to be aggregated and carried forward for a certain period of time, such as three years. If the business in one year spends 6% of its gross revenue on providing access, the business should be able to claim “safe harbor” for three years. Aggregation, however, should work both ways. If a business has spent nothing on access for the prior two years, it should be presumptively required to spend 6% of its gross revenue in the third year.

The effect of such a regulation would be that most, if not all, theaters would become fully accessible. Those theaters with significant revenue and means would do so sooner, and those with fewer resources would do so later. Requiring theaters to become accessible at a pace commensurate with their resources also appears far more consistent with the “undue burden” standard than the non-individualized five-year phase-in proposed by the DOJ. Like the 50% access standard, the five-year phase-in may require too much of some theaters but too little of others.

The concern that any revenue-based presumption would become a “floor” might be a problem when the issue is as generalized as “barrier removal.”¹²³ This is because there may be no end as to how many barriers can be removed. This possibility of spending without end disappears, however, when a revenue-based presumption aims at the very specific requirement of providing auxiliary aids and services. The DOJ can and should make clear that the requirement deals with two things—captioning and video descriptions. When a theater has provided captions and descriptions on all its screens, the only necessary

¹²¹ *Id.*

¹²² The author would note that this suggestion is no more or less arbitrary than the DOJ’s proposal to require that half the movie auditoriums be equipped to show captioned movies, a proposal that seems to have arisen only because it splits the difference between what the people with hearing loss want, which is total accessibility, and what the theaters want, which is no requirement.

¹²³ Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. at 56,294.

expense is repair and replacement. There is no possibility of unknown and never-ending additional demands.

Record-keeping need not be a problem. The large corporate theater owners that are public corporations report extensive financial data pursuant to Securities and Exchange Commission requirements. Other businesses report gross revenue on their tax returns, whether it is a Schedule C to an individual income tax return or a corporate or partnership return. The penalties for tax fraud are such that there is a strong presumption of accuracy on those returns.

The reduction in transaction costs would be immediate and, in all likelihood, complete. A business needing to install captioning and descriptive video equipment would only need to get a cost quote and compare that number to their gross revenue. That comparison would indicate at once whether the cost would be presumptively reasonable, either all at once or spread over a period of time. A business realizing it would be presumptively capable of providing the required equipment would either do so voluntarily or determine whether it could demonstrate extenuating circumstances and rebut the presumption of reasonableness. Conversely, a business that was not even presumptively capable of providing access, or had already spent the presumptively required amounts, could simply produce the tax data and any data on incurred costs to whomever is doing the requesting. Either way, there would be little need or incentive for litigation, reducing the transaction costs to little or nothing and permitting the businesses to spend their money on providing access, rather than fighting access.¹²⁴

Without disputing whether a percentage-of-gross presumption would work for all industries, the author believes it would work well for movie theaters. The reason for this conclusion is that if the requirement is applied uniformly to all theaters, it becomes relatively easy for the theaters to incorporate the uniform costs into their price structure. Additionally, because movie tickets are relatively inexpensive forms of entertainment—generally less than \$10—a 2% price increase is not likely to have any appreciable effect on attendance.¹²⁵

¹²⁴ To further reduce the opportunity for litigation, the DOJ could require a pre-litigation request for financial information, namely, the gross revenue and access-expense numbers for an appropriate number of years, and require appropriate rules of confidentiality. The author's experience has been that if the outcome of potential litigation is essentially foreordained and both parties are aware of that outcome, it is seldom necessary to even file suit.

¹²⁵ Average movie ticket prices went up more than 8% between 2009 and 2010, while total attendance declined only three-tenths of 8%. While much of that increase is attributable to the premium price charged for 3-D movies, the average price for regular 2-D movies went up 4%. Ben Rooney, *3D Movie Tickets Set for Epic Price Hike*, CNNMONEY.COM

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The suggested 2%-of-gross presumption would yield significant and immediate benefits in accessibility. Equipping a theater to show RWC captions in a film costs roughly \$11,000 per auditorium, while other captioning methods cost considerably less.¹²⁶ Regal Cinemas, the nation's largest exhibitor, operated 6,768 separate auditoriums at the end of 2009. Equipping all of those screens to show RWC could cost as much as \$74,448,000. But in 2009, Regal's gross income was \$2.893 billion, 2% of which would be \$57,860,000. Thus, at the 2% of gross figure, Regal could afford to equip all of its theaters to show captioned films in less than two years.¹²⁷

On the other end of the spectrum, the National Association of Theatre Owners states that a typical small, independent movie operator might expect gross annual revenues of roughly \$100,000 per screen.¹²⁸ Spending 2% of that amount per year, or \$2000, could mean that five or more years of spending would be required to caption each screen. In reality, though, such a "Mom and Pop" operation would be eligible for the tax credit of up to \$5000 per year for qualified expenses that provide access, including auxiliary aids and services.¹²⁹ The reduction of the actual cost to \$6000 would make captioning equipment affordable over a manageable time period.

In addition to the possibility of a small price increase, providing access to people not presently able to enjoy a movie will bring in some new patrons, and the cost of the equipment can be recovered over a

(March 25, 2010, 1:59 PM), http://money.cnn.com/2010/03/25/technology/3D_movie_ticket_price_spike/. Those numbers suggest that demand is not particularly sensitive to small price increases. *Id.*

¹²⁶ Equipping a digital theater to show RWC costs about \$9200 per auditorium. E-mail attachment from Mary Watkins, WGBH, to author (June 22, 2010, 2:30 PM) (on file with author). Some of the major theater chains are working on new devices to display closed captions, and while the costs are not firmly established, they will presumably be less than the RWC costs. Showing open captions at a digital theater costs nothing—the theater operator simply selects the captioned package from the menu of digital options, and the captions appear for that showing. E-mail from Mary Watkins, WGBH, to author (Aug. 13, 2010, 2:43 PM) (on file with author) [hereinafter E-mail from Watkins].

¹²⁷ The discussion of how a revenue-based rule might impact Regal appears to be largely academic. In a declaration filed in support of a Motion to Stay the Washington movie-captioning case, *Wash-CAP v. Regal, Cinemas, Inc.*, Regal's Chief Administrative Officer and Counsel Raymond L. Smith, Jr., stated that once a digital cinema closed-captioning system becomes available at a commercially reasonable price, Regal intends to equip all of its first-run theaters with that equipment. Declaration of Raymond L. Smith, Jr., *Wash-CAP*, No. 09-2-06322-2-SEA (King Cty. Super. Ct. filed Jan. 31, 2011) (on file with author).

¹²⁸ National Association of Theatre Owners Comments, *supra* note 42, at 29.

¹²⁹ 26 U.S.C. § 44 (2006). The Internal Revenue Code states that a business with less than \$1 million in annual gross revenue or fewer than thirty full-time employees may receive a credit for 50% of all access-related expenditures exceeding \$250, with a \$10,250 maximum. *Id.*

relatively modest period of time. Regal's published financial data shows an average ticket price of \$8.15 and per-patron concession purchases of \$3.17. Regal keeps, on average, \$3.87 of the ticket price and pays \$4.28 to the distributor. With each additional patron contributing roughly \$7 in incremental revenue, recovering the "worst-case" captioning cost of \$11,000 per screen would require some 1570 additional admissions. Regal's average annual attendance per screen is 36,125, so a 4.3% increase in attendance would recover Regal's cost in one year, and an increase of less than 1% in attendance would recover the "worst-case" costs in less than five years.

In its Advance Notice of Proposed Rulemaking, the DOJ also raised the possibility of allowing theaters to opt for open captioning as a way to satisfy their accessibility obligations. The author believes theaters should not only be permitted but perhaps even encouraged to do so. Although not required either by the *Harkins* decision or the DOJ regulatory interpretations that provided the basis for that decision, open captioning is undeniably effective as a means of communicating aural information to people with hearing loss and is therefore a permissible alternative.

From the theaters' point of view, the potential advantage of open captioning is that it is significantly less expensive than closed captioning. Indeed, for theaters that have converted to digital projection, the cost of open captioning is absolutely nothing. All the theater must do is merely select the captioning package from the menu of digital options for that particular showing, and the captions appear without the need for any special display equipment.¹³⁰ From the perspective of people with hearing loss, open captions can be attractive because there is no need to self-identify, no equipment to check out, and no need to focus back and forth from the caption-display device to the screen.

As the DOJ additionally noted in its Advance Notice, open captioning as deployed today offers only very limited access, as those theaters that do show open-captioned movies engage the captions for only certain showings, generally at less-than-optimal times.¹³¹ The stated basis for limited deployment of open captioning is that at least some portion of the hearing audience shuns captioned movies, and thus attendance at the captioned shows is less than at non-captioned shows.¹³²

Even if the facts are correct, the argument is fundamentally flawed. If the potential patrons who avoid a captioned movie instead attend a different movie at the same theater, or attend the captioned movie at a

¹³⁰ See E-mail from Watkins, *supra* note 126.

¹³¹ See *supra* note 43 and accompanying text.

¹³² See *supra* notes 41–42 and accompanying text.

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time when it is shown without captions, the theater loses nothing. On the other hand, if some of the attendees at the captioned showing are individuals and their companions who would not otherwise attend a movie at all because non-captioned movies are inaccessible, those admissions could represent new revenue that the theaters would not otherwise realize.

Implicit in this argument, though, is the acknowledgement that where open captioning is used, it should not be required for every showing. People who want to see a movie without captions should have that option available to them, and if hearing audiences do indeed shun open-captioned showings, theaters would lose money if they had to engage the captions for every show. But theaters should not be able to relegate all their open-captioned showings to late-morning, late-night, or off-day showings and claim that such an arrangement provides effective access.

The author posits the following as a reasonable measure of accessibility for a theater that elects an open-caption option. First, there should be at least one open-captioned showing per day. Second, the theater should include at least two “prime-time” evening shows—the showing beginning closest to 7:00 p.m.—each week, one of which must be on either Friday or Saturday evening. Third, the theater should include at least two mid-afternoon shows—the show beginning closest to 3:00 p.m.—each week, including one on either Saturday or Sunday afternoon.

As a practical matter, a mix of closed captioning and open captioning offerings may prove both effective and practical. Most multiplex theaters are a mix of large and small auditoriums, the large ones where more popular movies play upon release, and the smaller ones where those movies migrate after they stop selling out in the larger auditoriums. If open captions scare away hearing audiences, then theater owners would likely employ closed captioning in their larger auditoriums during the initial release of the movie. But by the time the films run their course in the large auditoriums, they are no longer filling even those smaller auditoriums. A theater owner might decide that it makes more sense to provide open captions in those auditoriums than to undertake the additional expense of equipping them to show closed-captioned movies. By conspicuously publicizing which showings will be open-captioned, both people who dislike and people who like captioning will be able to plan their movie-going schedules accordingly.

The DOJ ought not let either the legislative history or the *Harkins* decision deter it from permitting open captioning, or even requiring open captioning as opposed to exempting a theater from the requirement

to furnish auxiliary aids and services. As the DOJ argued in its *Harkins* amicus brief, the legislative history in the ADA that suggests that open-captioned movies are not required, can and perhaps should be limited to the situation at the time of the enactment of the ADA, when an open-captioned movie was a completely different thing than the uncaptioned version of the same movie. Furthermore, the *Harkins* decision never suggested that the DOJ could not require at least some open-captioned movies. The decision merely held that because the DOJ had not yet required open-captioned movies, and had a rational basis for not doing so, the theaters could rely on its rule permitting but not requiring open captioning. Yet nothing in the decision suggests that the DOJ could not implement a new rule permitting open captioning, nor even a rule to the effect that open captioning might even be required in situations where closed captioning is not possible.

VI. SUMMARY AND CONCLUSION

Captioning to make movies accessible to people with hearing loss seems, superficially, to be a “no-brainer” under the Americans with Disabilities Act. Yet, for almost twenty years, due to an over-rigid regulatory interpretation of ambiguous legislative history, judicial skepticism towards the ADA, and undefined critical terms that essentially require expensive litigation against a well-funded industry, adversaries have combined to make accessible movies exceptional rather than routine. The first court of appeals decision on the issue correctly held that movie captioning may be required. That decision, combined with the long-promised conversion to digital movie projection, could dramatically increase the availability of captioned movies.

At the same time, the DOJ is now proposing to require movie captioning by rule. Still, the proposal, which only calls for 50% of the movie screens to show captioned movies, is fundamentally flawed because it substitutes a performance standard for the individualized, financially based statutory defense of “undue burden.” Nonetheless, the proposal addresses the very real need to reduce the transactional costs of access disputes by providing a readily applicable rule.

Instead, the author urges the DOJ to adopt a rule based on the financial status of the theaters, which could provide accessibility, certainty, and flexibility, while virtually eliminating the need for litigation. The author further endorses the DOJ’s suggestion that at least some of a theater’s access burdens might be satisfied through periodic showings of open-captioned movies. Because open captioning is less expensive, and is preferred by at least some members of the hearing-loss

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population, the open-caption option should be permitted and perhaps even encouraged.