

**Before the
U.S. DEPARTMENT OF JUSTICE
Civil Rights Division
Disability Rights Section**

In the Matter of) CRT Docket No. 112
)
Department of Justice, Civil Rights Division,) Comments of the Washington State Communication Access Project (Wash-CAP), the Oregon Communication Access Project (OR-CAP), the Utah Communication Access Network (Utah CAN), the Collaborative for Communication Access via Captioning (CCAC) and the Association of Late Deafened Adults (ALDA)
Advanced Notice of Proposed Rulemaking,	
Nondiscrimination on the Basis Of Disability, Movie Captioning And Video Description	

The Washington State Communication Access Project (Wash-CAP), the Oregon Communication Access Project (OR-CAP), the Utah Communication Access Network (Utah CAN), the Collaborative for Communication Access via Captioning (CCAC) and the Association of Late Deafened Adults (ALDA) appreciate this opportunity to comment on the Department's Advanced Notice of Proposed Rulemaking concerning Movie Captioning and Video Description.¹

Wash-CAP and OR-CAP are both statewide non-profit membership corporations whose objectives are to enrich the lives of people with hearing loss by implementing the benefits and protections of federal and state anti-discrimination laws intended to make public places meaningfully accessible to individuals with hearing loss. Wash-CAP's president is Bert Lederer of Bellingham, Washington. OR-CAP's president is David Viers of Vancouver, Washington, part of the Portland metropolitan area.

Utah CAN is a coalition of five advocacy groups in that state similarly dedicated to improved access to public places. Its chair is Ann Lovell of Salt Lake City, Utah.

¹ While the ANPRM addresses video description for movies, and while the logic of these comments applies as well to video description, the organizations on whose behalf these comments are filed do not have as their purpose advocacy for people with visual limitations, and hence may lack standing to comment on questions related to video description. We will therefore address only captioning, but do not mean to suggest that video description should not be required.

The Collaborative for Communication Access via Captioning is a virtual community of more than 200 individuals from across the nation and internationally that advocates for captioning as a preferred and available means of making aural material available to individuals with hearing loss. Its chair is Lauren Storck, Ph.D, of North Haven, Maine.

The Association of Late Deafened Adults (ALDA) is a national organization headquartered in Rockford, Illinois, dedicated to advancing the communication needs of individuals who lost some or all of their hearing after childhood. ALDA's president is Cynthia Amerman of Tucson, Arizona, and its national advocacy director is Cheryl Heppner of Fairfax, Virginia. ALDA's authorized representative for movie-captioning issues is Past President Linda Drattell of Pleasanton, California.

The comments were drafted by John Waldo of Bainbridge Island, Washington. As advocacy director of Wash-CAP, Waldo has been active in movie-captioning litigation. Waldo filed an *amicus curiae* brief in the Ninth Circuit Court of Appeals in the *Harkins* case on behalf of Wash-CAP and the Hearing Loss Association of America. He is representing Wash-CAP in a case filed in King County, Washington seeking movie captioning under the Washington state Law against Discrimination. *Wash-CAP v. Regal et al.*, Civil No. 09-02-06322-2, and is co-counsel with Disability Rights Advocates in a class-action case pending in California. He is author of an article on movie captioning accepted for publication by the *Valparaiso Law Review*. He testified at the San Francisco hearing on the proposed rules.

I.

INTRODUCTION

We applaud the Department of Justice for focusing on the issue of movie captioning. We also applaud DOJ for correctly identifying the theaters themselves as the entities responsible for the extremely low prevalence of movie accessibility for people with hearing loss.

While DOJ's involvement is welcome and commendable, we believe the ANPRM is seriously flawed both legally and factually in proposing a rule that only 50% of movies must be made accessible through captioning over a five-year phase-in period. The appropriate rule, articulated by the Ninth Circuit Court of Appeal in *Arizona ex. rel. Goddard v. Harkins Amusement Ent., Inc.*, 603 F.3d 666 (9th Cir. 2010), is that accessibility is required unless the theaters can demonstrate that providing access would constitute an "undue burden." That standard requires individualized, case-by-case determinations of financial ability, and is incompatible with a general performance standard that could demand too much from some theaters while requiring far too little from others. For that reason, we believe a 50%-access rule – particularly after conversion to digital display – would be arbitrary, capricious and contrary to law.

The foregoing statement is consistent with the position DOJ took in the *Harkins* case on remand. In opposing a defense motion to dismiss or stay the remand pending completion of this rulemaking, DOJ stated:

The DOJ has already stated its position in this litigation that closed captioning and video descriptions are required ... The DOJ has further stated in this litigation that the provision of closed captioning and video description will not fundamentally alter the nature of Defendant's services. Therefore, the only matter left to be adjudicated is whether or not an undue burden exists ...

Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc., CV07-703-PHX-ROS, The United States of America's Statement of Interest in Defendants' Motion to Dismiss or Stay, Dec. 6, 2010, at p. 6.

The rule that captioning is required unless specific theaters can demonstrate that captioning would impose an undue burden is really the only rule that is necessary. Application of that rule to specific situations is an adjudicative matter that can and must be resolved by the courts. Neither quantum of captioning nor phasing of deployment is an appropriate subject for an across-the-board rule.

We agree with DOJ that the theaters are entitled to select from among the available modes of effective captioning. While DOJ focuses on closed-captioning (CC), in which captions are visible only to patrons who use a viewing device, we do not believe DOJ should totally rule out open captioning (OC), in which captions are visible to everyone. OC is clearly an effective means of making aurally delivered information available to individuals with hearing loss, and is preferred by a very substantial number of such individuals. While we do not suggest requiring OC in preference to CC when both display modes are available, we do believe OC can and should be required in preference to an exemption from access requirements in those situations where OC is possible but CC is not.

II.

FACTUAL BACKGROUND

For over a century, movies have been America's favorite evening out. Initially, movies were accessible to people with hearing loss, but with the advent of "talkies" in 1927, people who could not understand the sound track lost the ability to fully enjoy films. Today, it is technologically possible to make movie soundtracks accessible and understandable through captioning, either open captions visible to the entire audience or closed captions visible only to patrons who request a viewing device.

Movie captions today are prepared by the Media Access Group at WGBH public television in Boston, and are distributed free of charge on computer discs capable of running either OC or CC, or are distributed as part of a digital package. As DOJ notes in the ANPRM, over 80% of the widely released major-studio movies are now captioned.

Despite the wide availability of captioned movies, captions are actually engaged for less than 1% of all showings. The problem is not that the studios don't produce captioned movies – in cooperation with WGBH, they do. The problem, as the ANPRM correctly states, is that only a miniscule proportion of America's movie theaters are equipped to show captioned movies, and even when those theaters are equipped, the captions are engaged for only a few showings, particularly of OC films. We agree that it is high time for DOJ to address this situation.

III.

THE APPLICABLE LAW

A. The Requirement for Auxiliary Aids and Services.

The Americans with Disabilities Act defines "auxiliary aids and services" as "qualified interpreters or other effective methods of making aurally delivered material available to individuals with hearing impairments." 42 U.S.C. § 12103((1)(A). As the ANPRM recognizes, captions fit comfortably within that definition.

The statute states the following general rule:

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.

42 U.S.C. § 12182(a). "Motion picture houses" are specifically enumerated as being "public facilities" within the meaning of ADA, 42 U.S.C. § 12181(7)(C), and are therefore subject to the prohibition against discriminatory acts or omissions that interfere with "full and equal enjoyment" of goods and services.

The statute then defines "discrimination" to include:

a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated

differently than other individuals because of the absence of auxiliary aids and services 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**.

42 U.S.C. § 12182(b)(2)(A)(iii)(emphasis added).

Read together, those statutory provisions require businesses to provide auxiliary aids and services such as captions unless doing so would fundamentally alter the nature of the goods and services or create an undue burden. The context and syntax of the statutory language plainly require an entity-specific and individualized inquiry. Aids and services must be provided unless **the entity** – singular and specific – can bear the burden of demonstrating that the entity itself – not its colleagues and competitors – would be unduly burdened.²

As DOJ has recognized throughout its regulatory efforts, it cannot impose by rule any requirement for providing auxiliary aids and services that **would impose** an undue burden on a public accommodation. Conversely, we do not believe DOJ can adopt a rule that **would excuse** a public accommodation from providing auxiliary aids and services where doing so **would not** impose an undue burden.

B. The Auxiliary Aids and Services That Must Be Provided.

ADA broadly defines “auxiliary aids and services” as any “effective method of making aurally delivered material available to individuals with hearing impairments.” For those individuals whose hearing is such that assistive-listening devices are not sufficient, access to the material aurally delivered at a movie is only possible through captioning, which converts the aural material to visual form and displays that visual material in some manner.

As DOJ recognizes in both the ANPRM and its filing in the *Harkins* remand, CC does not alter the service provided. Therefore, CC is required up to the point that doing so becomes an undue burden.

While DOJ states in the ANPRM that it is not considering requiring OC, we think a blanket dismissal of OC is improper. As an effective method of conveying aural information, OC clearly constitutes an “auxiliary aid and service.” It is the mode preferred by many people with hearing loss, and best fulfills the ADA mandate that services should be offered in the most integrated appropriate setting. 42 U.S.C.

² The United States Supreme Court invalidated DOJ guidelines concerning the definition of “disability” in part because the Court believed those guidelines substituted blanket rules for individualized, case-by-case adjudications. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999).

§ 12182(b)(B). Therefore, we believe that OC should at least remain on the menu of available options unless, as always, the affected entity can demonstrate that OC would constitute a “fundamental alteration” or impose an “undue burden.”

We question whether either showing can be made. OC is actually less expensive than closed captioning. Indeed, when theaters employ digital projection, OC costs nothing, and is therefore less likely than CC to constitute an undue burden.

Nor do we think OC can constitute a fundamental alteration when that inquiry is properly framed. In our view, the proper inquiry is not whether OC fundamentally alters the specific movie showing for which the captions are engaged, but rather, whether *some* OC showings fundamentally alter the opportunity of both hearing and hearing-limited audiences to access that movie. By properly balancing the interests of both groups, OC can be deployed in a way that does not fundamentally alter the viewing opportunities of anyone.

We do not suggest that DOJ can or should require OC in preference to CC – as Title III facilities, the theaters have the right to select from among available effective accommodations. But what about those situations in which OC is available and CC is not, such as where the CC equipment has broken, or where CC would impose an undue burden but OC would not?³ We believe that in those situations, OC must be required in preference to no access.

DOJ’s reluctance to require OC apparently traces to the snippet of legislative history in the House of Representatives report to ADA, which stated:

Open captioning, for example, of feature films playing in movie theaters, is not required by this legislation. Filmmakers are, however, encouraged to produce and distribute open-captioned versions of films, and theaters are encouraged to have at least some pre-announced screenings of a captioned version of feature films.

H.R. Rep. No. 101-485(II), at 108 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 391. That statement stands in total isolation, without any explanation as to *why* the House evidently believed the statute does not require OC movies when the auxiliary aids and services requirement seems to say otherwise. Nor was that statement intended to be the last word. As DOJ notes in the ANPRM, the 1990 House report also stated that technological developments might warrant different regulations in the future, and that Congress was therefore “leaving the door open for the

³ At present, it is unclear whether 3-D movies may be captioned in any fashion other than OC.

Department to require captioning in the future as the technology developed.” ANPRM at 75 Fed. Reg. 43467, 43470.

Even assuming the legislative history must be given effect,⁴ the House Report is highly ambiguous. In 1990, captions had to be laser-etched onto a separate print of a film, and open-captioned movies were physically separate things from a non-captioned version of the same movie. As physically separate things, open-captioned movies could plausibly be analogized to separate “inventory.” That analogy falls apart, though, in light of today’s technology that places captions on a separate computer disc (or separate item on a menu of digital options) furnished free of charge to the theaters. As DOJ stated in its *amicus curiae* brief filed on behalf of plaintiffs in the *Harkins* case, theaters now have captioned movies in stock, and in that light, can appropriately be analogized to bookstores that stock Braille books but refuse to sell them.

DOJ agrees that the 1990 legislative history must be read in context. Indeed, in its *Harkins amicus* brief, DOJ appropriately labeled the 1990 reference to OC in the House Report as **outdated**. That outdated legislative history should not be a basis for exempting theaters from ADA’s access requirements when OC is the only available option.

Nor did the Ninth Circuit arrive at a contrary result in *Harkins*. The Court noted that DOJ has not required OC, and said the theaters were entitled to rely on those regulations. It also noted that the possible effect of OC on the movie-going experience of the hearing audience could provide a rational basis for distinguishing OC from CC. But nothing in that opinion suggested that DOJ could not require OC. Again, we do not think OC should ever be required in preference to CC, but we do believe OC can and should be required in preference to no access.⁵

⁴ That assumption is dubious. “Legislative history – no matter how clear – can’t override statutory text. Where a statute’s language can be construed in a consistent and workable fashion, we must put aside contrary legislative history.” *Hearn v. Western Conference of Teamsters Pension Fund*, 68 F.3d 301, 304 (9th Cir. 1995). Here, the text is plain and easily interpreted. It is the legislative history that is ambiguous and confusing.

⁵ A rule to the effect that OC is required where CC is unavailable would be a reasonable and perhaps even a required interpretation of the statute itself. Notwithstanding the ambiguous legislative history, such an interpretation would be entitled to *Chevron* deference, and would likely be upheld by a court. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Alternatively, DOJ can simply remain silent on the matter. What we believe to be unacceptable would be any statement to the effect that OC is never required, even when it might cost nothing and when CC is unavailable.

IV.

THE APPROPRIATE PRINCIPLES FOR MOVIE CAPTIONING

In light of the foregoing factual and legal background, we propose the following three principles:

1. Movie theaters must provide auxiliary aids and services in the form of captions unless the theater can demonstrate that doing so would constitute an undue burden.

The most single important thing DOJ can do in this proposed rulemaking is to adopt the Ninth Circuit decision in the *Harkins* case as a national rule, and squarely declare that movie theaters are required by ADA to display captioned films unless the theater can demonstrate that doing so would constitute a fundamental alteration or an undue burden. As part of making such a rule, DOJ also needs to affirm the position it took in the *Harkins* remand to the effect that determining the applicability of either of those defenses, and particularly the undue-burden defense, is an adjudicative inquiry for which courts are most appropriately suited. While it might be appropriate to suggest some percentage as an informal advisory, DOJ must make it clear that any suggested percentage is neither a required floor for those theaters that cannot afford to comply nor a ceiling for those theaters that can afford to do much more.

2. Movie theaters that convert to digital projection must immediately make all auditoriums accessible through either OC or CC unless the theater can demonstrate that providing access through either form of captioning would constitute an undue burden.

Movie theaters have been arguing for years that they should not be required to install equipment to show captions for traditional films because the "imminent" conversion to digital projection would render traditional film and the corresponding captioning technology obsolete. The implicit representation has been that as conversion to digital projection takes place, captioning will follow. Moreover, captioning is much less expensive when digital projection is used than when analog equipment is used. For those reasons, we submit that when theaters convert to digital projection, they should also be required immediately to show captioned films.

We are informed by Regal Cinemas that when a theater multiplex has been converted to digital display, showing CC movies requires a central server, some number of individual viewing devices, and individual relay boxes in each auditorium to take the caption signals from the central server and transmit them to the viewing

devices.⁶ Once the first auditorium in a multiplex is equipped to show CC movies, the only incremental cost to equip an additional auditorium is the cost of the relay device. Regal estimates the cost of the relay box will be roughly \$900,⁷ and the unit box will last for approximately six to eight years.

Those economics show the factual flaw in DOJ's proposal to require that Regal and other theaters equip 50% of their auditoriums to show captioned movies. Such a rule would be justified if, but only if, 50% accessibility (phased in over five years) is not an undue burden, but that greater accessibility would be an undue burden. Yet at least in the case of Regal, that is palpably not so.

Regal is the largest theater chain in the United States and the world, with 6,739 separate auditoriums. After the first half of those auditoriums are equipped to show CC movies, the cost of equipping the remaining half (3,370 auditoriums) to show CC movies at \$900 per auditorium would be \$3.03 million.

Can Regal afford that? According to its 2009 10-K filed with the Securities and Exchange Commission to inform potential investors, Regal paid \$110.8 million in dividends in 2009, and expects to continue paying dividends "for the foreseeable future."⁸ It must be remembered what dividends are. They are monies paid from the cash left over after all bills are paid, all debts are serviced, all leases are paid, all film rentals are paid, and all the employees are paid, including executive bonuses. Before the company can pay dividends, it must pay income taxes at rates approaching 40%. Practically speaking, corporations pay dividends only when they don't have any better use for the money. We submit that a cost that can be covered by less than 3% of a company's annual dividend cannot constitute an "undue burden."⁹

Cinemark, the third-largest theater chain, is similarly situated. It operates 3,830 screens in the United States (4,896 worldwide), and in 2009, it paid dividends

⁶ The viewing devices that the theaters presently intend to deploy are horizontal armatures that would be attached to a flexible gooseneck on a base that would fit into the cupholders. The captions would be sent to those devices wirelessly.

⁷ Other comments suggests that the relay box might cost as little as \$300.

⁸ 2009 was actually something of a "down" year for Regal dividends. According to its 2009 10-K, since 2002, an eight-year period, Regal has paid an eye-popping **\$2.8 billion** in dividends.

⁹ This calculation overstates the true cost, because spending the money to equip the theaters will reduce Regal's tax burden. Without knowing what the depreciation schedule for captioning equipment might be, though, we can't calculate that reduction.

of some \$80 million.¹⁰ Cinemark has recently converted all auditoriums at both of the multiplexes it operates in Washington State to digital projection, and has also installed CC capability in enough of those auditoriums to show *all* movies that come with captions in captioned form. What it has done in Washington can be and should be done elsewhere.

What about smaller theaters that have converted to digital? If they can't afford to equip their auditoriums to show CC movies, an available alternative is to show OC movies. The cost to do that is absolutely nothing. No additional equipment is needed – the theater simply selects the OC option from its digital menu, and the open captions appear superimposed on the movie print for that showing only.

Because theaters can show OC movies at no cost after converting to digital, we believe that as a matter of fact and law, access should be provided immediately upon conversion to digital. Most theaters will likely prefer to provide access through CC, and are free to do so. But until and unless they do provide CC access, they should provide OC access at once.

Providing access through captioning is admittedly more difficult for theaters that are not converting to digital. The captioning equipment costs somewhat more. Those theaters tend to be smaller, and may be able to make out an undue burden defense. While there is some theoretical appeal to a general rule on what those theaters must do and how fast they must do it, there appears to be no practical way such a rule could be developed and applied. There may be no alternative to case-by-case adjudications.¹¹

3. Accessibility Through OC Should Be Defined Differently Than Accessibility Through CC.

While we do not believe OC can or should be ruled out as a means of providing access, we do acknowledge that just as we have the right to see movies in a manner that makes them accessible to us, people who do not need or want captions should also be able to see movies in a non-captioned form. So we think that

¹⁰ The second-largest theater chain, AMC, is not now paying dividends, but has filed for an Initial Public Offering in which it states that it plans to do so. AMC's per-screen operating revenues appear fairly similar to those of Regal and Cinemark.

¹¹ DOJ could possibly consider defining "undue burden" in terms of some determinable number like a percentage of gross income reported for tax purposes. For example, DOJ might say that 2% of annual gross income is presumptively not unduly burdensome, leaving both the facility and the claimants the opportunity to refute that presumption in a specific case. Unlike the 50% proposal that *substitutes* a performance measure for the statutory "undue burden" standard, such a presumption would *define* what constitutes an "undue burden."

while access must be provided in one form or another, access should be defined differently for CC than for OC access.

Where CC is the auxiliary aid and service used, the rule should be simple and absolute – all showings of all captioned movies should have the captions engaged and the viewing devices available.

Where OC is the auxiliary aid and service employed either by choice or because CC is not available, a different rule should apply. Rather than engage the captions for every showing, the theaters should only be required to engage the captions for enough showings to give people with hearing loss an adequate opportunity to see the movie, while giving people who would prefer uncaptioned movies an ample opportunity to see the movie in that form.

While we accept the general proposition that OC need not be engaged for every showing, we cannot endorse Regal's widespread practice of offering the OC showings only at off-peak hours, especially on the weekends. We believe that to be deemed as providing adequate access through OC, the theater should show at least one OC movie each day. At least two of those daily showings should be evening showings (the showing beginning closest to 7 p.m.), one of which should be on Friday or Saturday evening, and at least two mid-afternoon showings (the showing beginning closest to 3 p.m.), one of which should be on Saturday or Sunday afternoon. The definition of "accessible" through OC is an appropriate subject for rulemaking.

V.

ANSWERS TO SPECIFIC QUESTIONS

While the foregoing states our position in considerable detail, it might also assist DOJ to respond briefly but specifically to the 26 questions posed in the ANPRM. We do so as follows:

Question 1. We do not believe either the proposed 50% access requirement or the five-year compliance schedule is appropriate for reasons set forth in this response.

Questions 2 and 3. We do not believe it is appropriate to require that a certain proportion of movies be shown with captions. Should DOJ adopt such a rule, though, we believe the requirement should apply to the number of theaters at any particular location, and not to the number of movies shown. Those very popular movies that are shown in multiple theaters provide hearing audiences with a multitude of show times, and the same variety of opportunities should be provided to people with hearing loss.

Questions 4-6. If a proportion-of-theater access requirement is imposed, the proportion should be calculated on a location-by-location basis so patrons who need

auxiliary aids and services have the same range of geographic options as others. The captioning requirement should be based on number of theaters, not on number of captioned movies, because theaters should not be permitted to reduce their captioning obligations by deliberately selecting non-captioned films.

Question 7. We have no information on the cost of providing video description, and therefore have no response to this question.

Question 8. Films need to be shown in captioned form beginning on the day of their release.

Question 9. OC is an effective method of making aurally delivered material available to persons with hearing loss, and should therefore be permitted and, in fact, encouraged. While OC ought not be required where closed captioning is feasible, it should be required where CC is not available in preference to a captioning exemption.

Question 10. Our information is that the three largest theater chains intend to convert all of their theaters to digital by the end of 2013. We understand that many smaller theaters want to convert to digital as soon as possible, but unlike the three large chains, do not have specific financial arrangements in place that will enable them to convert.

Question 11. We have been assured that protocols for digital captioning have been developed and adopted.

Question 12. Rear Windows Captioning (RWC) does not require digital projection.

Question 13. RWC can be used with digital projection, and the cost is lower than for analog (film) projection. RWC with analog projection requires a DTS "box" that costs approximately \$4,200. A theater that converts to digital does not need the box – there is a resale market for them – but does need a \$1,500 software upgrade. The LED display panel and the viewing reflectors are compatible with either digital or analog projection.

Question 14. RWC captions are best seen from seats close to the middle of the theater, both laterally and front-to-back, but that varies by theater – the slope of the seating area and the placement of the LED display panel. Theaters should ascertain which is the best viewing position at their theater, and reserve those seats until a certain time prior to show-time or until the other seats have all been sold. Non-RWC display devices may work equally well from all seats, but no such devices are currently in wide use, so it cannot be ascertained at this juncture whether they work equally well from all seats.

Question 15. Costs vary depending upon whether the theater uses digital or analog projection, and on the kind of captioning equipment selected. Our information is that per-theater costs range from a high of \$12,000 to equip an analog theater to show RWC to a low of zero, which is the cost of showing OC movies at a digital theater.

Question 16. Digitally equipped theaters may show OC movies at no cost simply by selecting the captioned option from their digital menu. The cost of showing CC movies will vary, depending upon the equipment selected.

Question 17. Rather than focusing on specific technical requirements, the Department's overall concern should be to ensure that whatever caption display mode the theaters select is in fact effective under actual movie-viewing conditions. This is not an abstract concern. OC and RWC have proved themselves effective, but theaters do not wish to use OC because they believe it is distracting to viewers who do not need captions, and for reasons known only to them have spurned RWC. Instead, the theaters are using newly developed display modes, the effectiveness of which have not been demonstrated under actual movie-viewing conditions.

The new display modes are digital display devices mounted on flexible goose-necks. Viewers will be required to look down at the captions, then to look back up at the screen. Both the line of sight and the focal length for the captions will be different than for the movie itself, and may cause considerable eyestrain and discomfort over the duration of a typical movie. RWC at least partially solves both of those problems. The reflector is translucent, and may be superimposed on the lower portion of the movie screen, putting the captions in the same line of sight as the movie itself. Depending upon where one is seated, the focal length may be compatible as well.

We recognize that as Title III facilities, the theaters are entitled to select auxiliary aids and services of their choosing, so long as those aids and services are effective. The newly developed devices might be. Our only caution is that the Department not simply assume that display equipment tested under artificial conditions - specifically, audience-tested for periods much shorter than a full-length movie - are effective, but rather, the Department should monitor the use of those devices to ensure that they are indeed effective.

Question 18. Theaters must conspicuously notify patrons which movies are available with captions and descriptions, and the notice requirement should include the theater marquee as well as newspaper and internet advertising and telephone recordings of the start times. Additionally, while theaters may book and show whichever movies they choose, irrespective of whether those movies are captioned, they must be prohibited from asking studios not to arrange captions for any movie. To the contrary, theaters should be required to inform studios that if the movies are made available with captions, the theaters will show the captions.

Question 19. Theaters must train their personnel to operate the captioning equipment, and to inform patrons of its existence. Theaters should be required to inform their personnel not to discourage attendance at a movie because it is captioned.

Question 20. There should be no small-business exemption per se. Title I of ADA contains a small-business exemption by defining covered "employers" by size of business. Title III does not contain any similar exemption, and it would be inappropriate for DOJ to create such an exemption by regulation. The "undue burden" standard is the appropriate safeguard to prevent financial ruin of smaller businesses.

Questions 21-23. We do not have any specific information on costs of captioning other than the information set out in response to Question No. 15. Because at least some of the theaters intend to use CC display equipment that is not presently being marketed, we do not know what that equipment might cost.

Question 24. Small entities with less revenue will likely require a longer time to fully equip their theaters to display captions and video descriptions.

Question 25. We do not support categorical exemptions based either on size or type of theater. Drive-in theaters, for example, may not be able to show CC movies using RWC, but may be able to show captions through a PDA-type device or special glasses where the captions are not reflected but are transmitted wirelessly.

Question 26. The only kind of exemption even arguably appropriate would be for theaters (such as art houses) that show films that are generally not captioned. Many small, independent studios and art-house films are presently not captioned, which is vexing, because those films tend to appeal to the demographic (older patrons) with a higher prevalence of hearing loss. Because the cost of captioning itself is nominal – less than \$2,000 per film – those smaller studios likely are less influenced by cost considerations than by the fact that few independent and art-house theaters are equipped to show captioned films. We believe the best way to end that "chicken-egg" dilemma is to require all theaters to inform the studios and distributors that all movies made available with captions will be shown in captioned form.

VI.

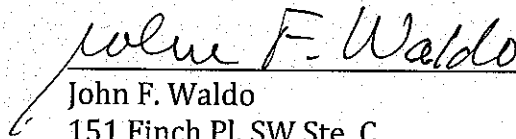
SUMMARY AND CONCLUSION

As groups advocating for people with hearing loss, we applaud DOJ for acknowledging the importance of movie captioning. We also applaud DOJ for recognizing that the resistance to captioning has come not from the movie studios, which arrange captions for most of their major releases, but from the theaters, who have generally declined to install the equipment needed to display captions.

We believe the appropriate rule is simple – theaters must show captioned movies to the extent that doing so does not constitute an “undue burden” or a “fundamental alteration.” Because closed-captioned movies do not affect the experience of others, those captions are not even arguably a “fundamental alteration,” so the only question is the extent, if any, to which those captions constitute an undue burden. That is an adjudicative matter that can only be determined by a court on a case-by-case basis. For these reasons, we cannot support the proposal that 50% of an entity’s screens should be made accessible through closed captioning if DOJ also determined that 50% access would the Title III obligations of all entities, even those that can afford to provide full accessibility.

We think DOJ should permit and even encourage open captioning as a means of providing access. We do not suggest DOJ should require open captioning where closed captioning is feasible and where the theaters elect closed captioning. But we think that where closed captioning is not feasible either financially or technically, open captioning should be required in preference to an exemption.

We appreciate the opportunity to comment on the ANPRM, and look forward to meaningful access to the movies for people with significant hearing loss.



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