



January 24, 2011

By electronic filing:

Disability Rights Section
Civil Rights Division
U.S. Department of Justice

Comments on the Advance Notice of Proposed Rulemaking on Title III of the Americans with Disabilities Act, 28 C.F.R. Part 36; CRT Docket No. 112; AG Order No. RIN 1190-AA63 (Movie Captioning and Video Description)

The National Association of the Deaf (NAD) submits these comments in response to the Advance Notice of Proposed Rulemaking (“ANPRM”), RIN 1190-AA63 (Movie Captioning and Video Description) released by the U.S. Department of Justice (“DOJ”) to amend regulations implementing Title III of the Americans with Disabilities Act (“ADA”).

Established in 1880, the National Association of the Deaf (“NAD”) is the nation's oldest and largest consumer-based national advocacy organization safeguarding the civil and accessibility rights of deaf and hard of hearing individuals in the United States of America. The advocacy scope of the NAD is broad, covering the breadth of a lifetime and impacting future generations in the areas of civil rights, early intervention, education, employment, health care, technology, telecommunications, youth leadership and more. For more information, please visit www.nad.org.

As an initial matter, the NAD commends the Department of Justice for recognizing the need to ensure that deaf and hard of hearing individuals are given equal access to the movies by promulgating regulations requiring movie theaters to provide

movie captioning. We also appreciate the opportunity to submit comments on the Department's proposed rules.

While the NAD recognizes the DOJ's efforts to make movie theaters accessible, the NAD is vigorously opposed to the Department's proposal that would require movie theaters to require merely 50% of their screens to provide captioning. This would constitute legalized discrimination against deaf and hard of hearing moviegoers. Likewise, we also oppose allowing the deaf and hard of hearing community to wait five years before requiring movie theaters to provide equal access for deaf and hard of hearing moviegoers. Given that the theaters already have been required to provide access for the past 20 years, granting them additional 5 years is unwarranted.

The NAD, instead, strongly encourages the Department to adopt the following proposals:

- (1) Movie theaters to be required to show captions at 100% of movies, in all theaters, on all screens immediately unless, in certain specified and limited circumstances, the theater owner can prove that doing so would constitute an undue burden;
- (2) New terminology to be adopted as following:
 - a. **Open Captions:** The term "open-caption" should only be used to describe movie captions that are hard-coded into a film and cannot be turned off. Therefore all viewers will see the captions.
 - b. **Closed Captions:** Closed captions are captions that can be turned off. When closed captions are turned on, everyone in the room viewing the screen is able to see the captions.

c. Individual Captioning Systems: This term refers to caption display systems that allow individual users to view captions through an ancillary device without displaying captions to the entire audience.

(3) Movie theaters can and should combine various technologies including open captions and closed captions to ensure 100% access;

(4) Movie captioning in any form:

- a. is not an undue burden in any new or upgraded auditorium; and
- b. does not fundamentally alter the service of screening movies.

Each question presented by the Department appears first in *italicized print*, followed by our response. Some questions may be grouped together to avoid repetition.

I. COMMENTS ON THE SUGGESTION THAT ONLY 50% OF MOVIE SCREENS NEED TO COMPLY WITH THE ADA (QUESTIONS 1 THROUGH 6)

Question (1): The Department is considering proposing a regulation that contains a sliding compliance schedule whereby the percentage of movie screens offering closed captioning and video description increases on a yearly basis, beginning with 10 percent in the first year any such rule becomes effective, until the 50 percent mark is reached in the fifth year. Please indicate whether this approach achieves the proper balance between providing accessibility for individuals with sensory disabilities and giving movie theaters and owners sufficient time to acquire the technology and equipment necessary to exhibit movies with closed captioning and video descriptions. Also, if you believe that a different compliance schedule should be implemented, please provide a detailed response explaining how this should be accomplished and the reasons in support. Should a different compliance schedule be implemented for small businesses? If so, why? What should that schedule require?

Question (2): The Department is considering proposing regulatory language requiring movie theater owners and operators to exhibit movies with closed captions and movies with video description so that, after any sliding compliance scale has been achieved by the final year (e.g., at year 5), all showings of at least one-half of the movie screens at the theater will offer captioning and video description. We seek comment on the most appropriate basis for calculating the number of movies that will be captioned and video described: Should this be the number of screens located in a particular theater facility, the number of screens owned by a particular movie theater company, the number of different movies being screened in a particular theater facility, or some combination

thereof? Should a different basis be used for small business owners? If so, why? What basis should be used? Please include an explanation of the advantages and disadvantages of each option and the reasons a particular option is preferred over another.

Question (3): If the number of screens located in a particular theater facility is the preferred option, please explain whether the fact that some theaters show the same movie on multiple screens poses any concerns with regard to the number of movies being screened with captions and video descriptions, and if so, what are they and whether there are any ways to address those concerns. Does this option pose particular concerns to small businesses? If so, what are they? Please indicate whether the Department should include specific language in the regulation that states that the basis for calculating the number or percentage is the number of captioned and video described movies the theater receives from the movie producers in order to make clear that the owner has no independent obligation to caption or describe movies.

Question (4): If the number of screens owned by a particular movie theater company is the preferred option, please explain whether there are any concerns about the geographic distribution of movies being screened with captions and video descriptions, and if so, what they are and whether there are any ways to address those concerns. Does this option pose particular concerns to small businesses? If so, what are they? Please indicate whether the Department should include specific language in the regulation that states that the basis for calculating the number or percentage of movies is the number of captioned and video described movies the theater receives from the movie producers in order to make clear that the owner has no independent obligation to caption or describe movies.

Question (5): If the number of movies being screened in a particular movie theater facility is the preferred option, please indicate whether the Department should include specific language in the regulation that states that the basis for calculating the number or percentage of movies is the number of captioned and video described movies the theater receives from the movie producers in order to make clear that the owner has no independent obligation to caption or describe movies. Does this option pose particular concerns to small businesses? If so, what are they?

Question (6): If some combination of these three methods is the preferred option, please explain that option and how it would be implemented. Should a different combination or percentage be used for small business owners? If so, why? What combination or percentage should be used for small business owners? Please indicate whether the Department should include specific language in the regulation that states that the basis for calculating the number or percentage is the number of captioned and video described movies the theater receives from the movie producers in order to make clear that the owner has no independent obligation to caption or describe movies.

A. Movie Theaters Continue to be Essentially Inaccessible for Deaf and Hard of Hearing Individuals

In 1990, the ADA was passed with the promise that people with disabilities, including deaf and hard of hearing individuals would receive the equal opportunity to access a wide range of public accommodations, including movie theaters. Over twenty years after the passage of this groundbreaking legislation, movie theaters remain largely inaccessible for individuals who are deaf and hard of hearing. In order for this population to be able to enjoy the movie theater experience, which includes understanding aural information, captions are required. However, deaf and hard of hearing individuals face several obstacles.

Less than 1% of all movies being shown in theaters are shown with captions, irrelevant of whether such movies come supplied with caption data or not.¹ Many individuals who are deaf and hard of hearing often have to travel long distances to find a theater with captioning while their hearing counterparts are able to attend any theater of their choice. Individuals who are deaf and hard of hearing often face limited options when choosing a movie to watch. For example, many movies with onscreen captioning (whether open or closed)² are shown during off peak times. Frequently, the days and times are inconvenient, such as morning during a weekday or late at night. Additionally, theaters usually only choose one movie in the entire theater to caption at a time, and this movie is usually shown in its captioned format for only a week. Furthermore, they do not show first run movies so that they can put the captioned movies in smaller theaters as opposed to the bigger theaters where first run movies or blockbusters are shown.

¹ NAD Presentation at Access Board Meeting on Communication Access, report courtesy of Northern Virginia Resource Center for Deaf and Hard of Hearing Persons, available at <http://www.hearinglossweb.com/Issues/Access/nad.htm> (last visited January 19, 2011).

² See response to Question 9 in Section II.

Exacerbating an already frustrating experience, is when deaf and hard of hearing movie patrons arrive at a theater only to find the equipment malfunctioning and untrained employees unable to provide assistance.

As such, many individuals who are deaf and hard of hearing are forced to wait for movies to come out on DVD before they have the opportunity to watch a movie with captions. This is not the same experience provided to hearing moviegoers.

B. The Department Should Require 100% Access to the Movies

The NAD strongly urges the Department to discard their proposal to require captioning of 50% of movies or movie screens within five years and instead **require all movie theaters to display captions at every movie, in every theater absent a showing of undue burden.** Limiting deaf and hard of hearing individuals to only half of movies in five years deprives them of equal access and equal enjoyment of movies shown in a theater.

As mentioned above, the ADA was enacted in order to eliminate the discrimination against individuals with disabilities that “...persists in such critical areas as . . . public accommodations, *education*, . . . communication, *recreation*, . . .” 42 U.S.C. 12101(a)(3) (emphasis added). Movie theaters are both educational and recreational.

There is increasing realization in America that informal learning experiences are nearly as important as formal ones. Cultural literacy is a sure avenue of opportunity for people with disabilities – in particular deaf and hard of hearing people whose communication needs often isolate them from society at large. Learning occurs constantly, both inside and outside of the classroom. Today, movies, along with television and the Internet, are the most pervasive providers of incidental learning.

Because deaf people often do not have access to incidental learning otherwise, movies are critical for the exposure of deaf and hard of hearing people – especially children - to new ideas, as viewing them contributes to the development of communication and literacy.

Furthermore, going to the movies undoubtedly is one of America's favorite recreational activities. Such activity is often not done alone. Given that 90% of deaf and hard of hearing children have hearing parents (and possibly hearing siblings)³ and that 90% of deaf and hard of hearing adults have hearing children⁴, granting access to the movies does not only mean dollars from deaf and hard of hearing individuals, but dollars from their parents, children, siblings, other family members, and/or friends who accompany them.

1. The Department Should Clarify that Movie Captioning is Already an Auxiliary Aid and Service, as Required Under the Regulations

The Department's proposal is a step backwards for the deaf and hard of hearing community. The ADA *already requires* movie theaters to provide deaf and hard of hearing individuals with auxiliary aids and services necessary for full and equal enjoyment. Movie captioning clearly falls under this category. It allows aural information to be presented in a visual format, allowing deaf and hard of hearing moviegoers to understand and enjoy movies.

In fact, the existing regulations require movie theaters to do more than what the ANPRM proposes. When the ADA was passed in 1990, Title III of the ADA required

³ Communication Options for Children Who Are Deaf or Hard-of-Hearing, NICDCD Fact Sheet, available at (<http://www.nidcd.nih.gov/staticresources/health/healthyhearing/tools/pdf/CommOptionsChild.pdf>) (last visited January 19, 2011).

⁴ Deaf Parents and Their Hearing Children Information Packet, prepared by CODA International, p. 1, available at http://coda-international.org/blog/wp-content/uploads/2010/07/CODA_InfoPacket.pdf (last visited January 19, 2011).

that individuals with disabilities be provided “*full and equal* enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodations . . .” (emphasis added).⁵ Among these public accommodations, Congress specifically mentioned movie houses and theaters.⁶ Movie theaters provide the service of screening movies. *Arizona ex rel. Goddard v. Harkins Amusement Enterprises*, 603 F.3d 666, 674 (9th Cir. 2010); *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1084 (9th Cir. 2004).

Title III of the ADA defines discrimination as a failure to provide individuals with disabilities appropriate auxiliary aids and services to ensure that they have equal access and equal enjoyment in public accommodations, such as movie theaters.⁷ Title III regulations already includes a broad definition of auxiliary aids and services, including open and closed captioning. 28 C.F.R. § 36.303(b)(1). As held by the U.S. Court of Appeals for the Ninth Circuit, “[m]ovie captioning and audio descriptions clearly are auxiliary aids and services.” *Harkins Amusement Enterprises*, 603 F.3d at 670. Public accommodations are exempted from providing such services only when they can demonstrate that doing so would be an undue burden or would result in a fundamental of the good or service being provided. 42 U.S.C. § 12182(b)(2)(iii).

To recap, the ADA requires full and equal access to public accommodations, including movie theaters. Captions are auxiliary aids and services pursuant to the ADA and the *Harkins* court. Accordingly, theaters are required to provide full and equal access by providing auxiliary aids and services, and they are only exempted from providing such

⁵ 42 U.S.C. § 12182(a).

⁶ 42 U.S.C. § 12181(7)(C).

⁷ *See supra* note 1

auxiliary aids if they can prove that doing so would be a fundamental⁸ or undue burden. Therefore, the NAD strongly urges the Department to require all movie theaters to display captions at every movie, in every theater absent a showing of undue burden.

2. The ADA Requires Full Access to All Movies at All Theaters, Except in Very Limited Circumstances Where Undue Burden and Fundamental Applies

The Department of Justice should not allow 50% of movie theater auditoriums in this country to remain inaccessible to people who are deaf or hard of hearing. As explained above, this rule would conflict with existing regulations and the ADA. Nowhere in the ADA does it say that auxiliary aids and services must be provided only for some services, facilities, or accommodations, as the Department's suggested 50% rule would imply. Instead, the ADA mandates that a person with a disability cannot be "segregated" or "treated differently" and must have an "opportunity to participate" that is "equal to that afforded to other individuals." 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. §36.202(b). By its plain language, full and equal enjoyment requires that movie captioning be made available for all movie screens and for all show times. Because hearing patrons have full access to all movies and are not limited to certain movie screens or show times, patrons who are deaf or hard of hearing would be segregated, treated differently, and denied an equal opportunity to participate if they were restricted to 50% of movie screens with the resulting reduced movie schedule.

Absent a showing of affirmative defense of undue burden or fundamental existing law and regulations already require movie theaters to make all screens and auditoriums accessible. 42 U.S.C. §§ 12181(7)(C); 12182(b)(2)(iii). In the current rule

⁸ As discussed in Section I.B.2.c *infra*, captions are not fundamental alternation, see e.g. Brief of the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 22-24, *Arizona v. Harkins Amusement Enterprises, Inc.*, 603 F.3d 666 (9th Cir. 2010) (No. 08-16705).

making process, the Department should clarify the availability of affirmative defenses to Title III entities showing movies. Specifically, the existing undue burden defense is available in extremely limited circumstances to theater owners, on a case-by-case basis. Although, we suspect, such defense would be extremely difficult to assert, given how the costs of providing captioning are not relatively enormous over time.

a. Movie Theaters Must Demonstrate Undue Burden, Which is a Case-By-Case Determination and Not One Size Fits All

Pursuant to Title III, movie theaters must provide captions (an auxiliary aid and service) on all of their screens unless doing so would be an undue burden. 42 U.S.C. §12182(b)(2)(A)(iii). Upon proof of undue burden by a particular existing movie theater using analog projection, the number of screens with captions will be determined on a case-by-case basis. Undue burden is a fact-specific inquiry that is proved on a case-by-case basis. Existing Title III regulations already provide detailed factors that demonstrate whether providing an auxiliary aid and service would result in an undue burden for any movie theater owner:

1. the “nature and cost” of the auxiliary aid or service;
2. the “overall financial resources” of the movie theater “site or sites,” the “number of persons employed” at that theater site, the effect of the aid or service “on expenses and resources,” and “the impact . . . upon the operation of the site”;
3. the “geographic separateness, and the administrative or fiscal relationship” of that theater site to “any parent corporation or entity”;
4. the “overall financial resources of any parent corporation or entity,” if applicable, the overall number of people employed by

the parent corporation, and “the number, type, and location” of its movie theaters; and

5. 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,” if applicable.

28 C.F.R. § 36.104.

These factors appropriately consider the individual circumstances of the particular theater “site” as well as the parent movie theater company. The legislative and regulatory histories of Title III make clear these factors are to be applied to the financial situation of the particular place of public accommodation and its parent company. Congress explained that “[t]he determination of whether the provision of an auxiliary aid or service imposes an undue burden on a business *will be made on a case-by-case basis*, taking into account the same factors used for purposes of determining ‘undue hardship.’” H.R. Rep. 101-485(II) at 106-07, 1990 U.S.C.C.A.N. 303, 389-91 (1990) (emphasis added).

Similarly, the Department of Justice stated in Appendix B of the implementing regulations that the undue burden “definition lists factors considered in determining whether provision of an auxiliary aid or service *in any particular circumstance* would result in an undue burden.” 28 C.F.R. Pt. 36, App. B (emphasis added); *see also Pinnock v. Int’l House of Pancakes Franchisee*, 844 F. Supp. 574, 583 (S.D. Cal. 1993) (“[A] public accommodation is not required to provide any particular aid or service that would result in . . . an undue burden.”) (quoting 28 C.F.R. § 36.104, App. B, 576, 595) (s in original).

We therefore urge the Department of Justice to reject the proposal in the ANPRM which would require that only 50% of movie screens be made accessible. Movie theater captioning falls squarely within existing auxiliary aids and services requirements and has been commercially available for years.⁹ An arbitrary 50% rule could excuse theater chains from providing captions in more auditoriums when it would not be an undue burden to do so. The existing regulations and undue burden factors provide not only sufficient guidance to both movie theaters and the courts as to how many screens at a particular theater complex built must be made accessible to customers who are deaf or hard of hearing but actually *mandates* full and equal access. The ANPRM is clearly contrary to such mandate.

Consistent with the current framework of the ADA, new and altered theaters should be required to ensure full access without the availability of an affirmative defense. *See* 42 U.S.C. § 12183. In the current statute, only when the entity can demonstrate that it would be structurally impracticable to provide access will the entity be exempted from providing access. 42 U.S.C. § 12183(a). The 50% standard proposed in the ANPRM would provide less access than required in the statute, as described above.

First, it is inappropriate to apply this standard to theaters currently undergoing conversion to digital and theaters that will undergo such conversion. Because the undue burden factors focus on the cost of the auxiliary aid or service and the resources of the public accommodation, the conversion to digital projectors demonstrates that the much

⁹ In at least one other context, the Department has recognized that specific numerical guidance for compliance does not serve the goals of the ADA. *Pinnock*, 844 F. Supp. at 583 (quoting 28 C.F.R. § 36.104, App. B, 577) (explaining that DOJ declined to devise a numerical formula for readily achievable compliance and instead adopted the “flexible case-by-case approach chosen by Congress”).

smaller cost, if any, of providing movie captioning¹⁰ will not be an undue burden for a movie theater that has converted or is converting to digital.

Second, the Department should make clear that movie theaters must have the capacity of showing captioning when constructing new auditoriums or altering existing ones because the cost of construction and renovations dwarfs the cost of providing captioning.

The concerns of several of movie theaters' concerns regarding making movies completely accessible to the deaf and hard of hearing, and hence constitutes an undue burden, are unjustifiable. Investment in providing captions will enable numerous of deaf and hard of hearing individuals, along with their family and friends, to enjoy movies while increasing revenues for the theaters with new patrons. In fact, the availability and demand for subtitled foreign movies show that many moviegoers who are hearing do use captions. Everyone benefits from captioning whether they can hear or not. Open captioning of television programming, including movies, is also widely used in many public accommodations, including restaurants, bars and gyms.

Also, to date, no data has ever been provided to show that captions are a distraction or drive moviegoers away. Even if open captions are distracting, it does not matter. As ruled in other civil rights cases, the alleged discomfort of other patrons is *not* a defense for theaters under other civil rights laws. *Compare United States v. Gulf-State Theaters, Inc.*, 256 F. Supp. 549, 552 (N.D. Miss. 1966) (three-judge court; rejecting theater's defense that white patrons objected to presence of African-American patrons);

¹⁰ As discussed in Section II, *infra*, providing closed captioning using digital technology requires simply the operator to turn the captioning feature on or off – at no cost to the theater. Providing individual captioning would incur a relatively small expense: an one-time expense of installing the technology necessary, and much smaller maintenance cost.

Baylies v. Curry, 21 N.E. 595, 595-96 (Ill. 1889) (rejecting theater's defense that exclusion of African-American woman was justified “to avoid collision between the races”). This is true irrelevant of whether the hearing patrons are uncomfortable with open, closed, or individualized captions.

In the disability rights context, bus lifts can be viewed as an example. Some passengers may be irritated waiting for the bus to take the time to pick up someone using a wheelchair with a lift. However, this does not relieve the bus of its obligation to provide access to the passenger using a wheelchair. The same principle is applied to movie captioning and deaf and hard of hearing moviegoers.

b. The 50% Regulation Conflicts with the Statutory Mandate

In *Chevron*, the Supreme Court set forth a two-prong test for agency interpretation of statutes. *Chevron, U.S.A., Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the statute is clear, the court should give effect to the expressed intent of Congress. *Id.* Only if the statute is not clear will the court accept the agency’s reasonable interpretation of the statute. *Id.* Here, there is no room for agency interpretation limiting of movie theaters’ obligations to provide captions. The statute is clear in requiring full and equal access absent a showing of undue burden - a case-by-case determination.

Covered entities, including movie theaters, are required to comply with ADA standards. The statute, plainly and clearly, requires “**full and equal** enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodations . . . “ 42 U.S.C. § 12182(a). The statute goes on to state that it is the

entity's burden to demonstrate undue burden by including the following as one method of discriminating against persons with disabilities:

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)(iii).

First, making a public accommodation half accessible is inconsistent with the plain language of "full and equal" access of the ADA. According to dictionary.com, an online dictionary, "full" means:

- (1) completely filled; containing all that can be held; filled to utmost capacity;
- (2) complete; entire; maximum
- (3) of the maximum size, amount, extent, volume, etc.¹¹

Again, looking at dictionary.com, "equal" means:

- (1) as great as; the same as;
- (2) like or alike in quantity, degree, value, etc.; of the same rank, ability, merit, etc.¹²

Offering half of a certain service or benefit is hardly the same as providing the entire or maximum amount of such service or benefit. In the same vein, half is hardly equivalent of "the same as" and it is definitely far from being alike in quantity or degree. Because

¹¹ <http://dictionary.reference.com/browse/full> (last visited January 18, 2011).

¹² <http://dictionary.reference.com/browse/equal> (last visited January 18, 2011).

“full and equal” is plain in the statute, the Department cannot change Congressional intent by adding the 50% requirement to the ADA in its regulations pursuant to the *Chevron* rule.

i. 50% Access is Not Full and Equal Access

The comments are full with reasons why 50% access is not full and equal access.¹³ One of the benefits of a movie theater is the wealth of choices of movies and times to accommodate everyone’s individual preferences and schedules. Whereby a hearing customer can select from all the available movies and showings, a 50% rule would limit a deaf or hard of hearing customer to half of the choices of the hearing customer.

Similarly, giving the movie theaters the decision of what and when to caption gives the theaters the power to decide for deaf and hearing customers. This is less than full and equal, and also imposes an inferior status and limitations onto the deaf and hard of hearing – two of the very implications the ADA intended to eliminate. 42 U.S.C. § 12101(6), (7).

Further, given the current but unwarranted deference the Department gives to the movie industry by allocating the burden of supplying caption data on the producers and not the theaters¹⁴, a 50% rule is likely to result in even less than 50% access. This will provide deaf and hard of hearing individuals with less than full and equal access as demanded under the statute. In other words, the Department’s proposal would change the statutory language in a way that the Department is not allowed to pursuant to *Chevron*. Anything short of 100% is arbitrary and does not meet the requirements of the ADA.

¹³ See Sections 1.A and 1.B for detailed examples.

¹⁴ See Section 1.D.

ii. The 50% Proposal Would Relieve Movie Theaters From Having to Show Undue Burden

As explained above in Section I.2.a, the statute is clear in requiring movie theaters to provide full and equal access unless they can demonstrate undue burden. 42 U.S.C. § 12182(a), (b)(iii). Nowhere in the statute does it provide a benchmark figure or percentage requirement for all entities to follow to satisfy undue burden. In fact, the statute explicitly puts the burden of showing undue burden on the entity. 42 U.S.C. § 12182(b)(iii). In imposing a 50% limit for movie theaters, the Department is, in a sense, relieving movie theaters of the obligation of proving undue burden. This is especially true for larger theaters.

c. Movie Captions Are Not A Fundamental Alteration

The NAD urges the Department of Justice to add language in the new regulations that movie captioning does not constitute a fundamental alternation of the nature of the services of screening movies. 28 C.F.R. § 36.303(a). The Department itself has already concluded that captions are not a fundamental alternation. *See* Brief of the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 22-24, *Arizona v. Harkins Amusement Enterprises, Inc.*, 603 F.3d 666 (9th Cir. 2010) (No. 08-16705).

Movie captioning does not fundamentally alter the content of films or require theater owners to fundamentally change their movie screenings. It only requires theaters to provide the equipment and technology necessary to allow deaf and hard of hearing patrons to access the caption data that comes with movies.

C. The ADA and Existing Regulations Do Not Support a Five-Year Implementation Schedule nor Waiting for Transition to Digital Cinema

The ANPRM suggests a five-year period for the full implementation of captioning in the movie theaters. This schedule does not comply with the ADA and its current regulations. As mentioned above, the movie theaters have been on notice for twenty-plus years since the passage of the ADA to make their movies accessible to deaf and hard of hearing persons. Technology has been available during this time period to allow movie theaters show captioned films.

The Department should not wait for movie theaters to make the transition to digital cinema to display captions. Movie theaters have long used the excuse that they should not be required to caption films until theaters finish the transition to digital cinema. Yet, theaters have been claiming that the transition to digital cinema was imminent for many years. The transition to digital cinema is expensive, and is certainly not an immediate reality.¹⁵ Individuals who are deaf and hard of hearing have waited long enough for auxiliary aids and services that provide them with equal access and equal enjoyment to movie theaters. Absent a showing of undue burden, movie theaters have no reason not to employ these auxiliary aids and services to make movies accessible to individuals who are deaf and hard of hearing.

As stated above, the NAD urges the Department to require all movie theaters to display captions at every movie, in every theater absent a showing of undue burden. As such, implementation should be required as follows:

¹⁵ Year 11 and We're Still Talking About Rollout, presented by Digital Cinema Society, available at <http://www.digitalcinemareport.com/Michael-Karagosian-digital-cinema-rollout-technology> (last visited January 19, 2011).

(1) Any auditorium that is newly constructed, or altered, including converted to digital projection (hereinafter “upgraded”) on or after the effective date of the new regulations shall have the capacity to show captions as of the date the newly constructed or upgraded auditorium is open to the public;

(2) Any auditorium equipped with digital projection equipment prior to the effective date of the regulations shall have the capacity to show captions as of the effective date of the regulations; and

(3) Any auditorium that is not newly constructed or upgraded within one year of the effective date of the regulations (including all auditoriums that have existing analog projection equipment) shall have the capacity to show captions within one year of the effective date, unless the theater owner can prove that doing so would constitute an undue burden. If the auditorium is subsequently upgraded, it must be equipped with the capacity to show captions as of the date that the upgraded auditorium is available to the public.

We strongly encourage the Department to carefully consider our primary proposal of captioning 100% of the movies within the time period allocated as discussed for the reasons stated above. The theaters have had plenty of time to implement the ADA, and to provide murky details on their obligations would allow for too much abuse of discretion, giving the theaters the power to decide what deaf and hard of hearing moviegoers can watch and when.

D. Movie Theaters, not Movie Producers, Have the Obligation to Caption Movies

The NAD firmly believes that the movie theater operators have an independent obligation to caption or describe movies. Movie theaters are public accommodations

under Title III, and have an independent obligation to ensure that their movies are accessible. 42 U.S.C. § 12181(7)(C). The movie theaters should not rely on the goodwill of studios, which have no legal obligation to caption movies. Instead, it is essential under the ADA to make sure the theaters know it must ensure that the movies are captioned, however it happens.

The Department's proposal relies on the faulty assumption that **all** movies come with caption data. The current practice is that the studios, and not the movie theater owners, provide the data for the captions. Out of about 550 new movies released each year, about 150 are "wide release" movies are distributed nationally. For example, in 2009, 110-115 of the wide releases were supplied with caption data. The other 400 new movies were independent films or "limited releases" that are not routinely produced with captions. Requiring movie theaters to ensure that half of their movies are captioned if not all of the movies released are actually captioned does not result in full and equal access as required under the ADA. In fact, this opens up doors for potential loopholes on the part of the movie theaters.

Instead of requiring that just 50% of movies to be captioned when studios do not caption all of its movies, it is imperative that the Department clearly place the burden of captioning the movies on the theater owners, and not allow the theaters to hide behind the studios. Currently, the studios, which have no legal obligation to provide caption data, provide caption data for 25% of its movies released annually. However, absent any law, the studios are free to reduce or cease this practice, since they are not public accommodations as defined by Title III of the ADA.

Conversely, the ADA does place a specific obligation on movie theaters, as places of public accommodations, to make its movies accessible. If a certain movie is not captioned by the studio, this is not a get out of jail free card for the movie theater. Instead, the movie theater has to decide whether it wants to caption the movie itself, or not show the movie at all. Requiring only 50% of movies to be captioned allows too much discretion to the movie theaters and allows them to shift the blame on the studios for the captioning of the movies. Only by requiring that absolutely every theater be equipped with the capacity to display captions and every movie be able to be shown with captions will the message be absolutely clear to movie theaters that it is their obligation under the ADA, absent undue burden, to ensure access to the movies. If movie theaters have to ensure accessibility, then they will be hounding movie studios to caption the films or provide the caption data themselves.

II. COMMENTS ON METHOD OF CAPTIONING (QUESTION 9)

Question (9): While the Department is not considering requiring the use of open captioning, should movie theater owners and operators be given the discretion to exhibit movies with open captioning, should they so desire, as an alternate method of achieving compliance with the captioning requirements of any Department regulation? If theaters opt to use open captioning, should they be required to exhibit movies with such captioning at peak times so that people with disabilities can have the option of going to the movies on days and times when other moviegoers see movies?

The NAD finds it important to clarify the definitions the Department and many other writers are using to describe current, commonly-used movie caption technologies. The Department refers to open movie captions as “similar to subtitles in that the text of the dialog is visible to everyone in the theater.” The Department goes on to state that: “[o]pen movie captions are sometimes referred to as ‘burned in’ or ‘hardcoded’ captions. However, new open captioning technology enables studios to superimpose captions

without making a burned in copy or having to deliver a separate version of the movie.”¹⁶ Given the confusion surrounding the terms “open captioning” and “closed captioning,” the NAD recommends the Department clarify these terms as they apply to movie theater captioning. In addition, the NAD would encourage the Department to add the term “individual captioning system” to the language being used to describe movie captioning. The NAD would propose the Department adopt the following categorizations:

Open Captions: At the time the ADA was passed, the only form of movie captioning available was, in fact, “open captions.” Open captions were hard-coded, burned into the original film print and could not be turned off. In television, open captions refer to captions that cannot be turned off. The NAD asserts that the term “open-caption” should only be used to describe movie captions that are hard-coded into a film and cannot be turned off. Therefore all viewers will have access to the captions.

Closed Captions: By contrast, in television, closed captions are captions which can be turned off. When closed captions are turned on, everyone in the room viewing the screen is able to see the captions. **The defining characteristic of closed captions is their ability to be turned on and off, not whether the entire audience can view the captions.** New technologies such as DTS-CSS allow captions to be displayed on the movie screen, for the entire audience to view, but these captions can be turned on or off by the theater. The Department’s characterization of systems like DTS-CSS which enable studios to superimpose

¹⁶ Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. 43,467 at 43,470 (July 26, 2010).

captions on the movie screen as open captioning is incorrect. These systems are the equivalent of closed captioning on televisions and should be labeled as such.

Individual Captioning Systems: Advancements in technology have also led to the development of new caption display systems, which allow individual users to view captions through an ancillary device without displaying the captions to the entire audience. Rear Window Captioning is, perhaps, the most common form of individual captioning currently available in movie theaters.

These definitions are an accurate description of the various types of movie captioning available today and these categories should remain flexible enough to absorb the new types of technology that will become available in future years as movie theaters make the transition to digital cinema as well as other forms of cinema that emerge in the future.

As noted above, at the time the previous regulations were promulgated, in 1991, the only form of movie captioning available was open captioning, with the hard-encoded captions burned into the film print. At that time, the Department suggested that “[m]ovie theaters are not required by Sec.36.303 to present open-captioned films.”¹⁷ This language has been used by theaters and even the courts to exempt theaters from showing any film where captions are projected on the screen, visible to the entire audience.¹⁸

¹⁷ 28 C.F.R. Pt. 36, App. B (1991).

¹⁸ *Arizona v. Harkins Amusement Enterprises, Inc.*, 603 F.3d 666, 673 (9th Cir. 2010) (“Because the commentary to Title 28, part 36.303 states that open captions are not required by § 36.303, we conclude that open captioning is not mandated by the ADA as a matter of law.” The Court further states that “[e]ntities such as Harkins should be able to rely on the plain import of the DOJ’s commentary until it is revised.”

Legislative history that says movie theaters are not required to show “open” captioned films also recognized that new technology may make some accommodations possible and required someday, and that day has come:

Committee wishes to make it clear that technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities. Such 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.

HR Rep No. 101-485(II) at 108 (1990) reprinted in 1990 USCCAN 303, 391. This implies the anticipated possible changes in technology, including movie captioning and the flexibility that the ADA should have in recognizing such advancement. The NAD strongly urges the Department to clarify that this earlier guidance must be read in the context of captioning technology available at the time the regulations were promulgated. Movie theaters should be encouraged to use any and/or all systems available to provide effective captioning for individuals who are deaf and hard of hearing. The NAD further urges the Department to make clear that movie theaters must choose between effective means of providing and displaying captions unless a movie theater can demonstrate undue burden.

Many individuals in the deaf and hard of hearing community find captions that are visible on-screen, whether projected on the screen or burned into the film print, effective. Additionally, based on the experience of billions of people who view subtitled movies, we know that displaying large, clear, high quality, high contrast captions as part

of the visual movie presentation is effective. Decreasing the quality or increasing the distance between subtitles or captions and the corresponding visual presentation, decreases their effectiveness. The introduction and use of ancillary equipment has proven such individual captions to often be ineffective. Consumers who have used existing ancillary caption display equipment report that it is often difficult to use, subject to frequent equipment malfunction and faulty hardware, and causes physical discomfort and inaccessibility for those with mobility difficulties.

The NAD urges the Department to require, in compliance with the ADA, that movie theaters provide and display closed captions, as defined above, unless doing so results in an undue burden. Captions should be available for display when the movie is first released and shown in movie theaters.

Although the NAD urges the Department to require closed captioning, as a less desirable alternative the NAD maintains that if movie theaters use individual caption display systems and ancillary equipment, such system must be effective and be used at any showing of any movie in any theater at any time. Movie theaters and caption display system developers and manufacturers should also be encouraged to innovate and to conduct research and development to ensure that these systems are effective.

The NAD encourages theaters to meet with individuals who are deaf and hard of hearing within their community, to seek their input, and to install the types of systems that are the most effective based on that feedback.

The position of the NAD is that showing onscreen captioning (either open or closed) does not exempt movie theaters from showing movies at peak times. While showing onscreen captioned movies is a method to satisfy the DOJ's new movie

captioning requirements, the movie theaters need to also ensure that accessible movies be shown at peak times – e.g. at the release of a movie, during weekends at popular times, and frequent captioned showings. Individuals should not be restricted in what movie they can see, and where and when they can see movies.

III. COMMENTS ON QUESTIONS 7, 8, 10-26

Question (7): Should any such regulation require that the same number or percentage of movies with video description be exhibited as required for movies with captioning or should a different number or percentage be imposed? If the latter, what would be the justification for distinguishing between these forms of access? Should small businesses use a different ratio or percentage of video described movies or should they also be required to exhibit the same number or percentage of video described and captioned movies as other entities?

The NAD asserts that there should be no difference between video description and captioning. Both are auxiliary aids and services. There are well developed and widely used technology for both auxiliary aids on the market. Absent a showing of undue burden limited to an existing theater using analog projector, a theater should be required to make movies accessible in all theaters at all times.

Question (8): Should the Department adopt a requirement that movie theater owners and operators exhibit captioned and video described movies beginning on the day of their release? If not, why not (e.g., could such a requirement impose additional burdens and if so, what are they)? Should a different requirement be imposed on small business owners? If so, why? What should that requirement be?

The NAD strongly advises the Department to adopt a requirement that movie theaters exhibit captioned and video described films beginning on the day of their release. A significant portion of the movie theater experience includes catching the release of a well-anticipated flick. The opportunity to be one of the very first viewers of a popular blockbuster is often a memorable experience. Nothing kills the experience of a movie more than learning all about the movie at the water cooler at the office or from family

and friends the day after it is released. To be denied the opportunity to see a movie at the same time as everyone else is to deprive the deaf and hard of hearing population of equal access and full enjoyment. All movies, in all theaters, regardless of the size of the theater should be required to display accessible films absent a showing of undue burden on part of existing theaters using analog projection.

Question (10): How many movie theater owners or operators have converted, in whole or in part, to digital cinema? How many have concrete plans to convert 25 percent of their theaters in the next five years? Next ten years? How many have concrete plans to convert 50 percent of their theaters in the next five years? Next ten years? How many have concrete plans to convert 75 percent of their theaters in the next five years? Next ten years? What are the estimates for the cost for a movie theater to convert a movie auditorium to digital cinema? Are these costs different for small businesses? Have small businesses entered into any cost-sharing agreements or other financing arrangements to assist in such a conversion?

The NAD does not have this data available.

Question (11): Have specific protocols or standards been developed for captioning and video description for digital cinema and, if so, what are they?

The ancestor of the Described and Captioned Media Program (DCMP), Captioned Films for the Deaf, was begun for the purpose of captioning movies. This program (now DCMP) continued to caption movies up through the mid-1990's. The *Captioning Key* guidelines were developed for all types of media, and for all consumers (youth through adult). The *Key* is used today by approved vendors on our list who also caption movies.

The NAD encourages the Department to review the *Key*, available at <http://www.dcmp.org/ai/captioningkey/>, or more specifically, http://www.dcmp.org/ai/captioningkey/quality_captioning.html, to determine how to measure the quality of captions.

Question (12): Do the closed captioning and video description technologies currently available require the use of a digital sound system or digital cinema? Have technologies been developed that do not require the use of either a digital sound system or digital

cinema in order to display open or closed captions and offer video description? If any new technologies have been developed, please explain how they work and what, if any, additional costs are associated with the purchase or use of such technologies? Are there technologies in development that will not require the use of a digital sound system or digital cinema in order to display captions or video description? If so, what are they and when are they expected to be available for use by movie theater owners and operators? Please explain what, if any, additional costs are associated with the purchase or use of such technologies.

The NAD does not have this data available.

Question (13): Is the existing closed captioning and video description equipment in use for digital sound systems compatible, or able to be integrated, with digital cinema systems? If not, why not? Are there additional costs associated with using this equipment with digital cinema systems? If so, please provide details. Are the costs different for small businesses? If so, why? What are they?

The NAD does not have this data available.

Question (14): With regard to closed captioning systems, is the ability to read the captions equally good throughout the movie theater or are there certain seats in the theater that provide an enhanced level of readability or line of sight both to the screen and the adjustable panel affixed at or near the patron's seat? If certain seats enable individuals who are deaf or hard of hearing to view movies more effectively, which seats are they and why are they better (e.g., the image is better, there are fewer obstructions, there is less need to continually adjust the panel, etc.)? Should movie theater owners and operators be required to hold such seats for individuals with disabilities who wish to use the theater's closed captioning system? Since movie theater seating is usually first-come, first-serve, is there an effective system that movie theaters would be able to implement to hold back releasing such seats? Should movie theater owners and operators be allowed to release such seats if they are not requested within a certain amount of time before the start of the movie? Should movie theater owners and operators be allowed to release much seats to the general movie going audience once all of the other seats in the theater have been sold out? Are there alternatives for seating that minimize the cost but still provide patrons who are deaf or hard of hearing with effective and efficient readability of the captions and lines of sight to the screen?

See Question 9 for our proposed terminology. As used in the comments, closed captioned should refer to captions shown on the screen that can be turned on and off.

Individualized captions refer to captions that require the use of ancillary equipment by the individual viewer.

In any movie where the captions are displayed on the screen – the method the NAD finds to be most effective - the Department must ensure that the captions are high quality, in a large text with sufficient contrast, readable, and can be seen from anywhere in the theater.

In individualized captioning systems, there should be designated seats for individuals who are using specific captioning systems where the quality of captions depends on the location of the seat in the theater. Movie theaters could employ a number of systems to reserve those seats, by holding them until a movie begins, then releasing the seats if no one has filled them, or designating the areas with signage and training ushers to ask individuals to move if a person using captioning comes into the theater. The individual systems set up may vary from theater to theater, and depend entirely on the set-up of the theater. However, it is reasonable to expect that if a theater is going to use a system that only allows adequate viewing for individuals with disabilities in certain areas, then those areas should be designated and reserved for individuals with disabilities.

It is important to note that such seats for individuals who use an individualized captioning system should not be the same as seats designed for those with physical disabilities. Seats reserved for those with physical disabilities do not take factors unique to individualized captioning systems in account and therefore cannot be assumed to be ideal for such systems. Individualized captioning systems require a certain depth of vision to be able to avoid any eye-strain. The ideal location may depend on the system used, but usually it is somewhere above the halfway mark of the center of the height of the theater. Lengthwise, it depends on the system.

Question (15): Are there other factors that the Department should include with regard to the display of captions or the use of video description? What is the cost of

purchasing/incorporating video description equipment per screen/theater? Are the costs different for small businesses? If so, why? What are they?

The NAD does not have this data.

Question (16): Has any specific equipment been developed or is there equipment in development for use with digital cinema that would be necessary to exhibit closed captioned movies or movies with video description? If so, is that equipment included in the general cost of the conversion to digital cinema or is an additional fee imposed? If an additional fee is imposed, please provide details. Are the costs different for small businesses? If so, why? What are they?

The NAD does not have this data.

Question (17): Are there any other technical requirements that the Department should consider for inclusion in any regulation? If so, please provide details

The Department is encouraged to establish standards for the captions to ensure readability. Such standards should include specifics on line of sight, clarity, contrast between text and background, text size, and so forth. There also must be strict standards to prevent malfunctioning.

The NAD proposes the following regulatory language:

Movie Captioning. When a public accommodation provides movie captioning, it shall ensure that it provides –

- (1) readability and minimum potential for eye strain through high-quality captions that do not produce choppy, blurry, or grainy images, different focal acuity from that of the film, high intensity of light source;
- (2) captions on a high contrast background as such that they continue to be readable throughout the film;
- (3) captions in text size that is large enough for the viewer to read from any seat in the theater and that are viewable from any angle, enabling the viewer to sit anywhere;
- (4) Speaker identification;
- (5) Characters, line length, number of lines must account for readability, including sufficient amounts of text at one time and for enough time;
- (6) contemporaneity: captions must be present at the time same information is presented aurally without lags or irregular pauses in presentation
- (7) functioning equipment that requires minimum effort on the viewer's part in using the technology provided; and

- (8) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate captions.

Question (18): Should the Department include a requirement that movie theater owners and operators establish a system for notifying individuals with disabilities in advance of movie screenings as to which movies and shows at its theaters provide captioning and video description? If so, how should such a requirement be structured? For example, should the Department require movie theater owners and operators to include, in their usual movie postings in the newspaper, on telephone recordings, and on the Internet, a notation or some other information that a movie is captioned, the type of captioning provided, or that the movie has video description? Should the Department require movie theater owners and operators to establish a procedure or method for directing individuals with sensory disabilities to where in each movie theater they should go to obtain any necessary captioning and video description equipment? Should movie theater owners and operators have the discretion to determine what notification procedure or method is most appropriate or should the Department specify how and where individuals with disabilities can obtain such equipment at each theater? What are the costs for these types of notifications? Are there any alternative types of notifications possible? Are these costs different for small businesses? If so, why? What are they?

With our proposal – captions on all movie screens, in all theaters, at all time, deaf and hard of hearing patrons will be confident that every movie screening is accessible, and there would be no need for separate notification.

In the alternative, if another proposal is adopted by the Department, the theater owners have a responsibility to inform the public of which movies will be captioned and when they will be captioned.

The Department should require theater owners to put a notice regarding captioned movies and their show times wherever they put a notice for their general showtimes. In other words, if an owner uses the internet, the newspaper, and telephone recording to notify the public about general showtimes, the owner must use the same means to notify the local deaf and hard of hearing community of captioned movies showtimes. In such notification, the method of captioning should be mentioned (e.g. open, closed or individual).

The cost of additional notification is minimal – add a few characters per captioned film. This should not put small businesses at a disadvantage. A possible additional (and not an alternative) form of notice would be a separate webpage with a list of captioned movies and their showtimes. An additional webpage that uses pretty much the same layout as the entire site requires minimal cost and maintenance.

Question (19): Should the Department consider including a training requirement for movie-theater personnel? Should the Department require that movie theater owners and operators ensure that at least one individual working any shift at which a captioned or video described movie is being screened be trained on how any captioning and video description equipment operates and how to convey that information quickly and effectively to an individual with a disability who seeks help in using that equipment? What are the costs and burdens to implementing such a training requirement? Are these costs different for small businesses? If so, why? What are they? Would written and recorded explanations of how the equipment works be a better alternative?

The NAD encourages the Department to require that all employees receive proper training on interacting with and assisting individuals who are deaf or hard of hearing. Unless a theater can show an undue burden, or fundamental defense, there is no reason not to provide such training.

Theater personnel should be trained with respect to accessible equipment. This includes training the staff on how to use the technology and/or equipment properly. A sufficient number of staff members must be trained to ensure that there is always staff on duty that can provide this information to movie patrons who are deaf or hard of hearing.

Each theater should develop policies and procedures for customers to receive and use accessible equipment. Such policies and procedures should include where ancillary equipment, if provided, should be stored (in an easily detected and accessible area within the theater, in a central location), and include requirements that movie operators check equipment and maintain them regularly, preferably at least once a month and not just

sporadically or when a customer complains of failure. If malfunction is detected, repair should be done as soon as possible.

The cost of training and implementing policies and practices mentioned above also is minimal. Initially, the theaters may invest some time and money on training current employees as they implement accessible technology. However, such training should and can easily be incorporated into a new employee training curriculum. Such training will impose little, if any, additional charge on businesses, whether big or small. One example of such training would be to have employees experience a captioned movie for a short period of time and understand where to find the equipment, if any is required.

Also, such training will ultimately prove to be a more cost-effective way to conduct business. Currently, due to lack of training of theater employees, deaf and hard of hearing customers are unable to access and enjoy movies that theaters claim to be captioned and a considerable amount of employee time is spent looking for nonexistent equipment or with unhappy patrons.

Question (20): The Small Business Administration size standard for small movie theatres is \$7 million dollars in annual gross revenues. Does the public have estimates of the numbers of small entities that may be impacted by future regulation governed by this ANPRM? How many small entities presently provide movie captioning or video description? How many small entities already have, or have plans to convert to, digital cinema? How many small entities presently have, or plan to convert to, digital sound systems? How much would it cost each small entity to provide movie captioning and video description technology using digital sound? How much would it cost each small entity to provide movie captioning or video description if the entity converted to digital cinema?

Small businesses should only be exempt when it is an existing theater using analog projector which is able to prove undue burden, pursuant to our answer in Section I.b.2.

Question (21): Currently, what are the general costs per movie theater owner or operator to display movies with closed captioning? How many small entities offer this feature? What are the general costs to small entities to display movies with open or closed captioning? For all entities, is that figure per auditorium, per facility, or per company? Do these costs change for showing IMAX or 3D films with captions? Are there any cost-sharing or cost-allocation agreements that help mitigate these costs for movie theater owners or operators? Is most or all of this expense a one-time fee? If not, please explain.

The NAD does not have this data.

Question (22): Currently, what are the general costs per movie theater owner or operator to display movies with video description? How many small entities offer this feature? What are the general costs to small entities to display movies with video description? For all entities, is that figure per auditorium, per facility, or per company? Are there any cost-sharing or cost-allocation agreements that help mitigate these costs for movie theater owners or operators? Is most or all of this expense a one-time fee? If not, please explain.

The NAD does not have this data.

Question (23): Currently, what are the general costs to convert to digital cinema? Are the costs different for small entities? If so, why? What are the costs for small entities? Is that figure per auditorium, per facility, or per company? Are there cost-sharing or cost-allocation agreements that help mitigate these costs for movie theater owners or operators?

The NAD does not have this data.

Question (24): What impact will the measures being contemplated by the Department requiring captioning and video description of movies have on small entities? Please provide information on: (a) Capital costs for equipment needed to meet the regulatory requirements; (b) costs of modifying existing processes and procedures; (c) any effects to sales and profits, including increases in business due to tapping markets not previously reached; and (d) changes to market competition as a result of the proposed rule.

Movie captioning and video description open up a new market. Since less than 1% of films being shown presently are captioned, few individuals who are deaf and hard of hearing go to the movies in the theater. Not only will movie captioning will make movies accessible to individuals who are deaf and hard of hearing and bring them to the theaters, it will also attract other movie patrons who would not normally attend movies without deaf or hard of hearing individuals such as their children and other family

members. The same is true for video description. This is a positive thing for both theaters and individuals who are deaf and hard of hearing.

Despite this, the NAD would like to re-iterate that failing to caption movies is a blatant failure on the part of theaters to provide individuals who are deaf and hard of hearing with appropriate auxiliary aids so that they may have equal access and equal enjoyment to movies being shown in theaters. This constitutes discrimination by the movie theaters. As such, whether or not captioning provides a “new market” and will create new revenue for theaters should not be the primary consideration. Instead, movie theaters should be required to make appropriate auxiliary aids available to individuals with disabilities (which includes captioning for individuals who are deaf and hard of hearing) unless they can demonstrate undue burden.

Question (25): Should any category or type of movie theater be exempted from any regulation requiring captioning or video description? For example, the Department now considers it likely that drive-in theaters will not be subject to this rule because the Department is not aware of any currently available technology that would enable closed captioning or video description of movies shown in drive-in theaters. Are there other types of movie facilities that should be exempted and why?

The NAD asserts that no movies or movie theaters should be exempted from these rules and regulations unless providing captioning or video description constitutes an undue burden. See Section 1(b)(2). In other words, drive-in theaters, 3-D movies, IMAX, and other types of movies and movie theaters must provide captions unless they can assert undue burden.

Question (26): If an exemption is provided, how should such an exemption be structured? Should it be based on the size of the company? To determine size, should the Department consider (a) using the Small Business Size Standard of \$7 million dollars in annual gross revenue so that movie theater owners who fall within those parameters should be exempt?; (b) using factors such as whether the movie theater owner is an independent movie house (not owned, leased, or operated by, a movie theater chain), or small art film house in order to be exempt?; or (c) using some other formula or factors to determine if a

movie theater owner should be exempt? Should the Department consider the establishment of different compliance requirements or timetables for compliance for small entities, independent movie houses, or small art film houses to take into account the resources available to small entities? What are other alternatives for small businesses, independent movie houses, or small art film houses that would minimize the cost of future regulations?

The NAD asserts that no movies or movie theaters should be exempted from these rules and regulations unless providing captioning or video description constitutes an undue burden. See Section 1(b)(2).

IV. SUMMARY AND CONCLUSION

The NAD urges the Department to adopt the recommendations set forth above to ensure clarity and provide the guidance necessary to implement and reflect the intent of the ADA in the context of captioning in movie theaters.

Respectfully submitted,

_____/s/_____

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