

Before the
U.S. Department of Justice
Washington, D.C.

In the Matter of:)
)
Nondiscrimination on the Basis of Disability) 28 CFR Part 36
Movie Captioning and Video Description) CRT Docket 0112
)

COMMENTS OF
HEARING LOSS ASSOCIATION OF AMERICA

Hearing Loss Association of America (HLAA) submits these comments in response to the Advance Notice of Proposed Rulemaking (ANPRM) released by the U.S. Department of Justice (the Department) to revise its regulation implementing title III of the Americans with Disabilities Act (ADA) in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by movie theaters accessible to individuals who are deaf or hard of hearing or who are blind or have low vision by screening movies with captioning or video description. HLAA confines our comments to issues related to captioning of movies.

HLAA is the nation’s leading consumer organization representing people with hearing loss. HLAA impacts accessibility, public policy, research, public awareness, and service delivery related to hearing loss on a national and global level. HLAA’s national support network includes an office in Bethesda, Maryland, 14 state organizations, and 200 local chapters. The HLAA mission is to open the world of communication to people with hearing loss through information, education, advocacy, and support. HLAA constituents are directly impacted by title III of the ADA.

We applaud the Department for initiating this ANPRM and for recognizing the importance of movie captioning. When we notified our members and constituents about this ANPRM, HLAA received an outpouring of support for 100% captioning of movies. For people with significant hearing loss who cannot access movies any other way, not having captioning available means people with hearing loss cannot enjoy movies side by side with their hearing spouses, children and grandchildren, friends and co-workers. Access to movies, particularly now, when the economy has forced people to cut back on more expensive accessible entertainment they might otherwise enjoy, becomes an even greater issue for people with hearing loss. While their hearing friends kick back at the movies, people with hearing loss are left behind. For people with hearing loss, access to movies has become a quality of life issue.

It has long been the position of HLAA:

- People with hearing loss are entitled to receive captioning in movie theaters as a form of auxiliary aid under the ADA.
- People who need captioning should be able to access that accommodation at any theater for any screen, at any time, for any showing, absent undue burden by the theater owner or operator.
- Theater owners or operators should be able to choose from a number of closed or open captioning options to fulfill their obligations under the ADA.

For the reasons stated below, we request the Department revise the regulations to require 100% captioning of movies offered in movie theaters.

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?

Q. 1. HLAA strongly disagrees with the proposed compliance schedule, which would require captioning 10 percent within one year after a final rule becomes effective and increasing 10 percent a year until reaching 50 percent five years after the effective date of the final rule.

As the Department notes, Title III of the ADA prohibits as discrimination the failure to provide auxiliary aids and services to ensure that individuals with a disability can participate in the “full and equal enjoyment” of all that a place of public accommodation has to offer, subject to the defenses of undue burden and fundamental alteration. 42 U.S.C. § 12182(a); 42 U.S.C. § 12182(b)(2)(A)(iii). Movie theaters are places of public accommodation. 42 U.S.C. § 12187(7)(C).

There is no doubt that people with significant hearing loss are “disabled” as that term is defined in the ADA, as amended. Additionally, there is no issue that auxiliary aids, in the form of technology and equipment, to provide captioning, either open or closed, in movie theaters have been available for a number of years. The technology is available whether the film is 35 millimeter, 70 millimeter, or digital format. Accordingly, the clear language of the statute requires that all films shown at all times in movie theaters display captions unless the theater owner or operator can establish an affirmative defense of fundamental alteration or undue burden. Anything less violates the mandate of “full and equal enjoyment.”

To begin with, the Department should make it clear that captioning of films being displayed publicly does not constitute a fundamental alteration, precluding the availability of this defense in this instance. Current regulations explicitly list open and closed captioning as auxiliary aids and services. 28 CFR § 36.303(b)(1). Converting audio aspects of a film into a visual format is employment of an auxiliary aid to provide access to disabled persons. To claim that the use of such an aid fundamentally alters the product is to assert that all captioning is barred under the statute, an untenable result.¹

Given the elements of the statute, it appears that the Department is wrestling with the application of the undue burden defense. We recognize that there is a cost associated with the installation of equipment into movie theaters to provide captioning. However, whether the costs constitute an undue burden is a fact-specific test applicable to each theater owner who asserts the defense on a case-by-case basis. Moreover, each theater owner is required to provide access to the maximum extent possible until the cost becomes an undue burden. See 28 CFR § 36.303(f). The law makes no provision for a universal bright-line standard that applies across the entire industry. Yet that is what the Department is attempting to do by proposing a regulatory compliance schedule and a 50% cap on captioning.

It appears that the Department fears an overwhelming number of complaints, filling the courts, which would force every theater owner to prove an undue burden for failure to exhibit films with captioning 100 percent of the time. Alternately, complaints could be sent to the Department, tying up Department resources with investigations. Whether such fears are likely to be realized or not, the potential for litigation would be entirely consistent with the Title III scheme. Moreover, *Arizona v. Harkins Amusement Enterprises, Inc.* 603 F.3d 666 (9th Cir. 2010) has already opened the door to similar litigation across the country, with the prospect that the decision of the 9th Circuit will be replicated. The result of this case, a remand for proceedings on the existence of an undue burden on the part of the theater owner, Harkins, is a logical application of the law.

Faced with similar litigation to compel captioning, theater owners are likely to seek settlement agreements that establish compliance schedules unique to their own financial circumstances, or begin showing captioned films all the time, or, perhaps for small entities, demonstrate that displaying captioned films would constitute an undue burden. The Department offers no explanation for its apparent desire to avoid this case-by-case outcome. We recognize that enforcing Title III, to obtain movie captioning through litigation or the threat of litigation has the possibility of being burdensome for both complainants and theater owners. Historically, however, not many cases have been brought. Also, theater owners may, on their own, show captioned films to increase their customer base or to avoid the cost of litigation with a low probability of success. The Department's ostensible fears may be unfounded.

¹ The availability of “fundamental alteration” as a defense is not a hypothetical issue. The court in *Arizona v. Harkins Amusement Enterprises, Inc.*, 548 F. Supp. 723 (D. Ariz. 2008) ruled that the captioning constituted a fundamental alteration of the movie. Although this decision was reversed on appeal in *Arizona v. Harkins Amusement Enterprises*, 603 F. 3d. 666 (9th Cir. 2010), the Court of Appeals stated that Harkins was entitled to assert fundamental alteration as one of the defenses on remand.

The Department's proposed uniform compliance schedule would not necessarily prevent litigation or filing of complaints with the Department, and it is seriously flawed in other respects. First, challenges are likely to be brought against theater owners, even if they are in conformance with a compliance schedule, claiming the regulation to be in violation of Title III, or as arbitrary and unsupported by substantial evidence (see discussion below). Second, even if the compliance schedule is upheld, theater owners who fall short or who are perceived to fall short of meeting a regulatory schedule would be exposed to claims by affected disabled movie goers. Unless the Department requires theaters to publicly report when they have reached compliance benchmarks, challenges may be brought simply because consumers are unsure whether the theater is in compliance with the schedule.² Owners being sued could avail themselves of an undue burden defense, with the test based upon the statutory standard of displaying captioned movies 100 percent of the time in the first instance, or against the compliance schedule in the second instance. To the extent that theater owners can and do comply with the regulatory schedule, and the regulation is upheld, it is possible that the potential for litigation would be reduced from the situation where there is no regulatory compliance schedule and 100 percent captioning is required. However, the potential for reducing litigation by adopting a compliance schedule is a matter of pure speculation, and there is no certainty that the regulation will be upheld.

The compliance schedule proposed by the Department in this ANPRM is highly problematical. Any attempt to project a reasonable and realistic standard to measure undue burden across the industry over the next several years must be based upon a set of clear and substantiated facts. To the contrary, the Department's proposal is arbitrary. Requiring captioning 10 percent of the time in the first year after the effective date of the rule and increasing the percentage by 10 until a maximum amount of 50 percent is achieved within five years has no apparent connection to reality. This schedule seems to be created out of whole cloth. The Department offers no explanation of its proposal in terms of the status of the industry now and its expected status in the near future, with regard to availability, type, and cost of equipment to provide captioning.

For example, the industry reports that currently more than 30 percent of its screens are equipped to show movies in a digital format³. Our understanding is that the four largest chains will be transitioned to digital within the next three years, and that nearly 80 percent of all screens in the U.S. will be converted to digital within the next five years. With this transition, the costs of installing the equipment to provide captioning will be substantially reduced. When the digital transition is completed, these theater owners will be able to equip those theaters easily and less expensively with systems that will be able to process captioning provided by studios and distributors.

² Similar benchmarks for television captioning were difficult for consumers to track during the time before broadcasters and cable providers were required to provide 100% captioning of programming. On the other hand, hearing aid compatible wireless handsets are much more easily tracked because the Federal Communications Commission requires quarterly publically available reports and has the authority to levy fines if a report is not filed, as well as if the provider falls short of the required level of compliance with the benchmarks.

³ "We've grown from 192 theater screens with digital projectors at the end of 2005 to more than 8,500 screens (out of 39,547) as of April 2010. The three members of Digital Cinema Implementation Partners — AMC Entertainment, Cinemark, and Regal Entertainment — have secured a \$660 million funding deal to accelerate the rollout of digital projectors to 14,000 screens in North America. As many as 2,500 3D screens will be installed this calendar year by the three companies involved." (National Association of Theater Owners, from website: <http://www.natoonline.org/pdfs/Talking%20Points/TP-Digital%20Cinema%202010.pdf>, January, 2011.)

A primary purpose of this ANPRM is to obtain the facts regarding the digital transition, and especially the costs associated with the acquisition of and/or retrofitting captioning equipment prior to and after the conversion of screens to a digital format. The Department should, under the law, require 100 percent captioning immediately, subject to the undue burden defense; however, if the Department nonetheless decides to establish a compliance schedule, as a minimum, the Department should use the information gathered from this ANPRM to design an industry wide compliance schedule for showing captioned films. Taking such an approach may enable the Department to design a compliance schedule that can be explained and justified in terms of the facts surrounding the industry, rather than one that is arbitrary, unsubstantiated by relevant evidence, and seemingly disconnected from reality.

There are two additional flaws in the proposed compliance schedule. First, the schedule does not ever require any theater owner to provide captioned films 100 percent of the time, required by Title III (subject to a showing of undue burden). The Department's proposal establishes that displaying captioned films by any theater owner more than 50 percent of the time would be an undue burden as a matter of law indefinitely. As mentioned above, the four major theater chains expect to have 100 percent of their screens converted to digital within the next few years. All of their screens will thus be capable of equipping technology that will more easily and less expensively show captioned films provided by studios and distributors. A rule that does not require 100 percent captioning at a point in time consistent with industry's ability to achieve this result would be a continuing violation of Title III, depriving disabled movie goers of their statutory rights without end.

Second, the five year time schedule in the Department's proposal is untenable. This schedule is (as rules are typically written) tied to the effective date of the final rule. However, given that this issuance is only an ANPRM, coupled with the Department's history in promulgating regulations, suggests that a final rule is not likely to be produced for at least a year or most likely two years. Certainly, the proposed compliance schedule, requiring 10 percent captioning two to three years from now and reaching 50 percent six to seven years from now, makes no sense at all in light of industry's planned conversion to digital format. It is conceivable that a point in time will be reached where a vast majority of the screens will be digital and have available the technology to display captioned films, and in fact may be showing captioned films. At the same time, the rule may require only a fraction of the actual amount of captioning that is actually occurring. Or worse, the 50 percent requirement will operate as a ceiling even though theater owners may have the clear capacity to display captioned films up to 100 percent of the time. This situation would demonstrate the arbitrariness of the rule and render it meaningless as a Title III enforcement mechanism for most of industry.

Third, by proposing a 5 year schedule of benchmarks with a 50% cap, inequities are likely to be created. The Department's Questions 2-6 in this ANPRM acknowledges such issues. With only 50% access at best, clearly some people with disabilities will not have access to captioned showings at some times. If reaching 50% is determined by the number of screens showing captions, then small, privately owned businesses will be treated in the same manner that large movie chains are treated, giving large chains an advantage over the smaller theaters. In addition, people with disabilities living in rural areas may find they cannot have access to movies simply by virtue of living in the wrong place, since theater chains would have the choice of clustering

those screens in larger cities and towns. In short, 100% captioning not only fulfills the requirements of the ADA, but creates a much simpler and more equitable formula, for both the movie industry and consumers who require captions for access to the movie theater.

In sum, any compliance schedule that attempts to establish by rule an industry wide measure of undue burden is inconsistent with Title III. We urge that the Department not proceed with this approach as part of its rule. If the Department, nevertheless, elects to proceed with a compliance schedule, it should be based on realistic projections of the status of the industry, including such factors as the transition to digital format, the cost of captioning equipment prior to and after the conversion to digital, and the time schedule for making this transition. Also, any compliance schedule must have at its final point a requirement for captioning 100 percent of the time.

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?

Q. 8 The Department should adopt rules that require movie theater owners and operators exhibit captioned movies beginning on the day of release. This result is required by the statute's mandate that disabled theater goers have "full and equal enjoyment." Excluding disabled persons from access from the day of release would constitute unlawful discrimination. Compliance with the law should be self-evident to the producers of films. It's our understanding that the process of making a movie intended for theatrical release from start to finish requires a well thought out plan and typically takes months or years to accomplish. There is no reason why the captioned portion of the production should be treated any differently than any other aspect of movie making. There is little concern that the producer would release a film for theatrical distribution before the sound track is finished. Captioning must be considered on par with the sound track: an integral part of the movie making process, without which the movie itself is not complete. Such a requirement would not likely pose a burden to the movie theater owner: it would, however, require that the producer ensure that the process of making the movie is completed, including captioning, before release to movie theater owners and operators.

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?

Q 9. Movie theater owners and operators should be given the option of exhibiting movies with open captioning, so long as the total of all captioned showings, open and closed, reaches 100% of showings and open captioning is available at times and days that include peak attendance

times so that people with hearing loss can be afforded the opportunity as all others attending movies.

HLAA does not propose to define which kind of technology the theater owner must use to display captions; we do believe the ADA requires access to movies, absent undue burden, and that captioning is an accommodation for people with significant hearing loss who attend movies. Open captioning should be considered one of several types of captioning a theater owner may choose to reach 100% captioning of movies screened, absent undue burden.

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 such 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?

Q.14. The ability to read captions anywhere in the movie theater is important to movie goers. Standards and best practices for closed captioned systems are needed to ensure that anyone with a hearing loss can come in at any time, including arriving late for a showing, and be able to view the movie from any seat with an unobstructed view. This result is required by the “full and equal enjoyment” provision of the statute.

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

Q.17. The Department needs to consider standards to establish what “effective communication” means for devices that display captions. In years past, hand-held devices were test marketed. Users found that the hand-held device was ill-suited to watching a movie or live theater performance for several reasons. One factor was that the person using the device found the line of sight for viewing the captions was different than the line of sight for the screen or the stage, creating a huge problem shifting focus back and forth between the hand-held device and the screen. A second consideration was the fatigue of the user holding the device in the same spot for the duration of the movie or performance. A third issue was for some hand-held devices, the user was required to advance the text manually. For someone with a hearing loss, that meant

guessing what was being said to match the performance, a frustrating exercise at best. Standards covering these as well as any other functional usage issue need to be developed and enforced so that theater owners have clear guidance on what kinds of devices provide effective communication.

The Department should consider scoping requirements for the number of closed captioned receivers made available in a particular theater. People with hearing loss must be assured they can attend any screening with friends and family who also hard of hearing or deaf. Having an adequate number of receivers in place per screen is important for consumers to get the access they need.

In addition, the Department should reinforce the requirement that all equipment must be in working order. We have found with assistive listening devices that even when the theater has these devices in place, often consumers have found that the devices are not in working order, the batteries are dead or the receivers are kept in a place that is a mystery to employees. With Rear Window®, we have learned that sometimes acrylic panels used by consumers to view the captions are ill cared for, with smudges on the panel making it difficult to read, or even sticky with a prior user's spilled soda left on the panel. We anticipate that with any technology, maintenance issues will arise. Captioning technology that does not work or is poorly maintained is of little use to consumers. Testing of equipment at regular intervals and standards of care should be part of the basic maintenance schedule of equipment used in the theaters and best practices to ensure that this equipment is working and usable is imperative.

Finally, the Department should consider best practices to cover situations when either the receiver or the captioning projector is not turned on or is not working properly. To facilitate that, standards for the receiver could include the ability to show a test screen before the movie starts, so that movie goers using the equipment know the receiver is in working order before the lights go down. In addition, best practices should be put into place that include having staff readily available to troubleshoot problems either before the start of the showing, or during the showing.

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?

Q.18. Notification of movie goers with hearing loss as to the time and day of captioned movies has been another source of constant problems for movie goers. We have accounts from people who have tried their best to ensure that the movie they wished to attend was in fact captioned by phoning the theater to check with staff in advance, only to be frustrated in attempts to find the correct phone number to find out whether the movie was captioned, or worse, find on arrival that the captions were not available. At this time, one of the most consistent sources of accurate information has been private entities such as Captionfish, Inc, that post showings on their websites. However, Captionfish and other online resources, has at times been unable to get the correct information about captioned showings in advance. Having this information available in multiple ways would serve the consumer and the theater owner or operator as well. The information could be available via: the theater via phone; on the theater's website; if applicable, on the chain's website; in advertisements; and by third party websites.

However, ensuring that the theater owners and operators notify individuals about their captioned showings creates another burden for the theater owner or operator, particularly for smaller theaters, and creates another enforcement nightmare. Even if the Department requires notification in newspapers, how will that requirement be enforced? Must the Department or consumers monitor all newspapers to ensure compliance? Would the theater owners be liable for fines if they are not in compliance? Will consumers need to file complaints with the Department if they find theaters that do not comply in each and every instance where the captioned showing was not advertized?

These questions would not need to be asked if the Department requires 100% captions. With 100% captioning in place, the consumers will know they can attend any showing anytime, regardless of whether a theater owner advertized the closed or open captioning of a movie. It would be far easier and less expensive than trying to enforce any notification requirements.

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?

Q.19. The Department should include training requirements for staff. We have found that staff in some movie theaters are not well trained in handling the equipment that is available now: assistive listening or Rear Window ® technology. Staff must be trained on a regular schedule on the proper handling of and maintenance and cleaning of all equipment, on where the equipment is stored, and how to provide it to consumers on request. In addition, procedure must be put into place on how staff will respond to consumer input that the captioning equipment is not working properly. Staff should be trained to troubleshoot problems if there is a failure either with the receiver or the transmitter before the start of the showing, or during the showing.

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?

Q.25. As we pointed out previously, title III does not recognize categorical exemptions, including one based upon an assumption that all entities within a particular class have an undue burden. The Department must, as a minimum, demonstrate sufficient substantiating evidence that all small businesses or art houses, for example, would not have the capacity to display captioned films. Moreover, if the Department considers class exemptions, we strongly urge the Department, to include periodic review of any such exemptions. Technology has moved along so quickly, in terms of availability, usability and cost, to make it necessary to review exemptions regularly.

Instead of categorical exemptions, establishing a compliance schedule for these types of entities may be valid in this instance. As we discussed before, such a compliance schedule should be based on data pertaining to the availability, types, and cost of equipment to provide captioning. Smaller business may need additional time to come into compliance, but still must reach the ultimate goal of providing access to people with disabilities in their theaters. In cases where there the theater finds they cannot, they certainly may avail themselves of the undue burden defense.

We thank the Department for the opportunity to provide comments in this proceeding.

Sincerely,



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