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Open and Closed: Captioning Technology as a Means to Equality, 23 J. Marshall J. Computer & Info. L. 159 (2004)

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OPEN AND CLOSED: CAPTIONING TECHNOLOGY AS A MEANS TO EQUALITY

Indeed, the Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of [the Americans with Disabilities Act], should keep pace with the rapidly changing technology of the times.¹

I. INTRODUCTION

Going to the movies is an extremely popular American pastime, as evidenced by the 2003 United States box office sales of \$9.49 billion.² To keep propagating this trend, movie theater operators are only too eager to cater to Americans by offering a wide selection of movies, show times, and locations. They would never dare dictate to Americans that they could see only a particular movie, at one exact time of showing, at a specific place, and only over only a three-day period. It would be unthinkable - yet, it is happening. Even worse, most movie theaters do not even allow some Americans appropriate access to the movies shown. Who are these people that movie theaters discriminate against as if they were second class citizens? These people are part of a population of thirty million Americans who are deaf or hard of hearing.³

According to movie theater operators, they do not discriminate against deaf⁴ and hard of hearing⁵ individuals. To them, access to their

1. H.R. Rpt. 101-485(II) at 108 (May 14, 1990).

2. Motion Picture Association, *US Economic Review*, <http://www.mpa.org/useconomicreview/> (accessed Nov. 3, 2004).

3. National Center for Health Statistics, *Fast Stats A to Z*, <http://www.cdc.gov/nchs/fastats/disable.htm> (accessed Nov. 3, 2004).

4. National Association of the Deaf, *What is the Difference Between a Deaf and Hard of Hearing Person?*, <http://www.nad.org/site/pp.asp?c=foINKQMBF&b=180410> (accessed Nov. 6, 2004) (explaining that although deaf people and hard of hearing people both experience hearing losses, the results of a hearing test determine who is deaf and who is hard of hearing). As a matter of degree or severity of the hearing loss, deaf people are those with little to no residual hearing and do not depend on their hearing in order to communicate. *Id.*

5. *Id.* (explaining that people are considered hard of hearing if their hearing, although diminished, still permits them to use their hearing to communicate). These people may have a mild to moderate hearing loss. *Id.*

movies simply means that deaf individuals⁶ are able to enter the theater, purchase a ticket, and sit down. The operators fail to recognize that, where deaf individuals are concerned, this kind of access is meaningless when deaf people are unable to understand the movies shown. They fail to admit that access goes beyond mere physical entry of their facilities. They refuse to accept responsibility for communication access so that deaf people may fully and equally enjoy the movies just like everyone else. Without a visible way to understand verbal dialogue, informative sounds,⁷ and sound effects, deaf people enjoy watching movies as much as hearing people⁸ would if they had to watch movies with the volume off. Unfortunately, some courts have sided with the movie theater operators and held that deaf people are not entitled to captioned movies in the theaters as a matter of law.

This refusal to install available caption technology or show open captioned movies has the same effect as if the theaters posted signs reading, "Deaf People Are Not Welcome." It results in an ostracism of deaf people in much the same way that people of color were denied access to "whites only"⁹ movie theaters in the late 1800s and early 1900s.¹⁰ It is segregation based on a disability and excludes deaf people from an everyday activity when the means exist for movie theaters to allow inclusion.

Just as Congress recognized segregation based on color was wrong and eradicated it with the Civil Rights Act of 1964 ("CRA"),¹¹ Congress also recognized that Americans with disabilities were also being segregated and discriminated against in everyday life.¹² They sought to rectify this with the enactment of another civil rights act, the Americans

6. For word economy, referral to "deaf people" or "deaf individuals" includes both deaf and hard of hearing people.

7. Informative sounds, as used in this comment, refer to non-verbal sounds that have a meaning associated with it. For example, the ringing of a telephone is a sound that informs someone that a call is incoming.

8. A hearing person is someone without a hearing loss.

9. Jackson Sun, *The Untold Story of Jackson's Civil Rights Movement*, http://www.jacksonsun.com/civilrights/sec1_mainbar.shtml (accessed Nov. 6, 2004) (explaining that, around 1896, when segregation was lawful, movie theaters had separate seating areas for whites and for blacks); see also Ramsey, Emily and Ramsey, Lara, *Survey and Research Report on the Grand Theater*, <http://www.cmhpf.org/Surveys&grandtheater.htm> (accessed Nov. 6, 2004) (explaining that when movie theaters designated an area for whites and another for blacks, blacks would often be relegated to the worst seating).

10. *The Untold Story of Jackson's Civil Rights Movement*, *supra* n. 9.

11. 42 U.S.C. § 2000a(a) (2002) (stating that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin").

12. "[H]istorically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2) (2002).

with Disabilities Act (“ADA”).¹³ At the heart of the two civil rights acts are the basic tenets that everyone has the right to be treated equally and be afforded the right to be treated as a full member of society.¹⁴

The ability to go to a movie—and understand it—is not in and of itself the most important component of an individual’s civil rights. But the issue behind this basic ability to enjoy a movie in the theater does represent a core civil right to be a full participant in societal activities. The movie theaters’ refusal to implement available captioning technology or show open captioned movies that would permit deaf people to be full participants is discrimination, the very thing the ADA prohibits.¹⁵

For equal access for people with disabilities, Congress intended that the entities required to comply with the ADA be subject to the requirement to keep pace with the latest technology available, whenever feasible, if it meant that accessibility would be ensured.¹⁶ This reflects the understanding that while the present level of technology might not now allow for access, the door to access is not forever shut especially when some future technology enabling access arises.

However, movie theater operators disagree that this mandate for technology as a means for access to people with disabilities extends to the installation of captioning technology in the theaters or to the showing of open captioned movies. This stems largely from their misunderstanding of the different forms of caption technology available, their misinterpretation of the ADA and legislative history, and a general unwillingness to open up their pocketbook. Their arguments are addressed in this Comment.

This Comment advocates what the ADA champions: allowing individuals with disabilities full inclusion and equal access to all activities that make up an American life.¹⁷ Specifically, this Comment focuses on whether movie theaters have a legal obligation to install caption technol-

13. *Id.*

14. H.R. Rpt. 101-485(III) at 26 (May 15, 1990) (stating that “[t]he Americans with Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning [with the Civil Rights Act of 1964]”).

15. 42 U.S.C. § 12182(b)(2)(A)(ii)-(iii) (2002).

16. H.R. Rpt. 101-485(II) at 108 (stating that “[t]he 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”).

17. H.R. Rpt. 101-485(I) at 1 (May 14, 1990) (stating that “[t]he Americans with Disabilities Act (ADA) will permit the United States to take a long-delayed but very necessary step to welcome individuals with disabilities fully into the mainstream of American society”).

ogy or show open captioned movies as a form of access for deaf people. The background of this Comment reviews the portions of the ADA that govern issues of access for people with disabilities. This Comment also examines the level of technology currently available that will enable deaf people to enjoy movies to the same extent as hearing people do. This examination addresses the insufficiency of access that most movie theaters provide. Next, this Comment addresses the relevant cases that deal with the issue of technology as a means of access for people with disabilities. This Comment then analyzes those cases to determine whether a legal mandate exists to provide any available technology to ensure access. Finally, this Comment proposes a solution derived from available legal avenues in order to resolve the current lack of access for deaf people who seek equal enjoyment of the movies.

II. BACKGROUND

The purpose of this background is to provide an explanation of the factors that tie into the issue of whether movie theater operators are obligated to provide deaf people the technology required in order to show closed or open captioned movies as a form of access under Title III of the ADA.

A. THE AMERICANS WITH DISABILITIES ACT OF 1990

This section explains why, instead of merely amending the reach of the CRA to include people with disabilities, there was a need for a completely new civil rights act to grant, protect, and guarantee basic rights to people with disabilities.

1. *A General Overview*

The population of Americans with disabilities numbers at nearly fifty million,¹⁸ a figure that will likely grow larger as the Baby Boomers age.¹⁹ Congress recognized society's history of isolating individuals with disabilities, leaving them disadvantaged in many aspects of daily living, as well as powerless to effect change.²⁰ To level the playing field for these individuals, the ADA was passed in 1990, a groundbreaking victory for civil rights.²¹ Individuals with disabilities were no longer re-

18. U.S. Census Bureau, *USA QuickLinks*, <http://censtats.census.gov/data/US/01000.pdf#page=2> (accessed Nov. 6, 2004).

19. See generally National Academy on an Aging Society, *The State of Aging and Health in America*, http://www.agingsociety.org/agingsociety/pdf/state_of_aging_report.pdf (accessed Nov. 6, 2004).

20. 42 U.S.C. § 12101(a)(4), (6), (7).

21. H.R. Rpt. 101-485(III) at 26 (stating that "[t]he Americans with Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to

duced to relying on charitable accommodations from those who felt inclined to do so.²² The ADA granted individuals with disabilities a voice with which to effect change and legally empowered these individuals.²³

With the enactment of the ADA, Congress made it patently clear that American businesses²⁴ and state/local governments²⁵ were required to make efforts toward ending discrimination against individuals with disabilities.²⁶ Further, Congress provided that individuals could bring legal action against those who did not comply with the ADA.²⁷ Individuals with disabilities protected by the ADA may seek remedy for discrimination if the source of the discrimination falls within the categories of entities subject to the ADA under Titles I, II, and III.²⁸

2. *Title III of the Americans with Disabilities Act*²⁹

Title III begins with the general rule that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”³⁰

On its face, the rule seems to make clear that anyone operating a business is prohibited from discriminating against people with disabilities. But this rule is misleadingly simple. The drafters realized that dis-

them the same civil rights protections provided to women and minorities beginning in 1964. This year, 1990, is a historic one in the evolution of this nation’s public policy towards persons with disabilities”).

22. “In 1973, during consideration of the Rehabilitation Act, Senator Harrison Williams said: for too long, we have been dealing with [the handicapped] out of charity It is for the Congress and the Nation to assure that [the handicapped’s] rights are no longer denied.” *Id.*

23. 42 U.S.C. § 12101(b)(1)(2); *see generally* 42 U.S.C. § 1288(a)(1) (Title III mirrors the remedies provided in Title VII, section 2000a-3(a), of the Civil Rights Acts of 1964); 42 U.S.C. § 12101(b)(2).

24. *See* 42 U.S.C. §§ 12111-12117 (regulating private employers); *see also* 42 U.S.C. §§ 12181-12189 (regulating places of public accommodations).

25. *See* 42 U.S.C. §§ 12131-12165 (regulating public entities).

26. 42 U.S.C. § 12101(b)(1)-(2) (explaining that the purpose of the ADA is to eliminate discrimination against individuals with disabilities and to provide enforceable standards addressing the elimination of the discrimination).

27. *Id.* (explaining that the ADA is meant to provide enforceable standards that would address discrimination against individuals based on disability).

28. *See* 42 U.S.C. § 12101 (2003) (Title I of this Act concerns employment, Title II concerns public services, and Title III concerns public accommodations and services operated by private entities).

29. For purposes of this article, only Title III of the ADA will be discussed in depth.

30. 42 U.S.C. § 12182(a).

crimination could occur in many different ways, even inadvertently.³¹ The following explains the general and specific prohibitions on discrimination, as well as the additional steps required to avoid discrimination. Other terms that are used throughout Title III and the ADA are also defined. For purposes of this Comment, however, only those provisions and terms relevant to the context of captioning in the movie theaters will be covered.

a. Discrimination

Under Title III of the ADA, discrimination against individuals with disabilities by private entities operating places of public accommodations ("PPAs") is prohibited.³² The prohibited acts of discrimination are categorized as general and specific.³³

i. General Prohibitions on Discrimination

These general prohibitions are modeled after the "basic, general prohibitions that exist in other civil rights laws that prohibit discrimination on the basis of race, sex, religion, or national origin."³⁴

Denial of participation is one of the general prohibitions.³⁵ It is discriminatory to deny people with disabilities the opportunity to participate or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.³⁶

Separate benefit is another general prohibition.³⁷ PPAs must provide individuals with disabilities with services or accommodations that are equal to the services or accommodations provided to other people.³⁸

31. H.R. Rpt. 101-485(II) at 102 (stating that "[a]t times, segregated seating [as a form of discrimination] is simply the result of thoughtlessness and indifference").

32. 42 U.S.C. § 12182(a) (stating that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation").

33. *See generally* 42 U.S.C. § 12182.

34. H.R. Rpt. 101-485(II) at 104.

35. 42 U.S.C. § 12182(b)(1)(A)(i).

36. *Id.* (stating that "[i]t shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements . . .").

37. 42 U.S.C. § 12182(b)(1)(A)(ii).

38. *Id.* (stating that "[i]t shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals"); *see also* H.R. Rpt. 101-485(III) at 56.

ii. Specific Prohibitions on Discrimination

Although the general prohibitions were modeled after the prohibitions in other civil rights legislations, these legislations did not include provisions that would specifically address the circumstances people with disabilities faced as a result of their disabilities.³⁹ Realizing this, Congress enumerated specific prohibitions on discrimination to augment the general prohibitions so that individuals with disabilities would be effectively protected.⁴⁰

It is specifically prohibited that PPAs fail to ensure certain 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.”⁴¹ The House Report on the ADA clarifies this by stating that “[i]t is discriminatory to fail to take steps to ensure that a disabled individual is not treated differently because of the absence of auxiliary aids and services.”⁴²

b. Disability

The ADA was designed to protect individuals with mental and physical disabilities that “substantially [limit] . . . major life activities.”⁴³ These major life activities include, among others, the ability to walk, see, speak, work, and hear.⁴⁴ Individuals who are deaf or hard of hearing to an extent that substantially limits their ability to hear have disabilities within the meaning of the ADA, and merit protection under the ADA.⁴⁵ The same is true for individuals who use wheelchairs in that they have mobility impairments that substantially limit their ability to move.⁴⁶

c. Places of Public Accommodations

Places of public accommodations are defined to include private entities whose businesses affect commerce.⁴⁷ Examples of PPAs include

39. H.R. Rpt. 101-485(II) at 105.

40. H.R. Rpt. 101-485(III) at 58.

41. 42 U.S.C. § 12182(b)(2)(A)(iii).

42. H.R. Rpt. 101-485(III) at 59.

43. 42 U.S.C. § 12102(2)(A) (defining members of the class that the ADA was designed to protect have a disability that is “a physical or mental impairment that substantially limits one or more of the major life activities . . .”); *see also* H.R. Rpt. 101-485(III) at 28.

44. H.R. Rpt. 101-485(III) at 28 (“stating that “the impairment must be one that ‘substantially limits a major life activity.’ Major life activities include such things as . . . walking, seeing, hearing, speaking, breathing, learning and working”).

45. *Id.*; *see also* 42 U.S.C. 12102(2) (indicating that “[t]he term ‘disability’ means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment”).

46. H.R. Rpt. 101-485(III) at 28; *see also* 42 U.S.C. 12102(2).

47. 42 U.S.C. § 12181(7).

places of lodging, establishments serving food or drink, places of exhibition or entertainment, and places of public gathering, and motion picture houses.⁴⁸ Under this definition, movie theaters are PPAs.⁴⁹ They, and other places falling within the enumerated categories, are subject to the Title III provisions under the ADA.

d. Auxiliary Aids and Services

Auxiliary aids and services are those devices and services that a person with a disability requires in order to offset the consequences of their disability.⁵⁰ They are the equipment or services necessary for a person with a disability to use or enjoy a facility or participate in a program or service to the same or equivalent extent as a person without a disability.⁵¹ Auxiliary aids and services include, among others, "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments," as well as the "acquisition or modification of equipment or devices," and "other similar services and actions."⁵² The regulations promulgated under Title III of the ADA elaborates on the definition of "auxiliary aids and services."⁵³ These regulations specifically include, among others, open and closed captioning as auxiliary aids.⁵⁴

e. Full and Equal Enjoyment

As part of the general rule on the prohibition of discrimination by public accommodations, the House Report explains that "[f]ull and equal enjoyment means the right to participate and to have an equal opportunity to obtain the same results as others."⁵⁵ However, the Report makes clear that it does not mean that an individual with a disability must experience or accomplish the exact same things as other people without a disability would.⁵⁶

f. Integrated Settings

There was a need for the ADA to eradicate society's treatment of people with disabilities as if such people were merely "second-class citi-

48. 42 U.S.C. § 12181(7)(C); H.R. Rpt. 101-485(III) at 53-54.

49. 42 U.S.C. § 12181(7)(C); H.R. Rpt. 101-485(III) at 53-54.

50. 42 U.S.C. § 12102(1).

51. *Id.*

52. *Id.*

53. 28 C.F.R. § 36.303(b).

54. 28 C.F.R. § 36.303(b)(1).

55. H.R. Rpt. 101-485(III) at 55 (stating that "[f]ull and equal enjoyment means the right to participate and to have an equal opportunity to obtain the same results as others").

56. *Id.* (stating that "[i]t does not mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability").

zens.”⁵⁷ People with disabilities were segregated from other people and provided services that were inferior to what was provided to others.⁵⁸ “Fundamental” for the ADA’s purposes,⁵⁹ people with disabilities must be able to use or enjoy the services or goods of a PPA in the “most integrated setting appropriate” for their needs.⁶⁰ To the maximum extent possible, the benefits offered by the PPA should be provided to people with disabilities in the same place and manner as provided to other people.⁶¹

3. *Defenses to the Requirements of Title III of the ADA*

The ADA provides for two specific defenses that PPAs may use to avoid having to provide access to people with disabilities.⁶² One defense is to demonstrate that a particular provision of auxiliary aid or service would fundamentally alter the nature of a PPA’s programs or services offered.⁶³ The second defense is to assert that implementation of the auxiliary aid or service would be an undue burden for the PPA.⁶⁴

But the PPA’s obligation to comply with the ADA does not end even if they can show that one particular auxiliary aid or service fundamentally alters their services or goods or if it would be an undue burden.⁶⁵ The PPA is expected to continue to seek ways to make their goods or services accessible through alternative methods.⁶⁶

57. H.R. Rpt. 101-485(III) at 57.

58. *Id.*

59. *Id.* (“Integration is fundamental to the purposes of the ADA”).

60. 42 U.S.C. § 12182(b)(1)(B) (“Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual”).

61. H.R. Rpt. 101-485(III) at 57.

62. 42 U.S.C. § 12182(b)(2)(A)(iii) (stating that PPAs must take steps to avoid discrimination “. . . 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”).

63. *Id.*

64. *Id.*

65. H.R. Rpt. 101-485(II) at 107 (stating that “[t]he fact that the provision of a particular auxiliary aid would result in an undue burden does not relieve the business from the duty to furnish an alternative auxiliary aid, if available, that would not result in such a burden”); *see also* 28 C.F.R. § 36.303(f) (stating that “[i]f provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or in an undue burden, i.e., significant difficulty or expense, the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would not result in an alteration or such burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation”).

66. *Id.*

a. Fundamental Alteration

A PPA may be exempt from providing a particular accommodation for people with disabilities if they can demonstrate that doing so would constitute a fundamental alteration of the nature of the benefits being offered.⁶⁷ The Title III Technical Assistance Manual⁶⁸ defines fundamental alteration as “a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.”⁶⁹

b. Undue Burden

If a PPA determines that it would not be able to provide a particular auxiliary aid or service to accommodate people with disabilities without “significant difficulty or expense,”⁷⁰ then it may claim the affirmative defense of undue burden.⁷¹ The defense of undue burden is comparable to the undue hardship⁷² defense provided in Title I of the ADA.⁷³ Performed on a case-by-case basis, the same factors used in the undue hardship analysis are to be applied in determining whether the provision of an auxiliary aid or service would be an undue burden for the PPA.⁷⁴

The factors to be considered in determining undue burden are:

- 1) The nature and cost of the action;
- 2) The overall financial resources of the site or sites involved; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements necessary for safe operation, including crime prevention measures; or any other impact of the action on the operation of the site;
- 3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- 4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

67. 42 U.S.C. § 12182(b)(2)(iii).

68. The Americans with Disabilities Act, *Title II Technical Assistance Manual (1993)*, <http://www.ada.gov/taman3.html> (stating that “[t]his technical assistance manual addresses the requirements of title III of the [ADA] . . . to assist individuals and entities in understanding their rights and duties under the Act”).

69. *Id.* at <http://www.ada.gov/taman3.html#III-4.3600>.

70. 28 C.F.R. § 36.303(f).

71. 42 U.S.C. § 12182(b)(2)(iii).

72. 42 U.S.C. § 12111(10).

73. H.R. Rpt. 101-485(II) at 107.

74. *Id.*

5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.⁷⁵

c. ADA Legislative History and Department of Justice Report

In addition, the legislative history behind the ADA and the Department of Justice, which is responsible for the promulgation of the rules implementing the ADA, appears to show an intent to exempt movie theaters from being required to provide *open* captioning.⁷⁶ How movie theater defendants have raised this defense is later discussed in more detail.

4. Other Technologies for the Deaf Affected by Various Civil Rights Legislation

There is no dispute that captions, which are text versions of sound and voice, are absolutely necessary for deaf people to gain communication access to aural medias, such as the television, telephone, and film. The importance of using captions and other auxiliary aids in order to facilitate the inclusion of deaf people has been illustrated time and time again by a series of laws and regulations. For instance, under the Television Decoder Circuitry Act of 1990,⁷⁷ all televisions larger than thirteen inches manufactured for sale after July 1993⁷⁸ must contain a built-in caption decoder.⁷⁹ The Telecommunications Act of 1996,⁸⁰ a subsequent amendment to the Communications Act of 1934 and enforced by the Federal Communications Commission, requires that all new television programs be captioned by the year 2006.⁸¹ The N11 phone service code,⁸²

75. *Title II Technical Assistance Manual (1993)*, *supra* n. 68, at <http://www.ada.gov/taman3.html#III-4.3600>.

76. See *Cornilles v. Regal Cinemas, Inc.*, 2002 WL 31440885 at *5 (D. Or. Jan. 3, 2002) (stating that “[i]t is clear from the House Report dated May 15, 1990, in which the Committee on Education and Labor (‘the Committee’) discussed an early version of the ADA (‘the Report’), that Congress did not intend for the ADA to require open captioning of all feature films shown in movie theaters”).

77. 47 U.S.C. § 303 (1997).

78. Federal Communications Commission, *Closed Captioning*, <http://www.fcc.gov/cgb/consumerfacts/closedcaption.html> (accessed Nov. 16, 2004).

79. AccessIT, *What is the Difference Between Open and Closed Captioning?*, <http://www.washington.edu/accessit/articles?50> (accessed Nov. 16, 2004) (explaining that caption decoders are used in order to view closed captions).

80. Pub.L.No. 104-104, 110 Stat. 56 (1996) (amending the *Communications Act of 1934*, 47 U.S.C. §§ 151–615b).

81. 47 U.S.C. § 613 (1996); 47 C.F.R. § 49.1 (2003).

82. Federal Communications Commission, *Fact Sheet Abbreviated Dialing Codes – N11*, http://ftp.fcc.gov/Bureaus/Common_Carrier/News_Releases/2000/nrc0036a.html (accessed Nov. 9, 2004) (explaining that N11 codes allow callers to make a call with only three digits as opposed to the usual seven or ten digits).

711, has been dedicated to the operation of the relay system⁸³ which facilitates communications between conventional telephones and teletypewriters, a text-based telephone.⁸⁴ The trend of creating new modes of access whenever technology advances permit is further evidenced by the recent requirement of wireless phone manufacturers to produce at least one hearing-aid compatible phone.⁸⁵ These legislative initiatives exhibit an intent to ensure that technology innovations do not leave people with disabilities behind, but rather include them through whatever technological modifications are available to accommodate their needs.

B. TECHNOLOGY USED FOR ACCESS IN MOVIE THEATERS

1. *Captioning Technology*

This section begins on a cautionary note. It is vital that the distinctions between the different types of captions available are clearly understood since the issue of captioning methods theaters may be required to use may depend upon the type of captioning systems available.

a. *What is Captioning?*

Captioning is the conversion of the audio portion of a film or video into text that is displayed onto the screen of some viewing device.⁸⁶ Although similar, captions are not to be confused with subtitles. Subtitles operate on the assumption that the viewer can hear and are used primarily as a foreign language translator, converting the audio language used in the film to text in another language.⁸⁷ Captions are text versions of sound and voice that mirror the audio script, thereby allowing the viewer to "hear" by reading what is being said or what informative noises there might be.⁸⁸ The difference between subtitles and captioning is best demonstrated by the fact that subtitles would not indicate when a tele-

83. Federal Communications Commission, *FCC News: Telecommunications Relay Services Rules Modified: Comments Sought on Emerging Technology, Public Outreach Campaign and National Security Status of TRS*, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-234565A1.doc (accessed Nov. 19, 2003) (explaining that the relay system in which a third party verbally conveys textual information received via TTY with a deaf person to a hearing person who does not have a TTY).

84. Federal Communications Commission, *What is a TTY?*, http://www.fcc.gov/cgb/dro/trs/what_is_a_tty.html (accessed Nov. 9, 2004) (stating that "TTY's are also called text telephones. [A] TTY allows persons with hearing and/or speech loss to make or receive telephone calls by typing their conversations, via two-way text").

85. Federal Communications Commission, *FCC Acts to Promote Accessibility of Digital Wireless Phones to Individuals with Hearing Disabilities*, <http://www.fcc.gov/cgb/consumerfacts/accessiblewireless.html> (accessed Nov. 9, 2004).

86. Vitac, *Captioning FAQ*, <http://vitac.com/technical/faq.htm> (accessed Nov. 9, 2004).

87. *Id.* at <http://vitac.com/technical/faq.htm#whatisub>.

88. *Id.* at <http://vitac.com/technical/faq.htm#whatiscap>.

phone rings in the film, but captioning would.⁸⁹

Although television has been around from since the 1940's,⁹⁰ it was not until 1972 that deaf viewers were able to understand what was being said on television.⁹¹ This historic event began with the captioning of the late Julia Child's cooking show, *The French Chef*.⁹² Captioning technology improved over the years as different techniques made captioning easier and affordable.

To understand the captioning technology available for use in movie theaters, the different types of captions will be explained.

i. Types of Captioning Technology

There are two categories of captions, open captions (OC) and closed captions (CC).⁹³ The type of captioning first used on the television show, *The French Chef*, was of the only type of captioning available at the time, which was OC.⁹⁴ Open captions are usually text burned onto the actual film of the television program or movie.⁹⁵ There is no way to turn these captions on or off; if displayed, every viewer will see the captions.⁹⁶ Conversely, closed captions, first developed in the late 1970s,⁹⁷ are any forms of captioning that are visible only when activated by some kind of caption decoder.⁹⁸ The distinguishing factor, particularly in the movie theater context, that identifies a captioning system as open or closed is whether the caption display is visible to everyone or only to those with the appropriate equipment to view it.⁹⁹

A) Open Captioned Systems Available for Use in the Movie Theaters

There are currently two open captioned systems available for use in the movie theaters. The first, and oldest method of movie theater captioning, is simply known as open captioned movies. The second, and the

89. *Id.* at <http://vitac.com/technical/faq.htm#whatissub>.

90. Federal Communications Commission, *Golden Age, 1930's Through 1950's*, <http://www.fcc.gov/omd/history/tv/1930-1959.html> (accessed Nov. 9, 2004).

91. NIDCD, *Captions for Deaf and Hard-of-Hearing Viewers*, <http://www.nidcd.nih.gov/health/hearing/caption.asp> (accessed Nov. 9, 2004).

92. *Id.*

93. *Captioning FAQ*, *supra* n. 85, at <http://vitac.com/technical/faq.htm>.

94. *Captions for Deaf and Hard-of-Hearing Viewers*, *supra* n. 91, at <http://www.nidcd.nih.gov/health/hearing/caption.asp>.

95. *Ball v. AMC Ent., Inc.*, 315 F. Supp. 2d 120, 122 (D.D.C. 2004).

96. *Captioning FAQ*, *supra* n. 86, at <http://vitac.com/technical/faq.htm>.

97. DVD-Makers.com, *A Brief History of Captioned Television*, <http://www.dvd-makers.com/public/499.cfm> (accessed Nov. 9, 2004).

98. *What is the Difference Between Open and Closed Captioning?*, *supra* n. 79, at <http://www.washington.edu/accessit/articles?50>.

99. *See Ball*, 315 F. Supp. 2d at 122.

most recent development, is the Digital Theater System-Cinema Subtitling System ("DTS-CSS").

Open captioned movies, as the first method of captioning ever used in the movie theaters, is the projection of film with captions burned directly onto the film itself.¹⁰⁰ The captions are visible to everyone once the film is projected on the screen.¹⁰¹ Currently, InSight Cinema ("InSight") is the go-between organization that handles the selection of movies to be processed for open captioning and sends the movies out to theaters interested in showing them.¹⁰² In cooperation with the movie studios, InSight selects the movies to be open captioned by attending screenings of movies a month before their scheduled release and decides whether the film's appeal is broad enough to satisfy their audiences.¹⁰³ Only the wide releases and projected top box office movies are chosen for open captioning.¹⁰⁴ Once the movies have been formatted for open captioning, the movies are rotated between theaters willing to play the open captioned movie, with priority given to the top fifty cities and to those theaters willing to play the movie over a longer period of time.¹⁰⁵ Weekend show dates for these movies cannot be guaranteed due to the uncertainty of several factors, such as when a particular theater might receive the movie or until the movie studios inform InSight when and where they have a film booked.¹⁰⁶ Although it does not require movie theaters to spend money on equipment to show these open captioned films, the downside is that so few open captioned copies of a movie are available at a time—typically ten to twelve—that it takes a while for the copies to rotate between the movie theaters that have requested them.¹⁰⁷

DTS-CSS is an open captioned system even though it requires no

100. InSight Cinema, *Frequently Asked Questions*, <http://www.insightcinema.org/faqs.html> (accessed Nov. 9, 2004) (stating that "[t]he process by which captions (or subtitles) are applied to a motion picture print is by use of a laser, which engraves the text onto each individual frame of the film, burning away the emulsion layer of the film, allowing white light from the projector to pass through the film and project white captions on the screen").

101. *Captioning FAQ*, *supra* n. 86, at <http://vitac.com/technical/faq.htm>.

102. InSight Cinema, *Who We Are*, <http://www.insightcinema.org/whoweare.html> (accessed Nov. 9, 2004) (stating that "InSight Cinema has created a 3-way partnership with the major studios and all major exhibitors. This 10 year-long outreach program serves a liaison between the DHH community and the major studios by increasing efforts to distribute Open Captioned prints to mainstream theatres").

103. *Frequently Asked Questions*, *supra* n. 100, at <http://www.insightcinema.org/faqs.html>.

104. *Id.*

105. *Id.*

106. *Id.*

107. Deaf Today, *Deaf Moviegoers Have Few Choices*, <http://www.deaftoday.com/news/archives/004106.html> (accessed Nov. 9, 2004).

special alteration of the film for the captions to be visible.¹⁰⁸ Instead, the captions are on a CD-ROM that is played in sync with the movie and as the movie plays, the captions (or subtitles) are projected and superimposed on the movie screen.¹⁰⁹ An estimated number of thirty theaters in the United States are undergoing installation of this particular technology.¹¹⁰

B) Closed Captioning Available for Use in the Movie Theaters

Rear-window captioning (“RWC”) or rear-view captioning, is a specific type of closed captioning.¹¹¹ It is currently the only closed caption system widely available for use in the movie theaters.¹¹² Instead of text being displayed on the main viewing screen, as in the case of conventional open and closed captions, RWC is seat-based and the captions are displayed on separate individual screens.¹¹³ RWC does not require a specially printed film.¹¹⁴ Instead, the captions for RWC are provided on a CD-ROM that is simultaneously played with the film.¹¹⁵ The CD-ROM is provided at no charge by the movie studios responsible for the production and distribution of the movie films to the movie theaters.¹¹⁶

Individuals wishing to use RWC typically must go to the service desk of a movie theater that offers RWC in order to request the use of the individual screens.¹¹⁷ The screens are opaque plexi-glass screens with an adjustable ‘arm’ that ends in a round weighted base which can be placed in the cup-holder of the seats in the theater’s auditorium.¹¹⁸ In the back of the auditorium is a marquee that scrolls the captions backwards in lights.¹¹⁹ The viewer adjusts the arm of the screen until the reverse reflection of the text from the marquee is visible on the viewer’s screen.¹²⁰ The result is that only those individuals using the special

108. DTS, *DTS-CSS Cinema Subtitling System*, <http://www.dtsonline.com/cinema/products.php?ID=1579679456> (accessed Nov. 9, 2004).

109. *Id.*

110. *Deaf Moviegoers Have Few Choices*, *supra* n. 106, at <http://www.deaftoday.com/news/archives/004106.html>.

111. NCAM, *MoPix*, <http://ncam.wgbh.org/mopix/aboutproject.html> (accessed Nov. 9, 2004) (explaining how RWC works).

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

113. The CPB/WGBH National Center for Accessible Media, *Frequently Asked Questions*, <http://ncam.wgbh.org/mopix/faq.html#rearwindow> (accessed Nov. 9, 2004).

114. *Id.*

115. *Id.*

116. *Ball*, 246 F. Supp. 2d 17, 21 (D.D.C. 2003).

117. *Frequently Asked Questions*, *supra* n. 113, at <http://ncam.wgbh.org/mopix/faq.html#rearwindow>.

118. *Id.*

119. *Id.*

120. *Id.*

screens can see the captions.¹²¹

*ii. History of Caption Technology Use in Movie Theaters*¹²²

Ironically, the issue of captioning in the movies has come full circle. When movies were first made available to the general public, they were silent films.¹²³ As the name implies, they were movies without sound.¹²⁴ The silent filmmakers knew that it would be nearly impossible for the audience to follow the plot of the film without words.¹²⁵ But with the use of caption cards, the audience was able to follow the movie plot.¹²⁶ However, caption cards died out in the late 1920s with the advent of the so called talking movies that are the norm today.¹²⁷

In the mid to late 1990's, showings of open captioning of movies in a select few theaters began.¹²⁸ For many deaf Americans who attended these shows, it was their first glimpse of the interior of a "real" movie theater, having had no reason to enter before.¹²⁹ However, to this date, only a few movie theaters provide open captioned new release movies; it was only as recently as October 2003 that an Alaskan movie theater displayed its first newly released OC movie.¹³⁰ The 1997 blockbuster, *Titanic*, was the first movie displayed in theaters with RWC.¹³¹ Since then, deaf people have been able to watch more movies with RWC technology, which enabled them to be able to see first run movies before those movies became available on videotape or digital video disks ("DVD").¹³²

iii. Statistics on Captioning in Movie Theaters

To date, out of the more than thirty thousand movie screens in the

121. *Frequently Asked Questions*, *supra* n. 113, at <http://ncam.wgbh.org/mopix/faq.html#rearwindow>.

122. Films formatted for DTS-CSS will not be discussed as part of the history of caption use in the movie theaters due to the sparseness of information on this very new technology.

123. Museum of American Heritage, *Let's Go to the Movies: The Mechanics of Moving Images*, http://www.moah.org/exhibits/archives/movies/technology_development.html (accessed Nov. 18, 2004).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. InSight Cinema, *InSight Cinema in the News*, http://www.insightcinema.org/Article_InFocus.html (accessed Nov. 9, 2004) (explaining that the number of donated films for open captioned was twenty-five between 1993 and 1997).

129. Disability World, *The Second Annual Festival of Cinema for the Deaf*, http://www.disabilityworld.org/09-10_02/arts/deafcinema.shtml (accessed Nov. 9, 2004).

130. Juneau Empire Local News, *Juneau Theater Shows its First Open-Captioned Film*, http://www.juneauempire.com/stories/101703/loc_deaf.shtml (accessed Nov. 9, 2004).

131. *Cornilles*, 2002 WL 31440885 at *7 n. 8.

132. *Ball*, 246 F. Supp. 2d at 20 n. 7.

United States,¹³³ less than three hundred movie theaters have shown OC films.¹³⁴ Barely more than a hundred theaters are currently equipped with RWC in the United States.¹³⁵ Movie theaters that have shown either OC movies or RWC movies number at less than four hundred,¹³⁶ representing one percent of all movie screens in this country. There are thirty million Americans who are deaf or hard of hearing,¹³⁷ constituting ten percent of the approximately 288,000,000 people in the United States.¹³⁸ Putting these numerical figures into words, it means that ten out of every one hundred people are able to watch movies at only one out of every one hundred movie theaters.

C. THE PUSH FOR CAPTIONING IN MOVIE THEATERS

A large number of organizations that serve the different needs of deaf people have banded together to form the Coalition for Movie Captioning (“CMC”).¹³⁹ Despite the diverse ways the organizations comprising CMC differ in their respective philosophies or services provided, they are united in a common goal that deaf people should be able to watch captioned movies in the movie theaters at the same level of access as every one else.¹⁴⁰

Their support for the push in captioning includes the following arguments and propositions: over one hundred million Americans would benefit from captioning,¹⁴¹ there is no evidence that captioning would cause a negative effect on box office sales,¹⁴² and that the use of the “direct-

133. Video Technology Magazine, *The State of Digital Cinema*, <http://www.videotechnology.com/old0904.html> (accessed Nov. 9, 2004).

134. InSight Cinema, *InSight Theaters*, <http://www.insightcinema.org/dedicatedscreens.html> (listing the locations of nine theaters that have dedicated screens for open captioned movies fifty-two weeks a year, seven days a week; seventy theaters that dedicate screens fifty-two weeks a year, two, three, or four days a week; and 146 theaters that dedicate screens to monthly or bi-monthly showings).

135. The CPB/WGBH National Center for Accessible Media, *Locations*, <http://ncam.wgbh.org/mopix/locations.html> (accessed Nov. 9, 2004) (listing theaters across the country that have installed RWC).

136. Each movie theater that has shown OC or RWC films dedicate only one screen to captioned showings unless mentioned otherwise.

137. *Fast Stats A to Z*, *supra* n.3, at <http://www.cdc.gov/nchs/fastats/disable.htm>.

138. U.S. Census Bureau, *Annual Population Estimates: 2000-2003*, <http://www.census.gov/popest/states/NST-EST2003-ann-est.html> (accessed Nov. 9, 2004).

139. See National Association of the Deaf, *Access for Moviegoers Who are Deaf, Hard of Hearing, or Late Deafened*, <http://www.nad.org/site/pp.asp?c=FOINKQMBF&b=100781> (accessed Nov. 6, 2004).

140. See National Association of the Deaf, *Coalition for Movie Captioning Position Paper and Statement of Expectations*, <http://www.nad.org/site/pp.asp?c=FOINKQMBF&b=100782> (accessed Nov. 6, 2004).

141. *See Id.*

142. *Id.*

studio distribution" method would meet the captioning needs better than a third-party distributor.¹⁴³

CMC has been monitoring the legal controversy over captioning and gives their due support for additional captioned movies.¹⁴⁴ However, they are concerned that resulting case law or settlements from this controversy may lead to a fixed solution instead of one that would "leave open the possibility for other long-term solutions as technology evolves."¹⁴⁵

D. RELEVANT CASE LAW

Since the enactment of the ADA, there have been a large number of lawsuits over alleged disability discrimination and ADA violations. However, unique to the three, so far, ADA cases on captioning in the movie theaters is that they may represent the first instances where the courts have had to confront the issue as to whether a PPA is required under the ADA to facilitate access by using the latest technology available. The factual basis and holding of these cases will be discussed, as well as another case that has addressed movie theaters' obligations under the ADA. Settlements that have been reached concerning captioning in the theaters are also discussed.

1. *Movie Theater Captioning Cases*

In the only three cases to date that deal with movie theater captioning, the factual scenarios were largely the same. The defendants in each were movie theater operators.¹⁴⁶ The plaintiffs were deaf people who alleged that the defendants were in violation of Title III due to their failure to provide access to movies shown in the defendants' respective theaters.¹⁴⁷ The plaintiffs wanted to see first-run movies at the same level of enjoyment and access that other hearing people enjoyed.¹⁴⁸ But, these plaintiffs were unable to fully enjoy access to these movies because the defendants did not make captioned movies available at all, or if they did, they did not do so with a regularity that was equal or comparable to what was made available to hearing patrons.¹⁴⁹ While the factual scenarios in each case were basically the same, only one of the three cases survived a motion for summary judgment or motion to dismiss.¹⁵⁰

143. *Id.*

144. *Id.*

145. *Id.*

146. See *Cornilles*, 2002 WL 31440885; *Ball*, 246 F. Supp. 2d 17; *Todd*, 2004 WL 1764686.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

a. *Cornilles v. Regal Cinemas, Inc.*¹⁵¹

In *Cornilles*, the Oregon court granted the defendants' motion for summary judgment. The issue before the court was whether Title III required the defendants to provide captioning on all its movies so that plaintiffs could enjoy the movies as much as hearing people.¹⁵² The court held that the defendants did not violate Title III of the ADA because of their failure to install RWC in each of their theaters.¹⁵³ The court found that installation of RWC would fundamentally alter the nature of the product that the defendants offered, something that the ADA did not require.¹⁵⁴ The court ruled that the defendants violate the ADA because the plaintiffs were able to physically enter the defendants' theaters, buy tickets, and sit to watch the movies.¹⁵⁵ The court decided the defendants were already exceeding the requirements of accessibility under Title III because the defendants showed open captioned movies when available.¹⁵⁶ Finally, the court held that to require the defendants to install RWC in each of their theaters would be too financially burdensome.¹⁵⁷

b. *Ball v. AMC Entertainment, Inc.*¹⁵⁸

Conversely, a year after the *Cornilles* court issued its decision, the Washington D.C. court in *Ball* denied the defendants' motion to dismiss.¹⁵⁹ The defendants argued that the case should be dismissed for the following reasons: 1) captioning was a fundamental alteration not required under the ADA; 2) captioning was not required under the ADA; and 3) the installation of captioning technology would impose an undue burden upon the defendants.¹⁶⁰ The court, in ruling on the motion to dismiss, made several findings that were the reverse of what the Oregon court found in *Cornilles*.

The *Ball* court rejected the defendants' argument that the provision of RWC would alter the nature or mix of the services the defendants pro-

151. *Cornilles*, 2002 WL 31440885.

152. *Id.* at *2.

153. *Id.* at *7.

154. *Id.* at *6.

155. *Id.* (stating that "[d]efendants are complying with the requirements of Title III as explained by the Regulations. Defendants are allowing disabled individuals full access to their theaters and their selection of films and they are offering open-captioned films as often as once a month in the Portland area").

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

157. *Id.*

158. *Ball*, 246 F. Supp. 2d 17.

159. *Id.* at 26.

160. *Id.* at 21.

vided.¹⁶¹ The court also rejected the defendants' argument that the ADA explicitly exempts movie theaters from captioning the movies they show.¹⁶² Finally, the court found that a genuine issue of material fact remained as to whether the financial costs of installing RWC equipment would truly be an undue burden for the defendants.¹⁶³

*c. Todd v. American Multi-Cinema, Inc.*¹⁶⁴

The *Todd* court granted the defendants' motion for summary judgment.¹⁶⁵ The controlling issue in this case was whether it would be an undue burden for movie theaters to provide caption access to their movies.¹⁶⁶ The court found that the plaintiffs failed to refute the defendants' evidence that the provision of captioning in the theaters would be an undue burden for the defendants.¹⁶⁷ The court found that the plaintiffs failed to demonstrate that the cost of installing RWC technology would greatly exceed the defendants' capital.¹⁶⁸ Finally, the court disagreed with the plaintiffs as to the meaning of access, stating that "equal access does not mean equal enjoyment."¹⁶⁹

d. Captioning Settlements

As the sole captioning case to survive a motion for summary judgment or motion to dismiss, the parties in *Ball* negotiated a settlement, rather than going to trial on the merits.¹⁷⁰ There was another instance in New Jersey where movie theater operators voluntarily agreed to implement captioning access.¹⁷¹ The terms of both settlements will be discussed in order to assess their effectiveness in providing deaf people the access they require to enjoy movies at the theaters.

i. Ball Settlement

The movie theater defendants agreed to install six RWC units within twelve months of the settlement's court approval and to install

161. *Id.* at 25.

162. *Id.* at 24.

163. *Ball*, 246 F. Supp. 2d at 26.

164. *Todd*, 2004 WL 1764686.

165. *Id.* at *4.

166. *Id.* at *3.

167. *Id.* at *4.

168. *Id.*

169. *Id.*

170. *See generally Ball*, 315 F. Supp. 2d 120 (explaining the terms of the caption settlement between the parties).

171. *See generally* Office of the Attorney General - Division on Civil Rights, *Movie Theater Accessibility Press Packet*, http://www.njcivilrights.org/downloads/theateraccess/movie_access_complete_packet.pdf (accessed Nov. 9, 2004) (disseminating terms of captioning settlement).

six more units within the following twelve months.¹⁷² The RWC units were to be installed in mid-sized auditoriums in select theaters.¹⁷³ The theaters chosen for RWC installation were to be picked based on size, popularity, and location throughout the Washington D.C. metropolitan area.¹⁷⁴ Each defendant was to purchase ten RWC reflector screen for every RWC unit installed to be distributed among the theaters outfitted for RWC.¹⁷⁵ Therefore, each theater with RWC technology installed will have at least five reflector screens.¹⁷⁶

Additional terms of the settlement include an agreement that the defendants would advertise available RWC captioned films in the local newspapers and on their Web sites.¹⁷⁷ Furthermore, in every new theater the defendants build or acquire in the future, they are to install at least one RWC unit in a mid-sized auditorium.¹⁷⁸ Should the defendants close a theater outfitted for RWC, they must transfer that RWC unit to another open theater.¹⁷⁹ “Thus, under the Settlement, the Metropolitan Washington, D.C. area would have at least 12 RWC units installed within two years of approval of the [settlement], with more RWC units installed as Defendants expand their operations by building new theaters.”¹⁸⁰

ii. *New Jersey Settlement*

A settlement on captioning in the movie theaters was reached between the New Jersey Attorney General’s office and four major multiplex theater chains operating in New Jersey.¹⁸¹ Under separate agreements, the four movie chains “will either equip their theaters with closed-caption technology or, in multiplexes where the technology is already installed, will expand the number of screens offering closed captioning.”¹⁸² The movie chains, in the aggregate, have agreed to install at least thirty-four RWC systems at various specified existing locations.¹⁸³ Further, as an additional settlement term, these movie theaters must install at least

172. *Ball*, 315 F. Supp. 2d at 126.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Ball*, 315 F. Supp. 2d at 126.

178. *Id.*

179. *Id.*

180. *Id.*

181. See generally *Movie Theater Accessibility Press Packet*, *supra* n. 171 at http://www.njcivilrights.org/downloads/theateraccess/movie_access_complete_packet.pdf (explaining settlement terms with the four theater chains and also explaining that a discrimination complaint was filed against another movie theater chain).

182. *Id.*

183. *Id.*

one RWC system at all newly constructed or acquired theaters that have at least ten screens; if there are fifteen or more, two RWC systems must be installed.¹⁸⁴

2. *Case of Analogy*

While only three cases have dealt with the issue of captioning movies, there is a leading case that provides insight into the interplay between movie theaters and access rights for people with disabilities.¹⁸⁵ This case aids in the analysis of the application of the ADA to movie theaters by demonstrating that, in the past, movie theaters have been required to ensure that persons with disabilities were afforded equal and full enjoyment of the movies shown.¹⁸⁶

In *U.S. v. Cinemark USA, Inc.*, individuals using wheelchairs brought suit against movie theaters. The plaintiffs requested that the court order the defendants to restructure their auditoriums so that the plaintiffs would have options as to where to sit within the theater.¹⁸⁷ The court found for the plaintiffs.¹⁸⁸ Where the defendants were supposedly ADA-compliant by providing access to the theater in some form by way of accessible doors, ramps, and wheelchair areas within the auditorium, the designated wheelchair areas in the auditorium were located in the very front of the auditorium.¹⁸⁹ This forced the plaintiffs, who had no choice but to sit in those areas, to crane their necks in uncomfortable positions in order to see the movie screen.¹⁹⁰ The plaintiffs argued that they were not given options for an equal line of sight to the movie screen when compared to other patrons without disabilities.¹⁹¹ The court agreed and held that, in order to comply with the full and equal enjoyment clause of Title III, the defendants must provide comparable seating for people using wheelchairs.¹⁹²

III. ANALYSIS

The core issue of this Comment is whether movie theaters, as places of public accommodations ("PPAs"), are obligated under Title III of the ADA to provide communication access to deaf people so there is meaningful access to movies shown in the theaters. The starting point of the analysis begins with a reading of the statutory and regulatory language

184. *Id.*

185. *U.S. v. Cinemark USA, Inc.*, 348 F.3d 569 (6th Cir. 2003).

186. *Id.*

187. *Id.* at 575.

188. *Id.* at 576.

189. *Id.*

190. *Id.*

191. *Cinemark*, 348 F.3d at 576.

192. *Id.*

on access in Title III. An assessment of the decisions courts have made on the issue of captioning access in the movie theater context follows. Arguments against providing captioning that movie theater defendants have advanced are discussed and then refuted. Finally, a recommendation on movie captioning is outlined that attempts to strike a balance between the interests of the deaf community and the movie theater industry.

A. ACCESS AS IT RELATES TO TITLE III OF THE ADA

Title III refers to access as not only the ability to physically enter a PPA,¹⁹³ but also the opportunity to make the physical entrance meaningful.¹⁹⁴ Meaningful access is gained by the use of available services or devices necessary for a person with a disability to have full and equal enjoyment of the services or benefits offered by the PPA at a level comparable to everyone else.¹⁹⁵ The distinction between ensuring actual physical entrance of a PPA and providing the means necessary for the full and equal enjoyment purpose of the physical entrance is set forth in the general and specific prohibitions within Title III.¹⁹⁶ Thus, access, as it applies to Title III, is actually two-pronged. The first prong to access, explained by Title III's general prohibitions, guarantees the physical ability to enter the PPA.¹⁹⁷ It is, for all intents and purposes, identical to the purpose of the CRA,¹⁹⁸ albeit modified so that passive discrimination is also forbidden.¹⁹⁹

193. See 42 U.S.C. § 12182(a) (setting out the general rule that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the [benefits offered] of any place of public accommodation . . .”). Additional general prohibitions are listed in 42 U.S.C. § 12182(b)(1).

194. 42 U.S.C. § 12182(b)(2)(A); see also H.R. Rpt. 101-485(II) at 104 (stating that “[i]n order not to discriminate against people with disabilities, however, certain steps must often be taken as well in order to ensure that an opportunity for individuals with disabilities to participate in the goods or services is effective and meaningful”).

195. 42 U.S.C. § 12182(a); see also H.R. Rpt. 101-485(II) at 101 (stating that “[f]ull and equal enjoyment’ does not encompass the notion that persons with disabilities must achieve the identical result or level of achievement of nondisabled persons, but does mean that persons with disabilities must be afforded equal opportunity to obtain the same result”).

196. See 42 U.S.C. § 12182(b)(1) (listing general prohibitions); see also 42 U.S.C. § 12182(b)(2) (listing specific prohibitions).

197. See 42 U.S.C. § 12182(a).

198. H.R. Rpt. 101-485(II) at 104 (stating that “[t]hese general prohibitions are patterned after the basic, general prohibitions that exist in other civil rights laws that prohibit discrimination on the basis of race, sex, religion, or national origin”).

199. For example, a movie theater facility's lack of ramps or accessible entryways for people in wheelchairs will constitute discrimination even if the movie theater does not have a policy of banning such individuals from entering the theater.

The second prong to access,²⁰⁰ however, is the real test for Title III access and the defining factor that distinguishes the ADA from the CRA.²⁰¹ The second prong, provided in Title III's specific prohibition section, asks whether the provision of an auxiliary aid or service will enable a person with a disability to fully and equally enjoy the benefits offered by the PPA.²⁰² If the answer is yes, and the auxiliary aid or service has not been made available, then access has not been granted as a matter of law even if that person has not been denied physical entrance.²⁰³

Thus, two factors must be met before it will be considered access as intended under Title III.²⁰⁴ People with disabilities must be permitted to access the physical surroundings of the PPA²⁰⁵ and be provided the auxiliary aid or service so that they may have the opportunity for full and equal enjoyment of the PPA.²⁰⁶ In the context of this comment, the access deaf people need is the physical entrance of the theater and the use of captioning as an available auxiliary aid or service,²⁰⁷ to fully and equally enjoy the movie shown. Such a two-pronged access approach as-

200. 42 U.S.C. § 12182(b)(2); *see also* H.R. Rpt. 101-485(II) at 104 (stating that "[i]n order not to discriminate against people with disabilities, however, certain steps must often be taken as well in order to ensure that an opportunity for individuals with disabilities to participate in the goods or services is effective and meaningful. Thus, section 302(b)(2) includes specific prohibitions against discrimination, which refer to such requirements as providing auxiliary aids, modifying policies, or making various types of physical access changes").

201. H.R. Rpt. 101-485(III) at 58 (stating that "[t]he general prohibitions set forth in Section 302(b)(1) are patterned after provisions contained in other civil rights laws protecting women and minorities. In order to provide effective protections for persons with disabilities, however, additional specific prohibitions are provided . . .").

202. *See* 42 U.S.C. § 12182(a) (setting forth the mandatory rule requiring full and equal enjoyment); *see also* 42 U.S.C. § 12182(b)(2)(A)(iii) (setting out the rule that discrimination includes "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 . . .").

203. *See* 42 U.S.C. § 12182(a) ; *see also* 42 U.S.C. § 12182(b)(2)(A)(iii).

204. 42 U.S.C. § 12182(a).

205. *Id.*

206. 42 U.S.C. § 12182(b)(2)(A)(iii).

207. This comment focuses on captioning as the only form of auxiliary aid providing effective communication for profoundly deaf individuals, and does not discount the preferences of many hard of hearing individuals for assistive listening devices ("ALDs") over captioning. Movie theaters can provide ALDs for these individuals, and may be required to provide such devices as a means of effective communication for these individuals. However, movie theaters are precluded from offering ALDs as the sole form of auxiliary aid for persons who are deaf and hard of hearing because ALDs are usually helpful only to individuals who have mild to moderate hearing loss. For individuals with more severe hearing losses, ALDs are usually not an effective means of communication. Captioning is currently the only form of technology that serves as an auxiliary aid providing equally effective communication to profoundly deaf individuals as well as others with less severe hearing loss.

sures that movie theaters will not run afoul of Title III's general and specific prohibitions.

1. *Judicial Decisions On Access*

As evident from recent judicial decisions on captioning in movie theaters, there are conflicting opinions as to what exactly access entails as it pertains to deaf people and Title III of the ADA.²⁰⁸ There are those within the judiciary system who fail to understand that, under Title III, even if deaf people can physically enter a PPA, it is still not really access when they are unable to fully and equally enjoy the use or benefit of the PPA due to the absence of an otherwise available captioning system.²⁰⁹ Much of this confusion over what access means for deaf people appears to stem from a lack of understanding on how the ADA and the CRA are the same and how they differ. There is a lack of recognition that the access required by Title III also takes into account deaf people's need for communication access. Much of the analysis is performed improperly because of a narrow focus on the physical access rights of deaf people when the focus should be on the movie theaters' responsibilities under Title III to accommodate deaf people and their communication needs.

The purposes of and requirements imposed by the CRA are readily understood and properly enforced by the courts. However, the same cannot be said about the ADA even though the ADA mirrors the CRA's ideology.²¹⁰ The means to guarantee basic civil rights under the CRA to protected groups would not have been sufficient to guarantee these same rights to people with disabilities.²¹¹ Consequently, the ADA critically diverges from the CRA's methodology out of sheer necessity.²¹² The ADA requires more steps to ensure equal access than what the CRA would otherwise demand.²¹³ This is illustrative by the fact that the CRA was not merely amended to include people with disabilities, even though the CRA protects many other groups from discrimination.²¹⁴ Instead, a whole new act had to be created to adequately protect the rights of people with disabilities. Thus, where the CRA and ADA are of one purpose to ensure basic civil rights to certain groups, the ADA differs from the CRA by specifying how those basic civil rights are to be guaranteed.²¹⁵

208. See generally *Cornilles*, 2002 WL 31440885; *Todd*, 2004 WL 1764686; *Ball*, 315 F. Supp. 2d 120.

209. 42 U.S.C. § 12182(b)(2)(A)(iii).

210. H.R. Rpt. 101-485(II) at 104.

211. *Id.*

212. *Id.*

213. *Id.*

214. 42 U.S.C. § 2000a(a).

215. 42 U.S.C. § 12182(b)(2)(A); see also H.R. Rpt. 101-485(II) at 104 (stating that "[i]n order not to discriminate against people with disabilities, however, certain steps must often

A critical distinction between the CRA and the ADA is their respective definitions of access. In the CRA context, access simply means that a PPA may not forbid a person entrance, benefits, or services on the basis of race, religion, national origin, or gender.²¹⁶ For people with disabilities, the ADA not only includes the CRA's definition of access, but takes that definition further.²¹⁷ The ADA also requires that this right to enter the PPA be meaningful.²¹⁸ This is where much of the judicial confusion over access for people with disabilities lies, particularly with respect to deaf people.

There is the misconceived notion that simply because a person can enter the PPA, sit down, and watch the movie, access has been granted as a matter of law. This is true if the person is not with a disability—the CRA has its operative effect here. However, people with disabilities are not protected by the CRA, but rather by the ADA. The ADA's definition of access must then be applied. To assume that a person with a disability has gained access simply because he or she can enter, sit down, and watch the movie would be missing the point of access under the ADA. Title III, through its language on specific prohibitions, mandates that the right to physical access also be meaningful,²¹⁹ which includes communication access,²²⁰ when available auxiliary aids or services exist to facilitate that access.

Unfortunately, some courts disagree and believe that physical entrance automatically means access has been granted and that steps taken to further accommodate a disability somehow grants the person with a disability more rights than what is required.²²¹ Such an understanding might conform to the language and intent of the CRA, but fails to take into consideration the need to provide meaningful access – equal and full enjoyment – that the ADA provides beyond what the CRA requires for its protected classes.

To illustrate some of the judicial confusion, the following subsections discuss certain courts' decisions on access.

be taken as well in order to ensure that an opportunity for individuals with disabilities to participate in the goods or services is effective and meaningful”).

216. *Id.*

217. H.R. Rpt. 101-485(II) at 104 (stating that “[t]hese general prohibitions are patterned after the basic, general prohibitions that exist in other civil rights laws that prohibit discrimination on the basis of race, sex, religion, or national origin”).

218. 42 U.S.C. § 12182(b)(2)(A); *see also* H.R. Rpt. 101-485(II) at 104 (stating that “[i]n order not to discriminate against people with disabilities, however, certain steps must often be taken as well in order to ensure that an opportunity for individuals with disabilities to participate in the goods or services is effective and meaningful”).

219. *See* 42 U.S.C. § 12182(b)(2)(A); *see also* H.R. Rpt. 101-485(II) at 104.

220. H.R. Rpt. 101-485(II) at 107.

221. *See generally* Cornilles, 2002 WL 31440885; Todd, 2004 WL 1764686.

a. “Access” and “Additional Access”

In *Cornilles*, the court found that:

Title III does not require Defendants to provide additional access to Plaintiffs to accommodate their disability, such as providing Plaintiffs with a separate theater that is equipped solely for the use of individuals with hearing loss. Plaintiffs are merely entitled to use Defendants’ theaters to the same extent as hearing individuals. They may buy a ticket for a film shown by Defendants and sit in the same theater to watch the same movie shown to hearing individuals.²²²

The court’s assessment of the requirements under Title III is amiss.²²³ Although correct in that Title III does not impose extreme measures upon the PPA to provide access, the court appears to believe that the “additional access” requested by the plaintiffs to accommodate the plaintiffs’ deafness includes the setting aside of an entire theater to be “equipped solely for the use of” deaf people.²²⁴ The court points out, and correctly so, that the deaf plaintiffs may use the defendants’ movie theaters only “to the same extent as hearing individuals.”²²⁵ However, the court misunderstands the issue on access.

This court errs by attributing to the term “access” the ability to physically enter the PPA²²⁶ and attributing to the term “additional access” as the accommodation of the disability itself.²²⁷ It regards its own definition of “access” to be all that Title III requires from movie theaters and it has coined²²⁸ “additional access” to be an extra step not required of movie theaters.²²⁹ This court does not understand that without the “additional access” it speaks of – that is, the accommodation of the disability – it is simply not access under the ADA even if the person with a disability was able to physically enter the PPA.

Such use of the terms “access” and “additional access” does not conform with the ADA’s two-pronged access test to avoid violating Title III’s general and specific prohibitions. Title III of the ADA mandates access through the satisfaction of two prongs: the ability to enter the PPA and the ability to fully and equally enjoy the benefits provided by the PPA.²³⁰

222. *Cornilles*, 2002 WL 31440885 at *2.

223. The court mangles the plaintiffs’ request for access to first-run movies in *existing* theaters and makes the plaintiffs’ request for communication access appear manifestly unreasonable.

224. *Cornilles*, 2002 WL 31440885 at *2.

225. *Id.*

226. *Id.*

227. *Id.*

228. During its analysis, the court has created its own language. Nowhere in the statute, regulations, or legislative history is “additional access” mentioned or explained, nor did this court cite to any authority that purports to discuss this “additional access.”

229. *Cornilles*, 2002 WL 31440885 at *2.

230. *See* 42 U.S.C. § 12182(a).

Title III provides specific prohibitions against the failure of PPAs to provide auxiliary aids and services such as open or closed captioning, if it is necessary to provide the person with a disability with full and equal enjoyment of the programs or services offered by the PPA.²³¹ Consequently, this type of “additional access” is not optional as this court believes, but specifically required by statutory language.²³²

b. “Equal Access” and “Equal Enjoyment”

The court in *Todd*²³³ makes an equally faulty finding on the issue of access for deaf people. The court specifically noted that the plaintiff did not allege a denial of physical access to the movie theaters, but that the plaintiff alleged that captioning was required in order for the plaintiff to have access to the movies.²³⁴ In response, the court stated that “equal access does not mean equal enjoyment.”²³⁵ In support, the court called in as evidence the recommendation of the House Report (“Report”) that movie theaters pre-announce showings of captioned movies:²³⁶

Open-captioning of feature films playing in movie theaters is not required by this Act. Filmmakers are encouraged, however, to produce and distribute open-captioned versions of films and theaters are encouraged to have at least some pre-announced screenings of captioned versions of feature films.²³⁷

The court’s reliance on this Report to construe that only physical access is required for deaf patrons is erroneous. The Report does not stand for the proposition that equal access merely means that deaf people may enter the physical environment of the movie theaters and that deaf people do not have the right to enjoy the movies as well. Rather, all the Report statement represents are legislators’ opinions that the ADA did not require movie theaters to show open captioned films, although such showings were encouraged. No mention is made in this Report of closed captioned movie showings (which did not exist at the time of the Report).²³⁸ It is improper to surmise that the Report relieves movie theaters of any obligation to provide access to deaf people through any form

231. 42 U.S.C. § 12182(b)(2)(A)(iii).

232. *Id.*

233. *Todd*, 2004 WL 1764686.

234. *Id.* at *4.

235. *Id.*

236. *Id.* (stating that “[e]qual access does not mean equal enjoyment. In fact this proposition is evidenced by the House Report which encourages, but does not *mandate*, that movie theaters pre-announce and show captioned movies”).

237. H.R. Rpt. 101-485(III) at 59.

238. The Report at issue is dated May 15, 1990. See H.R. Rpt. 101-485(III). However, RWC, as the first closed captioned system developed for use in movie theaters, was not used in theaters until 1997.

of captioning.²³⁹

Even if the Report could be construed to mean – as the court has misinterpreted – that only physical access is essential and no form of captioning access is required, the Report would run afoul of Title III's specific prohibition against failing to provide people with disabilities with full and equal enjoyment of the facilities, including the services provided therein, of any PPA.²⁴⁰ Statements from a House Report simply cannot override statutory language.²⁴¹ As a result, the *Todd* court's assertion that "equal access does not mean equal enjoyment"²⁴² directly conflicts with the core principle of Title III's general rule guaranteeing persons with disabilities the full and equal enjoyment of the PPAs' programs and services.²⁴³ In fact, the Report even mentions that persons with disabilities are entitled to full and equal enjoyment, which "means the right to participate and to have an equal opportunity to obtain the same results as others."²⁴⁴ It is therefore impossible to reconcile the statutory requirement for full and equal enjoyment with the court's interpretation that a legislative House Report intended to exclude all forms of captioning, including closed captioning, as a means for deaf people to enjoy movies in the movie theaters.

c. Title III of the ADA Requires More Than Just Physical Access.

To assume that access under Title III merely means physical entry presupposes that the effects of all disabilities result in an inability to enter a PPA's physical environment. It presupposes that all Title III intended to accomplish was to ensure that, for example, doors were wide enough through which an individual who uses a wheelchair could move. If that were true, then the ADA would not have included the many types of disabilities other than mobility related disabilities. Physical access was all that the courts in *Cornilles* and *Todd* looked for in their respective cases to find that access was not denied – the ability to physically enter a public accommodation's surroundings.²⁴⁵ Since none of the deaf plaintiffs alleged such an inability, these courts found for their respective defendants and held in part that the defendants were complying

239. *Ball*, 246 F. Supp. 2d at 22 (stating that "[a]ccording to Defendants, this single statement from the House Committee Report signals unambiguous legislative intent that captioning in movie theaters is not required, but their reliance on the Report is misplaced").

240. 42 U.S.C. § 12182(a).

241. *Ball*, 246 F. Supp. 2d at 23.

242. *Todd*, 2004 WL 1764686 at *4.

243. 42 U.S.C. § 12182(a).

244. H.R. Rpt. 101-485(III) at 55.

245. See generally *Cornilles*, 2002 WL 31440885; *Todd*, 2004 WL 1764686.

with Title III's requirements for access.²⁴⁶ But the effects of that perspective – that deaf people are entitled only to physical access to PPAs – lead to the conclusion that deaf people will never be entitled to communication access or captioning of any kind in any PPA. If this view were to prevail, deaf people may as well be excluded from the class of people intended by the ADA to be brought “into the mainstream of society [with] full participation in and access to all aspects of society.”²⁴⁷ However, deaf people were not excluded, but instead expressly included in the protected class of people with disabilities. The drafters of the ADA defined “disability” to include deaf people, and mandated the provision of auxiliary aid and services, including captioning, for deaf people so that they may have full use and enjoyment.

A deaf person's difficulties with access is not the inability to physically open and enter through the doors of a movie theater. The type of access deaf people require is communication access: a way to express information and to receive and understand aural information. The ADA is cognizant of deaf people's need for communication access because the ADA specifically lists captioning as one of several auxiliary aids or services.²⁴⁸ The specific prohibition prong of Title III clearly mandates the provision of auxiliary aids and services to avoid discriminating against persons with disabilities, including deaf people.²⁴⁹

Title III of the ADA requires movie theaters, as PPAs, to ensure that deaf patrons not only have physical access but are also accorded the means to fully and equally enjoy the movies exhibited on the premises through captioning. This two-pronged requirement for access is borne out in successful ADA suits against movie theaters by individuals with disabilities which delineates the movie theaters' responsibility of complying with Title III beyond providing mere physical access to their facilities.²⁵⁰ The *Cinemark*²⁵¹ “line of sight” case is such an example in an analogous context, and the *Ball*²⁵² case is an example which fits squarely with the issue of captioning in the movie theaters.

*i. United States v. Cinemark USA, Inc.*²⁵³

In *Cinemark*, individuals using wheelchairs brought suit against movie theaters for the failure to accord them equal use and enjoyment of

246. See generally *Cornilles*, 2002 WL 31440885; *Todd*, 2004 WL 1764686.

247. H.R. Rpt. 101-485(II) at 35.

248. 42 U.S.C. § 12102(1).

249. 42 U.S.C. § 12182(b)(2)(A)(iii).

250. See generally *Cinemark*, 348 F.3d 569; *Ball*, 315 F. Supp. 2d 120.

251. *Cinemark*, 348 F.3d 569.

252. *Ball*, 315 F. Supp. 2d 120.

253. Americans with Disabilities Act, *Enforcing the ADA*, <http://www.ada.gov/aprjun04.htm#anchor%20Litigation> (accessed Nov. 18, 2004) (explaining that the US Supreme Court

the movie theaters.²⁵⁴ The individuals in wheelchairs asked that they be given options for the equal use and enjoyment of the movies within the theaters and not just be forced to sit in the front row where viewing of the movie screen was not optimal.²⁵⁵

The theaters argued that they were in compliance with Title III because the individuals in wheelchairs were able to get in and out of the theater, even if the wheelchair-accessible portion of the theater was not the best for viewing purposes.²⁵⁶ The court disagreed with the defendant movie theaters and found that they had violated the rights of individuals in wheelchairs because those users of wheelchairs were not given options at an equal line of sight.²⁵⁷

The court in *Cinemark* understood that having any means of physical access to the movie theater's facility was only the first prong in analyzing whether certain individuals with disabilities had appropriate access pursuant to Title III of the ADA.²⁵⁸ The court went on to assess whether the individuals who used wheelchairs were able to enjoy the movies shown in the defendants' theaters to the same extent of enjoyment as other patrons without disabilities.²⁵⁹ Since the individuals in wheelchairs had only one option in terms of placement within the movie theater for viewing purposes and that one option involved the front row, the court found that meaningful access would be denied if these individuals were not granted comparable viewing angles from other areas of the theater.²⁶⁰ In other words, the movie theater was denying people who used wheelchairs the second prong of access when it allowed them to gain entrance only to the theater but not to view the movie in the same fashion as everyone else.

ii. *Ball v. AMC Entertainment, Inc.*²⁶¹

A similar analysis regarding meaningful access was reached in the *Ball* case. In *Ball*, the court found that although the ADA "does not contain explicit language or clear Congressional intent requiring or preclud-

allowed to let stand this court's decision that comparable access means more than a merely unobstructed view).

254. See generally *Cinemark*, 348 F.3d 569.

255. *Id.* at 576.

256. *Id.* (stating that "[u]nder the district court's interpretation, a wheelchair-using patron could be relegated to the worst seats in the theater . . . so long as the disabled patron still had an 'unobstructed view' of the screen. This does not comport with the 'full and equal enjoyment' language of Title III, nor does it seem likely that this is all the DOJ and the Access Board were attempting to guarantee for disabled persons . . .").

257. *Id.* at 572.

258. *Id.* at 576.

259. *Id.*

260. *Cinemark*, 348 F.3d at 576.

261. *Ball*, 246 F. Supp. 2d 17.

ing closed captioning in movie theaters, the Act does contain explicit, applicable language which prohibits Defendants [movie theaters] discriminating against deaf individuals ‘in the full and equal enjoyment of the goods, services . . . or accommodations of any place of public accommodation.’”²⁶²

In this case, the defendants argued that the ADA only required them to be generally accessible to all patrons – i.e., deaf patrons must be able to buy tickets and sit in the movie theater – and not provide any adaptation of the goods or services, in this case movies, to meet the needs of patrons with disabilities.²⁶³ As in previous cases, this argument focuses solely on physical access which is only one of the two prongs required for access under the ADA. The *Ball* court recognized the error of this one-pronged access argument, holding instead that the explicit statutory language of Title III of the ADA mandated the provision of auxiliary aids and services, including captioning, to ensure that people with disabilities have access to the services provided for full and equal enjoyment of same.²⁶⁴ The court correctly applied the two-pronged test for access: physical access and ensuring that whatever auxiliary aids or services are provided to ensure that meaningful access is achieved.

B. ARGUMENTS AGAINST CAPTIONING BY THE MOVIE THEATER DEFENDANTS

1. *Argument: Congress Did not Intend to Require Movie Theaters to Show Captioned Movies.*

The movie theater defendants in the three captioning cases all raised the argument that they were not required to show captioned movies.²⁶⁵ They asserted evidence of this exemption existed in three forms:²⁶⁶ the House Report (“Report”) on the ADA, the Title III Appendix by the Department of Justice (“Appendix”), and the 2001 Technical Guidance Bulletin by the Architectural and Transportation Barriers Compliance Board (“Bulletin”).²⁶⁷ Specifically, the defendants argued that the Report signaled Congress’ clear legislative intent to exempt movie theaters from having to show open captioned films, that the Department of Justice indicated in their Appendix that movie theaters were not required to show captioned films, and that the ATBC also said in their

262. *Id.* at 24.

263. *Id.*

264. *Id.* at 23-24.

265. See *Cornilles*, 2002 WL 34041789 at *5 (D. Or. Dec. 11, 2001); *Ball*, 246 F. Supp. 2d at 21-24; *Todd*, 2004 WL 1764686 at *1.

266. The *Cornilles* case addresses only the House Report, but the *Ball* and *Todd* cases address all three documents.

267. See *Todd*, 2004 WL 1764686 at *1.

Bulletin that movie theaters did not have to show captioned films.²⁶⁸

This section presents four aspects of this Comment's counter argument that the Report, Appendix, and Bulletin²⁶⁹ do not indicate that movie theaters are exempt from showing captioned movies. First, an examination of these documents shows that the defendants overstate the intent of Congress. Second, these documents are of limited authority in that they are secondary to the plain language of the ADA. Further, without further satisfactory explanation, these documents cannot be interpreted to support an exclusionary action that defeats the purpose of the ADA. Finally, it will also be argued that the Report statement should not be made to apply to the status of today's captioned movies, or in the alternative, to the state of captioning technology in the future, because times have changed, or will change, since the circumstances under which the statement was originally made.

a. Movie Theaters Overstate the Intent of Congress.

The movie theater defendants overstate the intent of Congress when they argue that Congress, by way of all three documents, intended to exclude captioning as a form of access for deaf people in the theaters. The legislative history Report behind Title III indicates that whether a movie theater chooses to show *open* captioned movies is at their own discretion.²⁷⁰ The Report indicates that certain members of Congress believed that open captioned movies were not required by the ADA, but they nevertheless encouraged movie theaters to show open captioned movies when available.²⁷¹ But what the Report does not do is create a preemptive exemption for movie theaters to avoid providing *closed* captioned movies since the Report referred only to open captioned movies.²⁷²

b. The Documents are of Limited Authority.

Legislative history is consulted if there is confusion as to the meaning of a statute.²⁷³ A plain reading of the statutory language of the ADA

268. *Id.*

269. The purpose of those three documents are the same in that they represent "proof" that captioning is not required. But since the recommendations of the Appendix and Bulletin probably stem from the House Report statement, only the Report will be discussed in detail.

270. H.R. Rpt. 101-485(III) at 59.

271. *Id.*

272. *Id.*

273. *Ball*, 246 F. Supp. 2d at 21-22 (stating that "[w]here the language is clear, that is the end of judicial inquiry 'in all but the most extraordinary circumstances.' However, when the intent of Congress is not clear from the language itself, the court may 'look to the general purpose of Congress in enacting the statute and to its legislative history for helpful

itself contains no explicit exemption for the provision of either open or closed captioning.²⁷⁴ There should be no confusion as to whether captioning should be provided as a form of auxiliary aid and service that movie theaters, as PPAs, are obligated to provide.

In spite of this clear language, movie theaters are urging the courts to rely on a terse Report statement to carve out an exception to the statutory requirement for the provision of auxiliary aids, which includes open and closed captioning.²⁷⁵ Two courts have accepted this argument, particularly in the context of open captioning, even though the certainty of the ADA's requirement for providing auxiliary aids and services has never been questioned. However, the *Ball* court was reluctant to give great weight to the Report, commenting that "'reviewing legislative history is like looking over a crowd and picking out your friends,' Defendants have only one friend in this particular crowd."²⁷⁶

c. These Documents do not Adequately Explain Themselves to Justify an Exclusionary Action that Defeats the Purpose of the ADA.

It is clear at the outset that the ADA does not exclude deaf people from the communication access required for them to see a movie in the theaters because that would defeat its express purpose of including *all* people with disabilities into the mainstream.²⁷⁷ The evidence of this manifest purpose of the ADA is extensive. Title III of the ADA mandates as a general rule that people with disabilities have "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."²⁷⁸ Title III goes even further by stating that denying access to the facilities of a PPA is generally prohibited²⁷⁹ and the failure to provide auxiliary aids, which includes open and closed captioning, is specifically prohibited.²⁸⁰

Reliance on the House Report statement would defeat the spirit and letter of the ADA when it comes to deaf people and going to the movies. This isolated statement from the Report does not explain in any detail why open captioned movies, which at that time was the *only* form of access for deaf people in the movies, should not be mandatory when it had

clues. . . [and] must avoid an interpretation that undermines congressional purpose considered as a whole.") (internal citations omitted).

274. See 42 U.S.C. §§ 12102-12213.

275. 28 C.F.R. § 36.303(b)(1).

276. *Ball*, 246 F. Supp. 2d at 22 (internal citations omitted).

277. H.R. Rpt. 101-485(I) at 1 (stating that "[t]he Americans with Disabilities Act (ADA) will permit the United States to take a long-delayed but very necessary step to welcome individuals with disabilities fully into the mainstream of American society").

278. 42 U.S.C. § 12182(a).

279. 42 U.S.C. § 12182(b)(1).

280. 42 U.S.C. § 12182(b)(2)(A).

the practical effect of excluding deaf people from going to the movies entirely. It is fortuitous that a closed captioned system was developed for use in the movie theaters, otherwise deaf people today would still be waiting for their full and equal enjoyment in the simple luxury of going to the movies.

The exclusionary action that the Report statement appears to suggest requires compelling justification that would clearly explain the reasons why open captioned movies are not a requirement. Without further explanation or justification, this lone Report statement cannot seriously be given great weight when it clashes with everything else the Report discusses, as well as the entire unambiguous intent and manifest scope of the ADA.

d. Circumstances Have Changed.

Although it is clear that, at a minimum, the Report does not apply to closed captioning, it is debatable whether the Report's exemption even applies to today's open captioned movies - in particular, those movies shown with open captioning systems, such as DTS-CSS.

When the legislature made its findings and report in 1990, the captioned movies in existence was of only one kind²⁸¹ - movies formatted for open captions with text burned onto the actual film itself.²⁸² Indeed, the drafters were well aware of the possibility that new modes of facilitating access would be available in the future.²⁸³ These drafters had an express vision that PPAs would "keep pace with the rapidly changing technology of the times"²⁸⁴ by incorporating the new technology in order to facilitate access when access was once not possible.²⁸⁵ Since 1990, at least two more alternatives in captioning have developed.²⁸⁶

281. *Ball*, 246 F. Supp. 2d at 25 (stating that the first instance of a closed captioned movie being shown in a movie theater was in 1997).

282. *Ball*, 315 F.Supp.2d at 122 (explaining that the arrival of DTS-CSS as a new form of open captioned system eliminates the issue of product alteration in that the captions are projected and superimposed on the movie screen instead of being burned onto the actual film print; however, the captions are still visible to everyone).

283. H.R. Rpt. 101-485(II) at 108 (stating that "[t]he 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").

284. *Id.* (stating that "[i]ndeed, the Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times. This is a period of tremendous change and growth involving technology assistance and the Committee wishes to encourage this process").

285. H.R. Rpt. 101-485(II) at 108.

286. Notably RWC and DTS-CSS.

The exact reasons why the legislature chose to make showing open captioned movies optional was not explained, but given the context of the statement, a guess can be made. The most likely reason was that Congress, at that time, recognized the limited availability of open captioned films and the difficulty with which movie theaters could obtain those limited number of open captioned films.²⁸⁷

This reason Congress may have had for not making open captioned movies a requirement back in 1990 may not hold true in the twenty first century. If this reason is found not to apply to the present situation, or at some future time, then the Report's exemption should no longer have effect. Even now, this reason is losing merit. Since 1990, movie studios have been willing to cooperate with the push for captioned movies; in fact, they appear to encourage it.²⁸⁸ This is evidenced by the marked increase in number of open captioned movies made available each year, as well as the number of scripts on CD-ROMs movie studios provide for RWC movies.²⁸⁹ It can be presumed that the more theaters that are equipped to show captioned movies, the more caption scripts on CD-ROMs movie studios will provide.

2. *Argument: Captioning Fundamentally Alters the Nature of the Goods Provided.*

The fundamental alteration defense is meant to exempt PPAs from having to provide an auxiliary aid or service that would change the essential nature of the goods or services they provide.²⁹⁰ While the statute and regulations do not define "fundamental alteration," the Department of Justice has, in its technical assistance manual, defined it as "a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered."²⁹¹

The defendant in *Cornilles* was able to convince the court that captioning was a fundamental alteration.²⁹² The defendant in *Todd* also

287. It is significant that the only time the drafters make mention of filmmakers is in the context of this statement. Because filmmakers are responsible for the actual captioning of the movies, it leads to the conclusion that the drafters may have realized that movie theaters could not be held responsible for the failure to show open captioned movies if there were none to show or if there were not enough copies of an open captioned film to rotate among movie theaters.

288. *Ball*, 246 F. Supp. 2d at 25 n. 18 (stating that "Dreamworks will permit more if its movies to be captioned with the RWC if more movie theaters install the RWC equipment").

289. *Id.* at 25.

290. 42 U.S.C. § 12182(b)(2)(iii).

291. *Title II Technical Assistance Manual (1993)*, *supra* n. 68 at <http://www.ada.gov/taman3.html#III-4.3600>.

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

raised this defense; however, the court did not address this issue.²⁹³ But the court in *Ball* rejected this argument when it was raised.²⁹⁴ An examination of the *Cornilles* and *Ball* cases illustrates the debate over whether captioning constitutes a fundamental alteration of movie theaters' goods or services.

*a. Cornilles v. Regal Cinemas, Inc.*²⁹⁵

In *Cornilles*, the court addressed the fundamental alteration argument only in passing and focused primarily on 28 C.F.R. § 36.307, which is the regulatory rule exempting PPAs from altering its inventory of goods.²⁹⁶ Section 36.307 is entitled “[a]ccessible or special goods.”²⁹⁷ This section focuses on providing stores that sell goods the option of not having to provide accessible or special goods that would only be purchased by persons with disabilities.²⁹⁸ Stores would only be required to provide such accessible or special goods if they normally made special orders at customers' requests.²⁹⁹

Consequently, the court in *Cornilles* agreed with the movie theaters and held that Section 36.307 did not require movie theaters to provide accessible or special movies unless the movie theaters normally made such special showings at the customers' requests.³⁰⁰ No attempt was made to determine whether the captioning would modify the movie in such a significant manner that it would alter the essential nature of the goods or services entailed in the showing of a movie at the theater.

293. *Todd*, 2004 WL 1764686 at *2 (stating that “[t]he defendants argue that they should not be required to provide open or closed captioning for every movie they show. Such a mandate, they argue, would constitute a fundamental alteration of the goods and services they provide”).

294. *Ball*, 246 F. Supp. 2d at 25-26 (stating that “[i]t is clear that the relief requested by the Plaintiffs – installation of RWC in a fair number of Defendants' screens to make closed captions available to deaf patrons for those RWC-compatible movies that Defendants would otherwise show — would allow class members to enjoy the first run movies normally shown by Defendants without fundamentally altering the nature or mix of the services they provide”).

295. *Cornilles*, 2002 WL 31440885.

296. 28 C.F.R. § 36.307(a) (stating that “[t]his part does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities”).

297. *Id.*

298. *Id.*

299. 28 C.F.R. § 36.307(b).

300. *Cornilles*, 2002 WL 31440885 at *6 (stating that “[t]here is no evidence that Defendants' non-disabled customers have the ability to request that certain movies be played in the theaters.” Additionally, “[u]nder the regulations, Defendants have no obligation to comply with Plaintiffs' demand to purchase specially-altered movies to accommodate Plaintiffs' disability”).

b. *Ball v. AMC Entertainment, Inc.*³⁰¹

The court in *Ball* disagreed that closed captioning of movies constituted a fundamental alteration entitling movie theaters to avoid the provision of such captioning.³⁰² The defendants made the same argument as those made by other movie theaters in the *Cornilles* case: that the provision of captioned movies was an “accessible or special goods” not required under the ADA’s regulations.³⁰³ The court rejected this argument and ruled that the regulation governing “accessible or special goods” dealt solely with goods and not services.³⁰⁴ The court held that the showing of movies was not a good, but rather a service provided by the theater for the benefit of patrons.³⁰⁵ Therefore, Section 36.307 is not applicable to the *service* of showing movies in a theater.³⁰⁶

In addition, the court determined that closed captioning in the form of RWC could be provided during normal screening of the films currently being shown by the movie theaters rather than arranging for a specialized showing of specific films that may not be currently shown to non-disabled patrons.³⁰⁷ The movie theater would therefore be able to show whichever first-run movies it seeks to show on its various screens. The closed captioning technology would almost be an afterthought when turned on for any first-run movies for which the closed captions could be activated for those patrons who wish to see it. In reaching this conclusion, the court rejected defendants’ argument that requiring closed captioning would force the movie theaters to show movies according to which movies were compatible with the captioning technology in use at a particular theater.³⁰⁸ Instead, the court noted that the number of RWC-compatible movies was on the rise, and also indicated that movie thea-

301. *Ball*, 315 F. Supp. 2d 120.

302. *Ball*, 246 F. Supp. 2d at 25-26 (stating “[i]t is clear that the relief requested by the Plaintiffs – installation of RWC in a fair number of Defendants’ screens to make closed captions available to deaf patrons for those RWC-compatible movies that Defendants would otherwise show — would allow class members to enjoy the first run movies normally shown by Defendants without fundamentally altering the nature or mix of the service the provide”).

303. *Id.* at 24-25.

304. *Id.*

305. *Id.*

306. *Id.* at 24.

307. *Ball*, 246 F. Supp. 2d at 25 (stating “[g]iven that the closed captions for RWC-compatible films can be provided to deaf individuals during normal screening of those films, installation of RWC can be required under the ADA because it would not change the nature of the service supplied by the Defendants — screening first run movies to the public”).

308. *Id.* (stating that “[d]efendants also argue that requiring them to install RWC would result in a change of the mix of the services they provide. Defendants claim that the mix of movies they show would change because relatively few RWC-compatible films have been released by the movie studios”).

ters would not have to exhibit only RWC-compatible movies and therefore could maintain the same mix of films that they would normally show.³⁰⁹

Because the defendant movie theaters failed to prove that installing RWC equipment would fundamentally alter the nature or mix of the service they provide in showing movies, the court in *Ball* ruled that the defendants were not entitled to use the fundamental alteration defense to avoid having to provide closed captioning.³¹⁰

c. *Captioning is Not a Fundamental Alteration of the Nature of Mix or Services Provided.*

The installation of a closed captioning system, such as RWC, should not be considered a fundamental alteration. The movie product is not itself altered in any way, shape, or form when RWC is used.³¹¹ The RWC display is exhibited on individual screens separate from the movie screen.³¹² This element of separateness eliminates any possibility that the nature of the movie shown is significantly modified in such a way that it alters the essential nature of the film.³¹³ The movie theaters' reliance on the regulatory language of Section 36.307³¹⁴ to support any claim of fundamental alteration is flawed in that movie showings are *services*³¹⁵ and are not tangible goods to be sold or special ordered.³¹⁶

It is not as simple to determine whether open captioned movies constitute a fundamental alteration. The visibility of open captions to everyone in a theater may be construed by a court to be a significant modification that alters the nature of the service that movie theaters provide.³¹⁷ Yet, such an argument may be weakened by the fact that major movie theater chains willingly show subtitled foreign films, as well

309. *Id.*

310. *Id.* at 25-26.

311. *Frequently Asked Questions*, *supra* n. 113, at <http://ncam.wgbh.org/mopix/faq.html#rearwindow>.

312. *Id.*

313. *See Title II Technical Assistance Manual (1993)*, *supra* n. 68, at <http://www.ada.gov/taman3.html#III-4.3600>.

314. 28 C.F.R. § 36.307.

315. *See Ball*, 246 F. Supp. 2d at 24-25.

316. *Id.*

317. Although DTS-CCS provide open captions that do not actually remain on the film itself and therefore do not physically alter the film, the captions are nevertheless visible to all patrons within the theater. The visibility of such open captions, regardless of whether the captions are permanently or temporarily on the film, may be considered a significant modification that alters the essential nature of the film in that it affects the viewing experience of all patrons within the theater.

as domestic movies that contain subtitled portions.³¹⁸ The fact that movie theaters are willing to show subtitled movies on their screens would appear to contradict their argument that having to show open captioned movies on their screens would be a fundamental alteration. Ultimately, this issue of fact will most likely not be resolved until a jury has determined whether visible captions on a movie screen constitute a fundamental alteration of the movie or not. However, no such uncertainty exists with closed captioned showings of movies simply because none of the other patrons are affected by the provision of such closed captions and the type of movies shown are not affected.

3. *Argument: The Provision of Captioning is an Undue Burden.*

Just as all the movie theater defendants in the three caption cases asserted that captioning constituted a fundamental alteration, all the defendants claimed that the installation of captioning technology would be an undue burden.³¹⁹ The *Cornilles* court did not perform a formal analysis, but noted it would be unduly burdensome for movie theaters to install unproven³²⁰ technology.³²¹ The court in *Ball* touched upon the undue burden analysis briefly, but ultimately rejected the defendants' motion to dismiss, finding that there were issues of material facts in dispute as to whether it would be an undue burden.³²² This ruling is consistent with the fact-specific analysis that the defense of undue burden requires.³²³ In the *Todd* opinion, that court devoted most of its analysis to the issue of undue burden before holding that captioning would be an undue burden.³²⁴ In doing so, the *Todd* court failed to apply the proper analysis.

a. *Todd v. American Multi-Cinema, Inc.*³²⁵

The *Todd* court considered several factors in its undue burden anal-

318. Recent examples of popular subtitled foreign films include *Crouching Tiger Hidden Dragon* (2000), *Hero* (2002), *House of Flying Daggers* (2004), and *Amelie* (2001). Examples of popular domestic films that had subtitled portions include the *Lord of the Rings* trilogy and *The Passion of the Christ* (which was actually shown entirely in subtitles). This list is not exhaustive; there are many other domestic films that, at some point, show subtitling.

319. See *Cornilles*, 2001 WL 34041789 *7; *Ball*, 246 F. Supp. 2d at 26; *Todd*, 2004 WL 1764686 at *2.

320. A discussion of unproven technology is provided in the Unproven Technology section found in Section III.B.3.b of this Article.

321. *Cornilles*, 2001 WL 34041789 *7.

322. *Ball*, 246 F. Supp. 2d at 26.

323. H.R. Rpt. 101-485(II) at 107.

324. *Todd*, 2004 WL 1764686 at **3-4.

325. *Todd*, 2004 WL 1764686.

ysis:³²⁶ 1) the cost of installing caption technology for every screen the movie theater defendants owned;³²⁷ 2) the unreasonableness of the plaintiffs' request that all first run movies be captioned because movie theaters do not caption the movies themselves and must share what captioned movies are available;³²⁸ and 3) that the captioning technology was an unproven one.³²⁹

First, while the cost of installing caption technology certainly is a major factor of the undue burden analysis,³³⁰ the context in which the *Todd* court accepted the defendants' projected cost was extreme. The plaintiff requested captioning only in theaters with five or more screens, not for every screen at each theater owned by the defendants.³³¹ Yet, the defendants presented the estimated cost from the most extreme possible scenario.³³² The defendants claimed that, in the aggregate, the costs of installing captioning for *all* 11,508 screens from all their theaters combined would amount to 143,837,500 dollars.³³³ The *Todd* court automatically accepted this estimate and ended the inquiry as to undue burden.³³⁴ The *Todd* court did not inquire further and examine, for undue burden purposes, the cost of installing caption technology for the number of screens the plaintiffs really requested.³³⁵

326. In the *Todd* opinion, the court is inconsistent with the distinctions between open and closed captioning. For instance, during its analysis of whether *closed* captioning is an undue burden, the court specifically lists as a factor the costs of installing DTS-CSS, which is a form of *open* captioning. *See id.* at *4. To resolve any confusion, this Comment ignores, for the most part, these inconsistencies and presumes that the court's analysis applies to both open and closed captioning. Indeed, the court has indicated that the defendants' arguments on closed captioning would be similar to its argument that open captioning is an undue burden.

327. *Id.*

328. *Id.*

329. *Id.* (stating that "there is little evidence that establishes the best way to accommodate the plaintiffs request"); *see also id.* at *2 (stating that "the defendants claim that the benefits of the DTS-CSS are limited. Further, they argue that there is no evidence that DTS-CSS is the best technology available, or that it will be compatible with the new cinematic technology in five years").

330. *Title II Technical Assistance Manual (1993)*, *supra* n. 68, at <http://www.ada.gov/taman3.html#III-4.3600> (listing cost and nature of accommodation as first factor in undue burden analysis).

331. *Todd*, 2004 WL 1764686 at *2 (stating that "[t]he plaintiff maintains that he does not seek captioning in every theater; rather, that those theaters with five or more auditoriums provide first-run captioned movies").

332. *Id.* at *4.

333. *Id.* at *2 n. 5 (stating that "[t]he defendants estimate that [installing DTS-CSS] would cost \$12,500 per screen. AMC operates 3,120 movie screens, Regal operates 6,147 movie screens, and Cinemark operates 2,241 movie screens. At that rate, the defendants claim that it would cost AMC \$39,000,000.00, Regal \$76,837,500.00, and Cinemark \$28,000,000.00").

334. *Id.*

335. *Todd*, 2004 WL 1764686 at *2.

The second factor, the unreasonableness of the plaintiffs' request to first run captioned movies because movie theaters do not have the ability to caption movies, was inappropriate for the *Todd* court to consider during its undue burden analysis. The plaintiffs did not demand that movie theaters perform the actual captioning of the movies. Yet, the court improperly turned its focus on this inability of movie theaters to caption movies³³⁶ and having to share captioned movies.³³⁷ The movie theaters have complete control over their ability to show captioned movies as such movies become available and movie theaters have control over the type of captioning they could provide.

In disregarding this, the *Todd* court has, in essence, allowed movie theaters to deliberately avoid paying for and installing means for access by blaming the supposed lack of accessible materials.³³⁸ Allowing a theater to not install equipment that would allow closed captions to be seen because some movies may not be captioned would defeat all efforts at captioning the movies. Movie studios have steadily increased the number of captioned movies over the years.³³⁹ The only impediment at the present time to the showing of closed captioned or DTS-CSS-ready movies is not the lack of caption-ready movies but the lack of movie theaters able or willing to show such movies.

Additionally, a movie theater equipped with the technology to show captioned movies is never precluded from showing uncaptioned movies. If no captioned movies are available for showing, the movie theater can continue to use the screen to show uncaptioned movies. The theater would not be at fault for the failure to show a captioned movie if no movies with captions were available at the time. Conversely, a movie theater without the necessary equipment would not be able to show any available DTS-CSS ready or closed captioned movies and would, in such a scenario, be violating the mandate of Title III to provide equal access to deaf people to its movies.³⁴⁰

The principle behind the third factor in the *Todd* court's undue burden analysis is similar to the *Cornilles* court's reasoning that it would be unduly burdensome for movie theaters to install technology without evi-

336. *Id.*

337. *Id.* at *4.

338. *Todd*, 2004 WL 1764686 at *4.

339. *Ball*, 315 F. Supp. 2d at 25 nn. 18-19.

340. Movies that have open-captions permanently burned on them do not require specialized equipment to be shown, and theaters are able to show such movies without installing such equipment. However, closed-captioned (such as RWC) and DTS-CSS movies require specialized equipment for such captions to be visible. Movies are available in all caption formats in various numbers, but it is the theaters that control the frequency of captioned movies being shown in any one format, not the movie studios responsible for the actual captioning.

dence that this technology was best suited for the needs of deaf people. Therefore, it is appropriate to discuss the two courts' rationales in conjunction, as presented in the next section.

b. Argument: Captioning as an Unproven Technology.

In assessing that RWC installation in movie theaters would be unduly burdensome, the court in *Cornilles* expressed doubt as to whether RWC was "the best of the new [caption technologies available] or that the hardware required to support rear-window captioning will be compatible with the changes to the film industry expected in the next few years."³⁴¹ Even though the defendants in *Todd* argued in a similar vein that "there is no evidence that DTS-CSS is the best technology available, or that it will be compatible with the new cinematic technology in five years,"³⁴² the *Todd* court did not address this issue. However, the *Todd* court did question the "little evidence that establishes the best way to accommodate the plaintiff's request."³⁴³

In the context of both open and closed captioning, the arguments asserted within the two courts' statements present the rationale that before movie theaters can be made to provide an auxiliary aid as an accommodation, the accommodation must be the perfect one. This perfect accommodation would allow deaf people to understand movies and would be guaranteed to outlast changes in cinema technology forever. This argument fails in two major respects.

First, as a practical matter, such a perfect accommodation does not exist. As the Report made particular note of, technology is always in a constant state of flux.³⁴⁴ Therefore, this kind of argument is unfair as all technology is prone to become obsolete. To give weight to this argument would allow movie theaters, along with other PPAs, to avoid providing any type of auxiliary technology as an accommodation for people with disabilities on the presumption that something better is coming. People with disabilities would always be waiting for this perfect (and non-existent) accommodation. Consequently, they would always be denied access. Such a result does not comport with the letter and spirit of the ADA. It directly contradicts the ADA's manifest purpose to integrate people with disabilities in the mainstream of everyday life through the use of auxiliary aids or services.³⁴⁵

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

342. *Todd*, 2004 WL 1764686 at *2.

343. *Id.* at *4.

344. H.R. Rpt. 101-485(II) at 108 (stating that "[i]ndeed, the Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times").

345. 42 U.S.C. § 12182(b)(2)(A)(iii).

The fact that additional costs may be incurred if a movie theater installed one type of captioning system only to find a new caption system tomorrow is wholly dependent on the cooperation between the movie theater, caption technology, and filmmaking industries. These industries are free to collaborate on the development of new captioning or other types of technologies that are superior to and cheaper than existing captioning technology. But in the meantime, movie theaters are expected to attempt to comply with Title III's mandate to provide access to people with disabilities for the full and equal enjoyment of the benefits movie theaters offer.

The second reason why this "best accommodation" argument fails is because the ADA does not require the best, but rather, an *effective* means for access.³⁴⁶ Captioning is the most effective means for deaf people to understand movies, *regardless* of the form of captioning. Thus movie theaters must provide captioning, but have the discretion to decide what kind of captioning they will provide.

*c. Analysis of Whether Captioning is an Undue Burden*³⁴⁷

The undue burden analysis for the provision of auxiliary aids and services is fact specific, so it is difficult to apply the factors for determining undue burden without a concrete situation. The appropriate analysis of whether an auxiliary aid or service can be provided without great difficulty or expense requires an examination of the estimated logistics or financial expense for providing a specific auxiliary aid or service, whether the expenses should be compared against the parent corporation or the individual facilities, and a comparison of that estimated expense against the budget of the corporation or its individual facilities.³⁴⁸ These are issues to be determined on a case-by-case basis.³⁴⁹

In the context of captioning in the movie theaters, the main factor appears to be cost, and the defendants are corporations that each operate a significant number of movie theaters.³⁵⁰ Whether the cost of installing captioning technology would be unduly burdensome requires a comparison of that cost against the budget of the movie theaters as parent corporations.³⁵¹ But it is not for this Comment to say whether the projected

346. *Title II Technical Assistance Manual (1993)*, *supra* n. 68, at <http://www.ada.gov/taman3.html#III-4.3200>.

347. For purposes of this section, only equipment-based captioning (i.e., RWC or DTS-CSS) will be discussed.

348. 28 C.F.R. § 36.104.

349. H.R. Rpt. 101-485(II) at 107.

350. *See generally Cornilles*, 2002 WL 31440885; *Todd*, 2004 WL 1764686; *Ball*, 315 F. Supp. 2d 120.

351. *Title II Technical Assistance Manual (1993)*, *supra* n. 68, at <http://www.ada.gov/taman3.html#III-4.3600>.

cost would be an undue burden for a given movie theater; instead, this Comment will outline the proper analysis to determine whether the projected cost will constitute an undue burden.

The proper analysis for undue burden should take into account the fact that merely because movie theaters can demonstrate the prohibitive cost of one scenario does not mean that they are not exempt from having to comply with the ADA's mandate for access.³⁵² Rather, it only excuses them from having to provide that form of access at the level found to be unduly burdensome. The movie theaters must then determine whether other alternatives that are not unduly burdensome may be provided to achieve the requisite access.³⁵³

Movie theater chains have protested that installation of captioning technology for every movie screen they own would be an undue burden. Indeed, the figures they have come up with are shocking and have led courts to determine that deaf people are not entitled to captioning in the theaters at all – which is an extreme conclusion borne out of an extreme scenario. However, it must be kept in mind that the undue burden context the movie theaters propose is often unreasonable. These extreme figures come from a scenario of having to install caption technology in every screen they own and all at once.

Because captioning is arguably the most efficient and effective means to provide access to both deaf and hard of hearing people, captioning should not be discounted as a possible auxiliary aid even if the provision of captioning has been shown to be unduly burdensome at the quantity and frequency proposed. Instead, movie theaters should look to the scenarios where the provision of captioning technology would not be an undue burden. For example, if the installation of captioning technology for every screen owned by a movie theater chain is an undue burden, then movie theater chains should look to installing caption technology at perhaps one screen for every five or ten screens they own. The number of captioning systems at which point the provision of captioning would no longer be an undue burden should be assessed before even considering the cheapest scenario for movie theaters – which would be to install none.

C. RECOMMENDATION

Deaf people would like to be able to enter any movie theater at any

352. H.R. Rpt. 101-485(II) at 107 (stating that “[t]he fact that the provision of a particular auxiliary aid would result in a undue burden does not relieve the business from the duty to furnish an alternative auxiliary aid, if available, that would not result in such a burden”).

353. *Id.*

time to watch any movie with some sort of captioning method in place.³⁵⁴ Which captioning method they want to use is a matter of individual preference.³⁵⁵ Some prefer RWC closed captioning, but it is arguable that a significant number prefer open captioning instead, either by way of movies formatted for open captions or through the use of an open caption system.³⁵⁶

However, as previously discussed, the ADA guarantees deaf people some form of appropriate and effective auxiliary aid, but the ADA does not require that movie theaters grant deaf people their preferred auxiliary aid.³⁵⁷ Whether deaf people will get the open captioning they want may, at this point, only be at the discretion of the movie theaters.³⁵⁸ It is therefore very difficult to reconcile the wishes of the deaf community for open captioning with the practical reality of the limitations as to what movie theaters are legally obligated to provide.

This section will outline several possible options that movie theaters may undertake in order to remain ADA-compliant. It is, by no means, an exhaustive list of options that may be undertaken.

*a. Open captioned movies only*³⁵⁹

If a movie theater would rather not install caption technology, then they may show open captioned movies instead.³⁶⁰ Showing open captioned movies would appear to go beyond what the House Report would require, although this Comment does argue otherwise. Nonetheless, this option is limited by, as defendant movie theaters have often pointed out,

354. *Ball*, 315 F. Supp. 2d at 127.

355. *Id.* at 128.

356. *Id.*

357. *Title II Technical Assistance Manual (1993)*, *supra* n. 68, at <http://www.ada.gov/taman3.html#III-4.3200>.

358. *See Ball*, 315 F. Supp. 2d at 130 (expressing doubts as to whether, as a matter of law, open captions will ever be held to be a requirement under the ADA).

359. It is understood that the deaf community may prefer to have open captioned movies all the time, everywhere. But the frequency and availability of such open captioned movies does not lie in the hands of the movie theater chains, but with the movie studios. The only issue that can be addressed in the context of this comment is whether a movie theater is legally obligated to show captioned movies at all, whether by showing open captioned movies or through the provision of captioning equipment.

360. In the New Jersey captioning settlement, Regal theaters did not want to install RWC because they claimed that deaf people preferred open captioned movies. Being that DTS-CSS is a form of open captioning, why would Regal not be willing to install DTS-CSS technology instead of RWC? Doing so would be consistent with their claim and it promises more flexibility in the times and variety of movies shown. In refusing to install DTS-CSS (or some other open-caption system), then Regal's basis for their claim is not as altruistic as they assert since DTS-CSS provide the same results as open-captioned films. *See generally Movie Theater Accessibility Press Packet*, *supra* n. 171, at http://www.njcivilrights.org/downloads/theateraccess/movie_access_complete_packet.pdf.

the number of such movies available. This poses the problem of whether a movie theater can claim to be ADA compliant by showing open captioned movies based on the current rate of availability of open captioned movies. This is the case, particularly in *Cornilles*, where it was noted that each movie theater defendant had shown open captioned movies at least once. However, the deaf community is obviously not satisfied with the frequency at which movie theaters do show open captioned movies, otherwise the subsequent lawsuits would not have been brought.

Indeed, with the provision of only open captioned movies, movie theaters must schedule a specific time frame at which these open captioned movies will be available due to the special formatting these films require.³⁶¹ If deaf people want to see that movie, they must watch the movie at the specified time given. If the given time conflicts with deaf people's schedules, then deaf people have no recourse but to either try to make it to the next theater scheduled to show the movie or to wait for the movie to come out on home video. The former may not even be possible at all since the next theater may well be a movie theater in a different state. The latter means that deaf people must wait for as long as even a year before they can see that movie.

As it stands now, with few open captioned movies available at a time, movie theaters should not be allowed to take this option easily as it is the option that would most likely be abused. This option should be limited only to those theaters with the resources to show open captioned movies with reasonable frequency and variety or to those theaters that have demonstrated that the costs of installing captioning equipment would truly be an undue burden.

b. Open captioned movies and equipment-based captions

Showing both open captioned movies and equipment-based captions is probably the best option that would be a reasonable compromise between the deaf community and movie theater chains. In this instance, movie theaters can show what open captioned movies are available to them, thereby satisfying members of the deaf community who prefer such movies. With the provision of equipment-based captions, movie theaters ensure that they continue to be ADA compliant even in the absence of available open captioned movies. The options of movie choice and times available to deaf people will not be limited by the factors that make open-captioned films scarce. In this way, the compliance of the

361. Closed captioned films tend to be shown with much more frequency than open captioned films as the captions are provided on a disk that can easily be copied. Thus, sharing of the captions on CD-ROM is not a problem, there is no limitation on how long a movie theater can keep the CD-ROM.

movie theaters will not be wholly dependent on the availability of open captioned films.

c. Equipment-based captions only

The option of showing only movies formatted for equipment-based caption will meet the minimum of being ADA compliant. However, it does not take into consideration the preference of the deaf community for open captioning. While this option meets the legal standard of ADA compliance, it would be an empty victory. Movie theaters would be unhappy to spend the money on equipment and deaf people would be unhappy over the movie theaters' choice of captioning. It is in the movie theaters' best interests that, if required to comply with the ADA by providing captioning, they attempt to fit the preferences of the deaf community. However, as previously stated, deaf people may not have a say in the type of captioning movie theaters chooses to use, as long as captioned movies are provided with reasonable frequency and variety.

IV. CONCLUSION

Contrasted with the more immediate problems society already faces, the inability of deaf Americans to enjoy movies in movie theaters on the same scale as the general public may appear insignificant. But, in actuality, it represents the very serious issue of a population being excluded and ostracized from the rest of society through the deprivation of an all-American cultural venue that has a huge impact on American society. Elimination of the exclusion and ostracism that people with disabilities face is what the ADA was intended for.³⁶² Yet, society, including the judicial system, sometimes fails to grasp that the ADA is a civil rights act that not only extends basic civil rights to people with disabilities, but takes the extra steps to specify how.³⁶³

The intent of the ADA was to provide people with disabilities with the means to gain access to everyday occasions and activities that many people take for granted.³⁶⁴ As the legislative history behind the ADA indicates, Congress did not intend for the ADA to exist frozen in time to apply only to the level of technology available at the time of its passing.³⁶⁵ Rather, the drafters intended for the ADA to evolve in tandem with changes in technology that would make accessibility possible when

362. H.R. Rpt. 101-485(III) at 26 (stating that "[t]he ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation").

363. *Id.*

364. *Id.* at 25.

365. H.R. Rpt. 101-485(II) at 108.

it was once not.³⁶⁶

The deaf community yearns for equal access to the movie theater viewing experience³⁶⁷ and they have looked to the ADA as the means to this end.³⁶⁸ Because installation of the captioning access deaf people need necessarily requires money that movie theaters are loathe to spend, the ADA is the only way the deaf community can hope to bring about this access.³⁶⁹ Elimination of this reliance on the charitable inclinations of movie theaters that choose to show captioned movies every now and then is one of the catalysts that put the creation of the ADA into effect³⁷⁰- so that they would no longer be treated as a class of poor orphans begging for handouts, but a group recognized and accorded respect as full members of society.³⁷¹

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366. *Id.*

367. National Center for Accessible Media, *What People are Saying*, <http://ncam.wgbh.org/mopix/people.html> (accessed Nov. 9, 2004) (listing both deaf and hearing people's personal testimonies on their experiences with movie accessibility).

368. H.R. Rpt. 101-485(III) at 26.

369. *Ball*, 315 F. Supp. 2d at 128.

370. H.R. Rpt. 101-485(III) at 26 (stating that "[t]he Americans with Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964").

371. H.R. Rpt. 101-485(III) at 26 ("In 1973, during consideration of the Rehabilitation Act, Senator Harrison Williams said: for too long, we have been dealing with [the handicapped] out of charity. . . . It is for the Congress and the Nation to assure that [the handicapped's] rights are no longer denied").

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