



# The Americans with Disabilities Act (ADA): Movie Captioning and Video Description

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## Summary

The Americans with Disabilities Act (ADA) is a broad civil rights statute prohibiting discrimination against individuals with disabilities. Title III of the ADA prohibits discrimination by public accommodations, which are defined to include movie theaters, but the statute does not include specific language on closed captioning or video description. Although the Department of Justice (DOJ) has promulgated regulations under Title III, it has not specifically addressed issues regarding closed captioning or video description. However, DOJ has issued an advance notice of proposed rulemaking (ANPR) to establish requirements for closed captioning and video description for movie theaters. The ANPR asks for input in several areas including the implications of a sliding compliance schedule, and the appropriate basis for calculating the number of movies that will be captioned and video described. In addition, the Ninth Circuit, in the first federal court of appeals case to address the issue, held that the ADA requires the provision of closed captioning and descriptive narration in movie theaters unless to do so would be a fundamental alteration or an undue burden.

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## Introduction

The Americans with Disabilities Act (ADA) is a broad civil rights statute prohibiting discrimination against individuals with disabilities.<sup>1</sup> As stated in the act, its purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>2</sup> Title III of the ADA prohibits discrimination by public accommodations, which are defined to include movie theaters, but the statute does not include specific language on closed captioning or video description.<sup>3</sup> The Department of Justice (DOJ) has promulgated regulations under Title III,<sup>4</sup> but has not specifically addressed issues regarding closed captioning<sup>5</sup> or video description.<sup>6</sup> However, DOJ has issued an advance notice of proposed rulemaking (ANPR) to establish requirements for closed captioning and video description for movie theaters.<sup>7</sup> In addition, the Ninth Circuit, in the first court of appeals case to address the issue, held that the ADA requires the provision of closed captioning and descriptive narration in movie theaters unless to do so would be a fundamental alteration or an undue burden.<sup>8</sup>

## Statutory Language and Legislative History

Title III of the ADA prohibits discrimination in “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>9</sup> Public accommodations are defined as including “a motion picture house, theater, concert hall, stadium, or other place of exhibition entertainment.”<sup>10</sup> Places of public accommodation are prohibited from providing individuals with disabilities a service that is not equal to that afforded individuals without disabilities.<sup>11</sup> In addition, public accommodations are required to take action to ensure that an individual with a disability is not excluded, denied services, or otherwise treated differently because of the absence of auxiliary aids and services “unless the entity can demonstrate that taking such steps would fundamentally alter the nature of

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<sup>1</sup> For a more detailed discussion of the ADA see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Cynthia Brougher and James V. DeBergh.

<sup>2</sup> 42 U.S.C. §12101(b)(1).

<sup>3</sup> 42 U.S.C. §12181(7)(C).

<sup>4</sup> 28 C.F.R. Part 36. For a discussion of recent changes to these regulations see CRS Report R41376, *The Americans with Disabilities Act (ADA): Final Rule Amending Title II and Title III Regulations*, by Emily C. Barbour and James V. DeBergh.

<sup>5</sup> Closed captioning is a process that displays the written text of a movie’s dialog and other sounds only to those who request it by means such as a personal digital assistant (PDA). 75 FED. REG. 43470 (July 26, 2010).

<sup>6</sup> Video description allows individuals with visual impairments to access movies by providing a spoken narration of key visual elements. 75 FED. REG. 43470 (July 26, 2010).

<sup>7</sup> 75 FED. REG. 43467 (July 26, 2010). On the same date, DOJ also issued ANPRs on Accessibility of Web Information and Services Provided by Entities Covered by the ADA, Accessibility of Next Generation 9-1-1, and Accessibility of Equipment and Furniture. These other ANPRs are beyond the scope of this report. For a discussion of the ADA’s coverage of the Internet see CRS Report R40462, *The Americans with Disabilities Act (ADA): Application to the Internet*, by James V. DeBergh.

<sup>8</sup> *Arizona v. Harkins Amusement Enterprises*, 603 F.3d 666 (9<sup>th</sup> Cir. 2010).

<sup>9</sup> 42 U.S.C. §12182.

<sup>10</sup> 42 U.S.C. §12181(7)(C).

<sup>11</sup> 42 U.S.C. §12182(b)(1)(A)(ii).

the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”<sup>12</sup> Auxiliary aids and services are defined as including “qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; [and] qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments.”<sup>13</sup> Although the ADA does not define “undue burden,” the DOJ regulations define undue burden as meaning “significant difficulty or expense” and provide various factors to be considered in making this determination.<sup>14</sup>

When the ADA was enacted in 1990, the technology for closed captioning was limited. The legislative history of the ADA did not specifically discuss closed captions, but did discuss open captioning. Open captioning was not seen as required by the ADA, but open captioned versions of films were encouraged and theaters were encouraged to have some preannounced screenings of open captioned films.<sup>15</sup> The House Education and Labor Committee report also emphasized that advances in technology may change what the ADA requires:

The 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.<sup>16</sup>

## **DOJ Advance Notice of Proposed Rulemaking**

On July 26, 2010, the 20<sup>th</sup> anniversary of the enactment of the ADA, DOJ issued an advance notice of proposed rulemaking (ANPR) regarding movie captioning and video description. DOJ examined the ADA’s statutory language and found that “given the present state of technology, we believe that requirements of captioning and video description fit comfortably within the statutory text.”<sup>17</sup> Although DOJ had raised some questions regarding closed captioning and video description in its 2008 notice of proposed rulemaking, no regulations on the subject were proposed, and none were included in the final rule.<sup>18</sup> In the ANPR, DOJ sought further public comment on several new issues and technical questions as well as the implications of the conversion to digital cinema for potential regulations.<sup>19</sup> The issues DOJ sought public comment on included the following:

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<sup>12</sup> 42 U.S.C. §12182(b)(2)(A)(iii).

<sup>13</sup> 42 U.S.C. §12103.

<sup>14</sup> 28 C.F.R. §36.104 (2010). The factors to be considered are the nature and cost of the action needed; the overall financial resources of the site or sites involved, including legitimate safety requirements; the geographic separateness and the administrative or fiscal relationship of the site to any parent corporation; if applicable, the overall financial resources of any parent corporation; and if applicable, the type of operation of any parent corporation.

<sup>15</sup> H.Rept. 101-485 (II) at 108 (1990)(Report of the House Education and Labor Committee); H.Rept. 101-485 (III) at 59 (Report of the House Judiciary Committee); S. Rept. 101-116 at 64 (1989)(Report of the Senate Committee on Labor and Human Resources). Open captioning is similar to subtitles since the text of dialogue is visible to all but, unlike subtitles, it includes descriptions of other sounds as well.

<sup>16</sup> H.Rept. 101-485 (II) at 108 (1990)(Report of the House Education and Labor Committee).

<sup>17</sup> 75 FED. REG. 43470 (July 26, 2010).

<sup>18</sup> 75 FED. REG. 56164 (September 15, 2010).

<sup>19</sup> 75 FED. REG. 43471 (July 26, 2010).

- the implications of a sliding compliance schedule;
- the appropriate basis for calculating the number of movies that will be captioned and video described;
- whether movie theater owners and operators should be given the option to use open captioning;
- the number of movie theater owners or operators who have converted to digital cinema;
- whether there are specific protocols or standards for captioning and video description for digital cinema;
- whether DOJ should require a system of notifying individuals with disabilities in advance as to which movies provide captioning and video description;
- whether DOJ should consider a training requirement for movie theater personnel; and
- whether a proposed rule should be considered an economically significant regulatory act and, if so, are there alternative regulatory approaches to minimize such impact.<sup>20</sup>

## *Arizona v. Harkins Amusement Enterprises*

The Ninth Circuit in *Arizona v. Harkins Amusement Enterprises*<sup>21</sup> became the first court of appeals to address the ADA's requirements concerning closed captioning and video descriptions. The court held that closed captioning and video descriptions may be required by the ADA, but are subject to the ADA's fundamental alteration and undue burden exceptions.

*Harkins* involved a suit by two patrons of a theater, one with a hearing impairment and one with impaired vision. They alleged that the theater owners discriminated against them by not providing open or closed captioning and descriptive narration. The court examined the statutory language of the ADA, emphasizing the requirement for auxiliary aids and services and finding that "movie captioning and audio descriptions clearly are auxiliary aids and services."<sup>22</sup> Rejecting the defendant's argument that captioning and descriptive narration fall outside the scope of the ADA, the Ninth Circuit noted that the ADA makes it discriminatory to fail to take steps to ensure that an individual with a disability is not excluded "because of the absence of auxiliary aids and services."<sup>23</sup> The defendant also argued that DOJ's regulatory commentary specifically did not require open captioning, and the court agreed that the defendant should be able to rely on the plain meaning of DOJ's commentary until it was revised. However, the commentary did not address closed captioning, and the court returned to the statutory language regarding auxiliary aids for its analysis, finding that closed captioning and descriptive narration "fall comfortably within the scope of this definition."<sup>24</sup> In addition, the court noted that several defenses were

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<sup>20</sup> *Id.* at 43374-43476.

<sup>21</sup> 603 F.3d 666 (9<sup>th</sup> Cir. 2010).

<sup>22</sup> *Id.* at 670.

<sup>23</sup> *Id.* at 671 quoting 42 U.S.C. §12182(b)(2)(A)(iii).

<sup>24</sup> *Id.* at 674.

available to the defendant, including the arguments that closed captioning and descriptive narration would fundamentally alter the nature of its services or constitute an undue burden. Although the Ninth Circuit's decision is only binding in that circuit, its decision provided an added impetus to DOJ's consideration of regulations in the area.<sup>25</sup>

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This report was initially authored by Nancy Lee Jones.

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<sup>25</sup> 75 FED. REG. 43469 (July 26, 2010).